

THE EXISTENCE OF THE INDIGENOUS PEOPLE OF PASSO IN THE PERSPECTIVE OF POSITIVE LAW IN INDONESIA

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ABSTRACT

The Indonesian state is a state of law as stipulated in Article 1 paragraph (3) of the 1945 Constitution, meaning that as a state of law, all and every action of state administrators and citizens must follow and comply with any applicable regulations or laws. In the concept of a state of law, what is used as the commander in state life is the law itself. As a state of law, Indonesia highly upholds and recognizes the protection of human rights. Protection of human rights means that every citizen and/or community group must be seen as equal. In addition, certain groups that have special needs or vulnerabilities such as indigenous peoples, where the fulfillment of their rights must be treated very extra. This is clearly stated in Article 18B paragraph (2) of the 1945 Constitution. However, empirically, there are rights of indigenous groups that are often violated, such as the indigenous people in Negeri Passo, where their traditional rights in the form of Upulatu or king titles for generations are about to be revoked by parties who are supposed to protect and guarantee their customary legal rights. However, in reality, they actually tried to take away the traditional rights of the indigenous people in Negeri Passo by making new local regulations using their power/office, which resulted in losses to the indigenous people themselves. As a result, these indigenous groups find it difficult to obtain legal certainty as indigenous peoples.

KEYWORDS Customary Law Community, Tort, Human Rights,



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INTRODUCTION

Customary law communities are a group of people who live for generations in a unified form of attachment related to ancestral origins and/or common residence in a geographical area, cultural identity, certain customary laws, which remain respected, have a strong relationship with the land and environment, and a value system that defines economic, political, social, cultural and legal institutions. So it is important to recognize and protect the rights of customary law communities, because it must be recognized that customary law communities existed long before the formation of the unitary state of the Republic of Indonesia. However, in the

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process of development, these traditional rights must be adjusted to the principles and spirit of the Unitary State of the Republic of Indonesia (NKRI) through the normative requirements of the law itself. For this reason, recognition of the existence of customary law communities is needed. The desired recognition in this case is a written statement made by the state to accept and respect the laws of indigenous peoples with all the rights and identities associated with them. Meanwhile, what is meant by protection is an effort to secure and protect indigenous peoples and their rights so that they can live, grow and develop in accordance with their human dignity (Bisri, 2004).

In relation to the implementation of the protection of traditional rights of indigenous peoples, including customary land rights belonging to indigenous peoples, until now there has been no specific legislation that regulates it as initiated in the Indigenous Peoples Bill (RUU MHA). The MHA Bill is one of a number of draft laws that prioritize rules to protect the rights of indigenous peoples and legal recognition of indigenous peoples. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (UUD 1945) states that, "The state recognizes and respects the unity of society according to customary law and its traditional rights as long as it is still alive and in accordance with the times, the community, and the principles of the unity of the Republic of Indonesia according to law". This means that the state recognizes and respects customary law communities in accordance with the principles of the Republic of Indonesia. Thus, with the passing of the MHA Bill, it is hoped that the protection and respect for the rights of indigenous peoples will be better guaranteed (Alting, 2010).

Noting the urgency of the MHA Bill is the basis for government action to restore the rights of indigenous peoples to the law, granting rights, and implementing development programs. Arrangements for the recognition and protection of the rights of indigenous peoples aim to protect the rights of indigenous peoples so that they can live safely, grow, and develop as a community group in accordance with the dignity of humanity and are protected from acts of discrimination (Fuady, 2005). Such arrangements also provide legal certainty for indigenous peoples in exercising their rights, such as the fulfillment of customary land rights.

Recognition and protection of the rights of indigenous peoples form the basis of government and development programs. Empowerment, recognition, and protection of the rights of indigenous peoples are carried out by the central government and local governments in the following ways, namely identifying indigenous peoples, verifying indigenous peoples, and legalizing indigenous peoples. Thus, the MHA Bill is expected to provide a legal basis with justice and legal certainty, so that it is expected to provide recognition, protection and empowerment to indigenous peoples. In order to fulfill the human rights, protection, and legal certainty of indigenous peoples, the MHA Bill must be ratified immediately. The protection in question does not only concern rights to land or natural resources, but also customary rights to basic rights such as the regulation of local community sovereignty and the right to practice their beliefs (Ismail, 2010). Thus, the Government and the DPR as the formulators of regulations are expected to be sensitive to the crisis issues

faced by the people of Indonesia, the state must be better able to position itself as an institution to enforce the constitution of indigenous peoples of Indonesia.

