

## Contestation of Customary Law: Land Disputes between the Togutil Tribe and Developers in East Halmahera Regency



Maria Bintari Yulisinora<sup>1</sup>, Asrizal<sup>2</sup>

<sup>1</sup>Undergraduate of Law, Universitas Terbuka, Indonesia

<sup>2</sup>Lecturer of Shari'ah Science, Sultan Abdurrahman State Islamic College, Indonesia

**ABSTRACT:** North Maluku is one of the provinces whose people consist of various tribes, including the Togutil Tribe. Recently, there have been disputes between customary law communities (Togutil Tribe) and outsiders. This occurs because of the increasing expansion and exploitation of land by outsiders to reach remote areas including wilderness that was previously controlled by indigenous peoples. The purpose of this paper is to discuss alternative efforts to prevent land disputes between the Togutil Tribe and outsiders in East Halmahera Regency. This empirical legal research uses descriptive qualitative analysis method. The results of the analysis show that in principle the existence of customary law communities is regulated in Article 18B (2) of the 1945 Constitution, where the state recognizes and respects customary law communities and their traditional rights as long as they still exist and are in accordance with the development of society and the principle of a unitary state of the Republic of Indonesia as regulated by law. Therefore, the granting of legal orders must be in accordance with the laws and regulations of the Republic of Indonesia. The development of customary forest management systems as part of ecologically sustainable development requires a clear, stable, measurable and comprehensive legal basis to ensure legal certainty, protect and improve the welfare of indigenous peoples, especially the Togutil Tribe.

**KEYWORDS:** Indigenous Peoples, Mineral and Coal Mining, Customary Land Disputes

### I. INTRODUCTION

The Unitary State of the Republic of Indonesia consists of many islands, located along the equator. Indonesia's location between two continents and two oceans gives it a strategic position and an important role in international relations. However, Indonesia's ethnic and cultural diversity makes its territories and small islands vulnerable to conflict.

North Maluku is one of the relatively young provinces in Indonesia with an area of approximately 140,255.36 km<sup>2</sup>. In 2002, the total population reached 796,447 people. The Explanation of the Law of the Republic of Indonesia Number 1 of 2003 concerning the Establishment of North Halmahera Regency, South Halmahera Regency, Sula Islands Regency, East Halmahera Regency, and Tidore Islands City in North Maluku Province explains that North Maluku has shown positive developments in governance, development, and services to the community. Therefore, East Halmahera Regency was formed consisting of 4 districts, namely Wasile District, Maba District, South Maba District, and South Wasile District with a total area of ± 14,202.02 km<sup>2</sup>. This was done to increase regional potential, area, and meet future needs.

Limited access for inland communities living in forests and small islands, especially tribes that still live in the forest by moving around according to their needs, results in the need for good regulatory management so that the impact on human activities can be controlled. Inland tribes whose lives still rely on the availability of food sources directly from nature with high mobility due to dependence on nature are certainly not uncommon to cause conflicts either within tribal members or disputes with other parties.

The Dutch colonization of Indonesia for three and a half centuries gave birth to an Indonesian legal history that was dominantly influenced by Dutch law, especially in criminal law. However, the proclamation of independence resulted in Indonesian law still reflecting the personality of the Indonesian state. The proclamation of independence of the State of Indonesia is a means to revive the awareness that the Indonesian nation has a legal order that is different from other countries. This is evidenced by the existence of the science of Customary Law in Indonesia which is the source of the country's legal order (Kansil & Kansil, 2009, p. 6).

Van Vollenhoven in his research on the rules of community life in various regions in Indonesia (as cited in Siombo & Wiludjeng, 2021, p.1.2) introduced the writing *Het Adatrecht van Nederlandsch Indi*. In this paper, he stated that since several centuries before the arrival of the Dutch, Indonesian people (from Aceh to Merauke) had already had rules of life that were binding, regulating, and obeyed by the people in their respective regions.

In the North Maluku region, there are 25 tribes that inhabit various districts. Among them, there is one tribe, the Togutil Tribe, which is an inland tribe that lives in several districts. This tribe is unlike other tribes that have recognized modern life. The Togutil

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community can only be found in several inland areas of the Halmahera Islands, namely in North Halmahera Regency, precisely in the interior of the Tobelo and Kao forests, and in East Halmahera Regency, precisely in the interior of the Wasile, Buli and Maba forests.

