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Legal Status of Customary Communities, Customary Law Communities and Indigenous Communities as Custom Law Subjects

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Abstract

The goal of this study is to examine the legal-statutes of the unity of the adat-law community (customary community) and adat-community as the subject of adat-lawThis is a socio legal research and employed a reflective approach, this study is result and discussion: the result of the reflection base on research conducted in various regions or areas as adatlaw legal-fields and is supported by the writings of researchers, observers, adatlaw and indigenous people activists. The basic concept of this paper is to say that the legal-statutes of the unity of adat-law communities, adat law communities, and adat-communities as the subject of adat law as stated in Article 18 B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia are identical. However, the legal-statutes of the unity adat law communities, adatlaw community, and adat-community needs to be discussed. This discussion was initiated so that the unity of adat-law communities, adat-law communities, adat-communities were not identical. Therefore, it is important to discuss this paper with the aim of clarifying the legal-statutes of the unity of adat-law communities, adat-law communities, and adat-communities as the subject of adat-law.

Keywords: *Legal-Statutes, Customary Law Communities, Customary Law Subject, Indonesia.*

Introduction

Before starting this discussion with a number of terms as a translation of the word "rechtsgemeenschap", it is necessary to first understand why this term is used. In customary law books, several terms are put forward which are translations of the term Rechtsgemeenschap by Van Vollenhoven, such as customary law community, legal alliance, customary law alliance and indigenous peoples. Article 18B paragraph (2) of the Constitution of the Republic of Indonesia (1945) uses the term "customary law community unit" (Zuhraini, 2014).

The term Rechtsgemeenschap consists of 2 (two) words, namely rech and gemeenschap. The expression Gemeenschap was used by the German Ferdinand Tönnies (Tönnies, 1887). Ferdinand Tönnies divides society into two (two) categories, namely gemeinschaft which means association or community, and gesellschaft which means Patembayan community or society. It is possible that Van Vollenhoven used the term Gemeenschap combined with the word recht to comerechtgemeensach to describe community-based customary law communities, which is very appropriate. It says "is a possibility" because no written source has been found (Varon, 2011).

In general society (not academic society), the terms customary law community unit, customary law community and customary law community appear identical. However, among the academic community, these expressions must be studied and discussed scientifically to find scientific truths which in essence will be developed into legislation so that they become the technical language of legislation and can be applied in the life and life of the state until they are used as resolutions. Conflict (Priambodo, 2018).

Customary law as law generally has its own legal subject and legal object. The subject of customary law is understood as the holder of rights and obligations, while the subject of customary law is also the subject of

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the object of rights, which itself bears all obligations related to the enforcement of these rights. as a counterweight. As the inventor (science) of customary law, Van Vollenhoven also examines who is subject to customary law and what is the object of customary law itself (Vollenhoven, 1932). With that in mind, Van Vollenhoven developed the concept of Rechtsgemeenschap as a subject of customary law. Various customary law scholars have translated this language using various expressions such as customary law community, legal alliance, customary law alliance and indigenous peoples. Even the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) has also named it as customary law community units.

Although it does not intend to open controversy, this article provides space for discussion to find the legal position of customary law community units, customary law communities and customary law communities as subjects of customary law law, legal certainty, so that one concept can be used for all laws. For example, there are concepts that are often accepted and used and become the nomenclature of laws and regulations as an agreement. So far, no one has definitively stipulated that customary law units, customary law communities, or customary law communities are subject to customary law (Joesoef, 2020).

In the decision of the Constitutional Court. No. 35/PUU-X/2012 still creates confusion if examined more deeply, because in this decision the terms customary law community unit, customary law community, and customary law community are used interchangeably. Similarly, in several laws and ministerial regulations, the term "customary law community" is defined more broadly. This confusion indicates that the three terms are synonymous, especially between indigenous peoples and indigenous peoples entities. This has created confusion regarding customary land rights. On the other hand, in several laws (such as the Forestry Law, Plantation Law, UUPA, Coastal and Small Islands Law), common land rights are the subject of customary law communities, non-traditional law community units, and indigenous peoples (Decision of the Republic of Indonesia Court No. 35/PUU-X/2012, 2012).

The subject of customary law is discussed because it is important to include it in the law regarding their rights and obligations. The use of nomenclature in these laws and regulations is acceptable because the state adheres to "positivism" and as citizens must adhere to it. Based on this perspective, the unification of law in the form of legislation becomes logical (Jufri & Sjaiful, 2015).

