

Article Title

The Constitutionality of Customary Courts in Dispute Resolution for Indigenous Communities in Tana Toraja Regency

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ABSTRACT

This research encapsulates an attempt to thoroughly investigate and analyze the constitutionality of customary justice in the context of dispute resolution among indigenous peoples, with particular emphasis on the ways in which disputes are resolved through customary justice institutions in Tana Toraja Regency. The research method applied was a combination of a normative (doctrinal) legal research approach relating to legal theory and doctrine, and an empirical (non-doctrinal) legal research approach focusing on practical experience and field observations. The findings of this study underscore the importance of considering the political context of law in evaluating the constitutionality of customary justice, given that the system is faced with a range of complex challenges. In practice, the dispute resolution process through customary justice in Tana Toraja Regency is organized by a reconciliatory judge, who is tasked with facilitating the process of deliberation between the disputing parties with the aim of reaching a mutually acceptable agreement or decision. Recommendations from this study highlight the need for legislative efforts to formulate clearer laws and regulations regarding the role and procedures of customary justice in resolving disputes in indigenous communities. There is also a need for local policies that support the role of conciliatory judges in the customary justice system in Tana Toraja. This research not only provides a deeper understanding of customary justice practices, but also provides a foundation for improved policies and better legal practices in the future, which can strengthen the protection of indigenous peoples' rights and support sustainable and inclusive development.

Keywords: Constitutionality; Customary Court; Dispute Resolution; Indigenous Community.

INTRODUCTION

The Indonesian nation consists of diverse tribes, cultures, and customary societies. Therefore, the State recognizes the existence of living Customary law communities and their existence is still recognized (Husen, 2017), can be seen in the formulation of Article 18B section (2) of the 1945 Constitution, which regulated that:

“The state recognizes and respects entities of the adat (indigenous) law communities along with their traditional rights as long as these remain in existence and are in accordance with the development of community and the principles of the Unitary State of the Republic of Indonesia, are regulated by law.”

Furthermore, Article 28I section (3) of the 1945 Constitution regulated that:

“Cultural identities and rights of indigenous people are respected in accordance with the development of times/age and civilizations.”

Customary justice is very close to the tradition of deliberation. This is evidenced by the many concepts used by a number of ethnic groups in various ways, for example in West Kalimantan, the Customary Court is known as “*beduduk*”, in North Sumatra, especially Karo Regency, it is known as “*harungguan*”, in Sasak it is known as “*bagundem*” or “*paras paros sagilik saguluk sabayan taka*” in Bali. In Aceh, it is called “*peradilan*” or “*adat court*”. In customary societies, disputes have long been resolved by deliberation and consensus through customary institutions commonly called

customary courts. Usually the judges in these institutions are traditional leaders (*kepala adat*) and religious leaders. The authority of the adat judges is not solely limited to reconciliation, but also the power to decide disputes in all areas of law that are not divided into criminal, civil and public.

Many cases in community life are also resolved through customary law. The legal basis for the establishment of Customary Courts is supported by a number of laws and regulations, in other words, the legal umbrella for empowering customary institutions and customary law is very adequate. The dispute process occurs because there is no common ground between the disputing parties. Potentially, two parties who have different stances or opinions could potentially move into a dispute situation.

In the lush and culturally diverse rural areas of Tana Toraja Regency, South Sulawesi, there is a tradition that is deeply rooted in everyday life: customary justice (Rezah & Muzakir, 2021). Amidst verdant fields and traditional Toraja houses, the people of Tana Toraja have long relied on their customary justice system to resolve disputes that arise between them. As part of a rich cultural heritage, customary justice in Tana Toraja has been an important pillar in maintaining peace and harmony among the community.

However, the existence of the customary justice system is not only a legacy of the past, but also offers concrete solutions to handle disputes that occur in everyday life. Limited access to the formal justice system regulated by the state often leads Tana Toraja communities to rely on customary justice to resolve disputes, especially in hard-to-reach rural areas. This is where the power and legitimacy of customary justice is rooted, as communities believe that customary institutions better understand their values, needs and local cultural context. In many cases, adat courts also have an advantage in dispute resolution due to their more participatory and open processes, where all parties involved have the opportunity to speak and listen to opinions and proposed solutions. Such an approach often results in more sustainable agreements and strengthens solidarity among communities.