The term 'Togutil' basically means 'the underdeveloped'. This is due to the existence of the Togutil tribe who mostly inhabit the interior of the forest. The Togutil tribe is also identified as the Tobelo Dalam tribe in North Halmahera. Like inland tribes in general, this tribe also lives deep in the wilderness. The Togutil live a nomadic life in forest areas such as Tukur-tukur, Totodoku, Lolobata, Buli and Kobekulo. All of these areas are located in the Aketajawe National Park, Lolobata, North Halmahera Regency, North Maluku Province. Based on this, the Togutil Tribe is recognized as one of the indigenous tribes living in the Halmahera Islands (Hasmawati, et al., 2020, p. 1).

As one of the ethnic communities, the Togutil tribe still maintains traditions with a lifestyle that tends to be more closed. In an effort to fulfill the needs of their lives, this tribe faces various backwardness in relation to the facilities and infrastructure used. This is a consequence of the geographical condition of the tribe's existence which is very difficult to reach and socially does not interact with society in general or in other words is classified as an isolated community. This results in poor social relations with modern or developed communities.

The Togutil tribe has distinctive and unique characteristics, especially in their daily behavior. The characteristics of the lifestyle of these indigenous people are monotony, by applying a simple lifestyle, as it is in nature. They limit things related to the fulfillment of worldly needs or excess material. Life is guided by behavior and rules that are full of meaning (Sagaf, 2018, p. 2).

The Togutil tribe uses clothing, cooking utensils, hunting tools, and houses/shelters as shown in the following table:

**Togutil Tribe Technology Framework Table**

Equipment Type	Raw Materials	Technique/Method of Manufacture	Usage
Production equipment	Bamboo	Weaving and carving	Screening equipment, cutting equipment, piercing equipment
	Iron	Carving	
	Rattan	Anyam	
Weapons	Bamboo	Carving	Cutting weapons, archery weapons, stabbing weapons
	Iron	Carving	
	Rattan	Carving	
Food	Bamboo	Water heater, cooking utensils	Eating, drinking, cutlery
	Vegetables, leaves, meat	Cooked using fire from firewood	
Clothing	Woka/bayae leaf	Anyam	Holding/covering important parts
	Tree bark	Molded and carved	
	Fabric	Tie	
Sanctuary	Bamboo	Ancak / weaving	Home/shelter
	Wood	Compose	
	Rattan	Binding	
	Woka leaf	Roof	

Source: Nadra, et al., 2016, p.6.

Recently, many regions have experienced disputes between local indigenous communities and other parties or outsiders, including private developers. Disputes between indigenous peoples and outsiders are very likely to occur because of the increasing expansion and exploitation of land by outsiders to reach remote areas including wilderness that was previously controlled by indigenous peoples. On the one hand, the natural wealth of a region can have adverse effects if it cannot be utilized efficiently and effectively, but on the other hand, it can also have negative effects on the utilization of natural wealth, namely human consequences, which especially affect indigenous peoples. These problems are also experienced by the Togutil tribe in East Halmahera, where the district is one of the areas that has natural resources in the form of nickel mining. The forest hinterland of East Halmahera, home to the Togutil tribe, has been turned into a mining area. Based on the description above, this journal aims to present the results of an analysis of the Contestation of Customary Law Land Disputes between the Togutil Tribe and Developers in East Halmahera Regency.

## II. RESEARCH METHODS

Based on the background and research focus, this journal is categorized as empirical legal research. The empirical legal research method is by using empirical facts analyzed through the human behavior under study, both verbal behavior obtained from interviews and behavior that is actually carried out by the object through direct observation of the researcher.

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The data used in this journal are primary data and secondary data. Primary data was obtained from direct observation and information from the surrounding community during the author's official duties in North Maluku Province (period 2016 to 2022). Secondary data is obtained through literature review studies to obtain theoretical foundations, conceptions, or opinions related to the problems being studied. Secondary data in this study include:

a) Primary Data/Legal Materials, namely:

- 1) Constitution of the Republic of Indonesia 1945;
- 2) Other laws and regulations related to the issue.

b) Secondary Data/Legal Materials, namely:

- 1) Literacy books that support the writing;
- 2) Scientific works that can be accounted for in the form of journals, papers and articles from the internet related to the discussion of the problem;

The data analysis method used in the discussion is a qualitative descriptive method. In simple terms, this method is carried out by examining the actual situation in the community, namely by looking for facts related to the problems in this study, namely customary law contestation, land disputes between the Togutil Tribe as a customary law community and developers (private) in East Halmahera Regency.

