Global Scientific JOURNALS

GSJ: Volume 8, Issue 10, October 2020, Online: ISSN 2320-9186
www.globalscientificjournal.com

TRADITIONAL VALUE IN CIVIL PROVISION

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ABSTRACT

This study aims to determine how the power of customary value law in court proceedings at the District Court on various civil cases of the Malind tribe in Merauke district, and to determine the implications of the decision of the Merauke District Court on the values and legal culture of the Malind tribe in Merauke district. This study uses an empirical legal research method with a case approach. Because this research is qualitative, the data obtained as a result of the study will be processed qualitatively.

Customary law and positive law are like two sides of a coin that cannot be separated, the author has previously expressed a statement that if the district court cancels, or does not consider the customary values in its break, the two systems of justice have not synergized, so it will be difficult to achieve the goal of justice. and legal certainty. Almost everyone has understood that when a court has fulfilled legal certainty, it does not necessarily fulfill a sense of justice for the community. So do not be surprised if some people state that "why should we respect the country if the state does not respect us".

The evidentiary power presented by both the Malind Imbuti Indigenous Peoples Organization and the adat court is of weak quality. This turned out to be a polemic and a weakness in the application of customary law to positive law. Besides, local governments have failed to apply the special autonomy law, particularly in the field of law enforcement.

***Keywords*:** Customary Values, Evidence, Civil

1. Introductions

The basic reason why research on customary law needs to be carried out is for the welfare of community members by adopting a socio-legal approach. To achieve prosperity is not only certainty but also prosperity and justice, because research on customary law has a big moral responsibility.[1] Research conducted in 2015 on “revitalizing customary courts as an alternative to case resolution” found positive results but was only oriented towards criminal cases that focused on the existence and position of traditional courts in positive law and indigenous peoples in Papua. In practice, law enforcement in Merauke shows that civil cases are handled by state courts whose decisions are legally binding, but disputing parties usually make demands or lawsuits through customary courts with heavy sanctions so that they often impact security and public order in Papua.

Sulastriyono and Sandra in their research study on "the application of norms and principles of customary law in civil court practice", gave a conclusion that in reality, it is not easy for judges to apply customary law in resolving civil cases, so that judges develop a harmonization of the application of norms and principles. customary law into a positive civil procedural law system. This research also examines the basis for judges' considerations in the legal discovery process that effectively harmonizes customary law and positive law in the Yogyakarta and Bantul district courts.[2]

Several other studies have also examined the application of customary law as an effort to revive customary law in positive law and its effectiveness, such as the settlement of "Adultery in

[1] Dominikus Rato, *Hukum Adat Kontemporer*, Cetakan Pertama, LaksBang Justitia, Surabaya, 2015, Page. 177.

[2] Sulastriyon, Sandra and Dini Febri Aristya, 2012, *Application of Norm*s and Principles of Customary Law in Civil Court Practices, Volume 24, Number 1, Mimbar Hukum, Yogyakarta.

Tolaki Customary Law" by Harisman and friends, which revealed that the application of kalosara was very respectful and effective in resolving cases,[3] then "Restorative Justice and Revitalization of Customary Institutions in Indonesia" by Eva Achjani Zulfa, gave clear and worthy results to be compared regarding the relevance of justice in a positive legal system.[4] However, these studies are more directed at the concept of restorative justice in the field of customary criminal law. Another conclusion from the study material put forward by Laila M Rasyid provides additional information that even though positive law is still limited, when there is a difference in the application between positive law and customary law, both of them should have the same opportunity to be chosen as a basis for dispute resolution, with an approach to case related to Decision No.02 / Pdt.G / 2014 / Pn.Sgi, the panel of judges has considered the customary values that apply in society, this can be appreciated positively for the further development of customary law, and other judges can make law adat as an alternative in dispute resolution.[5]

Merauke Regency, which is located in the southernmost region of Papua Province, has a customary community organization which is also an institution for channeling the aspirations of the indigenous people, where these indigenous people are also a community group whose identity is recognized by the State. When viewed from its name, the Customary Community Organization, it is clear that all issues that arise due to customary problems have different characteristics and ways of handling them when compared to Indonesian positive law, the problems handled by Indigenous Peoples' Institutions are very diverse, ranging from issues of a customary nature such as eloping and witchcraft, as well as problems of a civil and criminal nature such as land disputes, persecution, fraud, and even murder.