One out-of-court dispute resolution mechanism (Aulia et al., 2021) is through the adat approach. Settlement through a customary approach means that disputes are resolved through customary mechanisms and by customary institutions. Customary dispute resolution still pays attention to the rights of the parties to the dispute (Rezah & Sapada, 2023).

Dispute resolution through the customary approach is an alternative to dispute resolution that occurs in society, especially in Toraja society and is a form of peaceful dispute resolution played by customary institutions. The main goal is to restore harmony, harmony and balance in the life of the community. In the reality of

community life in Toraja, many disputes have been resolved through customary law and this has been effective in reconciling community life. The existence of reconciliatory customary judges in the midst of society greatly assists the government's main task in legal development in Tana Toraja (Razak et al., 2022).

METHOD

This study uses normative legal research with the statute and comparative approaches (Qamar & Rezah, 2020). The legal materials used in this study include legislation, books, scientific law articles, and online materials discussing the constitutionality of customary courts in dispute resolution for indigenous communities. The collection of legal materials is carried out using a literature study technique. The collected legal material is then qualitatively analyzed to describe the problem and answer study purposes (Sampara & Husen, 2016).

RESULTS AND DISCUSSION

A. The Constitutionality of Customary Courts in Dispute Resolution for Indigenous Communities

The United Nations [Declaration on the Rights of Indigenous Peoples](#) is a declaration adopted by the United Nations General Assembly in New York on September 13, 2007. It outlines the individual and collective rights of indigenous peoples as well as their rights to culture, identity, language, employment, health, education and other issues. It also emphasizes their right to maintain and strengthen their institutions, culture and traditions and their right to development to meet their needs and aspirations.

It also prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters concerning them and their right to remain distinct and pursue their own vision of economic and social development (Asmah et al., 2022). As a country born out of hundreds of years of colonization, human rights are not new to Indonesia. Therefore, Indonesians understand the meaning and nature of human rights. As evidence, the preamble of [the 1945 Constitution](#) (Ibrahim et al., 2020) is a determination to abolish colonialism from the surface of the earth because it is not in accordance with humanity and justice. That is why Indonesia is committed to realizing and protecting human rights (Nasrullah, 2023). The Universal [Declaration on the Rights of Indigenous Peoples](#) is an elaboration of the [Universal Declaration of Human Rights](#).

Recognition that State law is the highest law and other laws are inferior to state law, is clearly illustrated in Article 33 section (3) of [the 1945 Constitution](#).

This article provides a legal basis for the state as the sole actor in the management of natural resources in Indonesia (Husen et al., 2020a). In the practice of state administration for more than three decades, the New Order government in particular has consciously manipulated the true meaning of the concept of control and utilization of natural resources as intended by the 1945 Constitution. There are two main things, namely:

1. The New Order government gave a narrow and single interpretation of the term state. The state basically consists of the government and the people, but during the New Order government, the state was defined solely as the government. Not as the people and the government. Therefore, a paradigm of government-dominated natural resource management was created, not a paradigm of state-based resource management as intended by Article 33 section (3) of the 1945 Constitution.
2. Consequently, in the practice of state administration as above, the position of the people is not equal to the position of the government, because a relationship is created that places the people subordinate and the government as inferior and the government is in a superior position.

The existence of customary law communities in the explanation of Article 18 of the 1945 Constitution states that the State of Indonesia has approximately two hundred and fifty *zelfbesturendelandschappen* and *volkgemenenschappen* such as villages in Java and Bali, *nagari* in Minangkabau, hamlets and clans in Palembang and so on (Cetera & Utama, 2022). These regions have an original structure and can therefore be considered as special regions. The Republic of Indonesia respects the position of these special regions and all state regulations concerning these regions will bind the rights of origin of these regions. Therefore, it is clear that based on Article 18 of the 1945 Constitution, customary law communities and customary governance systems are recognized and run as they are (Husen et al., 2020b).

