

# Comparative Study of the Customary Institutional Structure of *Ngata* Toro, Central Sulawesi, and Montesquieu's Legal Doctrine

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**Abstract.** The Republic of Indonesia was established on a unified territory of kingdoms and the original laws bounding them. Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia became the constitutional basis for formulating Law Number 6 of 2014 concerning Villages, accommodating both Customary Villages and Villages. At the local level, the ratification of the Decree of the Sigi Regent Number 189-324 of 2018 was a form of recognition and respect by the state for the existence of indigenous people living in *Ngata* Toro, Sigi region. As a customary village, *Ngata* Toro has a unique institutional structure based on local ancestral law. This study aims to explain the institutions in *Ngata* Toro's Customary Law compared to the infamous view of the Trias Politica by Baron de Montesquieu. A socio-legal method was employed by focusing on the study of legal anthropology to compare the institutional structure and functions of *Ngata* Toro to Montesquieu's doctrine. The results unveiled that institutions within *Ngata* Toro resembled Montesquieu's view regarding the separation of powers. Those institutions were *Topantale* (the legislative), *Topo Baha* (the executive), and *Topo Tangara* (the judges/judiciary), whose jurisdiction covered the entire territory of the *Ngata* Toro customary land.

## 1 Introduction

The indigenous population originated in the earliest human communities when rules and norms were formed to control behavior and preserve social order. It was rooted in the prehistoric era when human groups first established laws governing conduct, such as marriage, property ownership, and dispute settlement. These customary laws (customs) evolved into more formal legal systems as societies advanced and grew more sophisticated. Numerous elements, such as colonization, culture, and religion, have influenced customary laws. For instance, indigenous people's traditional religious beliefs and practices have shaped customary laws in many African countries. Moreover, colonialism and the adoption of Western legal systems have also affected customary laws in other areas, such as the Pacific Islands [1].

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Customary laws' effect on society will ultimately hinge on several variables, such as the community's unique context and needs, the degree to which they are linked with formal legal systems, and the amount of regulation and oversight in place. The preservation of local customs and cultural practices must be balanced with the defense of human rights and the advancement of social justice. Indonesia's Central Sulawesi possesses a complex and hierarchical system of customary laws, supported by traditional leaders and elders and is based on local cultural and social norms. Customary laws are still known as one of the sources of the legal system in the local context.

Unfortunately, the discussion regarding To Kulawi Moma and *Ngata* Toro from the law science perspective is minimal. Several publications discussing *Ngata* Toro include a thesis written by Imam Sofyan [2] and journals by Abdul Jaelani P, Andi Purnawati, and Maisa [3], Rahmat Hidayat [4], Zumrotin Nisa' [5], Arto Oktavianto, et al [6], and Asri Lasatu et al [7]. The inquiry into details on the customary institutional structure of To Kulawi Moma has never been published before. Following the mandate of the 1945 Constitution of the Republic of Indonesia, it is an essential record of the efforts to recognize and protect indigenous people. This paper aims to complement previous research on To Kulawi Moma and *Ngata* Toro by discussing the customary institutional structure and comparing it with the popular view of Montesquieu in his masterpiece entitled *The Spirit of the Law*.

Moreover, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, was one of the finest political philosophers of the Enlightenment. He accurately explained the various forms of governance and the elements aiding or impeding their development. He utilized this example to demonstrate how corruption in governments should be avoided. He believed that any non-tyrannical administration is constantly threatened by despotism. He further argued that the best way to prevent despotism is to have a system in which numerous institutions possess legislative, executive, and judicial power and are all subject to the rule of law. The United States of America's founding fathers and liberal political theory were greatly influenced by his doctrine of the separation of powers [8]

Indigenous institutions significantly impact how societies construct their social, cultural, and legal systems. These organizations have strong roots in age-old traditions handed down through the centuries. Understanding indigenous institutions is essential to comprehend how complex governance systems function and how they interact with state power. Montesquieu's concept of indigenous institutions and the indigenous community's viewpoint were contrasted in this comparative research to explore indigenous institutions from certain angles. This paper explored how the indigenous community interacts within its chosen institutions, upholds its sense of customary autonomy, and governs itself.