The practice of customary justice in general in Merauke district, especially for the indigenous people of *Malind Anim*, is applied in the form of a custom session which is usually chaired by the chief of the tribe, both in terms of adopting children, sharing and determining inheritance rights, customary marriage, and even to reverse land disputes. Some examples of cases or problems that often occur in Merauke district, especially in civil matters that are closely related to customs, often become problems that have an impact on the existence and patterns of existing customary laws and apply from generation to generation. Ahyuni Yunus and Ahmad Ali Muddin in the dispute resolution study provided information specifically in the customary law of the *Malind* tribe on reverse problems in Merauke, which also provides a general description that the results of this study indicate that the nature of settling land disputes with customary rights can be resolved through positive legal mechanisms and mechanisms. customary law.[6] Similar studies are interesting to use as a comparison of the application of customary values that occurred in Papua, especially in the Merauke district court.

The brief description above regarding what should be and the fact that happened is the basis for the author's thought that this problem is quite interesting to research to measure the extent to which the strength of customary values is presented in the district court as a power of evidence, as well as to provide an overview or description about the structure, the substance and culture of the customary law of the community, in this case, the pattern or culture of customary law that exists in the *Malind* tribe community in Merauke district, Papua.

2. Method

This study uses an empirical legal research method with a case approach, namely by observing various facts that occur at the research location, in the form of research that begins with a literature study in a case approach as a data source or source of initial material.[7] Then the authors conducted interviews to obtain data or material related to the object under study.

[3] Harisman, Sabrina Hidayat, dan Handrawan, 2019, *Penyelesaian Delik Perzinaan Dalam Hukum Adat Tolaki*, Volume 1 Issue 1, Halu Oleo Legal Research. Faculty of Law, Halu Oleo University, Kendari, Southeast Sulawesi, Indonesia.

[4] Eva Achjani Zulfa1, 2010, *Keadilan Restoratif Dan Revitalisasi Lembaga Adat Di Indonesia*, Jurnal Kriminologi Indonesia Vol. 6 No.II Agustus 2010.

[5] Laila M Rasyid, 2017, *Pengakuan Terhadap Hukum Adat Dalam Kajian Putusan Kasus Tanah Hibah Adat Di Pengadilan Sigli*, Volume 1 Nomor 1, Riau Law Journal.

[6] Ahyuni Yunus, dan Ahmad Ali Muddin, 2019, *Penyelesaian Sengketa Tanah Ulayat Yang Telah Bersertifikat Berdasarkan Hukum Adat Malind-Anim*, Vol. 41, No. 3, Jurnal Kertha Patrika.

[7] Peter Mahmud Marzuki, 2017, *Penelitian Hukum*, Edisi Revisi, Cetakan Ke-13, Kencan, Jakarta, page 158.

Types and Sources of Data

The primary data of this research is in the form of recordings and notes on the results of interviews with judges, Indigenous Peoples Institutions, traditional leaders, and several experts regarding legal opinions as respondents who have been determined as samples, in various regulations related to research objects, customary meetings, customary rituals, and documentation. location and research activities. Secondary data were obtained from copies of district court decisions, the results of previous studies that were almost similar, in the form of journals, scientific papers, articles, and other legal materials. Secondary legal materials are obtained from printed and electronic information media in the form of research reports, articles, journals, newspapers, magazines, technical manuals, and so on. Because this research is qualitative, the data obtained as a result of the research will be processed qualitatively. The writer processed the data by editing steps to re-correct the data collection records, the clarity of the meaning of the answers, the suitability of the answers to one another, and the relevance of the answers. Furthermore, it is analyzed qualitatively for each problem discussed in this study.[8]

3. Discussion

a. Characteristics and Parameters of Proof

In the following, the authors divide in a comparison between the characters and parameters of the law of proof to measure the quality, accuracy, and strength of proof in positive law and customary law based on the writer's in-depth study.

Table 1. Comparison of the quality of proof based on characters and parameters

	Theory in Positive Law	Customary Law (based on interview results)
Characteristics	- Relevant - Acceptable - Not obtained against the law - Must be evaluable	- Only based on confessions and testimonies, - Models that have not been legitimized in local regulations, - The accuracy of the testimony is questionable
Parameter	- The theory of proof - Evidence (1865) - Decomposition or how to convey evidence - Sharing the burden of proof - Strength of proof of each evidence - Minimum evidence	- Unwritten mechanism

Source: comparison of theory and primary data (interviews with respondents)

The author will discuss one by one the characteristics and parameters of proof in customary law. First; "Only based on testimony and confession". According to the results of the author's in-depth examination to a customary judge, the author gets an explanation that the examination mechanism of a customary case is by calling witnesses who are considered to know about an event, then ordering the person entrusted to seek information about the event then discussing it in a customary court then passed a verdict.[9]

Second; The mechanism or model is not yet legitimized in local regulation, it is very clear, as this is the mandate of special regional regulations number 20 of 2008 concerning customary courts in Papua. This will certainly have implications for the application, in which the respondent's explanation does not link the evidence of testimony with other evidence so that the accuracy of a person's testimony can be doubted, and third; according to the information, a person summoned as a witness often gave false or false testimony.