However, we also hope that legal harmonization in the form of legal regulations does not eliminate the content of customary law norms. Because association is a uniform form, not a norm (rule/substance). Norms (rules/substance) regarding legal awareness, enforceability and socio-cultural rights of legal subjects must still have a place, be recognized, respected and protected by the state, because these norms contain rights and obligations. Parliamentary intelligence is needed here. It makes sense to use the order of words in legal norms in such a way that the plurality of legal norms is taken into account (Jufri & Sjaiful, 2015).

On this matter, in the end a problem emerges where if customary law community units are accommodated as customary law subjects, it is necessary to confirm the similarities and differences with customary law communities and indigenous peoples. This needs to be stated because Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia uses 'customary law community units'. The following is the formulation of Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia:

Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that the state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in law .

If the three are indeed different, then the question posed is: are the units of customary law communities, customary law communities and indigenous peoples in one concept? Or in other words that customary law community units, customary law communities and indigenous peoples are identical? In this paper, it is postulated (argued) that customary law community units, customary law communities and indigenous peoples are identical. If these "units" are not separated from customary law communities, then the term "units" is meant to emphasize that customary law communities are community (gemeinschaft) (Haq et al., 2021).

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This paper is written contemplatively, but is based on the experience of research conducted in several indigenous and tribal peoples, such as in Ngadhu-bhaga (Central Flores-NTT), Osing (Banyuwangi-East Java), Madura (East Java), Tengger (East Java).), Dayak and Malay (Kutai Kertanegara-East Kalimantan), Dayak (Central Kalimantan), Batak (Dairi-North Sumatra), Tnganan Pegringsingan (Bali), and Dawan (Tetum-Timor). Indigenous peoples in areas that have been researched and studied have said that customary law community units, customary law communities, and indigenous peoples are identical, meaning that there is no difference in principle, but there are also those who differentiate them substantively, especially with respect to with the broad scope of its territory.

In general, research is carried out using approaches such as ethnography (culture), emic-etic (phonemic-phonetic), and socio-legal, with qualitative analysis. Several materials from these studies are abstracted in this paper, particularly with regard to the existence of customary law community units, customary law communities, and indigenous peoples as subjects of customary law. The views expressed here are only in outline, personal and subjective in nature because the above research interpretations are carried out emic-ethically. Thus, the subjectivity of researchers is very high. It is to reduce subjectivity that emic-etic approaches, triangulation and discussion are always carried out.

According to the introduction, the problem research from this article is

How Relationship between Customary Law and Customary Law Communities as Subjects of Customary Law

How the status and Existence of Customary Law Community Units and Customary Law Communities as Subjects of Customary Law

Why is need a Nomenclature of Indigenous Peoples for Indigenous Peoples Bill

Methods

This study used a mixed research methodology which combines the anthropological and juridical philosophical methods (Dimyati & Wardiono, 2004). This research employed a type of socio-legal study approach. The authors observed laws from the perspective of formal institutions and tried to understandthe laws and their empirical behaviors from applicable legal operations In this mixed method, the authors intensively studied customary law and the customary philosophy before conducting the legal research. The writers suggest that it is important togain a deep philosophical understanding of the customary law (Wiguna et al., 2024). This is so that when undergoing legal research on the local customary law and institutions, the authors can obtaina holistic understanding. Thus, in this mixed method, the obtained philosophical data were studied, and they were supported by data from the field that were produced from legal customary research. The focus of this study was the realization of community autonomy in choosing alternatives and innovations regarding legal decisions nor customary law (Budiono et al., 2022) made through a culture-based process (Absori et al., 2020). Instead of trying to understand a cultural object from an external perspective (formal-legal), this approach strives to gain understanding from an internal perspective by respecting (Budiono et al., 2023).

