



Traditional Law Principles in Dispute Resolution

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ABSTRACT

The research objective is to explore the Tolaki tribal customary principles in dispute resolution. The paradigm used in this study is the constructivism paradigm. Juridical sociological approach. Research data sources consist of primary data sources and secondary data sources. Using qualitative descriptive analysis. The results found that the Tolaki tribal customary law principle in dispute resolution is the Tolaki tribal customary law principle in dispute resolution, prioritizing the nature of kinship, using the basic values that are believed and used in the process of dispute resolution by not using a win-lose solution, but emphasizing the achievements based on consensus and based on the interests of the parties in order to achieve a win-win solution. The principle in settling Tolaki customary law disputes is carried out voluntarily, through deliberations that take the form of negotiation and mediation. Customary leaders carry out their functions as negotiators, mediators and traditional judges. These three approaches are jointly carried out in resolving private and public disputes. Customary leaders in resolving disputes do not have to have permission from the disputing family because with the authorities they can force the parties to settle by deliberation or make decisions based on customary law of the Tolaki tribe, if negotiation and mediation efforts do not produce results.



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Introduction

Indonesian Muslims have long longed for a bank that operates in accordance with Islamic law. K.H Mas Mansur, chairman of the Muhammadiyah Executive Board from the period 1937-1944 had outlined his opinion about the use of Conventional Bank services as a thing that must be done because Muslims do not have their own bank that is free of usury. Then it was followed by an idea to establish Islamic banks in Indonesia that actually had emerged as mid-1970s. This discourse was discussed at the national seminar on Relations between Indonesia and the Middle East in 1974 and in 1976 in an international seminar conducted by the Institute for Social Sciences Studies (LSIK) and the Bhineka Tunggal Ika Foundation. But there are several reasons that hinder the realization of this idea, namely: The operation of Islamic banks that apply the principle of profit sharing has not been regulated, and because it is not in line with the prevailing Banking Basic Law, namely Law No. 14 of 1967. The concept of Islamic banks in terms of politics is also considered ideological connotation, is part or related to the concept of an Islamic state, therefore the government does not want. At that time, it was still questioned, who would be willing to put up capital in such a

venture, while the establishment of new banks from Middle East countries was still prevented, among others by the policy of limiting foreign banks to open branch offices in Indonesia.

Judges are given the task of receiving, examining, deciding and completing each case submitted. Procedural law is basically a legal rule that regulates how to ensure compliance with material law by means of a judge, meaning how to file a lawsuit, examine, decide and implement a decision enforced by a judge.

The Tolaki tribe is the largest ethnic group in Southeast Sulawesi Province. The Tolaki tribe is an ethnic group that lives in the Southeastern peninsula of Sulawesi. The Tolaki tribe is spread across 7 Regencies / Cities of Southeast Sulawesi which include Kendari City, Konawe Regency, South Konawe, North Konawe, Kolaka, North Kolaka and East Kolaka. The Tolaki people have had traces of civilization since prehistoric times. Dispute resolution through the Tolaki tribal customary institution is still valid and effective and is adhered to by individual units both who live in villages and live from traditional farming as well as those who live in cities. The existence of legal principles in the customary law of Tolaki in providing decisions on dispute resolution is a reason for the parties to prefer to settle disputes through the Tolaki custom. The decision of the customary institution is felt to be the best decision because it is in accordance with their values, namely the truth, so that the implementation of the decision is carried out with full awareness and does not require an executor. The State of Indonesia is a constitutional state as mandated in the 1945 Constitution of the Republic of Indonesia as stipulated in Article 1 paragraph (3). This provision has been used as a constitutional basis, in the sense that every state administration must be based on the provisions of the applicable law. The source of national law is based on written provisions (state law), in the sense of law made by the state which consists of statutory regulations. Meanwhile, sources of state law that are not made by the state (non-state law) such as religious law, customary law, customary law also have binding power to every Indonesian citizen.

The existence of customary law and customary law communities has begun to be pushed back by national legal regulations. Customary law is only a complementary law to the national legal system in Indonesia (Sahalessy, 2011). The urgency to conduct research on the Revitalization of the Tolaki Tribe Customary Law Principles in Dispute Resolution outside the Justice Value-Based Court is:

The settlement of disputes in the national legal system is regulated in Article 24 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which determines that Judicial power is an independent power to administer the judiciary in order to enforce law and justice. Paragraph (2) of the article further determines that judicial power is exercised by a Supreme Court and the judiciary under it within the General Court, Religious Courts, Military Courts, State Administrative Courts and by a Constitutional Court (Hakim, 2015).