In the same situation, the author puts progressive legal theory as a yardstick for analyzing problems involving these two legal systems, namely customary law and positive law. Here the author argues that following the aspirated development of the world of law, it must be rooted, originate or

[8] Bambang Sunggono, 2015, *Metode Penelitian Hukum*, page 125

[9] Interview *with* Yesayas Ndiken.

depart from the needs of indigenous peoples for a useful justice, then compiled in regulation as a certainty value. It should be assessed the location of the role of the regional government in the formulation of a customary justice mechanism.

Customary courts have diversity in various regions which shows legal pluralism which of course can be used as an opportunity in alternative problem solving, but on the other hand, it is also a challenge in efforts to resolve conflicts. Starting from the findings of the various facts above and their explanation, the Malind tribal court has a little distinction from other regions in Papua, for example in the non-standard examination mechanism in examinations and considerations, issues of religious magical nature, but this is believed to be hereditary and not easily replaced by formal legal logic. This of course has something to do with the challenge of unfinished recognition from the regional government.

Laurence Friedmen's opinion regarding the 3 elements in the legal system that the author uses to study the object of the author's research relating to the quality or strength of evidence, is based on "the final report of the legal review team on opportunities for customary justice in resolving disputes between indigenous peoples and outsiders", the author notes. There are at least three debates about the recognition and existence of the *Malind* tribal court, namely, first; implicit recognition as recognition of customary law. This means that constitutional guarantees will be interpreted automatically against the claim for recognition of structures that work within the customary law community itself. Second; explicit recognition of the existence of customary courts. Although explicitly open acknowledgment through special regional regulations Number 20 of 2008 concerning Customary Courts in Papua has existed, regional products specifically as mandated by Article 10 of these special regional regulations to acknowledge the mechanism of investigation and so on have not been regulated and have received a place. Then the third thing that becomes very important in proof in court is; recognition of customary decisions. Recognition that does not place its position as a sub-ordinated customary court structure under the formal state structure can indirectly be problematic, although only limited to recognition of the decisions of the customary courts.

In fact, or practice, up to now, the regional government has not thought about formalizing the mechanism, although experience shows that district courts continue to seek customary law considerations in resolving cases. Although the author's investigation proves that the recording models of the results of customary decisions tend to be different.[10] This should be one of the first steps to open the relationship between the customary justice system and the general court. The author also found the fact that there was inconsistency when there was recognition of indigenous peoples, which gave birth to debates regarding the recognition and accommodation of the constitution in Article 28I paragraph (4) and (5) of the Constitution of the Republic of Indonesia on respect for indigenous peoples, in this case: recognition and respect for customary courts.

Recognition of the existence of customary courts is not without problems, for example regarding the contradiction between the decisions of the two systems which should be used, the execution mechanism and the execution process, and whether outsiders are willing to submit to customary decisions or not. This of course also needs to be answered as a parameter in court evidence, so that the idea of requesting a ruling can be interpreted as an effort to guarantee the enforcement of customary rights and laws by mobilizing other law enforcement officials in the settlement process if the customary court is ignored by other parties. This will create synergy and relevance for customary courts and general courts, especially in the case of customary courts dealing with big businessmen. This argument was put forward by a respondent who in an interview with the author expressed his desire for law enforcement or state officials to go down to the villages and learn about the customary laws of the *Malind* people.[11] Based on this idea, opportunities will be created to strengthen customary courts and provide a balance to the Indonesian legal system.

The challenge that arises on the other hand is regarding the involvement of women in the customary justice system, in which the principle of gender equality plays an important role in this regard. The fact is that the involvement of women in customary courts is very minimal, and even almost non-existent. For the *Malind* community in the past, the duties of a *Malind* woman have limited or nothing more than the task of managing the house and raising children, even *Malind* women were not entitled to an inheritance right in the family.[12] This is due to the habit of the people who consider

[10] Note; refer to table 2. cases containing evidence from the LMA
[11] *Op. Cit*. Yesayas Ndiken.
[12] *Op. Cit*. Kasimirus Gebze.

taboo when there are cases that involve something that is considered privacy and a disgrace for certain groups of indigenous peoples. The same thing was also stated by former chairman of LMA *Malind Imbuti* in the 2015-2017 period.[13]

The problem of the principle of justice will of course lead to failure in efforts to achieve the value of justice which does not only occur in customary courts but can also continue to process in district courts. This contradicts the principles of human rights on the values of non-discrimination, equality, and human dignity. The balance at this point will be the harmonization between justice, legal certainty, and legal benefits for the community.

b. Quality of Evidence for Customary Sessions and Indigenous Community Institutions

In the following, the author has summarized some important notes related to evidence of customary value in some of the judicial decisions of the Merauke country which the author made as material for in-depth study. Among the decisions, there are two verdicts in customary criminal cases as a comparison.

