

# ANALYSIS OF ACTIONS AGAINST THE LAW CASE OF APPOINTMENT OF THE PAGU TRIBE CUSTOM LEADER (*SANGAJI*) IN NORTH HALMAHERA REGENCY

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## ABSTRACT

This study aims to analyze the legitimacy of the appointment of the Pagu Tribe Chief based on the Customary Law of the Pagu people, as well as examine the considerations of the judges of the North Maluku High Court (PT) in deciding the case of appointing the Pagu Tribe Head of North Halmahera as an unlawful act (PMH). The research method used in this study is empirical legal research, namely research that looks at the application of laws and regulations in society. The results of this study indicate that validity of the Appointment of the Head of the Pagu Tribe based on the reason that the role of the Traditional Head in resolving land disputes in the Pagu Tribe is as a Peace Judge in customary trials and as a decision maker where the decision is binding for the parties to the dispute. Legal basis consideration of the judge of the District Court Number 13/Pdt.G/2020/PN.Tob decided the case of appointing the tribe head as the customary institutional administrator for the North Halmahera Pagu tribe was an unlawful act (PMH). Regarding loss of wealth (*hermogenschade*), compensation generally consists of compensation for losses suffered and also in the form of profits that one can expect to receive (*gederfdewinst*). In this regard, it is not as easy as predicted to determine the amount of compensation.

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## INTRODUCTION

Customary law is a law that applies and develops within the community in an area. Furthermore, according to Hardjito Natopuro, customary law is unwritten law, customary law with characteristics which are guidelines for people's lives in administering justice and social welfare and are familial in nature; Whereas in line with the understanding of customary law as described above, it can also be emphasized that the State recognizes the existence of indigenous peoples as formulated in Article 18B paragraph (2) of the 1945 Constitution which states;

"The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law";

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Indigenous peoples are groups of people who have lived in a certain geographic area for generations based on ties of ancestral origins, have rights born of a strong relationship with natural resources and the environment, have distinctive customs, values, cultural identities that are determining economic, political, social, legal institutions upheld by customary institutions. In addition, the criteria for customary law community units are also regulated as follows:

- 1) Is a community group that comes from one ancestor and/or inhabits the same customary territory?
- 2) Having certain customary territories, both cultivated and preserved from generation to generation, which are shared property
- 3) Has its own customary institution
- 4) It has its own customs and rules of customary law
- 5) As long as there is still existence, it does not conflict with the spirit of national development.

Based on the foregoing, this research focuses on indigenous peoples who still exist in North Maluku, one of which is the Pagu tribe who live in North Halmahera Regency, which previously had conflicts about the appointment of the chief of their tribe, which it was decided that the appointment was an illegal act. abbreviated as PMH by other members of the Pagu customary law community. The pagu tribal community is a unit of customary law community that lives and develops with its style and culture, which is located in North Halmahera Regency, North Maluku Province; that based on the 1945 Constitution as the position of the case above, the other Pagu customary law community, in this case who filed the PMH lawsuit, the plaintiff feels that he has the legal standing to file this lawsuit in his capacity as the Head of the Pagu Indigenous People Tribe.

The plaintiff is the Head of the Pagu Tribe Community or in the Pagu Customary position referred to as Tubol Ma Lamok, who was appointed through a deliberation of the Consuetude Council on 16 January 2012 at Sosol Village, Malifut District, North Halmahera Regency. the plaintiff was later confirmed as Tubol Ma Lamok or tribal chief of the Pagu Indigenous community on May 23 2013, that as a sign of blessing and respect for the plaintiff as the elected Head of the Pagu Tribe at that time, the traditional elders were given the opportunity to perform a traditional dance in the form of cakalele and carrying out other traditional processions in the traditional procession Defendant I took part in paying respects by performing the cakalele dance; in carrying out the customary institutions of the Pagu tribe, all of them are based on customary law or unwritten law, namely based on the living habits of indigenous peoples that do not conflict with applicable legal norms and decency;

If conflicted then Acts against the law are known as *onrechtmatige daad*. As regulated in Article 1365 **Civil Code**, an unlawful act is: Any act that violates the law and causes harm to another person obliges the person who caused the loss because of his mistake to compensate for the loss.

Act against the law explained that in determining an act can be qualified as against the law, 4 conditions are needed (1) Contrary to the legal obligations of the perpetrator; (2) Contrary to the subjective rights of others; (3) Contrary to decency; and (4) Contrary to propriety, thoroughness and prudence.

The appointment and confirmation of the plaintiff as Tubol Ma Lamok or Head of the Pagu Tribe by the Pagu customary council was carried out based on the customary law traditions of the local community, therefore this matter should be legally recognized, after the plaintiff was appointed and confirmed as Tubol Ma Lamok or Head of the Pagu Tribe, the plaintiff has carried out his duties well by introducing the customs and culture of the Pagu tribe to the Regional and National levels, participating in every customary and cultural celebration both held at the Regional

and at the National level and other activities aimed at developing customs and culture in the Territory of the Unitary State of the Republic of Indonesia.