Result and Discussion

- *Relationship between Customary Law and Customary Law Communities as Subjects of Customary Law*

Before discussing customary law communities, let us first briefly explain the existence of customary law in positive law. Usually customary law has been known to exist since the Dutch colonial period, namely: (1) Article 78 paragraph 2 RR 1854 uses the expression: (Godsdientige Wetten en Oude Herkomsten = Religious Regulations and Instincts); (2) Article 128 (4) IS (Indische Staatsregeling = Dutch State Law Regulations - a type of Dutch East Indies government constitution) uses the expression "Instelingen Des Volks" (people's institution); (3) Article 131(2)(b) IS reads: Met Hunne Godsdientige Wetten en Gewoonten

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Samenhangende Rechts-Regelen (rule of law in relation to their religion and customs); (4) Staatsblad No. 1929 No. 221.No. 487 already uses Adatrecht. And these rules will remain in effect after independence based on Article II of the Transitional Provisions of the 1945 Constitution. Thus, the existence of common law is recognized since 1854, although the term Adatrecht is not used. The term was not used technically and legally until 1929, although there is a fundamental difference between customary law and common law (Ibrahim, 2022; Suwandi et al., 2010).

The existence of customary law communities and customary law communities as legal subjects in positive law is already a legal certainty (Arizona, 2010). This is regulated in Article 18B Paragraph (2) of the 1945 Constitution of the Republic of Indonesia which was then implemented by Decree of the Minister of Home Affairs No. 52 of 2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples, in Paragraph 1 Article (3) Permendagri No. 52/2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples states (Abdurrahman, 2015):

Customary Law is a set of norms or rules, both written and unwritten, that live and apply to regulate human behavior that originates from the cultural values of the Indonesian nation, which are passed down from generation to generation, which are always obeyed and respected for justice and public order, and have legal consequences or sanctions.

The recognition of common law by positive (constitutional) law is very important because as classical legal theories say, (customary) law and society (customary law) cannot be separated according to Cicero's theory. Another legal theory from the historical and cultural school of Savigny and his student Puchta states that law and society cannot be separated like body and soul (Volksgeist). This theory also strengthens the relationship between law (adat) and society (adat law). Therefore (customary) law must be sought and found in society (customary law) (Mustaghfirin, 2011).

Other theories such as the mirror theory from AH Post that "Es gibt kein volk der Erde, welches nicht die Anfange eines Rechtes bessase" (however small/simple as society, law becomes a mirror, because no society lives without law). This view has been reinforced by legal scholars such as Utrecht who said that law is a social phenomenon, or Satjipto Rahardjo who said law cannot be separated from the socio-cultural context of its society (Wignjodipuro, 1978).

After understanding the existence of common law in positive law, the relationship between general law and the general law community will be discussed. The relationship between the two can be seen in Permendagri No. 52 of 2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples. In this Permendagri which is examined in detail, we only find a relationship between customary law and customary law communities which are called villages or by other names. The subject of customary law in this Permendagri is customary law communities, not customary law community units and customary law communities (Zakaria, 2018).

So, Permendagri No. 52 of 2015 concerning Guidelines for the Recognition and Protection of Indigenous Peoples is an Implementing Regulation of Article 18 B Paragraph 2 of the 1945 Constitution of the Republic of Indonesia. 6 of 2014 concerning Villages does not mention customary law communities at all as stipulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Only in view of the mention of Article 18 B paragraph (2), so what is meant by Village is not synonymous with units customary law community. This is very clear in Article 1 there is no definition of customary law community units (Regulation of the Minister of Home Affairs No. 52 of 2014 Concerning Guidelines for the Recognition and Protection of Indigenous Peoples, 2014).

Consequently, the legal status of customary law entities as subjects of customary law must be regulated in implementing regulations in accordance with the provisions of that article. The definition of customary law community as a legal entity can be found in Law Number 27 of 2007 concerning the Management of Coastal Zone and Small Islands. Likewise, definitions of indigenous peoples and local communities can be found in Article 1(35), which concerns traditional fishing communities. This is understandable because this law

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was made to implement Article 33 of the 1945 Constitution of the Republic of Indonesia (Thontowi et al., 2012).

- *The Existence of Customary Law Community Units and Customary Law Communities as Subjects of Customary Law*

Indigenous peoples' union is an association and/or association of customary law communities who live in a customary territory, self-governing and guided by customary law and local wisdom of each customary law community. In this context, "units" denotes the diversity of customary law communities, so the expression "units" is meant to indicate that customary law communities, like subjects of customary law, are spread throughout the archipelago. In other words, a customary law community unit is a group consisting of more than one customary law community living in a customary territory. In other words, the general community unit is indigenous peoples. The essence of these common law community units is the general law community which functions as a subject of common law (Junaidi & Merta, 2019).

