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THE UTILIZATION OF CUSTOMARY COURT AS MEANS OF PENAL MEDIATION : A LESSON LEARNED FROM PAPUA, INDONESIA

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ABSTRACT : *Customary court as a community justice system aims at restoring a disturbed balance to a whole or uninjured condition (restitutio in integrum) in resolving every criminal case. This article discusses the urgency and efforts to apply customary court system as a means of penal mediation in resolving criminal cases. The result of the analysis indicates that customary court has the ability to function as a means of penal mediation in resolving restorative justice-based criminal cases. Criminal cases that could be mediated are those that are in violation of customary law according to the Indonesian Criminal Code Law (Kitab Undang-Undang Hukum Pidana = KUHP) with imprisonment for up to five years. The utilization of customary court system is conducted by recognizing the institutional authority and judicial decision of the customary court in judicial authority law in Indonesia.*

KEYWORDS : customary court; penal mediation; resolving criminal cases

INTRODUCTION

It is undeniable that technical practices of conflict resolution[1] run by customary courts existing in various indigenous societies have been developing in most of the local order of life in Indonesia. These practices had existed long before the establishment of the Republic of Indonesia. Indonesian society recognizes not only statutes laid down and enforced by the state legislature (positive law) but also unwritten laws which is more commonly called non-state law, in the form of customary law (*adat recht*)[2]. However, the currently applicable legal politics of judiciary unification does not recognize customary court. From sociological perspective, this has ignored (political of ignorance[3]) the fact of law applicable in society.

[1] Ade Saptomo [2010], *Law and Local Wisdom: Revitalization of Customary Law across Archipelago*, (Jakarta : PT. Grasindo), p. 95-109.

[2] The term "adat recht" was first introduced scientifically in Indonesia in 1893 by Prof. Dr. C. Snouck Hurgronje in his book entitled "*De Atjehers*" which mentions the term customary law as "adat recht" (Dutch) to give a name to a system of social control existing in Indonesian society. Imam Sudiyat, [1991], *The Principles of Customary Law : An Introduction*, (Yogyakarta: Liberty), p.1.

[3] The political of ignorance means actions that ignore, displace, and even try to suspend values, legal norms (folk law) of society, including religions and traditions of community through domination and state law enforcement in the style of legal centralism. I Nyoman Nurjaya [2011], "Indigenous Wisdom-Based Natural Resource Management: Perspective of Law Anthropology". *Paper* for the National Seminar on Legal Protection Direction for Indigenous People in the National Legal Systems. Organized by BPHN. May 12, 2011, Malang.

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An independent, autonomous, and respected customary court is factually very effective in resolving disputes and law violations among indigenous societies. Local wisdom can be used as a principle of conflict resolution in resolving civil disputes and any violation of criminal law using an informal mechanism, which is a customary court system. Conflict resolution through local wisdom has not been well recognized by the formulators of law and legislation in Indonesia who mostly adopt the concept of law positivism and centralism. The concept of legal centralism[4] essentially does not recognize any law other than the state law, as stated by Satjipto Raharjo:

> "Legal centralism initially sees law as a state law and nothing more than that. Beyond that point, there is no other law. If there is ever another law, its existence will gain legitimacy from the existing state law. Such a view was shared by the Dutch legal system which was in force in Indonesia before the Indonesian independence.[5]"

The advantage of local wisdom-based dispute resolution is restorative justice. The main element of restorative justice, which is the willingness and participation of the victim, offender, and the society in resolving criminal acts, is also a feature of customary law. In a restorative justice approach, the main victims of a crime is not the state, as stated in the existing criminal justice system. In a customary law community, an occurrence of crime creates an obligation to fix the broken relationships caused by the crime. Meanwhile, justice is defined as the process of finding and solving problems that occur on a criminal case in which the involvement of the victim, community, and offender becomes an important factor in the restoration, reconciliation, and assurance of the improvement efforts sustainability.[6]

The principle of customary court is resolving cases based on reconciliation in an indigenous people community. The legal spirit of the principle is in accordance with the characteristic of customary law that tends to prioritize balance (*evenwicht* or *harmonie*) in cosmic life. In this case, it is relevant to look at the opinion of Supomo as quoted by Bushar Muhammad[7]:

[4] Legal *centralism* is often referred to as mainstream law. The term mainstream law is used to interpret more easily the dominant condition and situation of the implementation of laws that mainly based on a state law, or result from formal institutions of state institutions. In other words, mainstream law puts the state on its monopolistic interpretation through legislation to encourage the process of legal centralism. R. Herlambang Perdana & Bernard Stenly [2006] "Legal Pluralism idea in the Context of Social Movement", *Paper*, Faculty of Law, Airlangga University, Surabaya, 2006, p 5.

[5] Satjipto Rahardjo [1995] "The Relation of Customary Law and National Law in National Development", *Paper* for the Symposium on Integration of Customary Law into National Law within the Last 50 Years, organized by: The National Legal Development Agency, The Department of Justice Jakarta, January 9-10 1995, p. 1.

[6] Eva Achjani Zulfa [2010], "*Restorative Justice and Revitalization of Customary Institutions in Indonesia"*, Criminology Journal of Indonesia Vol. 6 No. II August 2010, p 188.

[7] Papua Police Team - Faculty of Law, Cendrawasih University and Partnership for Governance Indonesian Reform [2005] *Basic Framework of the Special Local Regulation in the Implementation of the Papuan Customary Courts*, (Jayapura: Papua Police-Faculty of Law, Cendrawasih University and Partnership for Governance Reform in Indonesia, 2005), p 49.

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> "Every customary court decision is meant to restore the disturbed balance due to the violation of customary law (*adat delicten*). The recovery is necessary since the violation is a unilateral act by an individual or a group of individuals, which threatens, offends, or disturbs the balance in society materially or immaterially to a person or to a united community. Such actions result in custom reactions that are believed to be able to restore the disturbed balance through various ways such as customary payment in form of goods or money, holding salvation, slaughtering large/small animals, etc."

In resolving custom cases, the leader as an indigenous judge should use customary law approach, in which an indigenous judge must hold on to three basic principles: "harmony", "propriety", and "conformity"[8] that become guidance in finding solutions to any custom problems.