### III. RESULTS AND DISCUSSION

#### 1. Theory Review

The *Beslissingenleer* theory proposed by Ter Haar, also known as the decision theory, states that customary law encompasses all rules produced through decisions of legal officials who have authority and influence, and are directly enforced and respectfully obeyed by those affected by the decision. In a speech on the occasion of the *Dies-Natalis-Rechtshogeschool* in 1937, Ter Haar stated that Customary Law is all rules set out in decrees and applied directly and bindingly. This means that customary law only comes from the decisions of legal officials in the community, such as village heads, judges, village meetings, and village officials. Such choices can arise as a result of conflict, or they can be made through harmonious discussion and agreement. Moreover, Ter Haar states that adat changes into law when all decisions made by authorized legal functionaries have authority and are fully and directly obeyed (Siombo & Wiludjeng, 2021, p.1.3-1.4).

Van Vollenhoven's opinion that customary law is rules of behavior that on the one hand have sanctions so that they are said to be law, and on the other hand are not codified so they are said to be adat. These rules apply to indigenous people and foreign easterners. F.D Holleman agrees with this statement, where he defines customary law as norms that live and are accompanied by sanctions. If necessary, it can be imposed by the community or related bodies to be obeyed and respected by community members. It does not cause problems with the presence or absence of legal officer decisions (Siombo & Wiludjeng, 2021, p.1.5).

Customary law can generally be interpreted as a form of cultural ideas consisting of cultural values, norms, laws and rules. All of these are interrelated with each other into a system and have very strong real sanctions. In Indonesia, legislation describes Masyarakat Hukum Adat as a group of individuals who adhere to their customary laws as collective members of the legal system, due to common residence or descent. By understanding this, it can be concluded that indigenous peoples have several criteria:

1. A group of people bound by the rules of their customary law;
2. There are community members who are part of Masyarakat Hukum Adat;
3. There are legal communities based on proximity of residence or descent.

#### 2. Results

Rich forest resources are often central to the economic and population growth of a region. However, a large proportion of the population in such areas experience high levels of poverty, which in turn puts pressure on the natural environment that is their source of livelihood. Therefore, it is imperative to develop norms of community empowerment in remote areas that are vulnerable to change and conflict. This aims to fulfill the needs of the community's life and livelihood in a safe and peaceful manner. In this context, policies are needed that can be implemented within these communities without compromising the needs of individuals and the group as a whole.

In the Togutil tribe's view, the forest is considered a gift from God that must be protected, as it provides life for them. Therefore, there are rules in place to protect their forests and gardens. For example, it is forbidden for anyone to exploit the forest carelessly, as the community believes that the forest is not only a place for hunting and gathering, but also a place where the spirits of the ancestors, often referred to as *o'gomanga*, reside.

There is some information about this tribe that wears loincloths and is almost naked. Based on data from the Encyclopedia of Tribes in Indonesia (LP3ES, 1996), the Togutil tribe is famous for living in the Dodaga and Tutuling forests in Wasile District, Central Halmahera Regency, North Maluku Province. Meanwhile, some also refer to them as *Oho-Ngana-Manyawa*, which means individuals who live in the forest or jungle and have a tendency to kill strangers who enter their territory.

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The Togutil tribe lives in East Halmahera Regency, more precisely located in the territory of the East Wasile sub-district. Wasile sub-district consists of 8 (eight) villages and is located in the eastern part with an area of 318 km<sup>2</sup>. In 2017, the projected population of Wasile Timur based on BPS data is 11,381 people, with 6,075 men and the rest are women (Munandar & Mikail, K, 2022, p. 4).