Table 2. Sample of Evidence with Customary Value

Verdict Number	Plaintiff's evidence	Defendant's Evidence
48/Pdt/2019/PT JAP	- Traditional session dated 25 November 2016	- Letter of release from the LMA (before the customary trial, number and year were not mentioned in the decision)
27/Pdt/2017/PT.JAP	- Letter of Release dated 17 September 1991	- statement letter of relinquishing customary land rights (based on testimony to traditional rituals in 1986)
14/Pdt.G/2013/Pn Mrk	- Release dated 15 August 1985 (P-2) - Statement of Release dated 18 January 1986 (p-5)	- Release dated 17 September 1991 (T-1) - Different witness testimonies - Defendant acknowledged receiving money but did not admit to selling the object
03/Pdt.G/2011/PN.Mrk	- Minutes of release dated 10 February 2011 - Release 31 / LMA-MI / II / 2011 (p-5)	- Release dated July 5, 1981

Source: secondary data processing results

Table 6. Criminal Cases in the Role of Customary Law

Verdict Number	Amar Verdict
120/Pid.B/2012/PN.Mrk	Stating that the Defendant has been legally and convincingly proven guilty of committing the crime of "Deliberately Misusing Power to Encourage Others to Commit a Planned Killing";
60/Pid.B/2012/PN Mrk	Stating Defendant, I, Defendant II, and Defendant III have been legally and convincingly proven guilty of committing the crime of "Committing a planned murder together"

Source: secondary data processing results

In the lawsuit number 48 / Pdt / 2019 / PT JAP above, it is stated in one of the points in the case that the traditional rituals carried out are customary courts whose existence is recognized as positive law and has legal force. Regarding the release letter made by the LMA, in the author's investigation through this decision, it turns out that the customary release letter was not made based on customary provisions or LMA manipulation. This has been proven by several parties related to this case where LMA *Malind Imbuti* has issued or issued a release letter on the customary release letter on the same object of dispute. After the author explores the causes of this incident, the facts have been

[13] Former Chairman LAM *Malind Imbuti* (1 August 2020)

found that the LMA itself does not remember the objects or records and books of correspondence that have been issued regarding several previous cases. This proves that the LMA itself creates legal uncertainty, according to the opinion of a respondent the author interviewed.[14]

Then the defendant who subsequently appealed rejected the plaintiff's claim that the recognition from the customary community institution as a result of the adat council meeting was the final decision. If you look closely, the issue of customary law in Papua is carried out by the application of customary courts as regulated in the Papua Regional Regulation Number 20 of 2008 concerning Adat Courts in Papua. Then regarding the authority to carry out customary justice as previously stated, based on the results of in-depth analysis through various interviews, it has provided an explanation that basically in the customary law of the *Malind* tribe, LMA *Malind Imbuti* is not authorized to carry out customary justice.[15] Although special regional regulations number 20 of 2008 concerning customary courts in Papua has regulated the functions, duties, and powers of customary courts, what applies to the *Malind* community is the customary court that has existed and has been in effect for a long time ago and has been adhered to from generation to generation before the existence of the LMA which had only existed since 1999. 2002, and the LMA itself is not entitled to accept and adjudicate a customary case.

This is possible if in certain circumstances where an indigenous community does not have a customary structure that is usually tasked with conducting customary sessions then the LMA can carry out the function of the customary court which is very possible because special regional regulations number 20 of 2008 in Article 10 paragraph 2 states the mechanism for receiving, administering, prosecute and make decisions are regulated in regional regulations, which until now there is no regional regulation on customary justice in Merauke. Then considering Article 1 paragraph 17 of this Special regional regulations states that "Customary courts are institutions for settling disputes or customary cases in certain customary law communities in Papua", and Article 8 paragraph (1) of this special regional regulations also states that "Customary courts have the authority to accept and administer cases. customary civil law and customary criminal cases among indigenous people in Papua ". This means that these two articles are mutually correlated in the role of the LMA as an alternative medium and media. This makes it very possible for the LMA to facilitate a customary council meeting which is a trial by involving and asking for the consideration of the traditional elders with the customary authorities who are authorized to hold adat sessions (adat courts) with special people in the customary structure who have been chosen to conduct customary court process.

In one of the points of the argument for rejection of posita or the basis for the plaintiff's claim, the defendant also stated that the customary hearing which was carried out in the settlement of the object of this case was carried out by the plaintiff after the Merauke district court's decision number 26 / Pdt.G / 2015 / PN.Mrk, the decision at the appeal level Jayapura high court Number 38 / PDT / 2016 / PT.JAP and Supreme Court decision Number 373 K / PDT / 2017 which states that the father of the defendants is the owner of the object of the dispute. This means that it shows the weakness of the customary mechanism that the release letter issued by the LMA itself has crashed the customary mechanism that should have been done, because the release letter issued by the LMA for the first time on the same object was known to have been issued without going through a custom mechanism or the process of a customary council meeting, meaning that the LMA has issued the release letter unilaterally. This is an open secret for almost all parties who often deal with LMA, according to the statements of several lawyers in different offices whose authors asked for information and opinions.