The existence of customary court is empirically advantageous for the judicial power system in helping the overload of problems faced by the state courts. The tendency of modern criminal law to bring all criminal cases to the court often causes law inefficiencies. In addition, minor criminal cases that are treated with procedural conventional approach to criminal law will often cause injustice and will hurt the feelings of the community justice.

Certain civil disputes and criminal cases qualified as minor offense ("flip-flops" cases) or complaint offense will be resolved more effectively and efficiently by customary court system, which is expected to provide restorative justice. The style of settling disputes in customary court that does not use criminal law and judicial manner, but applies deliberation instead, can be used as a means of penal mediation in certain criminal cases, in order to achieve simple, quick, and low-cost resolution in addition to reconstruction of the disrupted social harmony.

Based on the rationale above, this article focuses on explaining three issues: (1) academic argument as an excuse for customary court can function as a means of penal mediation in resolving criminal cases, (2) identification of the types of criminal case that can be resolved through means of penal mediation in customary justice, and (3) efforts to utilization customary court as a means of penal mediation in resolving criminal cases in Indonesia.

METHODS

This research belonged to a doctrinal legal research which took form as diagnostic and prescriptive research. Various approaches consisting of statute approach, conceptual approach, and philosophical approach were employed in the analysis. The legal sources in this research consisted of primary legal source, secondary legal source and tertiary legal source. The legal sources were collected through documents tracking and library studies. Researcher conducted contents' identification and textual analysis on the collected sources. Complementing the legal sources be held personal interview with key informan. Then, the legal sources and information were qualitatively analyzed by using interpretative methods. It

[8] Moh. Kosnoe [1978], "*Notes on Recent Customary Law"*, Airlangga University Press : Surabaya, p 44.

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means that researcher interpreted the meaning of various texts of laws used in this research. The result of the interpretation was used to answer the research question and to draw conclusions.

DISCUSSION

Customary Court and the Function as a Means of Penal Mediation

The existence of customary court cannot be separated from the indigenous people's autonomy.[9] In this context, Van Vollenhoven describes the scope of autonomy by expressing the teachings of *catur praja*. Based on the teachings of catur praja, autonomy includes activities to form own legislation (*zelfwetgeving*), implement own rules (*zelffuitvoering*), perform own justice system (*zelfrechtspraak*), and perform own police task (*zelf-politie*)[10]. In addition, the indigenous people's autonomy is undeniably a human rights recognized by the international society, as stated in the United Nation's Declaration on the Rights of Indigenous Peoples adopted by The United Nations General Assembly on September 13, 2007. Article 4 of the declaration states that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[11]

Customary court has a strategic significance in the lives of indigenous people in Indonesia. Resolution of any case (civil or criminal) in the lives of the indigenous peoples by trusted, open, and transparent people, by utilizing local wisdom as conflict resolution through local and informal institution mechanisms are seen as more effective than by the formal and procedural state judicial system. The indigenous peoples prefer customary court mechanisms to formal (state) justice mechanisms.[12] Case resolutions made by the customary court are considered more thorough and fair compared to resolutions made by the state court.[13] This idea is also supported by a research conducted by Idrus Abdullah[14] who confirmed that local institutions (including customary justice) are proven as highly recognized and trusted by the people in resolving disputes within their community.

As an illustration, in Papua, customary law and justice system is more dominant in regulating the society's life as it is considered more beneficial for related parties in resolving any case or

[9] I Ketut Sudantra [2013] "Recognition of Customary Courts in Judicial Power Law Politics". *Dissertation*, Doctoral Program in Law Science. Faculty of Law, Universitas Brawijaya.

[10] Jopi Peranginangin, "*Measuring Strength to Seize Indigenous Sovereignty"*, in http://www.ymp.or.id/content/view/221/1/, downloaded on September 30, 2012. [Accessed February 20, 2008].

[11] Sem Karoba, [2007], *The Right of Indigeneous People, United Nation Declaration on The Rights of Indigeneous Peoples*, (Yogyakarta : Galangpress), p 17.

[12] Andrea Woodhouse [2004] *Village Justice in Indonesia (A Case Study on Access to Justice, Democracy, and Governance of a Village),* (Jakarta : Social Development Unit, World Bank), p 7.

[13] W. Poespoprodjo [1993] *A Monograph of Customary Law in Irian Jaya*, (Jakarta: National Legal Development Agency, Indonesian Department of Justice), p 70.

[14] Idrus Abdullah [2002] "Resolving Disputes through Local Institution Mechanism: A Case Study of Legal Pluralism Dimensions in Sasak Tribe, West Lombok", *Dissertation*, Doctoral Program of Law Science, University of Indonesia.

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dispute compared to positive law.[15] Compared to state law, local wisdom-based dispute resolutions based on deliberation is more favorable to achieve restorative justice.[16] According to Michael Wenzel, restorative justice means the repair of justice through reaffirming a shared value-consensus in a bilateral process.[17]

According to the author, imposition of sanctions or customary reaction by customary courts aims to maintain and/or achieve communal balance, restore the existing cosmic world, keep the harmony of the livelihood of humanity, and achieve *restitutio in integrum* (restoring to the original condition). As an example, in Papua, there has never been any objection from either the victim or the perpetrator to the customary court's decisions run by *ondoafi*/*ondofolo*/*ontofro*. Every party is respectful and compliant, because the decisions of *ondoafi*/*ondofolo*/*ontofro* are bound to ancestral spirits and are sacred or magically religious (*participerend kosmisch*) so there is no term of appeal or multilevel justice.

The result of the analysis indicates that in Papua, the existence of customary court system in very effective in maintaining social order. Even, the indigenous peoples obey their customary law more than the state law.[18] The sanctions imposed by the Papuan customary court to anyone who violates the customary norms are paying fine (blood money), compensation in the form of beads (*eba*, *he* and *neko*), stone bracelet, stone axes, livestock (pigs), and traditional ceremonies (stone grilling). These types of customary fine have been agreed upon by the victim and the perpetrator during the process of custom hearing.