As one of the customary lands located in Ambon City, where the customary land has long lived long before the Proclamation of Independence of the Republic of Indonesia, Negeri Passo is a customary land that has its own autonomous government system characterized by custom. This is confirmed by Ambon City Regulation Number 9 of 2017 concerning the Determination of the State in Ambon City (Ambon City Regional Gazette 2017 Number 9, Supplement to Ambon City Regional Gazette Number 331, hereinafter referred to as Ambon City Regional Regulation 9/2017). The autonomous government characterized by adat, in Negeri Passo since a long time ago even before the land of Maluku was approached by rulers from the Arab and European plains, has a customary government system headed by someone who serves as Upulatu as the highest executive leader at the state level (Thontowi, 2015). A person to be appointed Upulatu, must be a person whose family name has been the leader of the country from the beginning. In this case for Negeri Passo, an Upulatu is always a straight descendant (eldest male) of the previous Upulatu based on the customs in Negeri Passo.

Since the arrival of the European/Dutch rulers, those who served as Upulatu were given titles similar to those of the Dutch. These included the titles Radja, Patih and Orangkaya. During the Dutch era, only someone who held the customary position of Upulatu would receive one of the three titles. Over time, until now the Maluku community, especially Ambon City, the titles of nobility held by an Upulatu have generally merged into one title, namely 'Bapa Raja'.

With the existence and civilization of customary law communities that are still alive and developing in Indonesia, it is necessary to ensure the protection of their constitutional rights. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution, Law Number 5 of 1960 concerning Agrarian Principles (State Gazette of the Republic of Indonesia Number 104 of 1960, Supplement to the State Gazette of the Republic of Indonesia Number 2043, hereinafter referred to as the PA Law), Law Number 4 of 2009 concerning Mineral and Coal Mining (State Gazette of the Republic of Indonesia of 2009 Number 4, Supplement to the State Gazette of the Republic of Indonesia Number 4959), Law No. 7 of 2004 on Water Resources (State Gazette of the Republic of Indonesia of 2004 Number 32, Supplement to the State Gazette of the Republic of Indonesia Number 4377), and other related laws that aim to recognize and respect the unity of customary law communities. The government has ensured the welfare of indigenous peoples by making efforts to fulfill constitutional rights and traditional rights (Raharjo, 2005).

These constitutional rights include the basic rights and fundamental freedoms to which every citizen is entitled, including aspects of education, employment, equality before the law, socio-economic rights, freedom of expression, and the right to life and residence, all of which are guaranteed by the constitution. Traditional rights, on the other hand, refer to the unique or distinct rights attached to certain communities based on factors such as common descent, territorial relationships and other customary elements. These rights relate to customary lands, rivers, forests, and are practiced within the community (Supriyadi, 2010).

RESEARCH METHOD

This research uses normative legal research. According to Peter Mahmud Marzuki, normative legal research is a legal research process that examines by using various library materials or secondary data sources used and aims to find legal rules, legal principles, and legal doctrines that are useful for answering the legal issues at hand. Meanwhile, according to Soerjono Soekanto, normative legal research is a method that uses normative case studies by examining document studies, using various secondary data such as laws and regulations, court decisions, legal theories, and can be in the form of scholars' opinions. This research will describe the existence of customary law communities in Negeri Passo in the perspective of positive law in Indonesia (Soekanto, 2006). Therefore, this research is conducted by using normative juridical research methods (normative legal research methods), namely by drawing legal principles that can be seen and carried out from written and unwritten positive laws. In addition, it can also be used by interpreting and translating laws and regulations.

RESULT AND DISCUSSION

Indigenous Peoples

The existence of indigenous peoples in Indonesia has a variety of terms and references in the literature and in legislation. The term 'indigenous peoples' itself refers to something similar in meaning, such as 'customary alliances', 'indigenous peoples', and 'customary law communities'. However, it is important to note and remember that these different terms do not diminish the existence and rights of indigenous peoples. The existence and rights of indigenous peoples themselves are recognized and regulated in the Basic Agrarian Principles Regulation (UUP A), particularly with regard to customary rights. Article 2 paragraph (4) of the PA Law states that the authority to supervise the implementation of these rights can be entrusted to local governments and customary law communities, as long as it is used for national interests and in accordance with laws and regulations.