This will be proven later in the form of documentary evidence or through the statements of witnesses; Whereas precisely in 2016 Defendant I together with Defendant II and Defendant III, claimed to be administrators of the Consuetude Ceiling institution, where Defendant I Simon Toloa claimed to occupy the position of head of the pagu tribe who had just replaced the plaintiff, Defendant II Yunus Ngetje claimed to be Chairman The Pagu/ Nyiar Traditional Council and Defendant III Yefta Mutji claimed to be commanders of the Pagu/ Kapita Traditional Troops;

That the actions of Defendant I who claimed to be the Head of the Pagu Tribe replaced the plaintiff's position as well as the actions of Defendants II and Defendant III who participated in completing the customary institutional structure of the Pagu Tribe were acts that violated the customary law of the Pagu people, because the actions were committed not based on the Customary Law tradition who live and develop in the Pagu Indigenous community;

The customary law tradition of the Pagu people does not recognize the periodization of traditional positions held by someone, but based on the local community's customary law that a tribal chief or Tubol Ma Lamok can only be replaced if the person concerned resigns, commits adultery, steals and dies. Therefore, the actions of Defendant I, Defendant II, and Defendant III should not be justified by the honorable Panel of Judges examining a quo case, that the actions of Defendant I, Defendant II, and Defendant III were not only limited to claiming to be administrators of tribal customary institutions. Pagu, but the defendants also used the pagu tribal customary institution for personal interests in order to obtain material benefits from PT.NHM as well as from other parties that could be invited to work together.

The actions of the defendants were certainly very detrimental. The act as the head of the Pagu tribe and even the Pagu indigenous people as a whole because they had used the name of the Pagu tribal customary institution and even the Pagu indigenous people as a whole because they had used the name of the Pagu tribal customary institution for personal gain, therefore this act should be declared as an unlawful act has caused moral loss to the plaintiff:

Based on the description above, the researcher felt interested in conducting research on the case in which the researcher focused on research that was empirical juridical in nature to find out empirical facts that were taken into consideration by judges at the first level (PN) who rejected the plaintiffs' lawsuit and finally at the second level. (PT) accepted the claim of the plaintiffs and decided the case as an unlawful act (PMH). The researcher raised the research title "Juridical Analysis of Unlawful Acts in the Appointment of Traditional Chiefs (Sangaji) of the Pagu Tribe in North Halmahera Regency".

The research objectives to be achieved in this study are; (1) to find out how the legitimacy of the appointment and replacement of the Head of the Pagu Tribe is based on the Customary Law of the Pagu community, and (2) to analyzeIs the consideration of the North Maluku High Court (PT) judge deciding the case of appointing the customary leader of the North Halmahera Pagu Tribe as an unlawful act (PMH).

## **METHOD**

### **A. Type and Nature of Research**

The type or approach of this research is Juridical Empirical, that is, this research besides using scientific methods also looks at the reality in the field. Specifically regarding the mechanism for appointing the Pagu customary tribe in North Halmahera Regency, North Maluku Province.

Research Specifications Based on the objectives to be achieved in this study, the results of the research used in this thesis are descriptive-analytical in nature, that is, it is intended to provide as accurate data as possible about humans, conditions or other symptoms. (Hadikusuma, 1980; Sulistiani & Sy, 2021). So that objective data can be taken which can describe complex realities or realities about the problems that exist in the Pagu Tribe indigenous people in Dispute Resolution in the process of appointing the Pagu Tribe Customary Chairperson.

### **B. Data collection technique**

The data collection technique of this research consists of main data collection techniques and supporting data collection techniques. The main data collection technique is the researcher himself while the supporting data collection technique is a list of questions, field notes and tape recorder recordings.

Field data collection will be carried out by way of interviews, both structured. Structured interviews were conducted with guidelines on lists of questions that had been provided by the researcher. The material is expected to develop according to the informants' answers and the situation that develops.

### **C. Data analysis technique**

Data analysis in this study was carried out qualitatively, that is, the data obtained was then systematically arranged, then analyzed qualitatively to achieve clarity of the issues discussed. Qualitative data analysis is a method of research that produces descriptive analytical data, namely what is stated by the respondent in writing or verbally as well as his real behavior, is researched and studied as a whole.

The meaning in analysis here is intended as an explanation and interpretation logically, systematically with a sociological approach. Systematic logic shows a deductive way of thinking by following the rules in writing scientific research reports. After the data analysis is complete, the results will be presented descriptively, namely by telling and describing what is in accordance with the problems under study. These results are then drawn a conclusion which is the answer to the problems raised in this study.

## **RESULTS AND DISCUSSION**

### **The Legitimacy of the Appointment of the Head of the Pagu Tribe Based on the Customary Law of the Pagu Community, North Halmahera Regency**

Customary Law is a source of National Law which generally exists in every region, it's just that its application depends on each of these regions as well. Do you still adhere to consuetude or not, because if a community group still adheres to consuetude, the application of customary law will be stronger in a particular community or area. However, the logical consequence is that if the community does not adhere to consuetude, the customary law will be eroded, so that customary law is no longer used in everyday life.

Carrying out their lives, the Customary Law Community is led by a Customary Chief who plays an important role, both as a tribal chief and as a mediator in resolving disputes. Whatever

is decided by the customary leader must be obeyed by the parties. Therefore, the life of the community which is characterized by traditional society, the role of the Head of the People occupies a central position in community development and leadership, he is the head of government as well as being a judge in resolving disputes in the community. As stated by Soepomo, the definition of a customary head is as follows (Rahman et al., 2020; Soepomo, 1986):

"The Traditional Head is the father of the community, he heads the association as the head of a large family, he is the social leader of life in the community".

The traditional leader is in charge of maintaining the life of the law within the association, guarding it so that the law can run properly. The daily activities of the Head of Customs cover the entire community field. There is no field for association of life within the association body which is closed for the Customary Head to intervene when necessary to maintain peace, balance physically and spiritually to uphold the law.