This research was conducted in *Ngata* Toro, the Sigi Regency, Central Sulawesi, Indonesia. Both primary and secondary legal materials in normative legal research were employed. Primary legal materials were sourced from legislation on local regulations, particularly the 1945 Constitution of the Republic of Indonesia, Indonesia's Village Law Number 6 of 2014, and the Decree of the Sigi Regent Number 189-324 of 2018, and the indigenous community of *Ngata* Toro by interviewing influential figures of To Kulawi Moma. The secondary legal materials included legal principles, theory, and doctrine. Observation, interviews, and literature review were utilized to collect data. Subsequently, the obtained data were analyzed descriptively and qualitatively to explain the institutional structure of the indigenous community of To Kulawi Moma compared to Montesquieu's popular view.

## 2 The Existence of the Indigenous Community in the Sigi Regency

*Ngata* Toro is a village in the Sigi and Poso Regencies, Central Sulawesi's administrative area. According to the demographic history of *Ngata* Toro, the current population consists of three dominant groups: the Moma people as the native inhabitants making up the majority, followed by the Rampi and Uma people as ethnic immigrants with quite significant numbers [9]. This paper explicitly discusses the To Kulawi Moma community regulated in Sigi Regent Decree Number 189-324 of 2018.

In the Kulawi language, "Toro" means "remnants". This concept designates a region that becomes a wilderness due to a long period of abandonment by its residents. Approximately 500 years ago, a population shifted from Malino (an area bordering the Behoa sub-ethnic group in the Poso Regency) to Toro. This relocation occurred due to the pressures of warfare with another tribe. The displaced families, totaling seven households, sought refuge and temporarily stayed in various places. Before settling in *Ngata* Toro, this group temporarily stopped and stayed in several places. Initially, they resided in Balinggi, a sub-district in the Parigi Moutong Regency. In Balinggi, the group grew to comprise 11 households. Then, they moved to their second transit location, Kulawi, after a long journey through Poboya (Palu City), Bora, Tuwa, and Namu (Sigi Regency). With the permission of a nobleman from Kulawi named Balu, this group was allowed to settle in a wilderness area called Kau Awu. They hoped to manage the area as a means of sustenance. When this area became part of the Sigi Regency in 2008, the Toro people administratively occupied two regencies in Central Sulawesi: Poso and Sigi [9]. The Sigi Regency was the result of division from the Donggala Regency.

It is crucial to recall that constitutional clauses and historical settings have influenced how indigenous communities have evolved. The 1945 Constitution of the Republic of Indonesia, specifically Article 18B paragraph (2), has stipulated that the state recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and follow the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law [13]. Therefore, indigenous communities are not only a matter of social welfare but also have a constitutional basis reflecting the principles of unity and local autonomy.

Autonomy is one of the front lines in safeguarding the unity of the state, bearing the burden and responsibility of implementing democratic governance based on the rule of law to realize equal prosperity, welfare, and justice in the economic, political, and social spheres, while respecting and upholding the differences between regions, be it in terms of social, cultural, economic, geographical, and other aspects. Recognizing these differences is crucial to demonstrate that the presence of regions remains crucial amidst the demands for unity. The late Sudiman Kartohadiprodjo referred to it as "unity in diversity and diversity in unity" [10]

Article 18B paragraph (2) formed the constitutional basis for subsequent arrangements in the Village Law Number 6 of 2014, including the "traditional village" term as part of the substance of its regulatory norms. In this legislation, "traditional village" is defined in the same sense as "village," or whatever other names call it. It refers to a unit of community that has boundaries with authority to regulate and manage the affairs of government, the interests of local communities based on community initiatives, the right of the origin, and/or traditional rights recognized and respected in the system of government of the Republic of Indonesia [11]

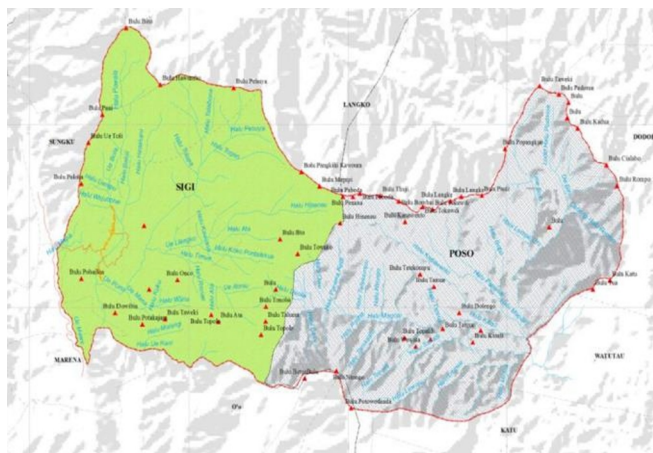
Chapter XII of the Village Law regulates village community institutions and traditional village institutions. This law provides authority to the government, provincial regional government, and regency/city regional government to carry out the arrangement of

customary law community units determined to become traditional villages, which must first fulfill specific requirements. The requirements are written in Article 95 that the village government and the village of traditional institutions can form village institutions. Indigenous village institutions perform custom functions and become part of the original composition of the village, growing and developing on the initiative of the village community. It is assigned to assist the village government and as partners in empowering, preserving, and developing customs as a form of recognition of the customs of the village community.