Constitutional protection of the rights of indigenous peoples is guaranteed in legislation that aims to recognize and respect the unity of indigenous peoples. Meanwhile, in relation to ulayat rights, which are the rights of indigenous peoples over all agrarian resources within their territories. These rights cover a wide range of agrarian resources, including land, water and the natural resources contained therein. Ulayat rights are not established through an official decree, but rather emerge, develop, and may also disappear in accordance with the existence and development of the way of life of the indigenous people concerned. The term "hak ulayat" is regulated in Article 3 of the PA Law. The implementation of hak ulayat and similar rights of customary law communities must be in line with national and state interests, based on national unity, and not contradictory to higher-level laws and regulations, as long as such rights still exist in reality (Kristiani, 2020). However, a specific definition of hak ulayat is not explicitly set out in the law, except to say that hak ulayat is the same as "beschikkingsrecht" (Elucidation of Article 3 of the PA Law).

Ulayat rights relate to the legal relationship between customary law communities and the land within their territorial environment. This legal relationship includes the authority and responsibility associated with the land and its various components such as water, flora and fauna which are the source of life and livelihood of the surrounding community. Thus, the scope of customary rights encompasses all agrarian resources within the community's territory including land as the main focus and object of these rights. Despite constitutional and legal obligations to recognize and respect the rights of customary law communities, both central and local governments often face obstacles in fulfilling these obligations. Evidence shows that government policies related to public services often show discriminatory treatment towards indigenous peoples, further marginalizing them as a minority group. The current situation indicates that indigenous peoples have not received adequate justice, as evidenced by the challenges they face in accessing and securing their inherited customary rights, which are designed to protect their interests.

Therefore, there is an urgent need for more effective legal development and the establishment of new laws to explicitly address the issue of customary rights of indigenous peoples. The law should aim to prevent arbitrary decision-making by the government and ensure the highest level of justice for indigenous peoples throughout Indonesia. Customary law was officially recognized by the Dutch colonial government and on an equal footing with European or Western law through Article 131 paragraph (6) of the Indische staatsregeling (IS). Through this Article, customary law was also declared as a source of positive law for the Indonesian people. Thus, as a result of this situation, 2 (two) legal systems emerged, namely Western law and customary law. The source of customary law comes from the rules and norms that develop in society in their daily lives which are present as the culture of the Indonesian people. Thus, customary law is purely owned by the Indonesian people and is formed based on value consciousness from generation to generation which is reflected in the customs in customary law and is also assessed from their sense of justice and sense of reason.

Recognition and Protection of Indigenous Peoples in Constitutional Court Proceedings

Indonesia is a country founded on the concept of the rule of law, so the protection of citizens and customary law communities is regulated in the Constitution (Constitution). The form of regulation provided by the Constitution is the provision of protection of rights owned by citizens who are multicultural, multiethnic, religious, racial, and multigroup as the motto *Bhinneka Tunggal Ika* which de facto reflects the plurality of national cultures contained in the Republic of Indonesia. Multicultural and multiethnic patterns as a form of existence of various cultures show the diversity of cultural customs found in the country of Indonesia. Each of these customs has its own characteristics which then have autonomous laws that specifically regulate the indigenous community in question.

Thus, it is important to recognize and protect the rights of customary law communities, because it must be recognized that the so-called customary law communities themselves existed and were formed long before the establishment of the Republic of Indonesia. However, in the process of development, these traditional

rights must be adjusted to the principles and spirit of the Republic of Indonesia through the normative requirements of the law itself. In exercising their rights, customary law communities also have the right to defend and protect them. Likewise, if there are laws and regulations that violate or potentially violate the constitutional rights of indigenous peoples, they can submit laws against the Constitution (judicial review) to the Constitutional Court.