The function of the Traditional Leader based on the above understanding is to maintain harmony in the community, to ensure that the law can work properly. The daily activities of the Traditional Head cover all fields of community life. There is not a single field of association living within the association which is closed for the Customary Head to intervene when necessary to maintain peace, physical and mental balance to uphold the law. As for the activities of the Traditional Leaders based on Soepomo's Views in outline the author can describe in 3 (three) classifications as follows (Manan, 2014; Sembiring, 2018; Soepomo, 1986):

1. Actions regarding land affairs are related to the existence of a close affinity between the land and the association (human group) that controls the land.
2. Implementation of law as an effort to prevent violations of the law (preventieve rechtzorg), so that the law can run as it should.
3. Implementing law as a legal correction, after the law has been violated (repressive rechtzorg). Therefore, the Traditional Head in all his actions and in upholding the custom always pays attention to it changes, there is legal growth, so that under the leadership and supervision of the Traditional Head, Customary Law grows and develops. Apart from that, the very important job of the Traditional Head is work in the field or work as a Village Peace Judge. If there are disputes or actions that are contrary to customary law, the customary head acts to restore customary peace, restore balance in the village atmosphere and restore law.

Based on the description above, it can be interpreted that the phrase Consuetude or in Arabic "adah" which means habit is something that is often repeated. The custom in the sense of custom is actually a normative habit that has embodied the rules of behavior that apply in society and are maintained by the community itself (Hadikusuma, 1980; Rantung, 2019; Widyaningsih, 2022). With the combination of the meaning of the term Traditional Leader, as stated above, the Traditional Leader in a comprehensive manner is a leader who leads normative habits that have embodied the rules of conduct that apply in an area or area of customary law which are continuously maintained.

When discussing the function of the customary leader in society, it is not much different from the function of customary law because it is the function of the traditional leader in society as follows:

1. Provide guidelines to members of the community, how they should behave in social life. At the same time, the basis of this behavior is normative habits, namely Custom and Customary Law.
2. Maintaining the integrity of the association in society, so that the association is maintained and can be felt by various actions of community members that are not in accordance with Custom and Customary Law.

3. Providing guidance to community members to community members to establish a social control system. This social control is more in the nature of monitoring the behavior of the community so that community life can be maintained as well as possible.
4. Pay attention to every decision that has been determined by customary law, so that the decision has authority and can provide legal certainty that binds all members of the community.
5. It is a place for community members to rely on to solve, protect and guarantee peace, so the Customary Head is the only place for community members to rely on to solve their problems.
6. As a place for community members to ask everything related to customary knowledge and customary law. This is very important because not all community members know, understand and understand the ins and outs of Custom and Customary Law. With such a function, the Customary Head can be said to be a media of information on Customs and Customary Law in society.
7. As a place for community members to solve all problems, both concerning matters of life and matters related to death. This function is very important because not all community members can solve their own problems unless they ask for the involvement of the customary head to participate in solving them.
8. As the father of the community who heads the association, where this function shows more leadership that can be an example in social life in the community. To preserve and establish National Law, there is no small contribution to Customary Law, because Customary Law is one of the sources of law. In the previous discussion it has been said that Customary Law is the law of society that grows and incarnates from the cultural spirit of the Indonesian nation.

On that basis, the customs of indigenous peoples also cover the complexity of aspects of life. Therefore, in the life of a traditional society there are many values that grow to guide behavior in that society which will embody the characteristics of society to behave which is at the same time a reflection of attitudes that originate from the values that exist in society.

Accepting and acknowledging acts of behavior will certainly give birth to habits that guide the behavior of society. However, the consequences of having a code of conduct which is the order of society, actually creates obligations that must be obeyed to become law in society which is called Customary Law. Customary law which is formed from behavior that exists in the community above has no power if there is no leader who defends it. Therefore the leader in question is the Traditional Head who has the authority to form, provide guidelines, administer and use Customary Law.

Resolve and restore the disturbance of the balance, then, of course, the role of the Traditional Head is very much needed in order to create peace and tranquility in society. Soleman Usually Taneko, in his book entitled "Basic of Customary Law and Traditional Law", expressed his opinion regarding the role of the Traditional Head, namely: (Amanda, 2018; Soemitro, 1990)

1. Imposing sanctions on community members who have committed customary violations. The imposition of sanctions does not only concern one area of violation, but involves all violations of the balance of customary law.
2. As executors and executors of customary law in everyday life. This has the intention that the customary law that has been in force is maintained in its integrity by resolving all forms of violations of customary law. By resolving all disputes that arise in the community, it means that there is an effort to uphold customary law, to notify customary law that applies in society, because not all members of the community know and understand customary law. Because of

that, the customary head here acts as an information medium that is quite effective in conveying customary law to the public (Pratama et al., 2017; Salinding, 2012).