This situation can be placed by the author in the Unlawful Legal Evidence category where the evidence obtained in this way is invalid in how to collect and obtain evidence, if this is also reviewed then we will get this as a result of the document archival administration system that is not clear by the LMA.

Interesting facts can be seen in case number 03 / Pdt.G / 2011 / PN Mrk. If the quality of evidence, in this case, is measured by the correct parameters or according to the theory of proof, it is clear in the lawsuit that the plaintiff's argument will be of weak quality, because there is a mismatch between the evidence and also the statements of the plaintiff's and defendant's witnesses. The judge's decision in the provisions stated that the plaintiff's provision for provision was unacceptable, then in the exception, the judge rejected the exception of the defendant and his co-defendants, then in the

[14] Interview with lawyer Guntur Ohoiwutun (07 January 2020).
[15] *Op.Cit*. Yesayas Ndiken (second stage interview, 11 February 2020).

main case, the judge stated that he completely rejected the plaintiff's claim. If we trace the chronology, it will be clear that the basis in the judge's consideration is that because the plaintiff cannot prove the main argument in his lawsuit, the rest of the plaintiff's petitum is no longer relevant to be considered and then the plaintiff's claim must be declared rejected. The rest of the plaintiff's evidence can be questionable due to the negligence of the doubtful loss of the release letter. The reason is seen that there has been a fabrication of the release issued by the LMA against the object of dispute in question.

As a comparison, the authors associate it with customary criminal cases which can imply a shift in customary values, because the law makes it clear that customary courts have no authority to impose criminal sanctions, and so far customary sanctions in the form of the death penalty still apply to the *Malind* community, in civil cases. , customary sanctions that apply such as fines and so on only apply in certain circumstances. The problem that arises is, the nature of *nebis in idem* in customary cases which is forwarded to the district court. For a judge at the Merauke district court, the nature of *nebis in idem* depends on the nature of the decision, and it will be carried out according to the judge's consideration, if the subject and/or object are the same, then it can be said that *nebis in idem.*[16] On the other hand, the customary court also expressed the opinion that the district court should be able to follow and understand that if the customary court has ruled against someone, the district court should give a decision that strengthens the customary decision.[17]

Analyzing the explanations from judges in district courts and statements from customary judges can still be said to be relevant if the authors compare it in one of the studies conducted by Budy Suhariyanto in 2018 regarding "Adat Absorption Problems by Courts and Its Effect on National Criminal Law Reform" which provides information in the form of the fact that the practice of adopting customary law by court decisions provides three variations of court decisions in addressing the enforceability of customary law. First; courts use the Criminal Code as an equivalent in deciding punishment. For example, the Supreme Court did not stipulate customary sanctions for violations committed by the defendant in the Supreme Court decision Number 666 K / Pid / 1984. This means that the imposition of sanctions which are not substituted penalties. Second; the court applied the principle of *nebis in idem* by deciding to cancel the sentence because the defendant had applied customary court by the customary head, as in the Supreme Court Decision Number 1644 K / Pid / 1988 which considers that someone who has committed an act according to living law (customary law) in that area is an act that violates the customary offense, the customary chief and has given a customary reaction in the form of customary sanctions against the perpetrator and this customary sanction has been carried out by the convicted person. According to the Supreme Court, against the convict who has been subjected to customary sanctions by the customary head, he cannot be brought forward a second time as a defendant in a trial at the District Court with the same charges (applies the principle of *nebis in idem*). Third; the court decided the conviction by using customary criminal sanctions, as the Supreme Court Decision Number 854 K / Pid / 1983 overturned the decision of the Klungkung District Court judge Number 33 / Pid.Sumir / 1983 which acquitted the Defendant of all charges, primary charges (violating Article 378 of the Criminal Code) and subsidiary (violating Lokika Sanggraha from Peswara Bali and Lombok).[18] In the three variations of the verdict he mentioned, the Supreme Court has absorbed customary criminal law with different contexts of consideration, such as different interpretations and different philosophies of customary law.