The legal norm of this regulation emphasizes that villages can form their institutions whose job is to assist the implementation of local governance at the village level. Furthermore, Article 115 of the same law stipulates that guidance and supervision by regency/city governments are also carried out to organize education and training for village governments, village consultative councils, community organizations, and customary institutions, as well as giving awards for achievements in the implementation of village government, consultative body villages, community institutions, and customary institutions. Thus, customary institutions have become a significant part of the village government structure in Indonesia.

At the local level, the Decree of the Sigi Regent Number 189-324 of 2018 is a specific norm regulating the recognition of the To Kulawi Moma community living in the *Ngata Toro* area, the Sigi Regency, Central Sulawesi. This regulation states that the *To Kulawi Moma* customary territory in *Ngata Toro* has an area of 23,860 hectares, with the following boundaries: Lindu District in the north, South Kulawi District in the south, North Lore and Central Lore Districts, the Poso Regency, in the east, and the Kulawi District in the west.

Customary territory recognized by the Sigi Government only applies to the *To Kulawi Moma* customary territory in *Ngata Toro*, which is part of the administrative area of the Sigi Regency, covering an area of 11,680 hectares.



**Fig. 1.** Map of Customary Territory belonging to *To Kulawi Moma* in *Ngata Toro*

The customary territory has traditional land use in the following areas.

- a. *Lida* (rice fields) covers an area of 386.3 hectares.
- b. *Oma* (former arable land) has an area of 3,040 hectares.
- c. *Pangale* (young forest) covers an area of 3,202 hectares.
- d. *Wana* has an area of 14,740 hectares.
- e. *Wanangkiki* (jungle forest) covers an area of 2,490 hectares.

According to their origins, the Toro people divided forest areas in their customary territory into six categories.

1. *Wana Ngkiki* is a forest area at the top of the mountain, away from human settlements, and is a critical core area because it is considered a source of fresh air (*winara*). This area is unmanageable and does not have individual ownership rights (*dodoha*). Traditionally characterized by not large trees with not much grass, many mosses are found on the forest floor and tree trunks up to the branch with cold weather and is a habitat for several types of birds.
2. *Wana* is a forest area with no agricultural activities in it. For the people of Toro, *wana* is a habitat for the growth and breeding of rare animals such as anoa (*Lipu*) and deer pig (*dolodo*), as well as a buffer function of the water source. *Wana* only extracts non-timber forest products, such as gum resin, medicines, rattan, and fragrances. Private ownership (*dodoha*) of the area only applies to resin trees growing in it, where ownership depends on who comes first to manage it. The rest is a collective right, as part of living space and the traditional management area (*huaka*).
3. *Pangale* is a forest area located in the mountains and plains and includes a transitional category between primary and secondary forests. Generations of predecessors formerly oversaw some of these areas, and now natural succession is taking place. For the Toro people, it is a reserve land prepared for farms on slopes and paddy fields on flat areas. With permission from the customary institution or the village government, the community can utilize this area to collect wood, rattan, resin, and forest pandanus for household needs.
4. *Pahawa Pongko*, included in the *pangale* category, is a former farm abandoned for over 25 years, almost resembling a secondary forest. The trees have grown large; if one wants to cut them down, he can use “*pongko*”. *Pongko* is a footrest made of wood placed higher than the ground to cut trees freely, whereas *pahawa* means changing or changing this area; it is excluded in private ownership, except for the damar tree.
5. *Oma* refers to a former farming land often cultivated and widely employed for coffee, cocoa, and other annual crops. This area has private property rights (*dodoha*) that cannot be claimed as collective ownership (*huaka*). *Oma* is classified based on its utilization age, consisting of three types.
  - a. *Oma Ntua* is a former old garden land abandoned for 16-25 years. The succession age is relatively old, causing the soil fertility to recover. *Oma Ntua* is ready and can be managed back into farms.
  - b. *Oma Ngurah* means a former young plantation area abandoned for 3-15 years. The succession level is still forest type, which is more accessible than *Oma Ntua*. The trees are relatively small and can be cut only with a machete. It takes the shape of a scrub and is distinguished by a profusion of grass.
  - c. *Oma Ngkuku*, a former farm between one and two years old, is distinguished by the presence of grass.
6. *Balingkea* refers to a six-month to one-year-old former garden land, causing a decrease in soil fertility. Nevertheless, this land is still often actively cultivated, with soil fertility sufficient to plant crops such as maize, cassava, beans, pepper, and vegetables.