The Togutil actually have knowledge of outside civilizations, but they choose to stay away from modernity. They maintain hereditary traditions that lead to a simple lifestyle. In this tribe, men have a dominant role in processing forest products, especially sago. The sago trees are cut down and the fiber is taken, then the fiber is sifted and dried. After finishing processing the sago, they return home. The supply of sago in the fields can last for weeks. Apart from relying on the forest, the river is also their source of livelihood. Every night, the Togutil like to look for kateko (frogs) and fish. Using a hoba (trident arrow), they can hunt frogs from a distance. Sometimes they can eat dozens of frogs in a night. Frogs and fish are a source of protein for them.

The Togutil live a very simple lifestyle, even the tools they use to fulfill their daily needs are still made from natural materials with simple quality. This tribe appears in the story during the Dutch occupation when conquering Indonesia. The oppression of the colonizers made a number of people in this tribal group feel scared, so they chose to flee and hide in the interior forests of Halmahera. Eventually, they settled in the dark jungle and began to expand their population in the area by giving birth to new generations. Historically, the Togutil refused to be colonized by the Dutch and refused to pay the taxes imposed by the Dutch, which led to their flight and hiding.

Based on the author's direct observation, each Togutil tribe group is led by a tribal chief whose role is to determine what decisions are made to fulfill the group's livelihood. The chief also determines the direction in which the group will move, given that Togutil life still depends on nature. The hunting and gathering lifestyle that is still maintained results in the group living on the move (nomadic), so that often when walking along the outer side of Halmahera island, especially on the forest side of East Halmahera and Central Halmahera, you can still find several people or a group of Togutil tribesmen walking hand in hand wearing leaf pants with the men in front while holding their weapons such as spears (jubi in Tobelo language) or arrows.

The Togutil tribe is still not familiar with the agricultural system until today. They rely on gathering forest products and hunting for their livelihood in certain periods. When food supplies are still sufficient, extended family members do not search for food together. Togutil food is generally obtained directly from trees, such as tubers and forest fruits.

The Togutil form hunting parties consisting of all the men in their family and use dogs. They use spears, machetes and arrows that have been added with poison as hunting tools. They also know how to use snares to catch games. The Togutil are skilled at making snares from flexible plants or rattan roots to trap animals. Animals that are often hunted are deer, pigs, birds, partridges, snakes, cuscuses, bats, and also monitor lizards.

Doa (2009) stated in his research that seen from the settlement system, the Togutil Wasilei people can be divided into 3 groups, namely:

- 1) Those who roam the forests with caves and makeshift houses for shelter.
- 2) Those who moved between the Toboino and Tutuling locations with an organized housing system.
- 3) Those who live in Paraino have a regular settlement pattern.

The Togutil also gather food in groups, such as when collecting sago, tubers (*gihuku*, *mangere*, *bete*) and forest fruits. Because they often live around rivers, fishing is also their main livelihood activity. Pots for cooking rice or medicine are made of bamboo, while young palm leaves are used as natural containers. The sap from giant walnut and hibum is used as a light source at night after the skin is cut and burnt.

If someone deliberately steals or harvests without the permission of the owner of the land or garden, then the thief will experience dangerous things for himself, such as illness. In addition, they can also experience bad things. Not only limited to members of the Togutil Tribe, this prohibition is applied in general including outsiders who enter their area. This system can be said to be local wisdom in an effort to protect plants contained in a garden or a local area from being exploited excessively until a predetermined time limit (Bayau, 2023, p. 5).

Although customary rules do not specify punishments for violators, the Togutil people strongly believe that if someone violates them, they will experience pain or even harm themselves. That's why they highly respect or avoid violations. In addition, any member of the community may be subject to *nagimi* or what is referred to as a fine, whether the land is privately or communally owned. The way fines are paid is common in Togutil life. If they trespass on private land, they usually deal directly with the owner. In the case of shared customary land or *mialolingiri* territory, fines are paid to *o dimono* (elder/tribal chief). The fine is used for the common good (Bayau, 2019, p. 16).

Before the emergence of laws based on centralized power, these customs were the rules of community life for several centuries, until the influence of Hindu-Buddhism entered into legal values and systems. During the Hindu-Buddhist period, there was also legal pluralism or multiple rules governing society. In the Hindu-Buddhist kingdoms there were rules based on religion and also some previous traditions.

Although a small number of tribe members have begun to mingle with villagers, the customary settlement method led by the chief is still maintained by the tribe. Therefore, the role of the chief is very important in the lifestyle and society of the Togutil tribe.