A petition in the Constitutional Court is referred to as a petitioner. The Applicant must be able to describe the losses experienced or potentially experienced due to the enactment of a Law or Government Regulation in Lieu of Law (Perpu). The legal standing of the Applicant which contains a clear description of the presumption of loss experienced or potentially experienced by the Applicant due to the enactment of a law or perpu. The Applicant in this case is the party harmed by the enactment of the law, namely:

- a) Individual Indonesian citizen;
- b) Customary law communities 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 are regulated by law;
- c) Public or private legal entities;
- d) State institutions;

The above provision is related to Article 27 paragraph (1) of the 1945 Constitution which states that every citizen is equal before the law and government and shall uphold the law and government with no exceptions. The Constitutional Court provided an official interpretation in one of its decisions to clarify the qualifications of customary law communities. In the legal considerations of Constitutional Court Decision Number 31/PUU-V/2007 dated June 18, 2008, the Constitutional Court has provided an interpretation of Article 18B paragraph (2) of the 1945 Constitution in conjunction with Article 41 paragraph (1) letter b of the Constitutional Court Law with regard to whether or not there is a legal position of indigenous peoples in an effort to protect their constitutional rights, as follows:

1. A legal community unit is de facto still alive (actual existence), whether territorial, genological, or functional, at least containing elements:
 - a) The existence of a society whose citizens have in-group-feeling;
 - b) The existence of customary governance institutions;
 - c) The existence of wealth and/or customary objects;
 - d) The existence of a set of customary law norms; and
 - e) Particularly for territorial customary law communities, there is also an element of a certain area.
2. A customary law community unit and its traditional rights are considered in accordance with the development of society if the customary community unit:
 - a) Its existence has been recognized based on applicable laws as a reflection of the development of values that are considered ideal in today's society, both general and sectoral laws, such as in the fields of agrarian, forestry, fisheries, and others, as well as in regional regulations;
 - b) The substance of the customary law norms is in accordance with and does not conflict with laws and regulations.

From the description above, it can be seen regarding the requirements that must be met to become a Petitioner in a Constitutional Court proceeding for the indigenous peoples' unit.

Recognition of Customary Law Communities in Negeri Passo (Ambon City Regional Regulation 9/2017)

Negeri Passo is a customary country that has its own autonomous government system characterized by custom, as regulated in the Ambon City Regional Regulation 9/2017. The autonomous government characterized by adat in Negeri Passo since a long time ago, even before the land of Maluku was visited by rulers from the Arab and European plains, has a customary government system headed by someone who serves as Upulatu as the highest executive leader at the state level. A person to be appointed Upulatu must be a person whose family name has been the leader of the country from the beginning. In this case in Negeri Passo, an Upulatu is always a straight descendant (eldest male) of the previous Upulatu based on the customs in Negeri Passo.

Since the arrival of the European/Dutch rulers, a person who served as Upulatu was given a title of nobility similar to those in the Netherlands, including the titles Radja, Patih and Orangkaya. Thus, during the Dutch era, only someone who held the customary position of Upulatu would receive one of the three titles. This applies until now in Maluku society, especially Ambon City, where the titles of nobility held by an Upulatu have generally merged into just one title, namely Bapa Raja. The position of Upulatu during the Dutch East Indies Government was officially called the position of Regent, which is currently known as the Head of State Government through Ambon City Regional Regulation Number 8 of 2017 concerning Negeri (Ambon City Regional Gazette 2017 Number 8, Supplement to Ambon City Regional Gazette Number 330, hereinafter referred to as Ambon City Regional Regulation 8/201). In Passo State, it has been recorded for generations that the position of Upulatu/Regent/Head of State Government with its titles of nobility (Radja, Patih, Orang Kaya) is the customary right of the Simauw Clan as the only Matarumah Parentah in Passo State with the title of Orang Kaya.

In the customary government system in Negeri Passo led by Matarumah Parentah Simauw, it is known through the writings of Georgius Everhardus Rumphius that the Upulatu of Negeri Passo is Simauw. In the historical record, Simauw is referred to as Hooftd Van Baguala, meaning 'Head of Baguala'. At the same time Simauw led 2 (two) lands at once, namely Negeri Ema and Negeri Passo/Baguala. which was confirmed in the 1700s. It was clearly recorded by Franciscus Valentijn who mentioned that, in the Kora-kora Hongi voyage, the Kora-kora contingent of Negeri Passo/Baguala was led by Johanes Simauw.