As a result of the weaknesses in the settlement of litigation disputes, and thoughts to resolve disputes in a simple, fast, and low cost, and contain fairness values, then give birth to thoughts on dispute resolution through non-formal processes (non-litigation). In particular regarding the settlement of civil cases, through Law Number 48 of 2009, which previously

had also been regulated in the provisions of Article 3 Paragraph (1) of the Elucidation of Law Number 4 of 2004, which provides alternative opportunities for peaceful dispute resolution outside the usual courts. is called Alternative Dispute Resolution. The settlement of disputes outside the court was also previously regulated in Article 3 Paragraph (1) of Law Number 14 of 1970, which has become the legal basis for the formation of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. This study will analyze the principle of the Tolaki tribe customary law in resolving disputes outside the court.

Methodology

The method in this research is the normative-legal research approach, or according to Zainudin, it is called normative legal research or doctrinal legal research, namely legal research using secondary data. According to Soerjono Soekanto, normative legal research is legal research conducted by examining library materials or secondary data (Soekanto & Mamudji, 2010).

Results and Discussion

The Principles of Tolaki Tribe Customary Law in Out of Court Dispute Resolution

In line with the course of history, the development of human civilization, along with the arrival of foreign nations, there are interactions with each other, and from that interaction there are groups who think that customary law is outdated and no longer suitable for international relations so that it must be abandoned and those who argue that the customary law contains unseen things that are against religious values so that they must be replaced. However, history is also a witness that determines that customary law remains and lives in the conscience of its followers. This occurs because there is a belief that customary law is true and fair law, namely law that is in accordance with the socio-cultural values, mindset, and way of thinking of the people who support it (Rato, 2011).

Recognition and respect for the rights of indigenous peoples is actually not only a national issue, but also has long been an international concern and in its development, recognition and respect for the rights of indigenous peoples have continued to increase. This was seen at one of the peaks of respect for the rights of indigenous peoples in 1993 with the stipulation of the Indigenous People Year by the United Nations (UN), which was a follow-up to a series of agreements on world conventions that emphasized the importance of state governance. UN members to immediately carry out empowerment of indigenous peoples (Sukardana, 2012).

In the social interaction of social life, there are other noble values which are the philosophy of life which are the customary principles of the Tolaki community, while the cultural philosophy of the Tolaki community is stated in a term or parable, including the following (Hakim, 2015):

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- a. O'sara (culture of being obedient and loyal to the decisions of customary institutions), the Tolaki community prefers to settle in customary ways before being delegated or submitted to the government in the case of disputes or social violations that arise in the Tolaki community, for example in land disputes, or harassment. The Tolaki community will respect and comply with every decision of the customary institution. This means that the Tolaki community is a society that loves peace and always chooses the peaceful way in solving the problems at hand
 - b. Kohanu (shame culture), the culture of shame has always been the core of self-defense of every individual in the Tolaki community which at any time, wherever they are and act are always guarded, maintained and maintained. This can be proven by the attitude of the Tolaki people who would be easily offended if they were said, lazy people, con artists, drunks, gamblers and poor, insulted, oppressed and so on. Shame Culture can be said to be a motivator for every individual in Tolaki society to always be more creative, innovative and motivated to always increase their respective resources to be at the forefront;

Merou (Understanding manners and social arrangements), this culture is a culture to always behave and behave in a polite and courteous manner, mutual respect for fellow human beings. Customary law as a legal system has its own pattern of resolving disputes. Law has a distinctive and unique character when compared to other legal systems. Customary law is born and grows from the community, so that its existence is compound and cannot be separated from the community. Customary law is structured and built on values, rules and norms agreed upon and believed to be true by the indigenous community.

Moreover, the settlement of criminal cases using a repressive approach as implemented in the Criminal Justice System has resulted in retributive justice, which is oriented towards retribution in the form of punishment and imprisonment. That the implementation of retributive justice is deemed to have not resulted in justice for all parties, especially victims (Prasetyo, 2012). Therefore, criminal sanctions are used when other sanctions are powerless (*Ultimumremedium*) (Rustan Syamsuddin, 2020).

Settlement of disputes in customary law communities is based on the view of life adhered to by the community itself. View of life is an objective view of the people in society about what and how the world and life is. Koesnoe stated that the view of life of indigenous peoples comes from values, mindsets, and norms which have given birth to the characteristics of indigenous peoples (Hardjasoemnatri, 2002).