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In other words, the chief's orders are listened to more than suggestions from the government. This is considered reasonable because the indigenous Togutil tribe is relatively unfamiliar with the practice of national law and modern life.

Indigenous peoples seem to feel that their habitat is disturbed by the arrival of outsiders who want to control their land for certain interests, even though the forest is a place of life where there are potential natural resources that can be used for indigenous peoples to sustain their lives. We know that behind the greenery of our forests, there must be extraordinary resources that are the target of capitalists. On the other hand, if forests are still controlled by indigenous peoples, it guarantees the preservation of nature because indigenous peoples are more humane in the use of nature and are not vulnerable to the aggression of natural destruction that is often carried out by outsiders, this is because outsiders touch nature for economic interests alone but for indigenous peoples, the use of nature is only for the needs of life and nature has a spiritual dimension and high local wisdom so that indigenous peoples have an interest in protecting it. If mining companies continue to emerge and continue to erode the forest area of East Halmahera, the living habitat of the Togutil indigenous people will be increasingly pressured and marginalized.

Friction between mining companies and indigenous communities has the potential to occur, especially for indigenous groups living in forest areas. The presence of indigenous peoples in an area prior to mining in the area often leads to social conflict. This conflict can arise violently due to confrontation (feud) between mining companies and indigenous groups, and or due to covert conflict, namely the eviction of indigenous peoples from their customary territories (Redi, 2016, p. 44).

### 3. Discussion

Haryadi (2018) argues that the central or regional government, as a representation of the Indonesian state, should make regulations on natural resource management that open as much access as possible for the people, and on the contrary, these regulations are more tightened for private and foreign parties. Furthermore, he states that the involvement of foreign parties must remain on track that the state is sovereign over the natural resources in its territory by prioritizing their use for the improvement of the national economy which will also have an impact on improving the welfare of all its people.

This can be illustrated through the provisions in Article 14 of Law No.23/2014 which explains the division of authority between the Central Government and provincial governments in several fields. For example, in the field of forestry and the management of botanical forest parks in regencies or cities, which are the authority of the regency or city government, while the management of natural products such as oil and gas is still the main authority of the central government.

In addition, Law No.3 of 2020 on the Affairs of Mining Business License, although it is the authority of the Central Government under the Minister of Energy and Mineral Resources (ESDM), in some specific situations this authority can be delegated to the Regional Government, especially the Provincial Government. Implementing regulations such as Government Regulation No. 96 of 2021 provide a framework for the delegation of business licensing authority to provincial governments based on the principles of effectiveness, efficiency, accountability, and externality.

This is also further regulated in Presidential Regulation Number 55 of 2022 concerning the delegation of business licensing in the mineral and coal mining sector. This delegation includes the granting of standard certificates, permits, guidance, and supervision of the implementation of business licenses delegated to the Regional Government.

Thus, although the authority initially rests with the Central Government, there are situations where Local Governments, especially Provincial Governments, may receive delegation of authority to grant business licenses in the mineral and coal mining sector. Through Presidential Regulation Number 55 of 2022 concerning Delegation of Authority to Grant Business Licenses in the Mineral and Coal Mining Sector, the government has given clear authority to local governments. This delegation aims to strengthen regional autonomy and provide flexibility in decision-making at the local level. By granting authority to local governments in granting business licenses, the central government seeks to support investment and economic development in these areas.

Previously, Law No. 3/2020 on Mineral and Coal adopted the principle of centralization, which gave authority to the central government in mining management. However, Presidential Regulation No. 55 of 2022 attempts to address the issue of illegal mineral and coal mining by granting authority to local governments to issue mining licenses. This is expected to cut the chain of illegal activities in the sector through stricter enforcement.

Nevertheless, the delegation of authority to local governments in granting business licenses is the first step to strengthen supervision and more effective law enforcement against *Illegal Coal Mining* cases. In addition, it is expected that local governments will also pay more attention to environmental and occupational safety aspects when granting business licenses in the mineral and coal mining sector, so as to prevent negative impacts on the environment and occupational safety risks often associated with illegal mining activities.

There are several positive and negative impacts in the centralized government system, which are as follows (Hido, et al., 2022, p. 14):

#### a. Economic Sector

The positive impact is a more directed and organized economy because the central government alone regulates the economy as a whole. The negative impact is the opinion that the regions are just implementing cows that are forced to continue working and do

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not have the right to regulate their own economic policies which results in the concentration of financial affairs in the central government.