The existence of indigenous peoples with their values and legal norms is contained in Law Number 5 of 1960. The birth of the Law Number 5 of 1960 was due to the existence of legal dualism in the regulation of national land law, namely the existence of lands subject to Western law and lands subject to customary law (Ayudiatri & Cahyono, 2022). To eliminate this dualism in Indonesian land law, the Law Number 5 of 1960 was enacted, thus creating a national land law. The concept used in Law Number 5 of 1960 related to agrarian law is not interpreted in a narrow sense, namely in the form of land alone, but also understood in a broad sense, namely agrarian law is understood as the earth, water and space (BARA) because the Law Number 5 of 1960 is an embodiment of Article 33 section (3) of

the 1945 Constitution. The explicit recognition of the acceptance of the concept of customary law is contained in Article 3 of [Law Number 5 of 1960](#), which regulates that:

“In view of the provisions of articles 1 and 2, the implementation of the ulayat rights and other similar rights of adat law communities, as long as such communities in reality still exist, must be such that it is consistent with the national interest and the State’s interest and must not contradict the other Laws and regulations of higher levels.”

The existence of customary law communities is also contained in Article 5 of [Law Number 5 of 1960](#), which regulates that:

“The agrarian law applicable to the land, water, and airspace is adat law as far as is not contrary to the national’s interest and the State’s interest, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Law, nor to other legislation, all with due regard to elements which are based on religious law.”

The use of the concept of customary law in the control of natural resources is a major advance in the context of legislation in Indonesia ([Nuraini & Yunanto, 2023](#)). On the other hand, these customary societies have been the foundation for the establishment of indigenous kingdoms, colonial powers and the Indonesian republic. The kingdoms may disappear, the colonial powers may fall and the unitary state of the Indonesian republic may be abolished, but the customary law communities will continue to exist.

It is clear that these customary law communities are more entrenched in the motherland. Therefore, it is the duty of the Republic of Indonesia to nurture, nourish and remember the countryside. The existence of customary law communities is found in Chapter XII on Village Community Institutions and Village Customary Institutions and Chapter XIII on Special Provisions for Customary Villages of [Law Number 6 of 2014](#) ([Hermawan et al., 2022](#)). In this case, Article 96 of [Law Number 6 of 2014](#) regulates that:

“The Government, Provincial Governments, and Regency/Municipal Governments shall organize indigenous communities and officially establish them as Customary Villages.”

The idea of autonomy as an alternative to a federal state has been around since independence. During the drafting of the 1945 Constitution, autonomy was one of the main points of discussion and was later included in the 1945 Constitution ([Asshiddiqie, 2004](#)). In this case, Article 1 point 12 of [Law Number 32 of 2004](#) explains that:

“A village, or what is known by another name and hereinafter referred to as a village, is a legal community entity with defined territorial boundaries, which has the authority to regulate and manage the interests of the local community based on local origins and customs that are recognized and respected within the governance system of the Unitary State of the Republic of Indonesia.”

Article 2 section (9) of [Law Number 32 of 2004](#) regulates that:

“The state recognizes and respects the units of indigenous legal communities along with their traditional rights, as long as they are still alive and in accordance with the evolution of society and the principles of the Unitary State of the Republic of Indonesia.”

The enactment of [Law Number 23 of 2014](#), which contains regulations on village autonomy, there is hope to empower the region, especially the existence of indigenous peoples. As required, village autonomy will be returned to its origin, namely customary government. This is one of the moments for the rise of customary law in the reform era. This law does not clearly state the existence of indigenous peoples, but in Article 371 of [Law Number 23 of 2014](#) regulates that:

- (1) Villages may be established within regency/municipal areas.
- (2) The villages referred to in section (1) have authorities in accordance with the provisions of the legislation concerning villages.

In this case, Article 1 point 43 of [Law Number 23 of 2014](#) explains that:

“A village, referred to as a village and customary village or by other names, hereinafter called a Village, is a legal community entity with defined territorial boundaries, authorized to regulate and manage governmental affairs, local community interests based on community initiatives, ancestral rights, and/or traditional rights that are recognized and respected within the governance system of the Unitary State of the Republic of Indonesia.”

The existence of customary law communities in relation to the protection of the human rights ([Salam, 2023](#)) is contained in Article 6 of [Law Number 39 of 1999](#), which regulates that:

- (1) In order to uphold human rights, the differences and needs of indigenous legal communities must be taken into consideration and protected by the law, public and the Government.
- (2) The cultural identity of indigenous legal communities, including ulayat land rights, must be protected, in accordance with the development of the times.