Soerjono Soekanto based on the field of law according to the Western legal system divides the scope of customary disputes, namely (Soekanto & Mamudji, 2010):

- a. The law of customary tantric abuse
- b. Customary civil fraud laws
- c. Customary criminal law.

From the description above shows that the scope of customary disputes is all human actions that can disturb the balance with nature and the balance of human life. Thus, the scope of disputes according to customary law includes aspects of Constitutional, Civil and Criminal

law. In general, the Duties and Functions of the Tolaki Customary Institution in the Tolaki tribal community unit include the following (Hakim, 2015):

- a. Providing guidance to community members sourced from Kalosara as a symbol, when should behave in social life and the basis for such behavior is normative custom, namely custom and customary law;
- b. Maintain the integrity of the partnership in the community, so that the partnership is maintained and is not damaged by various actions of community members that are not in accordance with custom and customary law;
- c. Provide guidance to community members to establish a social control system. Social control is more of a control over the behavior of the community so that the life of the community can be maintained as well as possible;
- d. Paying attention to every decision that has been stipulated in customary law, so that the decision has authority and can provide legal certainty that binds all members of society;
- e. It is a place where community members rely to resolve, protect, ensure peace. Therefore, whenever there is a dispute, the Customary Institution is the only place the community members rely on to solve the problem. Apart from that, customary institutions have a more important role in maintaining the balance of the environment with one another, so that harmony and peace can be created in society. Therefore, any disturbance of balance in society must be prevented and restored, either by means of payment in the form of material or immaterial.

Mechanism is a method, process or stages and steps from beginning to end in dispute resolution by Tolaki Customary Institutions. Procedures and mechanisms for dispute resolution through the Tolaki customary institution, in general, consist of negotiation, mediation and customary courts. For clarity, below, the characteristics of each dispute settlement carried out by the Tolaki Customary Institution will be presented below.

The following will describe each procedure and mechanism as follows:

- a. The law of customary civil fraud;
- b. Procedure for mediation in customary criminal cases.

In the mediation procedure for customary civil disputes, the role of the mediator Tolea Pabitara is to try to provide options for both parties in order to get the right solution for the settlement of customary civil disputes. A different matter is the role of the mediator in settling customary criminal disputes. Tolea and pabitara as mediators as well as elements of the Tolaki Indigenous institution do their best to reduce the anger of the families who have violated their customs so that there are no attempts to retaliate by providing insights which can then receive an apology from the customary violator.

Legal development in Indonesia, especially regarding the development of legal materials, must be directed at the formation of a national legal system which includes the structure, culture and substance of the law. The national legal structure that we build must be based on the basic norms (Grundnorm) which are used as guidelines by the Indonesian nation, namely Pancasila and the 1945 Constitution of the Republic of Indonesia. National law must inspire and inspire the provisions contained in both sources of all these sources of law.

Legal products that have been contradicting or even deviating far from the legal structure (source) deserve to be addressed immediately. Until now, not a few have found lower level regulations that conflict with higher regulations, even though the Pancasila and the 1945 Constitution of the Republic of Indonesia.

In Article 14 paragraph 1 of the Law on Judicial Power (Law Number 40 of 2009) it states: "Judges as court organs are considered to understand the law. Seekers of justice come to him to beg for justice. If he does not find written law, then he is obliged to explore unwritten law to decide based on the law as a person who is wise and fully responsible to Almighty God, himself, society, the nation and the State."

In the previous provisions of the Basic Law on Judicial Power, the unwritten law is the living law. The requirement for a reference to the laws that live in the community for judges to judge cases is very appropriate, because the decision will later be accepted by the community if it is based on the law that applies to them.

Conclusion

The principle of Tolaki tribal customary law in resolving disputes, prioritizes kinship, uses the basic values that are believed and used in the dispute resolution process by not using a win-lose solution, but emphasizes achievement based on consensus and based on the interests of the parties in order to achieve a win-win. solution. The principle in resolving Tolaki customary law disputes is carried out voluntarily, through deliberation which takes the form of negotiation and mediation. Customary leaders carry out their functions as negotiators, mediators and customary judges. These three approaches are jointly carried out in resolving private and public disputes. Customary figures in resolving disputes, there is no need for permission from the disputing family because the authorities they have can force the parties to resolve by deliberation or give decisions based on the customary law of the Tolaki tribe, if negotiation and mediation efforts do not produce results.

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