For the indigenous people in Papua, dispute resolution through customary court has a philosophical foundation, "atonement."[19] This philosophy ensures the balance between the application of custom sanctions/penalties on one side and peace and tranquility harmony on the other side. The imposition of sanctions or customary reaction aims to maintain or restore the communal balance, reestablish the balance of the cosmos and cosmic world, and keep the humanity life system running properly and harmoniously.[20] Furthermore, Ohoiwutun Eddy writes in his paper:[21]

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[15] *http://cloud.Papua.go.id/id/budaya/adat/Pages/Hukum-Adat-Mendominasi-Hukum-Positif-di-Papua.aspx*, [Accessed March 11, 2013].

[16] Darmawan Salman [2011] "Can Local Wisdom Functions in Conflict Management in the Global Prescription?" *Paper*, Department of Agricultural Socio Economics, Faculty of Agriculture, Universitas Hasanuddin : Makassar. *http://alwyrachman.blogspot.com/2011/04/dapatkah-kearifan-lokal-fungsional.html*,. [Accessed March 11, 2012].

[17] Michael Wenzel, Tyler G. Okimoto, Norman T. Feather, Michael J. Platow [2008] "Retributive and Restorative Justice", *Law and Human Behavior Journal*, October, p 1.

[18] *Ibid*.

[19]The term is deliberately used to emphasize the process towards the outcome, "peace". A personal interview with Eddy Ohoiwutun (Secretary of the Indigenous People Iinstitution in Port Numba), in Abepura, [April 9, 2013].

[20] Democracy Alliance Team for Papua (ALDP) [2008] *Customary Law Guide, Jouw Warry Tribal Council, Demta, Jayapura, Papua*, (Jayapura : Democracy Alliance for Papua - Cordaid the Netherlands), p 14.

[21]Eddy Ohoiwutun [2012] "Case Resolution Mechanism outside of Courts: Criminal And Civil Cases Resolution by Port Numbay Indigenous Consultative Council - The City of Jayapura ", *Paper*, unpublished, p 1.

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> "Therefore, case resolution should be made by considering three important aspects. *First*, the decision must be in accordance with the applicable customary rules and norms and must ensure that the same case will not happen again in the future. *Second*, the customary verdict should always prioritize collective responsibility. *Third*, the customary court decisions must guarantee the security and peace of the community as a whole."

Referring to the above philosophy, the process and mechanism of customary court are relative to the life principle of the indigenous people, which is maintaining and creating a safe and prosperous life in one unity of social, culture, economics, and politics. Therefore, the utilization of customary criminal court system can be seen as an instrument of justice, welfare, and law enforcement. Hence, the utilizationof customary court system based on the concept of penal mediation aims at creating a permanent reconciliation for community groups involved in disputes, as well as for those who violate the customary prohibitions applicable in the social life of the indigenous peoples.

This, for example, can be observed in the implementation of fines payment traditional processions. There are always people cheering and chanting spontaneously, sound of stabbed pigs screaming, or tribal/traditional dances and a feast. From such philosophy, in the author's opinion, the purpose of customary court system in the life of indigenous peoples is none other than to achieve restorative justice.[22]

Achieving restorative justice[23] in judicial process is very important, since it is in accordance with the view of many experts that restorative justice in the twenty-first century has evolved into a movement by empowering traditional values and involving citizens, as written by Mark S. Umbreit and Marilyn Peterson Armour as follows. [24]

> "The restorative justice movement is having an increasing impact upon criminal justice system policy-makers and practitioners throughout the world. As a relatively young reform effort, the restorative justice movement holds a great deal of promise as we enter the twenty-first century. By utilizing many traditional values of the past, drawn from many different cultures, we have the opportunity to build a far more accountable, intelligible, and healing system of justice and law, which can lead to a greater sense of community through active victim and citizen involvement in restorative initiatives."

[22] Michael Wenzel, *Loc.Cit.*

[23] Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders. http://www.restorativejustice.org/university-classroom/01introduction, [Accessed April 21, 2013].

[24] Mark S. Umbreit and Marilyn Peterson Armour [2011], "Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community", Washington University: *Journal of Law & Policy*, 2011, p 14.

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Restorative justice puts more emphasize on restoring a situation to its original state (*restutio in integrum*). Burt Galaway and Joe Hudson defines restorative justice and its elements as follows:[25]

> "A definition of restorative justice includes the following fundamental elements: "**first**, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves; **second**, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute; **third**, the criminal justice process should facilitate active participation by the victims, offenders, and their communities in order to find solutions to the conflict."

As an example, the customary court system practiced by the leaders and elders of the indigenous people in Papua is believed by all community members to be able to bring peace, because an *ondoafi/ondofolo/ontofro* conveys the voice of their ancestors and deities. *Ontofro* is a manifestation of the deities or ancestral spirits that arise to organize the community in order to achieve peace and tranquility. The term *ontofro* is derived from the word *onto* that means best friend and *fro* that means deity or ancestral spirits. *Ontofro* is a manifestation of the authority of the deities or ancestral spirits in regulating various interactions according to the customary system that continuously reflect the identity of the deities or ancestral spirits in the life of the indigenous people.[26]

In implementing the functions of customary court system, a leader of an indigenous community in Papua is always symbolized as:[27]

a. *The Sun*, the source of life that gives light to people, to which the people always express their happiness and sorrows.
b. *Land*, the protected land located within the area of the local community that represents all the people.
c. *A Yellow Bird* (Cenderawasih/bird-of-paradise), which symbolizes pride that is always worshipped and honored from age to age, from generation to generation.
d. *Fire*, which represents that all problems are under the command and decision of the leaders.
e. *Water*, which symbolizes that the *ondoafi/ontofro* is a serene person who provides serenity, peace, and tranquility for everyone.
f. *A ficus tree*, which represents the *ondoafi/ontofro* as a figure who provides protection for all people, regardless of whether they are rich or poor.
g. *The Ocean*, which symbolizes that the *ondoafi*/*ontofro* has an extensive knowledge.

[25] See: Eva Achjani Zulfa [2009] *Defining Restorative Justice*, Restorative Centre, Education-Consultation-Information, http://evacentre.blogspot.com/2009/11/definisi-keadilan-restoratif.html, [Accessed May 22, 2014].