### **b. Socio-cultural aspects**

The positive impact is that with the implementation of this centralization system, the existing cultural differences can be united. Each region does not emphasize its own culture, but rather prioritizes the motto of the Indonesian nation, namely *Bhineka Tunggal Ika*. The negative impact is that the central government is dominant in driving and running all government activities. This dominance has eliminated the existence of each region as a local government order with its own unique socio-cultural dynamics. In the long run, this situation leads to the dependence of local governments on the central government, where in the end local creations and initiatives will disappear.

### **c. Security and Politics**

The positive impact in the security sector is that the security of the country is more secure and conducive because conflicts between regions that can disrupt the stability of national security can be minimized. Meanwhile, the negative impact is that military organizations become more prominent than other organizations, because they are considered to have more performance and tasks. The positive impact in the political field is that because all decisions and policies are coordinated and regulated by the central government, local governments do not need to think about the problems arising from decision making. Decisions can be maximally implemented because local governments only need to accept and implement them. The negative impact is the dependence of local governments on the central government because they are waiting for decisions given by the central government. In addition, it takes a long time to produce a decision or policy which causes delays in achieving the realization of the decision.

The malfunctioning of the policy within the local government due to the dependence of the policy handed down by the central government has resulted in the role of the local government, in this case the district/city, being eroded by the central government's policy, even though it is actually the local government that is directly dealing with the surrounding community. In addition, the central government clearly does not understand and may be less sensitive to the turmoil or things that happen in the regions because it is possible that not all information about regional conditions can be conveyed properly to the central government.

Presidential Regulation Number 55 of 2022 concerning Delegation of Business Licensing in the Mineral and Coal Mining Sector as an extension of the central government from Law Number 4 of 2009 and Law Number 3 of 2020 marks the return of the decentralized government system. The transfer of authority to grant mining business licenses (IUP) to local governments certainly has an impact on local governments, although at this time it is still limited to the level of provincial governments, while district governments do not yet have similar authority.

In fact, in East Halmahera Regency, there are still investors who enter without going through administrative arrangements in the region, but directly through the central government (as quoted from Belseran, 2023, February 18) that the East Halmahera Government through its Deputy Regent said that the government accommodates the aspirations of the community by mediating, where the local government is in the middle to bridge these two interests. The interests of the community must be protected, but the interests of the company must also be safeguarded. Both will be brought together to be mediated by the local government.

On the other hand, as an extension of the central and provincial governments, the East Halmahera District Government is still obliged to forward the aspirations of its people, and must report them to the central government. Although the local government has promised to mediate to resolve the land dispute of the Tobelo Dalam (Togutil tribe) indigenous community regarding the customary forest area included in the company's plot, the local government will still review local regulations on indigenous peoples in East Halmahera. If regulations are needed to regulate within the scope of the district locality, then of course the regulations will be issued by the district only. Therefore, the East Halmahera government must play a more active role in holding meetings with indigenous peoples to accommodate the aspirations of the community.

So far, the existence of mining businesses in customary forest areas has not been considered beneficial for the Togutil community, but instead has damaged the local wisdom that has been created. However, the problem between the Togutil community and the mining company has not yet been resolved, but another problem arose between the Togutil community and the villagers. This was discovered when there was a problem of mutual claims to ownership of garden land between the Tobelo Dalam (Togutil) tribe and the people of Subaim and Dodaga villages. With this, several leaders requested that the people of East Halmahera Regency always maintain unity and avoid things that can cause division, but continue to create a safe, peaceful and prosperous atmosphere (as quoted from Lensa, 2023, August 31).

The community's lifestyle is also influenced by internal factors when disputes arise between group members within the community. The Togutil tribe's dependence on the forest is quite high. According to their cosmology, the forest is their home, so they prohibit and refuse to cut down the forest. This indigenous community utilizes all kinds of natural resources in the forest to support its life and existence through traditional methods such as harvesting sago and hunting various animals. This far-from-modern subsystem operation still survives. Basically, Halmahera's forests have enough natural resources to fulfill the needs of the Togutil

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tribe for a long time. But over time, developer activities such as logging companies, mining, and coastal communities have made this group increasingly dense and alienated from their natural habitat (Hasan & Rachmawati, 2019, April 5).