Based on the explanation above, it can be connected with the Constitutionality of Customary Courts in Dispute Resolution in Indigenous Peoples (Muhdar et al., 2023). *First*, the term “customary court” has also been recognized before Indonesia’s independence, at least through legislation during the Dutch East Indies Government. At that time, five types of courts were known, namely the Gubernement Court (*Gouvernementsrechtspraak*), Indigenous Court or Customary Court (*Inheemsche Rechtspraak*), Swapraja Court (*Zelfbestuurrechtspraak*), Religious Court (*Godsdienstige Rechtspraak*) and Village Court (*Dorpjustitie*). The existence of customary courts dates back to the Dutch colonial era. These courts were regulated in Article 130 of the *Indische Staatsregeling*, a basic regulation of the Dutch government which stipulated that in addition to the courts established by the Dutch government, indigenous courts were recognized and allowed to exist in the form of customary courts in some areas directly under the Dutch East Indies government and *Swapraja* courts.

Second, Article 1 point (2) of *Emergency Law Number 1 of 1951* regulates that the Minister of Justice is mandated to gradually abolish two courts, namely all *Swapraja* Courts (*Zelfbestuursrechtspraak*) and all Customary Courts (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*). The policy of abolishing adat courts was followed during the Soeharto era, through Article 39 of *Law Number 14 of 1970* which regulates that “*the abolition of Customary and Swapraja Courts shall be carried out by the Government.*” In its General Elucidation, explains that the abolition “... *in no way intends to deny the unwritten law, but will only transfer the development and application of the law to the State Courts.*” Nevertheless, with the law, practically, only the formal judiciary remained.

Third, the jurisdiction of customary courts has its own characteristics that distinguish it from state courts, because customary courts can cover public, private and or a combination of both in one trial. In practice, it can be very informal, using mediation mechanisms, with room for negotiation of the process. That is why defining or even determining the jurisdiction of customary courts, especially regarding private or public matters, is really not an easy thing, or even impossible or dangerous in the sense that it can bury the existence of customary justice itself. Customary justice, which utilizes customary law and or legal systems, actually has its own system logic and principles.

Fourth, the context of state institutions exercising judicial power, such as the Supreme Court of the Republic of Indonesia, has launched a number of judicial reform programs in its Blueprint 2010-2035. Unfortunately, the document pays little or no attention to the relationship between judicial power and customary courts. Nevertheless, the Supreme Court has now opened a space to explore dialogue to discuss the issue of customary justice, as jointly initiated between

HuMa Association and the Supreme Court Research and Development Agency, at Royal Kuningan, 10 October 2013. In BPHN's research notes, there are several reasons for the need to encourage non-litigation dispute resolution processes through customary justice in dispute resolution. In Indonesia, peaceful dispute resolution procedures have long been and are commonly used by the Indonesian people. Several studies have also shown this. The reasons are, among others:

1. Limited community access to the existing formal legal system;
2. Traditional communities in isolated areas basically still have strong legal traditions based on their traditional laws in solving legal problems that occur. This is a reality where tradition or custom still prevails in many places. It is also a reality that societal change is sometimes bounded by territorial boundaries, and that there are areas that are still "sterile" or untouched by the applicability of the formal legal system.
3. The type of problem solving offered by the formal legal system is sometimes viewed differently and is considered inadequate and does not fulfill the sense of justice of people who still hold their own legal traditions
4. The inadequacy of the infrastructure and resources of the formal legal system has led to a lack of adaptability in absorbing the needs of the local community's sense of justice.

Fifth, the fundamental principles of the implementation of adat courts, which should not be ignored in the process of implementation, as stated in the BPHN study. There are three principles, namely the principles of local wisdom, social justice and human rights:

1. The principle of local wisdom. This principle bases its implementation on traditions that have been maintained and widely accepted in the indigenous community for generations. Local wisdom is recognized as a very important part of community life as a basis for social interaction as well as a marker of morality that is recognized as a local belief. For example, the wisdom to "rest the land" in the Kaili indigenous community of Central Sulawesi, or the same wisdom in Bika Village, where the majority of residents are from the Dayak Kantuk tribe. However, the "rested" land is considered idle land, so in practice it is often sold or released to companies.
2. The principle of social justice. This principle prioritizes the realization of a sense of justice that is felt to be very important in the community where it applies, or something that has social significance. Social justice looks at "fairness" from the perspective of not only "law" and "law enforcement", but also the reach of a sense of justice for the wider community, whose considerations reflect social ideals.

3. Human rights principles. This principle includes the perspective of the universality of human rights, non-discrimination, equality, human dignity, not separating one human right from another (indivisible and interdependent), and placing state responsibility in efforts to promote and protect human rights. Of course, the measure is not merely human rights law as enacted in state regulations or laws, or international law, but rather prioritizes the philosophy of morality of rights.