[26] Team, Government of Irian Jaya Province [1996] *Ethnography of Irian Jaya, Second Series*, (Jayapura: Team, Government of Irian Jaya Province), p 105.

[27] Team, Papua Police Department-Faculty of Law, Universitas Cendrawasih and Partnership for Governanace Reform Indonesia, *Customary Courts in Papua..., Op. Cit*, p 41-42.

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Customary court is a justice system that is based on three main principles: "harmony," "propriety," and "conformity," [28] which have become guidance in solving any cases encountered. I Nyoman Sirte[29], following the opinion of Moh Koesnoe, describes each principle below.

The principle of harmony is a guiding principle in resolving customary conflicts. The implementation of the principle of harmony in resolving customary conflicts is intended to restore life's circumstances to their original state, status, and integrity and to re-establish harmonious relationship. In other words, the principle of harmony does not put emphasize on the win or loss of either side. Instead, it aims to reinstate a disturbed balance, so that the opposing parties are reunited in the bonds of the indigenous village.

The principle of propriety is a definition referring to morality and common sense, which is addressed to the assessment of an occurrence as human's actions or circumstances. The principle includes elements derived from morality, which are the values of good or evil, in addition to elements derived from common sense, such as calculations or estimations that are legally acceptable. The propriety approach is used in order to resolve conflicts by maintaining the good reputation of all parties, so that no one will feel inferior or humiliated. Therefore, the principle of propriety focuses on how to maintain the quality of a case and protect the status of all parties as properly as possible. Essentially, the main goal of this principle is to prevent all parties from shame or dishonor.[30]

The principle of conformity contains recommendations to pay attention to the reality and belief of the society, which has become tradition for generations. Therefore, experience and knowledge of the customs that grow and develop in society are the elements needed to formulate a concrete answer in resolving customary conflicts. The implementation of conformity approach is done by paying attention to place, time, and circumstances, so that the decision can be accepted by all parties in the community. The principle of conformity is related to the way of seeing a problem wisely, so that a given solution will be acceptable to all parties and the society as something that has comforting feeling.

The legal spirit of the three principles is in fact in accordance with the characteristics of customary law, which tend to promote the equilibrium (*evenwicht* or *harmonie*) of cosmic life. In this association, it is relevant to pay attention to the opinion of Supomo as quoted by Bushar Muhammad[31]:

> "Every decision of the customary court is meant to restore the disturbed balance due to customary offense. The restoration is necessary because customary offense is a

[28] Moh. Kosnoe, *Loc.Cit.*

[29] I Nyoman Sirte [2008], *Legal aspect in Bali Customary Conflict*, (Denpasar : Udayana University Press), p 78.

[30] Sara Ida Magdalena Awi [2012] "Para-Para Adat as Customary Court Institution on The Port Numbay Indiginous People in Jayapura City". *Jurnal Hukum.* Denpasar : Program Pascasarjana Universitas Udayana. p 15.

[31] Bushar Muhammad [2006], *The Principles of Customary Law* (Jakarta : Pradnya Paramitha), p 49.

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> unilateral act of a person or a group of individuals, which threatens, disturbs, or offends the balance of the community, be it material or immaterial to the person or to a united community. Such actions or behaviors result in a customary reaction that is believed to be able restore the disturbed balance through various ways or methods such as customary payment in form of goods or money, conducting salvation, slaughtering big/small animals, etc."

The potential of customary court system as a means of penal mediation is also quite high because even though judicial forum is also an option to resolve cases and the dualism of customary court and state justice institutions, people tend to prefer to resolve cases through a customary court or a non-state justice. According to Sinclair Dinen, this phenomenon still occurs in inland areas in many countries around the world. This fact is due to several reasons, such as:[32]

a) Limited access to the formal legal system;
b) In solving legal issues, traditional communities in isolated areas still have a strong legal tradition based on their traditional law. This shows that tradition or custom still prevails in many areas. It also illustrates that sometimes the changes in society hit regional boundaries, and that there are still many "sterile" areas that have never implemented formal legal system;
c) The style of problem solving offered by legal system is sometimes seen by many people from different perspectives and considered insufficient or does not meet the sense of justice of the society, who still hold their own legal traditions;
d) The infrastructure and resources owned by the formal legal system are insufficient, which causes a lack of adaptability in understanding the needs of the local community's sense of justice.

Hedar Laujeng accurately points out that the farther a community is from the state government system, the more obvious the figure and role of its customary court system, and vice versa.[33] This is in line with the statement of Donald Black who once said, "Law is stronger where social control is weaker,"[34] and of course, the opposite is, "law is weaker where social control is stronger."

Based on an interview with the Head of the Criminal Investigation Unit, Jayapura Police District, Papua,[35] many criminal cases that occur among the local indigenous communities are resolved through customary courts with support from police departments. If both parties (based on the initiative of the victim and the perpetrator) want to resolve the case through customary court, usually the police will wait for the result of the customary reconciliation to

[32] Sincalir Dinen [2003] "*Interfaces Between Formal and Informal Justice System To Strengthen Acces to Juctice By Disadvantages System*". *Paper* presenter in *Practice In Juctice Workshop UNDP Asia Pacific Rights and Justice Initiative*, Ahungala Sri Lanka, November 19-21, 2003, p 4.

[33] Hedar Laujeng [2003] *Considering Customary Court, The Series of Perpective Development.* Jakarta : HuMa. p 20.

[34] Donald Black [1976] *The Behavior of Law*, (London : Academic Press), p 107.

[35] A personal Interview with the Head of the Criminal Investigation Unit, Jayapura Police District, Papua. Steven J. Manopo, April 8, 2014.

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determine what law process will be used to follow-up the case by the police. Many criminal cases were handled by police department but were already resolved through customary court. In this case, the police investigation will stop after the reporter and the witness cancel the report and withdraw any evidence so there is insufficient evidence to continue the case to the court.

Customary court is a genuine justice system growing in an indigenous community, which in practice has the authority to resolve any type of case, since the principle of customary law does not recognize the difference between civil cases and criminal cases as western law does.[36] As an example, in practice, the types of cases handled by customary courts in the village of Nafri, Papua, and the types of traditional sanctions imposed widely vary.