Another opinion from different respondents said that seeing the phenomenon of customary decisions which are considered *nebis in idem* does not just happen even though there is a similarity in object or subject, in a criminal case even though the perpetrator has received forgiveness according to custom, however, this does not free the perpetrator from being caught. law is legally positive, so there must be light sanctions from the district court as a deterrent effect on the perpetrators.[19]

Customary law and positive law are like two sides of a coin that cannot be separated, the author has previously expressed a statement that if the district court cancels, or does not consider the customary value in its break, the two systems of justice have not synergized, so it will be difficult to achieve the goal of justice. and legal certainty. Almost everyone has understood that when a court has

[16] Interview with the Merauke district court judge (Rizky Yanuar, 24 January 2020).
[17] *Op. Cit*. Kasimirus Gebze.
[18] Budi Suhariyanto, 2018, *Problema Penyerapan Adat Oleh Pengadilan Dan Pengaruhnya Bagi Pembaruan Hukum Pidana Nasional*, Volume 30, Nomor 3, Mimbar Hukum, Jakarta. Hal 6.
[19] Interview with lawyer Efrem Fangohoy (24 January 2020).

fulfilled legal certainty, it does not necessarily fulfill a sense of justice for the community. So do not be surprised if some people state that "why should we respect the country if the state does not respect us".

Various statements and opinions of judges and several other respondents, the results of interviews related to customary sanctions which in the judgment of judges in district courts are only used to alleviate and cannot erase a person's punishment, that it is very weak because until now there is no regional regulation that regulates the customary justice mechanism in Merauke district, meaning that until now there has been no legitimacy regarding the customary justice mechanism from the local government in a regional regulation. However, for some indigenous peoples, the opinion is that even though there is no regional regulation, this will not necessarily eliminate the position of the customary court because the process has been passed down from generation to generation and continues to exist in the indigenous Malind community to this day.

The dilemma that results in a lack of synergy between the customary justice system and the general court lies in several mechanisms and customary decisions that do not strengthen for judges in district courts, in an interview with a traditional leader or community leader who is also a customary judge, he explained about The examination mechanism is carried out in a customary court, namely by ordering the person entrusted to ask anyone who is considered to know about an incident.[20] However, the reality is that people who testify in traditional courts often give different, false testimonies.[21]

The final sanction in a *Malind* tribal court after the perpetrator is given a warning and forgiveness but the perpetrator continues to repeat his actions, according to the provisions of *Malind* customary law, the final penalty is the death penalty. On the other hand, for judges in district courts, this is a purely criminal act, and also in the opinion of judges in district courts that there has been an act of abuse of power by the customary chief or customary judge in giving orders to execute the perpetrator or the defendant,[22] because it is clear that the district court judges will adhere to the law that the customary court is not authorized to impose criminal sanctions in the form of imprisonment or to execute someone.[23] This is what distinguishes the three variations of the Supreme Court's decision above and this decision, both in terms of different interpretations and philosophies of customary law in their respective regions.

Based on the results of the author's interview as discussed above with a customary judge who explained how to examine a case by asking people to ask parties who are considered to be aware of an event, it has provided an explanation of a few other weaknesses that are found is without any more Furthermore, which regulates the customary judiciary mechanism, we will not know what parameters or measurement tools are used by customary judges in examining cases in an adat court to prove allegations against someone who is considered to have violated customary norms.[24] In this situation, the author examines its relation to the Directed Verdict principle. Based on information from various respondents, the judge will argue that if something cannot be proven by the presumption that someone is accused by the custom of having committed an act that violates customary law (witchcraft) will not be proven with certainty. This means that the authenticity of anyone can be doubted, except with the recognition of the perpetrator himself.

Besides, several decisions in the Merauke district court considered the evidence presented by the LMA to be quite weak, which means that the measure of the quality of evidence presented by the parties in a case in the district court can be said to be weak due to one other important factor, in this case, it is seen to be contrary to the structure. or the LMA apparatus itself who does not work optimally, the fact that the LMA itself does not carry out administrative governance, the LMA document archives which often result in multiple release letters or overlapping letters issued by the LMA, as an example of this can be seen in decision number 48 / Pdt / 2019 JAP, 03 / Pdt.G / 2011 / PN Mrk, which in the defense of each party presents evidence in the form of a release letter for the same object issued by the LMA.[25]

Besides, the author is asking for a legal opinion by conducting an interview with one of the judges at the Merauke District Court and digging up information or information obtained by the author

[20] *Op. Cit*. Yesayas Ndiken (11 February 2020)
[21] *Op. Cit*. Efrem Fangohoy.
[22] Reference to court ruling like Merauke number 120/Pid.B/2012/Pm. Mrk
[23] *Op. Cit*. Merauke district court judge.
[24] *Op. Cit*. Yesayas Ndiken.
[25] Refer to the evidence data in Table table 2.

that mediation efforts that are usually carried out frequently or always fail to reconcile the litigants in court related to customary issues and returning them to be resolved by the customary party, this has resulted in many cases piling up to be examined and decided by the court.[26] According to information, there are indeed many cases that have been returned to be resolved according to custom, but customary parties often fail to reconcile the parties and are resumed or the legal process is continued to the district court.