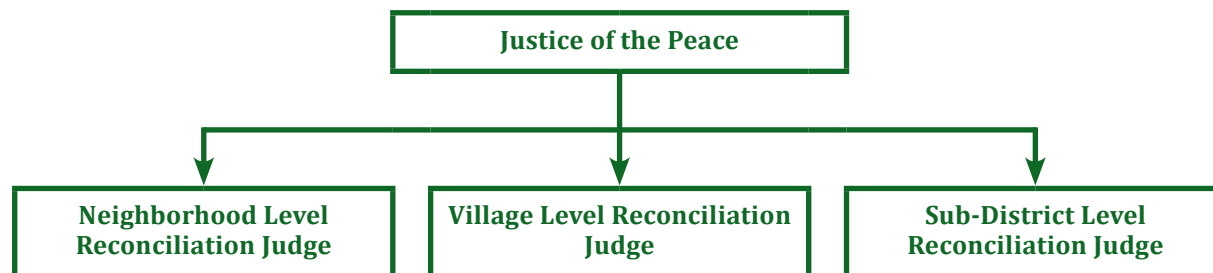
Sixth, in the Indonesian legal system, especially in the context of the constitutional structure, customary justice has strengthened its position because the political reality of decentralization has more openly provided space for local democratization, including the possibility of fostering broad civic political participation. The urge to give a stronger position to the operation of customary justice mechanisms does not necessarily make them automatically strong. In fact, it can be the opposite. The subjugation of state law to folk law, through the use of customary justice as a new legal instrument whose social empowerment is weakened (Bachmid, 2022).

B. Dispute Resolution Mechanisms in Indigenous Communities through Customary Courts in Tana Toraja Regency

Dispute resolution in indigenous communities through customary courts in Tana Toraja Regency is carried out by the Reconciling Judge. Reconciling Judges are Judges who have the duties, main points and functions to provide decisions in the judicial process at the Customary Court of the Indigenous Peoples of Tana Toraja Regency. Reconciling Judges are divided into 3 (three) levels, namely:

1. Reconciling Judge at the neighborhood level. The conciliatory judge at the Neighborhood level is a traditional leader and community leader including the RT whose duties, main tasks and functions are to resolve disputes in indigenous communities at the Neighborhood level.
2. Reconciling judge at the Lembang level. The reconciliatory judge at the Lembang level is the reconciliatory judge in the neighborhood (traditional leader) whose duties, main tasks and functions are to resolve disputes in indigenous communities at the Lembang level.
3. Reconciling Judge at the Sub-district level. The reconciliatory judge at the sub-district level is a reconciliatory judge who has the task, principal and function of resolving disputes in indigenous communities at the sub-district level.

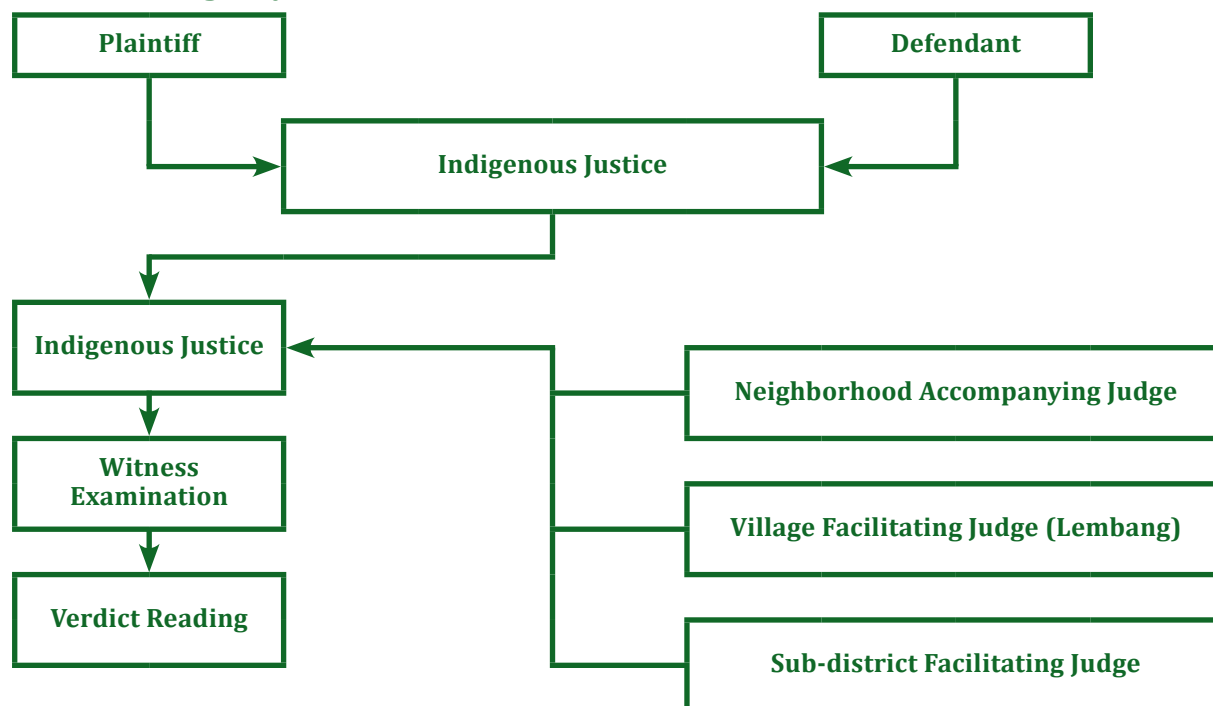
Figure 1. The Structure of the Reconciling Judge in the Tana Toraja Indigenous Community