In general, the cases that occur in the indigenous community of Nafri, Papua can be qualified into two types: customs violations and disputes. Disputes can occur because of a conflict between two or more parties due to disagreements regarding values, differences of opinion and conflict of interest. There are various ways to handle the cases of customary law violations and disputes through the customary *para-para*. The diversity of objects that become the source of conflict in the Nafri community can be classified into two major groups: pure customary cases and mixed cases.

Pure customary cases are those that are closely related to customs. Mixed cases refer to cases that include violation of customary law and state law at the same time. The most common pure customary cases or disputes that occur and are resolved by an *Ontofro* as the customary judge are cases between two individuals, such as pregnancy out of wedlock, immoral cases (adultery), land ownership disputes, breaking custom taboos, and so on. Resolving mixed cases that cause disruption of the balance of family and community environment such as assault, theft, rape, and so on can be done through customary courts by involving respective individuals and or family or clan (*keret*), although sometimes such cases are also brought by one of the two parties and addressed by the state courts.

Criminal Cases That Can be Resolved through Penal Mediation by Customary Courts

In order to analyze what types of criminal cases can be resolved through penal mediation in customary courts, it is important to study the regulations of customary court's authority to hold case hearings based the applicable laws. The only law that can be studied is the Law No. 21 of 2001 on Special Autonomy for Papua, because this is the only law that gives recognition to Indigenous Justice in Indonesia. The only law that can be studied is the Law No. 21 of 2001 on Special Autonomy for Papua, because this is the only law that recognizes customary court systems in Indonesia.

[36] The nature of the legal act in customary law is "thorough and unite", meaning it does not distinguish between criminal and civil cases. All of them are put together, and if there is a series of events that disturbs the balance, all of them are put together in finding solution in the presence of the customary law officers. Hilman Hadikusuma [1993] *An Introduction to Indonesian Custsomary Law Science*, (Bandung : Mandar Maju), p 232.

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The regulations of customary court's authority and competence to hold case hearings can be read on Article 51 (1) and the elucidation of Article 51 clause (2) on Special Autonomy Law for Papua. Article 51 (1) on Special Autonomy for Papua Law states: "Customary course ... has the authority to investigate and adjudicate customary civil disputes and criminal cases that occur among the respective indigenous people." In addition, the recognition of customary court's authority is also mentioned on Article 51 clause (2) which states:

> "Customary court … investigate and prosecute customary civil disputes and customary criminal cases based on the customary laws of the respective indigenous people … Customary courts are not authorized to impose sentence of imprisonment or confinement ... Customary courts are not authorized to investigate and adjudicate civil disputes and criminal cases in which one of the parties is not a citizen of the community. This includes authority in the state courts."

Indeed, customary court system knows no distinction between criminal and civil cases. However, in identifying the authority boundaries between customary court and state court to prosecute a case (object), it is better to classify between customary cases considered as disputes (which according to the state law are in the domain of civil law) and customary cases considered as violations of customary laws or customary offense (which according to the state law are in the domain of criminal law). Furthermore, customs violation case can be divided into two categories: pure customary violations and mixed customary violations, which is called double criminality.[37]

Custom violation (customary offense) as explained by Ter Haar [38] is any one-sided intervention on a balance and any one-sided collision of material and immaterial of a person's life, or of a group of people as a unity (community). Such actions lead to a reaction, whose nature and size are determined by a customary law functionary, which is a customary reaction. Because of the reaction, the balance can and must be restored (mostly by paying fines in forms of goods or money). Meanwhile, Bushar Muhammad gives the boundaries of customary law offense[39] as "a unilateral act of an individual or a group of people that threatens or insults or disrupts the balance and the community life either material or immaterial, against a person, or against a group of society. Such actions result in a customary reaction."[40]

[37] *Double criminality* is certain acts or behaviors within the scope of customary law (offense) that is is also an offense according to the national law. See: Chairul Huda [2013] "Coordination between Customary court System Stakeholders and Law Enforcement Formal Institutions", *Seminar Paper:* The Direction of Customary court System in the National Legal Systems, Organized by The Center for National Legal System Research and Development, National Legal Development Agency, Ministry of Justice and Human Rights, Republic of Indonesia, Surabaya, June 20, 2013, p 10.

[38] Ter Haar [1978] *The Principles and Structure of Customary Law*, (Jakarta: Pradnya Paramita), p 226.

[39] Bushar Muhammad [2006] *The Principles of Customary Law.* (Jakarta : Pradnya Paramita), p. 67.

[40] In principle, the occurence of customary offense according Supomo is similar to the occurence of every unwritten laws. A regulation of human behavior at a given periode of time receives a legal nature at the time when the respective legal officer defend it against people who violate the laws, or when the legal officers act to prevent the violation. See: Supomo [1983] *Chapters on Customary Laws*, (Jakarta: Pradnya Paramita), p. 111-112.

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Pure custom violations are actions that violate the customary law, which occur among the citizens of a respective indigenous community. Such actions are not categorized as criminal act according to the positive law. In other words, they are incomparable or have no equivalent according to the Indonesian Criminal Code Law. This type of case is supposed to be an absolute authority or competence of the customary court. This means that when such case occurs, the customary court has the absolute authority to resolve it through penal mediation and cannot bring up the case to be prosecuted at the state court. This view is in line with the opinion of Suparta Jaya, S.H., M.H. from the High Court of Papua who states, "If a customary case is not regulated in the Criminal Code Law, the customary court's decision is final, and there cannot be any re-examination by the state court.[41]

In my opinion, criminal cases under the authority of customary court are only those that belong to pure customary violations or that are not regulated or have no equivalent in the positive law, for example[42]: cases related to morality (romantic relationships, consensual sex, broken marriage promises, adultery, incest, cohabiting); cases related to property ownership (theft and destruction of indigenous objects); cases related to violation of personal interests (swearing /bad or dirty words, lying); case related to negligence (not obeying customary obligations, not following traditional ceremonies, not attending custom meetings, not paying custom dues); land cases related to customary rights; unauthorized adoptions cases (not procedural or without going through custom trials and ceremonies).