Based on the explanation above, it can be understood that along with the enactment of customary law in society, since then the customary head has a role to form, provide guidelines, administer and enforce customary law in society. As also stated by Hardjito Natopuro that Customary Law is unwritten law, customary law with characteristics which are guidelines for people's lives in carrying out justice and social welfare and are familial in nature. (Alting, 2011; Manarisp, 2013; Rahman et al., 2020). Thus, it becomes a logical consequence that the State recognizes the existence of indigenous peoples as formulated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states "The State recognizes and respects customary law community units and their traditional rights as long as they are alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the Law"; It is no exception, including the Pagu tribal community as a unit of customary law community that lives and develops with its style and culture which is domiciled in North Halmahera Regency, North Maluku Province. Understanding the formulation of Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, it is expressly stated that:

- a) The constitution guarantees the unity of indigenous peoples and their traditional rights;
- b) Constitutional guarantee as long as customary law is still alive;
- c) In accordance with the development of society;
- d) In accordance with the principles of the Unitary State of the Republic of Indonesia; and
- e) Regulated in law.

The mandate of this constitution, guarantees the recognition and respect for customary law if it meets the requirements (Jefran et al., nd; Manarisp, 2013):

1. Ideality Requirements, namely in accordance with the principles of the unitary state of the Republic of Indonesia, and enforceability is regulated in law;
2. Reality requirements, namely customary law is still alive and in accordance with the development of society.

The ideality requirements have been emphasized in the provisions of Law Number 39 of 1999 concerning Human Rights precisely in Article 6 paragraph 1 and paragraph 2 which reads: (1) In the framework of upholding human rights, differences and needs in the legal community must be considered. and protected by law, society and government. (2) The cultural identity of indigenous and tribal peoples, including their rights to communal land is protected, in accordance with the times.

Explanation of Law no. 39 of 1999 (TLN No. 3886) Article 6 paragraph (1) states that customary rights which are actually still valid and upheld within the customary law community must be respected and protected in the context of protecting and upholding human rights in the community concerned by considering laws and regulations. Furthermore, the elucidation of Article 6 paragraph (2) states that in the framework of upholding human rights, the national cultural identity of indigenous and tribal peoples who are still firmly adhered to by local customary law communities, is respected and protected as long as it does not conflict with the principles of the rule of law with the core of justice. and community welfare.

These provisions imply that customary rights include customary land rights in the sense that they must be respected and protected in accordance with the times, and it is emphasized that this recognition is made of customary rights which are actually firmly held by the local customary law community.

Meanwhile, when it is examined further regarding the reality requirements of customary law for the Pagu tribe community in North Halmahera, the author defines it as a group of indigenous peoples who live in Kao District, North Halmahera Regency, where the territory of the Pagu tribe consists of 16 (six) Villages in district Kao and Kec. Malifut. In each of the 16 (sixteen villages) inhabited by the Pagu Tribe, each has a Traditional Leader. Geographically Kao is adistricts in North Halmahera Regency, North Maluku, Indonesia. The population of this sub-district is 9,413 people (2021), with an area of 753.98 km<sup>2</sup>, and a population density of 12 people/km<sup>2</sup>. The population of North Halmahera district, in general, is ethnic or tribal Tobelo. While the ethnic groups in West Kao are mostly tribal Modole. In addition, there are also tribes Amahai, Ternate, Java, Sangir, Maluku, and other tribes. The daily languages used are Madole, Pago, Bian, and Java.

The system or mechanism for electing pagu tribal heads is carried out by way of deliberations on customary heads from the 16 villages, where the deliberations begin with the election of Fanyira, where Fanyira is someone whose job is to change leadership, Fanyira coordinates with all villages, determine who wants to be appointed and then confirm the elected Sangaji. The daily life of indigenous peoples is under the leadership of a traditional head, traditional stakeholders, head of the village, and so on. Their main task is clear that they will then become leaders in running the administration of indigenous peoples by maintaining the proper course of local customary law and becoming protectors of local customary law communities.

If we investigate the role of the Traditional Leader in the community, it is possible that many will ask for the involvement of the Traditional Head to solve problems, both concerning matters of life and those related to death. However, the more important role of the Traditional Head is to balance the environment with one another, so that harmony and peace can be maintained in society. Therefore, where there is a balance disturbance in society, it must be prevented and restored, either by means of payment in the form of material or immaterial (Bzn, 2001; Sembiring, 2018).

Traditional Leader of North Halmahera Pagu Tribe here is obliged to strive for peace, so that in society created peace.

1. Correcting customary laws that have been violated by the community. This correction intends to restore the image of customary law, so that its integrity can be upheld. For example, if there is a land dispute within the family, the balance of the relationship becomes damaged. So in this case the Traditional Head has a role to correct this imbalance so that it can be reconciled.
2. Decide and establish customary law regulations as the basis for community life. The decision has the aim that the community in carrying out actions is always in accordance with customary law regulations, it must be rejected so that customary law can be maintained and upheld in society (Amanda, 2018; Pratama et al., 2017).

Based on the opinion above, then one of the roles of the Traditional Leader is to make a customary decree, so that it can be accepted as a law that regulates people's behavior. As for the opinion according to Van Vollen Hoven that not all Consuetude in society is called Customary Law, it is only said as Customary Law when the Consuetude has sanctions. According to him, sanctions are in the form of sanctions from the legal community concerned. The customary reaction of the legal community in its implementation is carried out by the Customary Head. Because the customary head has the right to impose sanctions on anyone who has violated customary law.



According to Ter Haar in his book "*Begin selen en stelselv/hadatrecht*" that customary law that applies in society can become law that is binding on behavior, if there is a determination of the customary heads. Because in his opinion, as long as the existing behavior in the community has not been concretely determined by the Traditional Leader, then the regulation has not been implemented have a legally binding nature. Based on such an opinion, the role in determining customary law norms is after the determination of the customary head. As student of Cornelius Van Vollenhoven Ter Haar explores more deeply about indigenous peoples as a group of people who are organized, live in a certain area, have their own power, and have their own wealth in the form of visible and invisible objects, (Alting, 2011) Ter Haar's thought, known as the *Beslissingenleer* Theory (decision theory) postulates that Customary Law is all the rules that are embodied in the decisions of legal officials and their implementation is binding and obeyed by those regulated in the decision (Manan, 2014; Sulistiani & Sy, 2021).