Van Vollenhoven says that understanding common law requires, first and foremost, an understanding of common law. The duties of the customary law association are: a) as a matter of customary law, b) as a plan for implementing customary law, and c) as the scope of customary law. Like customary law subjects, customary law subjects have rights and obligations. Like the customary law community plan, it separates one area of the customary law community from other areas of the customary law community. And as part of the customary law community, it acts as legal protection for someone when an incident (crime of property) occurs in their territory (Ismi, 2017).

The function of the legal subject is to bear the rights and obligations related to the wealth of indigenous and tribal peoples. Only they have the right and authority to manage, enjoy and protect and maintain property in the general law community, such as land and the environment; because those who understand the peculiarities of customary law norms, the bearers of customary law institutions, are the subject of that customary law. When killings occur in customary law areas, they are held liable as subjects of common law (Suyono, 2018).

As a plan or frame, indigenous peoples are able to differentiate (territorially) from other customary law communities. For example, the customary law norms of Osing in Kemiren Village only apply within the territory and for members of the customary law community of Kemiren village. Meanwhile, the customary law community in the village of Olehsari, even though they are both Osing people, let alone neighbors, have customary law norms that differ from one another. Even though these two villages are side by side, the customary law norms in Sapikerep Village and Wono Asri Village are of course different, even though both are Tengger people. The village becomes the floor plan or frame where customary law lives, grows, and develops together with the customary law community as its legal subject (Rato, 2020).

As a frame, the differences are rather clear, for example between customary law norms in the Simalungun Batak, Karo Batak, and Dairi Batak customary law communities. All three have customary law norms, which are characteristically different from one another, even though they are both Batak people. What is most obvious is that in NTT the indigenous peoples in Kampung Doka, Deru-Pali, Sadha-Laja, Wogo, Mangulewa, where the kinship system is structured in an alternative way, are very different from the traditional law communities in Were, Sarasedu, and Soa who are also both alterendends. However, in the customary law communities of Were, Sarasedu, and Soa, submission of belis (a type of honesty) is mandatory, while in the villages of Doka, Deru-Pali, Sadha-Laja, Wogo, Mangulewa (Susanto, 2016).

With regard to the function of the customary law community as a frame, then another function of the customary law community or the 3rd is as the area where customary law operates. As the working area of customary law, customary law norms only work within their working area, namely in the domicile area of the customary law community as the bearer of that customary law. Outside that area is the area where the customary law of other customary law communities operates. The confusion over the area of operation of customary law opens up space for legal (customary) conflicts to occur. For customary law communities

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who actually live and develop, according to the law and awareness of the people, they already understand where, when, and to whom the customary law norms of a customary law community work and are enforced, coercive and binding (Regional Regulation of Mahakam Ulu Regency No. 7 of 2018 Concerning Recognition, Protection, Empowerment, Indigenous Peoples and Customary Institutions, 2018).

The existence of indigenous peoples as subjects of customary law cannot be separated from the role of Van Vollenhoven, a traditional law warrior who defends and constructs customary law as a science of customary law on a par with other sciences, particularly European law. Van Vollenhoven was the first to construct rechtgemeenschap as a subject of customary law (Van Vollenhoven, 1928). Van Vollenhoven's use of the term gemeenschap in rechtgemeenschap as a legal subject is not without meaning. The use of the term gemeenschap in rechtgemeenschap as a legal subject needs to look at the concept put forward by Ferdinand Tonnies in his book entitled Gemeinschaft und Gesselschaft (Tönnies, 1887). From this explanation it can be said that customary law communities are gemeenscahap (community) not gesselschaft (society), namely adatrechtgemeenschap (Muhammad, 1997). Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia uses the word "unities" (paguyuban) not "bonds" (patembayan). In the concept of association among the members of the community, there is an "inner bond and common awareness (community mind)". Meanwhile, in the Patembayan community, they do not have "mental ties and shared awareness (community mind)". For this reason, pay attention to Article 18 B paragraph (2) of the Constitution, as follows:

Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law.

The position of indigenous peoples as customary law subjects in positive law has been recognized and is declarative in nature. This is evident in several articles of legislation, starting from Article 18B paragraph (2), Law no. 6 of 2014 concerning Villages and their implementing regulations, the Plantation Law, and the Forestry Law. However, its legal position is already very strong because it is declarative. This means that the state only recognizes it, without having to question the substance of the customary law norms. The problem is complicated by the interpretation of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia as conditional recognition. The conditions referred to are, as follows: (a) as long as they are still alive, (b) in accordance with the development of society, and (c) the principles of the Republic of Indonesia, and are regulated "in" the law (Abdurrahman, 2015).