A mixed custom violation (double criminality) happens when an individual or a group of people breaks the customary law. This type of action is a violation of the customary law as well as the positive law, which is regulated in the Criminal Code Law. In such violations, customary court only has limited authority to prosecute custom violations; and according to the Indonesian Criminal Code Law, the state court will have the authority to prosecute the criminal act.

The Special Autonomy Law for Papua is considered vague since there is no distinction between the two types of customary violation. The Article 51 (1) only states that customary courts have the authority to investigate and adjudicate customary civil disputes and criminal cases that occur in an indigenous community. The phrase "criminal case" refers to cases categorized into pure customary violations, which do not have comparable and equivalent regulations according to the Indonesian Criminal Code Law. Mixed customary violations refer to actions or behaviors that violate customary laws, and are categorized as criminal acts according to the applicable law in the Indonesian Criminal Code Law. Based on the Article 51 (1) of the Special Autonomy Law for Papua, it is understood that customary courts have the authority to conduct penal mediation for any violations of custom, even when the

[41] The argument is stated during the *Seminar on Opportunities and Challenges against the Recognition of Customary Courts in Papua*, November 24, 2008. See: Tim Kemitraan, Protection and Recognition..., *Op.Cit.*, p 20.

[42] Team Papua Police Department-Faculty of Law, Universitas Cendrawasih-Partnership for Governance Reform in Indonesia, *Customary Courts in Papua...., Op. Cit.,* p 60-61.

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violation is categorized as a severe criminal offense according to the Indonesian Criminal Code Law, with potential penalty of more than 5 (five) years of imprisonment.

In consequence, customary courts are responsible and authorized for resolving any case of custom violation through penal mediation—pure customary violations as well as mixed customary violations that are regulated in the Indonesian Criminal Code Law with potential penalty of more than 5 (five) years of imprisonment, the decision of the customary court is final.

This customary court authority has a theoretical foundation that various legal systems in the world recognize penal mediation as a mechanism for resolving criminal cases.[43] In Explanatory Memorandum and the Recommendation of the European Council in 1999 on Mediation in Penal Matters, there are various models of penal mediation, such as:[44] 1) informal mediation, 2) traditional village or tribal moots, 3) victim-offenders mediation, 4) reparation negotiation programs, 5) community panels or courts, and 6) family and community group conferences. Penal mediation in law practice is found in indigenous communities through the so-called customary justice.[45]

In addition to penal mediation, another authority of customary courts is to prosecute customary violations that are regulated in the Indonesian Criminal Code Law with potential penalty of more than 5 (five) years of imprisonment. This authority is in accordance with the concept of diversion embraced by the National Law Number 11, 2012 on Children and Criminal Justice System. Diversion means diverting the resolution of cases involving children from the criminal justice process to outside of the criminal justice process.[46] Diversion can be implemented under the following conditions: a) When the crime committed is punishable by imprisonment of less than 7 (seven) years; and b) when the crime is not a repetition of criminal offense.

The authority of customary courts is also in accordance with the opinion of the Bill of Criminal Law drafting team, directed by Andi Hamzah, about case resolution outside of the court, as written in Article 42 paragraph (2) and (3). Article 42 paragraph (2) reads, "Public prosecutor is also authorized for the sake of the public's interest and/or specific reason to stop the prosecution conditionally as well as unconditionally." Article 42 paragraph (3) refers to the following terms:[47]

[43] In Indonesian Positive Law, the law number 11 of 2012 on Children and Criminal Justice System has recognized penal mediation integrated with formal judicial system or diversion.

[44] Barda Nawawi Arief [2012] *Penal Mediation in Resolving Criminal Cases Outside of the Court* (Semarang : Pustaka Magister FH UNDIP), p. 6.

[45] Ahmad Ubbe [2013], "Penal Mediation and Customary Courts (A Reflection upon the Law Protection for the Society Resolving Cases through Customary court System)", *Seminar Paper* The Direction of Customary court System in the National Legal Systems, organized by The Center for National Legal System Research and Development, National Legal Development Agency, Ministry of Justice and Human Rights, Republic of Indonesia, Surabaya, June 20, 2013, p. 2.

[46] See: Article 1 Clause 7, Law Number 11 of 2012 on Children and Criminal Justice System.

[47] Bill of Criminal Law Drafting Team, *Academic Paper of the Bill of Criminal law number ... of year ... on Criminal Procedural Law*, (Jakarta : BPHN, April 28, 2008), p. 16-17

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a. The criminal offense committed is minor
b. The criminal offense committed is punishable by imprisonment of 4 (four) years or shorter
c. The criminal offense committed is only punishable by paying fine
d. The age of the suspect when committing the crime is over seventy years old; and or
e. The loss of the victim has been compensated.

In the Netherlands, the maximum criminal penalty that can be resolved through criminal mediation (penal mediation) outside of the court is 6 (six) years of imprisonment, including theft cases. This method of resolution is included into restorative justice, which is reconciliation between the victim and the perpetrator.[48] In treating customary offenses that have comparable and equivalent regulations according to the Indonesian Criminal Code Law with potential penalty of more than 5 (five) years of imprisonment or categorized as serious criminal offense/felonies, customary courts should be authorized to conduct hearings only for custom violations and punishment. The final verdict should be under the authority of state court judges.

A research conducted by Ahmad Syaufi[49] concludes that penal mediation is a part of the efforts to improve the criminal justice system to be more effective and efficient. The existence of penal mediation will provide a solution that certain criminal cases do not have to be resolved through a judicial process, so that the criminal justice system workload becomes lighter. Penal mediation will give positive implication towards achieving a fast and simple justice system at a low-cost.

The Utilization of Customary Court as a Means of Penal Mediation in Resolving Criminal Cases

The utilization of customary court as a means of penal mediation in resolving criminal cases must be initiated by the recognition of customary court system in the judicial justice system. As long as the judicial power system in Indonesia does not recognize (deny) its existence, the customary court system will never function as a means of penal mediation in resolving criminal cases.