The imposition of sanctions that have been carried out by the customary head can only be said to be customary law. Based on the opinion above, one of the roles of the Customary Head is to impose sanctions, and it is a form of sanction that is imposed depending on the type or severity of the violation committed. The same goes for sanctions. It is not questioned whether or not it was determined by the customary head, because the important thing is to apply customary law that lives with all sanctions as a way to enforce community customary law.

Based on that logical-rational reason to regulate, justice is a legal goal to be achieved, in order to obtain comparability in society, besides that it is also for legal certainty. In an indigenous community, it is necessary to have a customary head. Furthermore, to discuss and analyze in the discussion regarding the settlement of disputes over the appointment of pagu tribal leaders who were carried out by some of the pagu indigenous people, the author wishes to describe the validity of the appointment of the Head of the Pagu Tribe based on the customary law of the Pagu community, North Halmahera Regency, as follows:

### **1. Based on Kinship System**

Kinship customary law is the governing customary law regarding how a person's personal position as a member of the family, the position of children towards parents and vice versa, the position of children towards relatives and vice versa and child guardianship issues. It is clear that customary kinship law regulates kinship ties, based on blood ties (seeds), marital ties and customary marriages. In the kinship system of indigenous peoples, descent is important to continue the lineage (clan), either straight or sideways. As in Balinese society where men will later continue the family temple to worship their ancestors.

In general, heredity has a relationship laws based on blood relations, among others between parents and their children. There are also legal consequences relating to heredity coupled with the single ancestor, but not all of these legal consequences are the same in all regions. Even though the legal consequences related to ancestral unity are not the same in all regions, in reality there is one main view that is the same regarding this heredity problem in all regions, namely that descent is an essential and absolute element for a clan, tribe or relative who wants the line descendants are not extinct, so there are generations of successors.

If in a clan, tribe or relatives are worried facing the extinction of clans, tribes or relatives, they generally adopt (adopted) to continue the lineage, as well as adopted children by marriage or adopted children for respect. Like in a society where other people's children who are adopted to be upright are taken from children who are still related to their adoptive father. Individuals as descendants (family members) have certain rights and obligations related to their position in the family concerned. For example, they may participate in using the family

name (marga) and may participate in using and are entitled to family assets, are obliged to help each other, can represent each other in carrying out legal actions with third parties and so on. Every society actually has an order in the form of customs and rules. This order arose to maintain unity in society. The closest and closest social unit is the kinship unit, which is in the form of the nuclear family and other relatives.

In the Dictionary of Sociology, the kinship system can also be said to be a social organization expressed as ways of socially organized human behavior. It is said to be socially organized because there is a group of individuals who feel bound by certain rules or customs that govern the life of the group. That is why this kind of social group is called a social unit. In the kinship system there are more social groupings in society, namely the matrilineal kinship system, the patrilineal kinship system and the bilateral kinship system.

Kinship customary law is customary law governing position someone as a family member, the position of the child before the parents and vice versa, the position of the child in front of relatives and vice versa, In essence, customary kinship law regulates relations with relatives, either through blood, marriage or customary kinship ties. Kinship related to blood and hereditary relations as well as customary ties, is called genealogical kinship. Kinship is defined as social units in which there are several families who are related by blood or marriage.

The kinship system is maintained so that the principle of kinship has a function related to marriage, namely the condition of being able to continue offspring, the existence of genealogy and family position. The genealogical kinship system is divided into 3 (three) types as follows:

#### **a. Patrilineal Kinship System**

Etymologically, patrilineal comes from two words, namely *pater* (Latin) which means "father", and *linea* (Latin) which means line. So that patrilineal kinship is a kinship system that is a lineage from the father's side or from the man's side, sons function to continue the descendants of their parents while daughters are to become children of other families in the same kinship so that their position produces offspring in other families, whereas if you do not have sons, you are considered to have lost your bloodline, so that when it comes to inheritance, sons are entitled to inheritance from their parents. Examples are the people of Lampung, Batak, and Bali. In patrilineal kinship, the rights and position of the husband will be higher than those of the wife. The wife's duties in the family are to accompany and assist the husband in the household, continue the lineage and maintain good kinship between the husband's family and the wife's family. With regard to original assets, marital assets and gifted assets, all of them are in the control of the husband, which is utilized based on deliberation between the husband and wife. There are 2 (two) forms of the patrilineal kinship system, namely:

##### **1) Pure Patrilineal**

Pure patrilineal is a form of kinship system draw lineage in men, but with regard to the inheritance system it has no effect on whether or not there are sons, it does not result in the offspring in the family breaking up, even if the family only has daughters, the continuation of inheritance can still be carried out.

##### **2) Patrilineal shifts**

Patrilineal shift is a form of kinship system draw lineage in men, but if there are no sons, then girls are drawn into the families of their parents so that they have legal status as sons even though biologically they remain as women, besides that it can also

be pursued to have sons men by way of adoption, so that the boy is cut off from his family of origin and has kinship and descent in his wife's family. Patrilineal alternately has the same concept as the matrilineal kinship system.