However, there are some incidents that eventually involve victims from ordinary citizens, with the perpetrators being Togutil indigenous people. Members of the Togutil tribe who commit criminal offenses will be processed in accordance with applicable national laws because the victims are citizens who will generally demand justice from existing law enforcement officials. One of the cases that occurred and has been handled under national law is as contained in the decision of the Panel of Judges of the Soasio District Court Number 94/Pid.B/2019/PN.Sos on behalf of the convicted person Habel Lilinger, et al.

As for work in the mining sector that is based on an agreement and has a permit before the issuance of Presidential Regulation Number 55 of 2022 concerning Delegation of Business Licensing in the Mineral and Coal Mining Sector as an extension of the central government from Law Number 4 of 2009 and Law Number 3 of 2020, it is still not within the authority and power of the East Halmahera Regional Government to provide further policies. This is the homework borne by the government, both by the central government and the local government.

Based on the discussion above, it can be seen that the implementation of justice in dispute resolution is expected to guarantee a sense of justice. Both the Togutil Tribe and other communities should not become victims of regulations that do not fully guarantee the protection of citizens' rights.

True justice does not require the rejection of positive law, but must be able to make the application of positive law more flexible (not more rigid). Fast and efficient settlement of criminal cases is the dream of the community. The handling of criminal cases, especially for Togutil community members, is expected that law enforcement officials, namely the police, prosecutors, and judges must have the same vision. For example, if there is a policy in the community that is contrary to existing regulations, but is carried out solely in the interests of service to the community, it is necessary to review the handling of the case in order to recall the *ultimum remedium* principle. For the government itself, it is expected that in issuing regulations, especially those related to services, it is expected to be more selective and take into account all unpredictable possibilities in carrying out tasks in the field. This is necessary when a criminal case has been submitted to the court, the existence of discretion that still maintains that the needs of the community are met and becomes the basis for judges to consider leniency of sentences for defendants.

So far, the role of the local government has only been limited as a mediator between indigenous peoples and outside parties, either individuals or ordinary citizens/communities or private parties, in this case mining companies. The role as mediator is considered less strong considering that the disputes that occur are more private / civil matters so that local governments must be more proactive in overcoming the problem of land disputes. East Halmahera Regency, which is rich in nickel mining products, certainly attracts the attention of investors or mining entrepreneurs to develop their businesses so that mining companies have sprung up in the East Halmahera Regency area. This is prone to causing disputes both physically and community unrest to the erosion of the culture of the community itself. Until now, there is no regulation in East Halmahera that is considered to be in favor of indigenous peoples. The solution that can be done is to issue a Regional Regulation to further ensure the protection of the area inhabited / occupied by the Togutil Tribe (Tobelo Dalam tribe) in the East Halmahera Regency area in order to maintain local wisdom and nature conservation.

Indonesian society is essentially a society that wants a peaceful and harmonious life according to traditional cosmic thinking, assuming that humans are part of nature, where the various spheres of life (legal, social, economic, political, etc.) do not overlap. This common sense is reflected in customary law, so the key element of the notion of traditional is part of the customary law system.

The lack of codification since the introduction of customary law raises the question of how the law exists today, as a codification system should apply to all areas of law in accordance with the development of society. With regard to this issue, we must consider that customary law is rooted in the customs of the Indonesian people. As a reflection of the basic cultural values of the Indonesian people, this customary law is recognized in the 1945 Constitution of the Republic of Indonesia. As understood as the original law of the Indonesian people as in the Transitional Government II which states that "All organs and regulations of the State shall remain in force until a new one is established based on this Constitution." In addition, the elucidation of the 1945 Constitution states that "In addition to the Constitution, an unwritten constitution also applies, namely the main rules that arise and remain in the practice of state administration even though they are not written." Although there are many differences of opinion on this matter, in general the author interprets the recognition of the existence of customary law as stated in the 1945 Constitution.

In terms of the constitution, the existence of customary law communities is regulated in Article 18B Paragraph 2 of the 1945 Constitution which states: "The state recognizes and respects customary law communities and their traditional rights as long as they still exist and are in accordance with customary law. The development of society and the principles of the unitary state of the Republic of Indonesia are regulated by law." However, the constitutional basis is still considered not strong enough considering there is no clarity on its operational capacity. Article 28 I Paragraph 3 of the 1945 Constitution states that "the cultural identity and rights of indigenous peoples shall be respected in accordance with the development of the times and civilization.