Data Source: Processed by Researchers 2023

Based on Figure 1 above, that the Reconciling Judge in the Tana Toraja indigenous community has the same duties, main points and functions but differs in the scope of the task area. The dispute resolution system in the Tana Toraja indigenous community is carried out using a deliberation system even though it is in the form of a court. In resolving a dispute, the Reconciling Judge can resolve a dispute that occurs in the indigenous community.

Figure 2. Dispute Resolution System for Indigenous Peoples in Tana Toraja Regency



Data Source: Processed by Researchers 2023

Based on Figure 2 above, the dispute resolution system in the customary community of Tana Toraja Regency by determining a schedule that has been agreed upon by the parties and the reconciliation judge. The customary trial can be held at the house of the reconciling judge or at the house of one of the parties to the

dispute. In general, the trial is conducted in an open and brief manner (one day). If a dispute occurs in an indigenous community, it is resolved at the environmental stage first by the Reconciling Judge and 2 (two) ad hoc judges, namely the Head of the RT and community leaders. If the decision at the Environmental Court is deemed not to provide legal certainty for the parties, then the trial can proceed to Lembang (Village). At the Lembang level, dispute resolution is conducted by the Customary Judge and 2 (two) Reconciler judges.

If the decision at the Lembang Court is deemed not to provide legal certainty for the parties, then the Court may proceed to the Sub-district to resolve the dispute. If the decision of the Sub-District Court is deemed not to provide legal certainty for the parties, then the Court can proceed to the State Court system. Disputes that can be resolved in the customary society of Tana Toraja Regency are civil disputes (Zainuddin, 2022). On the other hand, criminal disputes that can be resolved are minor criminal disputes including maltreatment or beatings. Meanwhile, serious criminal disputes are resolved through the State justice system.

CONCLUSIONS AND SUGGESTIONS

The constitutionality of customary courts in resolving disputes in indigenous communities in Indonesia needs to be considered by taking into account the political context of the law, which is often characterized by various challenges. Policies related to natural resource conflicts still tend to prioritize economic aspects over environmental sustainability and human needs. Patterns of natural resource management that tend to be ego-sectoralism and overlapping regulations and protection of indigenous peoples' rights are part of the complex dynamics faced. On the other hand, dispute resolution mechanisms in indigenous communities in Tana Toraja Regency are carried out through customary courts run by Reconciler Judges at various levels, ranging from the Neighborhood, Lembang, to Sub-district levels. The reconciling judge leads the deliberation process between the disputing parties to reach a mutually acceptable agreement or decision. To improve the effectiveness of this system, it is recommended that the Government immediately issue a Legislation that clearly regulates customary courts to resolve disputes among indigenous peoples. In addition, the Tana Toraja Regency Government also needs to immediately establish the Position of the Reconciler Judge in the Tana Toraja Customary Justice System through an appropriate and detailed Regional Regulation. With these steps, it is hoped that dispute resolution in indigenous communities can run more efficiently and fairly in accordance with local needs and values.

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