#### **b. Matrilineal Kinship System**

Etymologically matrilineal comes from two words, namely *mater* (Latin) which means "mother", and *linea* (Latin) which means line. So that matrilineal kinship is a system of kinship from the female side, so that the female offspring functions to continue the family lineage, while the male offspring only functions to provide offspring to the female family. And men as husbands let go of their traditional citizens and enter their wife's customary communities. However, the release of matrilineal indigenous people also depends on the marriage system implemented, not always releasing consuetude but also being bound to each other's customs, for example are Minangkabau and Semendo.

In matrilineal kinship, the opposite of patrilineal is rights and the position owned by the husband is lower than the rights and position of the wife, the husband is in charge of helping the wife. If the wife is the oldest child in the family, then she has an additional duty to keep the inheritance from being divided by her parents. These assets are called family heirlooms, guarding these inherited assets is accompanied by their use and management with due regard to the interests of their siblings. However, with regard to ownership of assets, it is not the opposite of patrilineal where all assets are controlled by the husband, but has its own pattern, namely in the event of a divorce, the husband still has the right to part of the joint property and continues to control the original assets and the gifted assets he owns. However, in inheritance, if the husband dies, the property will return to the family of origin. whereas if the wife dies it will be passed on to her daughter. In this kinship, daughters are entitled to inheritance.

#### **c. Parental Kinship System**

Etymologically parental comes from the word *parens* (Latin) which means parent or parent, so by looking at a comparison of the previous kinship system, it is known that Parental kinship is a kinship system that draws lineage from parents both from the female and from the male side together and in balance, an example is the community in the tribe Java and Aceh.

This kinship system gives a share to each children, both boys and girls, to obtain inheritance from their parents, but the amount of this portion depends on the custom of each. Even in marriage, the position of husband and wife is balanced. In parental kinship, honest payments and settlement payments are not recognized. In choosing a place of residence, they are freed to settle at the husband's or wife's place, even in a separate house that is separated from the influence of their parents and establish a new life. The form of marriage used by parental kinship is free marriage, both of them are still bound to their families of origin.

Related to assets, namely marital assets, original assets, and assets gifts that exist, are not controlled individually by the husband and wife but controlled jointly,<sup>18</sup> so that the husband or wife has the right to take legal action either jointly or individually both outside and inside the court.

## 2. Based on Inheritance

The parts of customary law have a great influence on inheritance law and vice versa inheritance law also stands central in relation to other customary laws, because inheritance law includes different legal rules with a continuous process from century to century, namely a continuation and transfer of wealth both material and immaterial from one generation to the next generation (Amanda, 2018; Hadikusuma, 1980). Soepomo said "Customary law of inheritance contains regulations governing the process of passing on and passing property and intangible goods (*Immateriele Goederen*) from a generation of humans (*Generatie*) to their descendants.

The process had started while the parents were still alive. It does not become "affected (influenced) by the death of a parent, indeed the death of the father and mother is an important event for that process, but in fact it does not radically affect the process of forwarding and transferring these assets and non-object assets". (Mashad, 2020; Soepomo, 1986).

The essence of Soepomo's view above is that all family assets, both the husband's property, the wife's property and joint property will become the rights of their offspring. In the field of inheritance law, it can be easily demonstrated that there are unity and types in Indonesian customary law, but it is not possible to formulate a rule for all legal environments with the same birth traits. (Al Qutuby et al., 2020; Bzn, 2001) Inheritance law rules not only experienced the effects of social change and increasingly close family ties, which resulted in loosening of clan and ethnic ties, but also experienced the influence of foreign legal systems that gained power, based on religion because there is a certain birth relationship with that religion.

The term inheritance in the completeness of customary inheritance law terms is taken over from Arabic which has become Indonesian. Customary inheritance law will not only describe inheritance in relation to heirs, but is broader than that. Customary inheritance law is customary law which contains lines of provisions regarding the system and principles of inheritance law, regarding the transfer of control and ownership of the inheritance from the heir to the heir.

Customary inheritance law is actually the law of passing on assets from one generation to their offspring (Hadikusuma, 1980; Sofyantanto & Darsono, 2020). As According to Ter Haar: "Customary inheritance law are legal rules regarding how from century to century the continuation and transfer of tangible and intangible assets from generation to generation".

Inheritance customary law contains regulations governing the process of passing on and passing property and intangible goods from a generation of humans to their descendants. (Soemitro, 1990) Thus, the law of inheritance contains provisions governing how to forward and transfer assets (tangible or intangible) from the heir to the heirs.

Inheritance is a matter of whether and how various rights and obligations regarding a person's wealth when he dies will be transferred to other people who are still alive. Inheritance according to Wirjono is a way of settling legal relations in society which creates more or less difficulties as a result of the death of a human being, in which the human who dies leaves behind assets. The term inheritance is defined as a way of settlement, not the object. Then the way of settlement is as a result of someone's death (Hawari & Tanawijaya, 2021). The important thing in this matter of inheritance is that the notion of inheritance shows the existence of three elements, each of which is an essential (absolute) element, namely:

a. An heir who at the time of his death left behind assets.

- b. One or several heirs who are entitled to receive this abandoned wealth.
- c. Inheritance or inheritance, namely wealth "in concreto" left behind and once transferred to the heirs.