The recognition of customary court system essentially is a state recognition politically as well as legally (political recognition and legal recognition). The recognition is formulated through a national state law in form of legislation that affirms that the country has recognized the existence of customary court as a legal and valid judicial system outside of the state court (non-state justice) that is genuine, born, developed, and practiced by the indigenous communities in Indonesia. By legally recognizing the authority of customary court system,

[48] In Russia, according to Article 76 of the new Russian Federation Criminal Code Law (2003), penal mediation can be conducted for criminal offenses with potential penalty of imprisonment of 10 (ten) years or shorter. In France, the state law decides that criminal cases that can be resolved outside of the court are those with potential penalty of 5 (five) years maksimum. See: *Ibid*, p 18.

[49] Ahmad Syaufi [2013] "Penal Mediation as an Alternative for Resolving Criminal Cases with Civil Aspects in the Criminal Justice System in Indonesia", *Dissertation*, Doctoral Program of Law, Graduate School, Faculty of Law, Brawijaya University, Malang. p. 103.

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there is a consequence that customary court is a part of the national law that must be nurtured and protected; and its rights and powers must be enforced.

The formulation of customary court recognition regulations in the judicial power system in Indonesia must be based on the social reality of customary court as a community justice system that exists in the indigenous society; the comparison between the ideal setting and the arrangement of the customary court system recognition in the country's authorized legislation; and also based on relevant theories.

The theoretical basis used to find and formulate customary court recognition regulations is responsive legal theory, legal pluralism theory, and the human rights of indigenous people's theory. According to the researcher's opinion, responsive legal theory is appropriate to use and needed during a transition period. Responsive legal theory considers that law must be sensitive to the transition circumstances happening around it. Therefore, responsive law[50] is not only demanded to be an open legal system, but also have to rely on the primacy of the objective (the sovereignty of purpose), which is the social goal that wants to be accomplished and the consequences of the implementation of the law.

In addition, there is also the theory of law pluralism that essentially contains more than one legal regulation (institution) in one social community.[51] In a community, apart from the state law and customary law, there are also habitual law and religious law.[52] The theory of law pluralism, which is then continued by the theory of law multiculturalism, prevents a nation to implement cultural assimilation programs that will marginalize minority groups by protecting the existence of cultural diversity and ensuring that the cultural minority can sustain and develop.[53] The theory of indigenous people's legal rights also becomes the basis of formulating customary court recognition regulations, because in principal, Indonesia's recognition of customary court system cannot be separated from its indigenous people's legal rights guaranteed by the Constitutional Law of the Republic of Indonesia (UUD NRI 1945) and the United Nations Declaration on The Rights of Indigenous People. Literally, human rights means the innate rights of every human being, which is universal and eternal, and therefore must be respected, protected, and fulfilled.[54] There is no power whatsoever which may reduce, take, and ignore it.

[50] Philippe Nonet and Philip Selznick [2008] *Law and Society in Transition: Toward Responsive Law*. (London : Harper & Row). p 19.

[51] John Griffiths [1986] "What is Legal Pluralism" *Journal of Legal Pluralism and Unofficial Law. Number* 24/1986, p. 1.

[52] Rikardo Simarmata [2005] "Finding Actional Characters in Law Pluralism". See: HuMa Team. [2005] *Law Pluralism: An Interdisciplinary Approach*, (Jakarta: Ford Foundation and HuMa). p 7.

[53] Ridwan Al Makasary, "*Multiculturalism: Theoretical Review and Critical Notes"*. See: Mashudi Nursalim, *et.al.* (Ed.), [2007] *Minority Rights: Multiculturalism and the Dilemmas of the Nation*, (Jakarta: Tifa and Interseksi Foundation), p 44-45.

[54] Suteki [2010] *Legal Political Reconstruction of Rights of Pro-People Water*, (Malang: Surya Pena Gemilang), p. 107.

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The regulations of customary court recognition are formulated by comparing analysis results of the ideality and condition of the current applicable regulations of justice system recognition. The formulation of customary court recognition regulations in a judicial power system is created by trying to get out of the law of judicial authority mainstream, which until today implements a legal politic that does not recognize the existence of judicial system outside the state court. Next, a synthesis is conducted on the comparison result to determine the formulation of customary court recognition regulations that is responsive to the needs of the indigenous community.

The dialogue process to formulate regulations of customary court recognition in a judicial power system that is responsive to responsive to the needs of the indigenous community can be seen in the comparison table of the ideality and existence of customary court legal recognition regulations below.

Table 1:Dialogue of Customary Court Legal Recognition in an Ideal and Existing Judicial Power System Regulations

Ideal Regulations of Customary Court Recognition	Existing Regulations of Customary Court Recognition
Basic: • The country's obligation to protect the people and the nation of Indonesia • Article 18 B (2), Article 24, and Article 25 of the Constitution of the Republic of Indonesia, 1945 • National Law on Judicial Power	**Basic**: • The country's obligation to protect the people and the nation of Indonesia • Article 24 and 25 of the Constitution of the Republic of Indonesia, 1945 • National Law No. 48 of 2009 on Judicial Power • National Law No. 21 of 2001 on Special autonomy for Papua
Subject: State court and customary court (as a justice system outside of the state) are co-existential.	**Subject**: State court is the only executor of judicial authority recognized by the country.
Objective: Grant the human rights of indigenous people in all parts of Indonesia and implement restorative justice	**Objective**: Creating unification and uniformity of justice systems in all parts of the country
Substance: a. The state shall recognize and respect indigenous communities and their dispute resolution institutions that are customary courts regulated by the law b. Recognition of customary court	**Substance:** a. The state denies the existence of customary court system, because all justice systems in the Republic of Indonesia are state justice systems regulated by the law

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system should include recognition of its institution, authority, and decisions c. Customary courts as a genuine community justice system in the MHA are informal, independent, and autonomous. d. Customary court has the authority to resolve cases of customary disputes and custom offense in an indigenous community e. Customary court is autonomous and independent, and its decision is always final	b. The state justice system is tiered, and its "peak" is at the Supreme Court that holds the highest judicial authority c. There is a pseudo recognition of customary court system in the National Law No. 21 of 2001 on Special Autonomy for Papua (outside of the National Law on Judicial Authority d. Because of the pseudo recognition in the National Law on Special Autonomy for Papua, customary court system is not autonomous and independent
Consequences: • The legislation of judicial authority law is not based on the ideology of judiciary unification and uniformity, but the ideology of pluralism • The state court is not a single subject of judicial authority. Besides the state court, the existence of customary court is recognized as a non-state justice system to fulfill the human rights of indigenous people	**Consequences**: • Customary courts are not recognized in the system of judicial authority and consequently, they are eliminated. Judicial power system is based on centralism and unification • The rights of indigenous communities to resolve disputes based on local wisdom and restorative justice is negated by the country

Based on the comparison in the table above, the regulations of customary court recognition can be formulated in order to use as a means of penal mediation in resolving criminal cases. The formulation is formulated by improving the weaknesses of the customary court recognition regulations in the applicable laws to close the gap between the ideality and reality of the current regulations.