Then in 1814, when there was a division of dati customary land in the Amboina Prefecture, it was recorded that the dati land in Passo State was given by Paulus Simauw as Upulatu in Passo State with the title of Orang kaya witnessed by Salem Sarimanella and Balthazar Rinsampessy as Elders in Passo State which was recorded as such. This is corroborated by the deed of Notary Karesidenan Amboina Frederik Jacobus Everhardus Neumann in 1883 which records the ownership of dati land belonging to Carel Frederik Simauw Regent Negeri Passo along with its

attachment letter of land grant belonging to the King of Negeri Suli Simon Simauw in 1825 made by the same person namely Carel Frederik Simauw signed by G. Rensampessy and J. Sarimanella as Elders of Negeri Passo. This illustrates that Matarumah Parentah Simauw's authority did not only cover Negeri Passo Baguala or Negeri Ema as recorded by Rumphius, but also controlled Negeri Suli. It can also be seen that the reign and rule of Carel Frederik Simauw in Passo State took approximately 58 years. And that power continued until another descendant of Matarumah Parentah Simauw, Regent Rudolf Willem Simauw, who at this time became the first person to establish a church in Passo State, as recorded on the plaque of the Menara Iman Old Church in Passo State. The reign of Willem Rudolf Simauw who was then by Vonnis Landraad Amboina in 1920 heard a land dispute between fellow Simauw families, with the defendant being Willem Rudolf Simauw Regent Van Passo. This authority was continued by his wife Carolina Maitimu because their children were still young.

When Indonesia proclaimed itself and Carolina Maitimu's age and physical condition began to make her unable to carry out these responsibilities, at that time the Regent of Maluku-Tengah appointed Christian Sarimanella as Deputy Government of Negeri Passo to temporarily fill the power vacuum (currently known as Temporary Acting). After his son was old enough Christian Petter Simauw, was appointed Upulatu Negeri Passo with the title of rich man of Negeri Passo. After Christian Petter Simauw finished his reign, the government was continued by his eldest son, Carel Simauw who is the biological father of the Plaintiff. When he was appointed Upulatu Negeri Passo in 1966, the Plaintiff's father was still very young and not even married. Therefore, in the customary tradition, the Plaintiff's father could not be accompanied by a nyora/wife, therefore a mother was appointed (Nyanyang Sarimanella) to fulfill the customary obligation in the appointment and inauguration of the Plaintiff's father.

The system of government based on the history of origin and customary law in Passo State was abolished by the Indonesian government through the 1979 Village Law. The law requires that the appointment of a leader no longer uses the customary mechanism that has been running for hundreds of years, but must follow the general election model. Through the Village Law, the Sarimanella clan and Theresia Maitimu were elected as the Passo Village Head, which is not part of the customary governance institutions. This is not in accordance with the customary law, history of origin, and customs that apply in the Land of Passo. Thus, based on the legal facts of the indigenous people in Negeri Passo, it appears that there are efforts and arbitrary actions on the part of the Ambon regional government to obstruct and even revoke the traditional rights of the Passo indigenous people that have been valid for generations, by replacing the government system based on the history of origin and customary law and customs in Negeri Passo with a mechanism through Law Number 5 of 1979 concerning Village Government (State Gazette of the Republic of Indonesia of 1982 Number 56, Supplement to the State Gazette of the Republic of Indonesia Number 3153, hereinafter referred to as the Village Law). This shows that the existence of customary law communities in Negeri Passo has experienced disturbances and threats from the local government in Ambon.

The legal facts show that what is implied in Article 18B paragraph (2) of the 1945 Constitution. However, this is not implemented by the Regional Government of Ambon City and at the same time shows the existence of indigenous peoples in Indonesia, especially in Passo State, who do not get protection and recognition as ordered by the constitution in Article 18B paragraph (2) of the 1945 Constitution.

Unlawful Acts in Negeri Passo between Indigenous Peoples and the Maluku Regional Government

Unlawful acts as regulated in the provisions of Article 1365 of the Civil Code (KUH Perdata), which stipulates that an unlawful act is an act committed by a person who through his fault has caused harm to another person. Meanwhile, the law recognizes 3 (three) categories of unlawful acts, namely:

- a. Intentional tort;
- b. Unlawful acts without fault (without elements of intent or negligence);
- c. Wrongful act due to negligence.