This customary inheritance law has its own style and characteristics that are unique to Indonesia, which are different from Islamic law and western law. This background is basically a mutual life that is mutual in nature to create harmony, harmony and peace in life. According to customary law, two basic lines are used to determine who is the heir, namely:

a. priority line

Line of law that determines the order of precedence among the groups in the inheritor's family, with the understanding that one group is prioritized over the other. The main line classification of priority is as follows: Priority group I: Descendants of the heir Prioritization group II: Heir parents Priority group III: The heir's siblings and descendants IV priority Group: The heir's grandparents and so on.

b. Replacement principal line

The main line of replacement is a legal line that aims to determine which of the people in a certain priority group appears as the heir. Those who truly become heirs are:

- 1) People who have no connection with the heir.
- 2) People who are no longer connected with the testator.

As for the implementation of determining the heirs by using the main line of priority and substitution, it must pay close attention to the principle of lineage adopted by a particular community. Below the author will describe three inheritance systems according to Indonesian customary law, namely:

1) Individual Inheritance System

The characteristic of the Individual Inheritance System is that the inheritance is divided into ownership among the heirs, as applicable according to the Civil Code (Book of Civil Law), Islamic Law, as well as in the environment of indigenous peoples such as Javanese families, who are parental, or also in patrilineal Lampung families. In general, this system tends to apply in independent family communities, which are not strongly bound by kinship. In recent times among modern indigenous peoples, where the power of traditional rulers has been weak, and there is no common property anymore, this system is widely applicable.

The goodness of this individual system is that by sharing, the heirs have free property rights over the portion they have received. The heirs are free to determine their will over the inheritance which is their share, they are free to transact their inheritance rights to other people. The weakness, is not only the breakdown of inheritance, but also the breaking of kinship between one heir family and another. Which means, the weak principle of living together and mutual help between one family and other families who are descendants. (Jefran et al., n.d.)

2) Collective Inheritance System

The characteristic of the collective inheritance system is that the inheritance is inherited/controlled by a group of heirs in an undivided state, which seems to be a legal entity of the family of relatives (customary legal entity) (Hadikusuma, 1980).

3) Mayoral Inheritance System

The feature of the mayoral inheritance system is that the inheritance of parents or the inheritance of relatives' ancestors remains intact, not divided among the heirs, but is controlled by the eldest male child (majorate male) in a patrilineal society. The mayoral inheritance system is almost the same as the collective inheritance system, only the

continuation and transfer of the right of the ruler over the undivided property is delegated to the eldest child who serves as head of the household or head of the family replacing the position of the father or mother as the head of the family. The weakness and goodness of the mayoral inheritance system lies in the leadership of the eldest child in his position as a substitute for parents who have died, in managing assets and using them for the benefit of all family members left behind.

**Legal Basisthe consideration of the District Court judge Number 13/Pdt.G/2020/PN.Tob decided the case of appointing the customary leader as the Indigenous Administrator of the North Halmahera Pagu Tribe as an unlawful act (PMH)**

Justice seekers (*justiciabellen*) certainly yearn for cases brought to court to be decided by judges who are professional and have high moral integrity, so as to produce decisions which not only contain aspects of legal certainty but also guarantee justice for everyone. Because justice is the main goal to be achieved from the dispute resolution process in the Jurisprudence court, derived from the Latin word: *iuris prudential*, technically means permanent or legal court.

Jurisprudence is a judge's decision (judge made law) which is followed by other judges in similar cases (the principle of *similia similibus*), then the judge's decision becomes permanent so that it becomes a source of law called jurisprudence. Jurisprudence in practice functions to change, clarify, delete, create or strengthen laws that have lived in society. Furthermore, according to Fockema Andrea, Judicial Jurisprudence (in a general sense, an abstract sense); especially the legal teachings formed and defended by the courts (as opposed to the teachings or doctrine of prominent authors), then the systematic collection of decisions of the Supreme Court and Decisions of the High Court (which are recorded) which are followed by judges in rendering their decisions in matters similar.

Customary law in legal jurisprudence, besides being a court decision that has become permanent in the field of customary law, is also a means of developing customary law, according to legal ideals, as well as from jurisprudence from time to time it can be traced the developments of customary law, both those that are still locally as well as those that have been implemented nationally. Developments in customary law through jurisprudence will provide knowledge about the shift and growth of customary law, the weakening of local customary law and the strengthening of customary law which then becomes national and binding. Thus, customary court decisions are the result of deliberation decisions in order to find solutions and peace between the two parties to the dispute. As the decision Number: 13/Pdt.G/2020/PN.Tob.

**1. The Case**

Whereas the Pagu tribal community is a unit of customary law community that lives and develops with its style and culture, which is domiciled in North Halmahera Regency, North Maluku Province. As based on the 1945 Constitution as per postita 2 above, the Plaintiff feels he has the legal standing to file this lawsuit in his capacity as Head of the Pagu Indigenous Peoples Tribe;

The plaintiff is the Head of the Pagu Indigenous Peoples Tribe or in the institutional position of the Pagu Consuetude referred to as Tubol Ma Lamok, who was appointed through the Customary Council Meeting on January 16 2012 at Sosol Village, Malifut District, North Halmahera Regency. The plaintiff was later confirmed as Tubol Ma Lamok or Head of the Pagu Indigenous Community on 23 May 2013;

As a sign of blessing and respect for the Plaintiff as the Head of the Pagu Tribe who was elected at that time, the traditional elders were given the opportunity to perform a traditional dance in the form of Cakalele and carry out other traditional processions. In this traditional procession, Defendant I took part in paying homage by performing the cakalele dance;

That in carrying out the customary institutions of the Pagu Tribe, everything is based on Customary Law or unwritten law, namely based on the living habits of indigenous peoples that do not conflict with prevailing legal norms and decency. As for the appointment and confirmation of the Plaintiff as Tubol Ma Lamok or Head of the Pagu Tribe by the Pagu Customary Council, it was carried out based on the customary law tradition of the local community. Therefore, this matter should be legally recognized.