The recognition of customary law communities is contained in the elucidation of Article 18 of the 1945 Constitution which can be stated that there are approximately 250 *Zelfbesturende Landschappen and Volksgemeenschappen* within the territory of the

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Indonesian state, such as villages in Java and Bali, lands in Minangkabau, villages and clans in Palembang, and so on. These areas are structurally indigenous territories, so they can be considered as special territories."

There are 4 (four) conditions for the existence of Law implied in Article 18B Paragraph (2) of the 1945 Constitution, namely:

1. The phrase "as long as it is alive" implies that the Customary Law must actually exist and in fact still be alive in the community.
2. The phrase "in accordance with the development of society" implies that as long as the values contained in Customary Law are still in accordance with the current situation and conditions, they are still recognized.
3. The phrase "in accordance with the principles of the Republic of Indonesia" implies that indigenous peoples are an inseparable part of the Republic of Indonesia itself, because the Republic of Indonesia and the entire territory in which its people live are an inseparable unit.
4. The phrase "regulated by law" implies that Indonesia is a state based on law.

The values contained in customary law are being re-examined amidst debates about the weaknesses of legislation. In some cases, positive law is considered no longer able to regulate human behavior. Then there is a tendency to deviate from positive law and re-examine the values contained in customary law. The inability of positive law to adapt to community behavior can be seen in a number of environmental cases that have begun to review the values of environmental "local wisdom". In fact, natural resources in the region are managed by local communities using the local wisdom system. Local wisdom is reasonable values in behaving towards the environment, because they understand that the nature around the community is part of their lives.

In accordance with the principle of the rule of law of the unitary state of the Republic of Indonesia, a clear, solid and comprehensive legal basis must be created in the forest management system as part of ecologically sustainable development. To ensure legality, the legal basis of each regulation must be based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Providing legal certainty and protection and strengthening the welfare of indigenous peoples, especially the Togutil tribe through legislation can guarantee access and rights for the people and communities of the Togutil Tribe in East Halmahera Regency.

#### IV. CONCLUSIONS AND SUGGESTIONS

The making of a legal regulation must be in line with the norms or values that exist in a society. These norms consist of religious norms, norms of decency, norms of politeness and legal norms that are used as guidelines in the process of making legal regulations and have been in effect for a long time before the regulation was formed.

Until a few decades ago, many Togutil communities in East Halmahera kept their distance from the outside world. Only recently have they begun to engage with neighboring communities in central Halmahera. This isolation has resulted in a lack of information, especially regarding judicial practices and legal institutions. This closed behavior is understandable as they are a displaced or fleeing community. Hopefully, the Togutil will not suffer the same fate as the Moro tribe in North Halmahera, where the community mysteriously disappeared in the previous century.

With the issuance of legal provisions based on the Indonesian state philosophy, namely Pancasila by the government, it is expected to be a reference for all legal regulations, especially for alienated communities such as the Togutil Tribe in East Halmahera. The regulation is expected to ensure the achievement of a sense of justice for the community, especially for the Togutil tribe itself. Justice does not have to turn away from positive law, but especially must be able to make the application of positive law less rigid or more flexible.

Based on the nature of the Republic of Indonesia as a state based on law, the development of a special law enforcement system that requires more wisdom for the community in this case the existence of the Togutil Tribe as a customary law community that is part of sustainable development with a national perspective must be given a solid, firm, clear, and comprehensive legal basis to ensure legal certainty for alienated tribes in general. The legal basis is based on the state foundation, namely Pancasila, as well as the basis of legislation, namely the 1945 Constitution of the Republic of Indonesia.

By providing protection and legal certainty through the establishment and implementation of regulations that can guarantee access to rights like Indonesian people in general, the level of prosperity of the Togutil Tribe can be improved. Through the establishment and implementation of Regional Regulations that can guarantee the protection of the area inhabited/occupied by the Togutil Tribe (Tobelo Dalam Tribe) in the East Halmahera Regency area, it is hoped that it can maintain local wisdom and nature conservation.

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