The *oma* and *balingkea* land categories are included in private property rights (*dodoha*).

### **3 Comparative of the Customary Institutional Structure of *Ngata Toro*, Central Sulawesi, and Montesquieu's Legal Doctrine**

The Trias Politica concept, a legal theory by Montesquieu, proposed the division of political authority within the state into three separate powers: the legislative, executive, and judicial [15]. Montesquieu argued that these authority divisions and independent operations are necessary for the best protection of individual liberty. As a result, the separation of powers refers to dividing governmental duties into distinct branches, preventing one department from interfering with another's fundamental duties. The primary objective is to prevent the concentration of power and create systems for shared supervision. This framework works to prevent overwhelming dominance by any one branch of government by constructing a structure with many branches of authority.

The arrangements of the legislative, executive, and judicial processes in modern constitutional systems are highly distinct. Hence, the doctrine has lost much of its rigidity and dogmatic purity. The 20<sup>th</sup> century saw an expansion of executive power due to governmental participation in many facets of a nation's social and economic life. This tendency picked up speed following the end of World War II. Instead of attempting to reassert the idea of the separation of powers, some people concerned about the impact of development on individual liberty suggested creating channels for challenging executive and administrative decisions (for example, through an ombudsman commission).

However, the relevance of the division of powers has altered significantly since Montesquieu's time, at least in the following three ways.

1. Limiting the state's authority to just three is no longer relevant. There are now new ways to distribute public power. The growth of federal systems has entailed expanding the primary functional separation of power to include a territorial allocation of authority (in the range of the federal and federated state governments). In addition, new centers of power not anticipated by the traditional three-power structure have emerged, such as the establishment in numerous nations of a Constitutional Court distinct from the Supreme Court, an independent electoral system, an Ombudsman or Administrative Court with independent authority, as well as the popularity of a new power, the public prosecutor, which is independent of the executive power in numerous countries.
2. It rapidly became evident during the evolution of constitutionalism that it was difficult to maintain a strict and radical division between the three fundamental powers, leaving each entirely isolated and autonomous from the other two. Eventually, it would suggest that each branch would have complete control over its sphere to the point that the others would be powerless to impose any restrictions. Due to the mechanisms of mutual control and cooperation that constitutional systems have built across the three government departments, the degree of their separation and how they interacted with one another changed significantly among constitutional systems. Additionally, the growth and development of political parties have dramatically changed how the executive and legislative branches are separated from one another, particularly under parliamentary systems where the executive power is dependent on the support of a parliamentary majority.
3. A third factor has prompted questions about whether the premise of the separation of powers is still sound. Democracy is the hallmark of contemporary constitutional systems. The constitutional arrangements that formerly allowed for the coexistence of the royal power, the traditional nobility represented in the Senate, and the democratic authority represented in an Assembly have all been abolished. The separation of powers was applied in those times to strengthen the many centers of power, most notably to ensure the elective Assembly's authority over the Monarch.

However, even under today's systems where some aspects of traditional authority still exist (such as the *Ngayogyakarta Hadiningrat Sultanate* in Yogyakarta or *To Kulawi Moma* of *Ngata* Toro), their characteristics are changed and stem primarily from ceremonial remembrance of the past. The separation of powers under the current popular democratic systems has fundamentally altered the monarchy system of government. These alterations have affected state institutions' composition based on how they were formed and their authorities.

State institutions could be legislative, executive, judicial, or mixed [16]. At the national or central level and in regions, state organizations and governments have been escalating in today's development. Therefore, the classic *Trias Politica* doctrine is attributed to Montesquieu's view that the three functions of state power must always be reflected in the three types of state organs. It is often seen that they are not relevant again for reference. However, due to the influence of Montesquieu's ideas highly profoundly on the way many scholars think, it is often extremely difficult to escape from the notion that the state's institutions are always associated with the three branches of the organ apparatus of the state. The concept of state institutions also has to relate to the three branches of power.