After the Plaintiff was appointed and confirmed as Tubol Ma Lamok or Head of the Pagu Tribe, the Plaintiff has carried out his duties well by introducing the customs and culture of the Pagu Tribe to the Regional and National levels, participating in every customary and cultural celebration both held at the Regional and at the regional level. National and other activities aimed at developing customs and culture in the Territory of the Unitary State of the Republic of Indonesia. This will be proven later in the form of documentary evidence or through the statements of witnesses.

Precisely in 2016, Defendant I, together with Defendant II and Defendant III, claimed to be administrators of the Customary Customary Institution, where Defendant I Simon Toloa claimed to occupy the position of Head of the new Pagu Tribe to replace the Plaintiff, Defendant II Yunus Ngetje claimed to be Chair of the Customary Council Pagu/Nyira and Defendant III Yefta Mutji claimed to be the Commander of the Pagu/Kapita Traditional Troops.

The actions of Defendant I who claimed to be the Head of the Pagu Tribe replaced the Plaintiff's position as well as the actions of Defendants II and Defendant III who helped complete the customary institutional structure of the Pagu Tribe were acts that violated the customary law of the Pagu people, because the actions were committed not based on living Customary Law traditions. and developed in the Indigenous Pagu community.

The customary law tradition, the Pagu people do not recognize the periodization of customary positions held by a person, but based on local community customary law, a tribal chief or Tubol Ma Lamok can only be replaced if the person concerned resigns, commits adultery, steals and dies. Therefore, the actions of Defendant I, Defendant II and Defendant III should not be justified by the Honorable Panel of Judges examining the a quo case.

The actions of Defendant I, Defendant II and Defendant III were not only limited to claiming to be administrators of the Pagu Tribe Traditional Institution, but the Defendants also used the Pagu Tribal Customary Institution for personal interests in order to obtain material benefits from PT.NHM as well as from other parties who can be invited to work together. The actions of the Defendants were of course very detrimental to the Plaintiff as the Head of the Pagu Tribe and even the Pagu indigenous people as a whole because they had used the name of the Pagu Tribal Customary Institution for personal gain, therefore this act should be declared as an Unlawful Act which has caused moral harm to Plaintiff.

The Plaintiff has been appointed and confirmed based on the Customary Law tradition of the Pagu people as described in *posita* point 5, so it is quite reasonable for the Honorable Panel of Judges examining the a quo case to decide to accept the Plaintiff's claim in its entirety and declare that the Plaintiff is the Head of the Pagu Indigenous People Tribe who was

appointed and confirmed based on Pagu Customary Law tradition is legally valid under State law;

Whereas because the actions of Defendant I, Defendant II and Defendant III, who claimed to be the Board of Trustees of the Pagu Customary Institution were not based on the tradition of Pagu Customary Law, then these actions should be declared as an act against customary law which is recognized as existing in the Unitary State of the Republic of Indonesia as meant in the the formulation of Article 18 B paragraph 2 of the 1945 Constitution; Whereas because the actions of the Defendants were unlawful acts as meant in posita 14, the Defendants should be punished to pay for losses, both material and immaterial losses suffered by the Plaintiffs arising from these actions.

In the Matter:

- 1) Granted the Plaintiff's lawsuit in part;
- 2) Declare that the actions of Defendant I, Defendant II and Defendant III who claimed to be the Board of Trustees of the Customary Institution of Pagu were unlawful acts because they contradicted the customary law traditions of the Pagu people;
- 3) Declare that the actions of Defendant I who always acted on behalf of the Pagu Tribe Head for personal gain were an unlawful act;
- 4) Declare that the appointment of the Plaintiff as Head of the Pagu Tribe/Tubol Ma Lamok on 16 January 2012 and his inauguration on 23 May 2013 in Sosol Village, Malifut District by the Customary Council based on tradition and Pagu Customary law is valid and legally binding.

## CONCLUSION

The validity of the Appointment of the Head of the Pagu Tribe Based on the Customary Law of the Pagu Community of North Halmahera Regency is based on the reason that the role of the Traditional Head in resolving land disputes in the Pagu Tribe is as a Peace Judge in customary trials and as a decision maker where the decision is binding for the parties to the dispute. Meanwhile, the obstacles faced by the customary head in resolving land disputes were that the witness did not want to be a witness, the evidence was incomplete, and if there was a dispute, the parties to the dispute usually resolved it themselves.

Legal basis the consideration of the judge of the District Court Number 13/Pdt.G/2020/PN.Tob decided the case of appointing the consuetude head as the customary institutional administrator for the North Halmahera Pagu tribe was an unlawful act (PMH). Regarding loss of wealth (*hermogenschade*), compensation generally consists of compensation for losses suffered and also in the form of profits that one can expect to receive (*gederfdewinst*). In this regard, it is not as easy as predicted to determine the amount of compensation. As a general rule, the fact can be used that the purpose of the obligation to provide compensation is to bring the sufferer as far as possible in the event that there is no unlawful act.

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