Several cases in the defense note are often directed by the attorney of one of the parties so that the case can be said or is *nebis in idem*, but the judge in his consideration has another opinion, that in this case there is an error in the object or subject of the case in question. Then the author connects the concept of justice theory which focuses on balance and slightly overrides certainty, about this case, the polemic that occurs is after the implementation of special autonomy which also recognizes customary courts, customary community institutions claim that some of the various ownership statuses during the New Order era should have been investigated and received recognition from the customary community, which means that the LMA thinks that the special autonomy law should be retroactive to restore the rights of indigenous peoples who are considered to have been seized during the New Order era.[27] But on the other hand, various legal opinions suggest that the guarantee in the special autonomy stats cannot be retroactive, but must move forward following the era or era.[28] In response to this, the author predicts that there will be a bigger polemic if the special autonomy law can be retroactive because according to the author there will be many new problems that arise with unclear claims, one-sidedly, to seek profit and will also result in a backlog of cases in district courts.

When the author asks for the opinions of several respondents who often deal with cases involving LMA, regarding the performance and quality of traditional values, the author finds an explanation that actually what creates uncertainty about customary law is the customary community itself, especially what happens to the performance of community institution officials. custom.[29] This statement, according to the author, is quite acceptable given the fact that many irregularities have occurred in various decisions, or recommendations, or any letters issued by the LMA. It can be said in slightly harsh language that the presence of the LMA only plays a role in dealing with customary rights problems because there is a growing awareness that customary rights problems have economic value. Abuse of power can occur and be misused only to get economic benefits from various problems that are brought to be resolved through the LMA.

Regarding the various facts, both infographics of evidence, respondents' statements in interviews, fiber measures of trust in the LMA in previous discussions, that the weak quality of the power of evidence-based on the evidence presented by customary parties is due to the chaotic administrative governance or document fragility of the LMA apparatus. reducing the quality and trustworthiness measure, the existence of evidence obtained by a process that is not following the provisions, even according to some respondents that often the witnesses presented did not provide true information or in other words, giving false information.[30] Besides, the inaccessibility of the mechanism for resolving customary problems through regional regulations is a weakness and a threat to the existence of customary law, as well as a shift to customary values, even though it is inherent, but some elements can manipulate customary mechanisms and traditions from what they should be just because they were lured with money. or other economic benefits.

On the other hand, the regional government is considered to have failed in implementing the special autonomy policy in the field of law enforcement which results in unfavorable conditions that may weaken the achievement of a sense of justice for indigenous peoples. Indeed, substantive justice in the judge's decision has implications for changing the pattern or culture of customary law, but the change or shift is not negative, but shifts in a positive direction in protecting human rights.

Referring to the theory or concept of justice, as expressed by Thomas Aquinas, it is the custom to give others what is their right, but about the judge's decision above legally, the judge may have considered the aspect of legal certainty but there will be gaps if the decision is made. it is felt that it is unfair to indigenous peoples. If traced further some of the decisions mentioned above have

[26] *Op. Cit*. Merauke district court judge.
[27] *Op. Cit*. Secretary LMA *Malind Imbuti*.
[28] *Op. Cit*. Efrem Fangohoy.
[29] *Op. Cit*. lawyer Guntur Ohoiwutun.
[30] *Op. Cit*. lawyer Efrem Fangohoy.

reached the second level court or appeal even to the cassation level, it means that if the judge's decision at the first level court has not fully provided a sense of justice for either party, in this case, the plaintiff, or by other words have not provided satisfaction to the plaintiff.[31] For example, several decisions reached the level of cassation or were exemplified in the decision number 48 / PDT / 2019 / PT JAP which strengthened the decision of the Merauke district court dated 7 May 2019 number 21 / PDT.G / 2018 / PN Merauke, which in his appeal memory the argued that judges at the first level court do not carry out their obligations as regulated in Article 28 of Law Number 4 of 2004 concerning Judicial Power, that judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society.[32] This means that the authors agree that in the view of the sociology of law, there must be a change in the way of thinking of judges from normative to more sociological empirical. On the other hand, the fact that also weakens the plaintiff argues that the plaintiff, hereinafter referred to as the appellant, has been involved as a witness in a previous case which, according to comparison, argues that the plaintiff has been a witness in a case with the same object so that the case is considered *nebis in idem*.