Three traditional institutions have performed their functions in the *To Kulawi Moma* community, living in *Ngata* Toro. The relationship between customary government and society lay between those who rule and those who are governed. The community has voluntarily respected and obeyed various customary rules these three customary institutions imposed. The institutions encompassed *Topantale*, *Topo Baha*, and *Topo Tangara* [14].

These three institutions were filled through an election method involving the *To Kulawi Moma* community members. The selected figures were well-known community leaders based on their leadership and personal abilities. There were magical and cosmic elements (macrocosm and microcosm) involved in the selection, and it was under *To Kulawi Moma's* view that there is a holy trinity (God-nature-human) whose balance must be maintained for the welfare and prosperity of society. Their understanding of the holy trinity influenced their mindset toward customary tradition, maintaining social order and protecting nature. It is in line with the religious understanding of power, asserting that power originates from a supernatural realm, is supernatural, and can be possessed by a person because he can contact that supernatural realm. This supernatural power comes from the divine realm [12].

The first institution, *Topantale*, was the legislators formulating and agreeing on the customary rules applied to *To Kulawi Moma*. The customary rules could be ceremonial or formal and enforced through deliberation. The ceremonial rules agreed upon by *Topantale* became the basis for carrying out various traditional ceremonies by *To Kulawi Moma*. In addition, formal rules became a behavior guideline for the *To Kulawi Moma* community. For instance, local people and outsiders complied with regulations prohibiting the logging of trees in the Core Zone of customary forests.

The second institution, *Topo Baha*, was the executive in charge of performing various customary rules agreed upon by *Topantale*. In filling its positions, prospective members of *Topo Baha* went through direct observation by the public before being elected. This observation included procedures for speaking, expressing opinions, making decisions, and dealing with the public. The authority of *Topo Baha* was evident in various *To Kulawi Moma* traditional ceremonies, such as the marriage ceremony or death ritual.

The third institution, *Topo Tangara*, carried out its law enforcement duties by holding a trial at the *To Kulawi Moma* community's traditional house, *Rumah Lobo*. Customary sanctions (also known as *givu*) could be imposed by *Topo Tangara* on the litigating parties. The provisions of Article 103 letters d and e of the Village Law state that customary dispute resolution is based on customary law in force in traditional villages in areas being in harmony with the principles of human rights by prioritizing settlement after deliberation and convening a peace trial in traditional village courts under the provisions of laws and

regulations. This regulation is consistent with the decision-making mechanism performed by Topo Tangara, which was through the deliberations.



**Fig. 2.** Rumah Lobo, the traditional house in *Ngata Toro*

The Decree of the Sigi Regent Number 189-324 of 2018 also acknowledges the existence of customary courts held by customary institutions in resolving disputes in the customary territory of *To Kulawi Moma*. It is an example of how local government accommodated the principle of recognition of indigenous people as stated in the constitution. This decree encourages the role of indigenous people concerning social life and natural resources by prioritizing the principle of respect toward collective spirituality, social justice, gender equality, environmental sustainability, and human rights. It follows the constitutional mandate stipulated in Article 18B, paragraph 2 of the constitution.

The transformation of Trias Politica since the age of Montesquieu has influenced the composition of power in the state reflected in its institutions. Hence, there was a distinctive structure of state institutions in every political society globally. It was also reflected in indigenous people's bond in *Ngata Toro*, especially the *To Kulawi Moma* community. As previously mentioned, three customary institutions of *To Kulawi Moma* held their respective functions and roles in social and community life, influencing how *To Kulawi Moma* treated nature and fellow human beings. A comparison of Montesquieu's view and *To Kulawi Moma's* customary institutions revealed that both adopted the division of duties among several government departments. While Montesquieu separated the functions to avoid centralization and abuse of power, the *To Kulawi Moma* community separated these functions to fulfill the balance between their holy trinity of God-nature-humans, which they believed was reflected in how to fill the positions of each of these traditional institutions.

## 4 Conclusion

According to Montesquieu, a state has legislative, executive, and judiciary functions. These three functions were also described in the customary structure of *To Kulawi Moma* in *Ngata Toro*, encompassing *Topantale* (the legislative), *Topo Baha* (the executive), and *Topo Tangara* (the judges/judiciary). All three bodies of jurisdiction covered the entire territory of the *Ngata Toro* customary land. Further inquiries are necessary to map the interaction of customary and state institutions, especially in law-making and law enforcement.



## 5 Acknowledgement

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