Thus, any intentional or unintentional unlawful act that is unlawful in nature and the elements of intent and negligence have been fulfilled in the act in question. What is meant by law in the article in question is all provisions and regulations or methods both written and unwritten and everything that is considered as law. So it is clear that what is violated is the law and what is seen or considered as law, such as laws, binding customs, judges' decisions, and so on. Furthermore, in order for a violation of the law to be said to have committed a tort, the result of the violation of the law must bring harm to other parties. Because there are times when a violation of the law does not have to bring harm to others.

In the case that occurred in Negeri Passo, the aggrieved party is the customary law community of Negeri Passo who has the title of Upulatu or Raja who has been hereditary authorized as a king or leader in the customary law community in Negeri Passo based on the decision of the local customary law community. This then became a problem or dispute in Negeri Passo when the local government of Ambon City issued Perda 9/2017 to appoint other people who were not the original indigenous people of Negeri Passo as kings, using Perda 9/2017. This condition shows the existence of actions or efforts from the local government of Ambon City to revoke the traditional rights and human rights of the indigenous people of Negeri Passo which have been recognized and protected by the Constitution Article 18B paragraph (2) of the 1945 Constitution.

Furthermore, based on the Ambon High Court Decision Number 72/PDT/2022 PT AMB dated January 17, 2023, finally the actions taken by the local government of Ambon City were proven, that what was done by the Ambon Government based on the description of the arguments and posita of the Ambon High Court Decision Number 2/PDT/2022 PT AMB fulfills the elements of a tort, namely not doing something that is required by law misfeasance, which is an act that is done wrongly where the act is an obligation or an act that regulates the right to do something. Furthermore, the requirement to be considered as an unlawful act based on the Ambon High Court Decision Number 2/PDT/2022 PT AMB is referred to, namely the causality requirement which is an action that determines Sarimanela and does not determine Simauw as a straight line descendant of King

Karel Simauw as the only Matarumah Parentah in Passo State. The decision is detrimental to the interests and legal rights of the Plaintiff who is the original king of the original indigenous people of Passo as the Head of the Government of Negeri Passo who has absolute rights according to customary law and the history of the origin of Negeri Passo.

CONCLUSION

Customary law communities are an existence that live from generation to generation in accordance with the origins of their ancestors and have existed long before the formation of the Indonesian state. Therefore, the existence of customary law communities must be protected and recognized along with their traditional rights by the state. This has been explicitly stated and regulated by Article 18B paragraph (2) of the 1945 Constitution. And if seen from the case that occurred in Negeri Passo, in terms of the appointment of a leader or a customary head based on the history of origin and customary law and customs in Negeri Passo, has been abolished through the Village Law. As a result of the Law, the appointment of a leader no longer uses the customary mechanism that has been running for hundreds of years as implemented in Negeri Passo so far, but is required to follow the method of election that applies in the country of Indonesia, namely through general elections.

Based on the legal facts in the dispute against the customary law community in Negeri Passo, it appears that there are efforts and arbitrary actions taken by the local government of Ambon City to reduce, obstruct, and even revoke the traditional rights of the Passo customary law community which have been carried out for generations. By replacing the government system based on the history of origin and customary laws and customs in Passo State, this shows that the existence of indigenous peoples in Passo State has been disturbed by the local government. Thus, the existence of customary law communities in Indonesia, especially in Negeri Passo, at this time still does not receive protection and recognition as ordered by the constitution in Article 18B paragraph (2) of the 1945 Constitution. However, with the issuance of the Ambon High Court Decision Number 2/PDT/2022 PT AMB, the community of Negeri Passo finally received recognition and legitimacy from the local government of Ambon City. Meanwhile, the strength of local regulations on the traditional rights of customary law in Negeri Passo has undergone a change since the existence of the Village Law, and the Ambon City Government issued the Ambon Regional Regulation 9/2017, which is to appoint someone who is not the original indigenous people of Negeri Passo to become a king or Upulatu. And since then there has been a disturbance/threat to the customary law community in Negeri Passo Ambon.

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