The formulation of customary court recognition regulations in the judicial power systems that includes basic aspects, subject, purpose, substance, and consequence is illustrated in the following table.

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Table 2: The Formulation of Recognition Regulation to Utilization of Customary Court as a Means of Penal Mediation in Resolving Criminal Cases

No.	The Formulation of Customary Court Recognition Regulation
1.	**Basic**: • The country's obligation to protect the people and the country of Indonesia. • Article 18 B (2), Article 24, Article 25 of the Constitution of the Republic of Indonesia, 1945. • Indonesian national law on judicial authority.
2.	**Subject**: State court and customary court (as a justice system outside of the state) are co-existential.
3.	**Objective**: Grant the human rights of indigenous people societies in all parts of Indonesia and implement restorative justice.
4.	**Substances**: (1) The regulation of customary court recognition must shift from abolition model to co-existence model; (2) Customary court institutions are recognized as justice system outside of the country that serves as a non-litigation judicial based on peace among the indigenous people societies that are independent and autonomous; (3) Customary court system is authorized to conduct case hearings for disputes and violations of custom among indigenous people societies. Pure customary violations are the absolute authority of customary courts. Double criminality regulated in the Indonesian Criminal Code Law with potential penalty of no more than 5 (five) years of imprisonment becomes the full authority of customary courts and the decision is considered final. If the potential penalty is more than 5 (five) years or the case is categorized as serious criminal felony, customary court is only authorized to prosecute the offense under customary law and customary sanctions, and then a state court judge will be responsible for determining the court's decision; (4) All customary court decisions are considered final and there is no chance to submit a request for re-examination and retrial by the state court as long as the decision does not violate human rights or any custom regulations, which is also considered a criminal case according to the positive law with potential penalty of more than 5 (five) years of imprisonment.
5.	**Consequences:** • Make fundamental changes to the legal legislation regulations on judicial power by shifting from ignorance to recognition of customary court system in indigenous people societies. • Customary court system is nationally recognized in the system of judicial power for all indigenous people societies in the Republic of Indonesia

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The formulation of the proposed regulations of customary court recognition primarily includes recognition of the institution, authority, and decision of customary courts in the system of judicial authority in Indonesia. Through the firm and clear recognition of customary court in the law of judicial authority, the customary court system will be able to be effectively implemented as a means of penal mediation to resolve customary criminal cases with potential penalty of less than five years of imprisonment according to the Indonesian Criminal Code Law.

CONCLUSION

This article has argued that customary court system has the feasibility to function as a means of penal mediation in resolving criminal cases. This statement is due to several arguments. Customary court system has the philosophy of becoming a justice of the peace; so that it is highly trusted by people, as it is believed to contain local wisdom and virtue ethics for all members of the indigenous people's community. Customary court has high validity among communities of indigenous people. Indigenous people usually tend to choose resolving disputes through customary courts rather than through the state court. The state court holds the principles of "harmony," "propriety," and "conformity" and has the objective to create *restitutio in integrum.* Judges at customary courts are generally traditional leaders who are highly respected and admired by the people. These traditional leaders are usually the community's elders, so that the decisions that they make are considered the best solution in maintaining harmonious relations among members of the community and between the community and the nature. Customary courts are experienced in handling cases of customary offense. The cases handled by customary courts can be classified into two types: custom violations and disputes. Cases of custom violations (offense/crime) handled by customary courts consist of two types: pure customary cases, those that are closely related to customs; and mixed cases, which refers to cases that violate both customary law and state law at the same time.

The authority or the competence of a justice system in resolving cases generally relates to the object of the case. To date, customary courts handle pure customary cases as customary offense only, which means that the cases handled are not regulated in the positive law, the Indonesian Criminal Code Law. In mixed cases (double criminality) that are considered violating customary law as well as the state law, customary courts only have limited authority to prosecute the customary offense only, and prosecuting the criminal offense or the violations of positive laws becomes the responsibility of the state law. In implementing penal mediation, customary cases should be given the authority to prosecute mixed cases (double criminality) that are regulated by the Indonesian Criminal Code Law with potential penalty of no more than 5 (five) years of imprisonment or that are classified into minor to moderate crime. The authority of customary courts in prosecuting these types of case will also rule out the authority of the state court to file a claim, except when the customary court does not perform its power and authority.

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The utilization of customary court system as a means of penal mediation in resolving criminal cases should be initiated by a recognition of customary court in a judicial power system. The regulations of customary court legal recognition must shift from abolition to co-existence model, which means that customary court system is recognized and acknowledged as a justice system outside of the state that functions as non-litigation judicial based on peace in an independent and autonomous indigenous people community. Customary court system must be recognized as having the authority to prosecute customary cases such as disputes and custom violations occurring in an indigenous people community. Pure customary cases are the absolute responsibility of customary court. Customary offenses that are regulated in the Indonesian Criminal Code Law (double criminality) with potential sentence of no more than 5 (five) years of imprisonment becomes the responsibility of customary court, and the customary court's decision is considered final. If the potential sentence is more than 5 (five) years, or if the offense is categorized as a serious criminal offense/felony, customary court is only authorized to prosecute the offense based on the customary law and customary sanction. The final verdict will be determined by the state court. Moreover, the decision of customary court is considered final. There is no chance to submit a request for re-examination and retrial by the state court as long as the decision does not violate human rights or any custom regulations, which is also considered a criminal case according to the positive law with potential penalty of more than 5 (five) years of imprisonment.

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