The existence of evidence presented by the plaintiff was deemed strong enough because the evidence was obtained based on the results or decisions of the customary court. Even though the customary hearing was held after decision number 26 / Pdt.G / 2015 was made, the object of the case according to the defendant was the same. After the author traced the truth of the release letter from the LMA and several different parties, the information obtained explained that the witness who signed the release letter was not the right owner of the object and had given false information, after previously the witness was given liquor then signed the release letter. the. Regarding this case, the argument of the objection note issued by the LMA is fabricated, and it is true after an investigation was made that on the same object LMA made an error with the release letter because LMA *Malind Imbuti* did not have records or files that contained the truth of the release. However, the authenticity of the release letter can be ascertained because it contains many signatures from the seven clans as a valid sign of the release.

As previously explained that if we place LMA decisions as customary decisions then that is a mistake because the customary courts themselves in terms of positions and mechanisms for receiving, examining, and adjudicating and making decisions are separate from the LMA's authority which has been going on for generations. This is in line with what was explained by the respondent that LMA *Malind Imbuti* was not authorized to try a case so that the decision made by the LMA did not represent a customary court so that about this case, it is appropriate in the judge's decision to consider the release letter issued by the LMA as an unacceptable weakness.[33]

Another known error is that the defendant or the defendant in his opinion argues that customary courts must be regulated by regional regulations. However, it needs to be reminded that if as long as it is still recognized and lives in the community then it must be considered a legitimate existence to be explored and followed.

This is in line with the views of the legal streams of historicism and sociology that understand law through an investigation of the Volgeist or soul of people (the soul of the people) which holds that law grows together with the people. However, in fact, in several cases in the research areas, things are contradictory due to dishonesty from the officials who run these traditional institutions. This is certainly not in line with the sociology of law, which means that without understanding the values, norms, and patterns of society. So a customary institution may err in its consideration of a decision to achieve justice.

Previously the author has explained the results of interviews with several advocates that based on the facts, it turns out that the indigenous people themselves create the uncertainty of customary law, this will also have implications for the inequality of the rule of law doctrine which in principle emphasizes the recognition and protection of the same rights. especially in the field of law, legal legality in all forms, and a trial that is free, impartial, and free from influence from other powers. The link is the recognition and protection of the rights of indigenous peoples, the legality of a customary institution, and a court that is free from intervention and impartiality. So if the

[31] Interview with lawyer Beksy Gaite (10 February 2020)
[32] The arguments for the memory of the appeal against the numbered verdict 21/PDT.G/2018 Merauke.
[33] *Op. Cit*. Yesayas Ndiken. (11 February 2020)

considerations and decisions of district court judges weaken, contradict, and even invalidate customary decisions, the conclusion is that the two judicial systems have not synergized.

The upside-down to the level of effectiveness and trust in traditional institutions in other areas is more appreciated and gets a positive value when compared, for example, research that examines customary case resolution mechanisms such as Restorative Justice and Revitalization of Traditional Institutions in Indonesia by Eva Achjani Zulfa which concludes that in practice, the problem that is often faced in various regions in Indonesia and even in Europe is that cases are often not continued because they have been resolved through traditional institutions.[34] Then in terms of the characteristics of case settlement through customary courts, the author compares several research results proposed by Harisman, Sabrina Hidayat, and Handrawan regarding the Settlement of Adultery Offenses in Tolaki Customary Law. arise in society.[35] The connection with this research is to provide a description or description of the comparison of the level of effectiveness of customary institutions or channels in resolving a case, which means that the existence of the Kalosara customary justice system is considered effective and capable of resolving cases that arise and are related to adat. This situation will allow very few cases to be brought to district courts, and this can be a positive step because it will have an impact on not accumulating cases in district courts.

4. Conclusion

Based on the results of the research that the author has described in the discussion, it can be concluded that the legal strength of the LMA decision in the trial at the Merauke District Court against the customary civil cases of the Malind tribe community and the customary court has a weak quality. This is since it is not uncommon to find evidence of overlapping letters issued or issued by LMA, witness testimony presented by LMA that does not coincide with other witnesses, or the discrepancy of witness testimony with letter evidence. This situation is influenced by several factors, such as human resource factors in the structure of the LMA to manage a social institution, as well as the inadequate facilities and infrastructure that LMA *Malind Imbuti* has. This turned out to be a polemic and a weakness in the application of customary law to positive law. Besides that, it can also be said that the regional government has failed to apply the special autonomy law, especially in the field of law enforcement.

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[34] Eva Achjani Zulfa1, 2010, Keadilan Restoratif Dan Revitalisasi Lembaga Adat Di Indonesia, Jurnal Kriminologi Indonesia Vol. 6 No.II Agustus 2010: 182 – 203.

[35] Harisman, Sabrina Hidayat, dan Handrawan, *Penyelesaian Delik Perzinaan Dalam Hukum Adat Tolaki*, 2019, Volume 1 Issue 1, Halu Oleo Legal Research. Faculty of Law, Halu Oleo University, Kendari, Southeast Sulawesi, Indonesia. Hal 3.

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