It is understandable that since May 20, 1908 and culminating on October 28, 1928, the Indonesian people from various tribes, regions and ethnicities have agreed to form a nation state, namely the Republic of Indonesia. The formation of the Unitary State of the Republic of Indonesia is a political consensus that must be obeyed and upheld by all Indonesian citizens. Obedience as citizens is a logical consequence of the agreement to form a nation state (Abdurrahman, 2015).

The actualization of constitutional rights also has limitations, as regulated in Article 3 of the UUPA. following:

Article 3

Bearing in mind the provisions in Articles 1 and 2, the implementation of customary rights and similar rights of customary law communities, as long as they actually exist, must be in such a way as to suit the national and state interests, which are based on national unity and must not conflict with laws and other higher regulations.

This limitation is also carried out by the Forestry Law as stipulated in Article 67, as follows:

Article 67

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Indigenous peoples throughout according to in fact it still exists and its existence is acknowledged to have the right to:

Collecting forest products to meet the daily needs of the indigenous peoples concerned;

Carry out forest management activities based on applicable customary law and not contrary to the law; And

Get empowerment in order to improve their welfare.

(Confirmation of the existence and elimination of customary law communities as referred to in paragraph shall be stipulated by a Regional Regulation.

Further provisions as referred to in paragraph (1) and paragraph (2) are regulated by a government regulation.

Laws that give more respect to the position of customary law communities as subjects of customary law are the Plantations Law, Articles 12, 13 and 17, as follows:

Chapter12

In the event that the land required for a plantation business is land with customary rights of the customary law community, the plantation business actor must conduct deliberations with the customary law community holding customary rights to obtain approval regarding the surrender of the land and compensation.

Deliberations with the Customary Law Community holding Ulayat Rights as referred to in paragraph (1) are carried out in accordance with the provisions of laws and regulations.

However, even though it is more lenient, it is still given the requirements as found in Article 13 of the Plantations Law, namely:

Article 13

The Customary Law Community as referred to in Article 12 paragraph (1) is determined in accordance with the provisions of laws and regulations.

However, in reality it is very difficult to enact laws to recognize, respect and protect the rights of indigenous and tribal peoples. The Alliance of Indigenous Peoples of the Archipelago attempted this matter 2 (two) times, namely the PPHMA Bill (RUU on the Recognition and Protection of Indigenous Peoples' Rights) in 2014, which was rejected by the Indonesian Parliament. This effort continues to be carried out by submitting the Indigenous Law Community Bill in 2021. The latest MHA Bill is expected to be approved and enacted in 2022. The final discussion with the Government is to carry out an Inventory List of Problems (DIM) which still leaves the term customary law community units, indigenous peoples and indigenous peoples (Widowati et al., 2014).

However, in this Plantation Law there is firmness, even though it is only normative, namely Article 17, as follows:

Article 17

Authorized officials are prohibited from issuing business permits for plantations on customary land rights of customary law communities.

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Prohibition as referred to in paragraph (1) is waived in the event that an agreement has been reached between the Customary Law Community and the Plantation Business Actor regarding the surrender of the Land and the compensation as referred to in Article 12 paragraph (1).

Restrictions on the recognition and protection of indigenous peoples are carried out by Government Regulations and Regional Regulations as required by the Forestry Law and the Village Law. The problem is that in several regions, the regional government has not yet opened up space for the establishment of regional regulations on customary law communities. This greatly hinders the recognition and protection of indigenous peoples (Public Relations of the Coordinating Ministry for Political, 2022).

The discussion on the legal status of customary law community units, customary law communities and indigenous peoples as subjects of customary law is very urgent and fundamental, because this relates to the legal protection of their constitutional rights when laws are against them. Legal status as an applicant in reviewing laws against the Constitution at the Constitutional Court. This is important because not all customary law communities and indigenous peoples can have legal status in the Judicial Review of the Act against the Constitution. There are conditions that must be fulfilled as stipulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. 6 of 2014 concerning Villages, must meet the requirements as stipulated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia and its derivatives. This has an impact on legal recognition and protection, namely recognition, respect and protection of customary law community units, namely: (1) their existence is still alive and recognized, (2) in accordance with community development, (3) the principles of the Unitary State of the Republic of Indonesia , and (3) regulated in law. Thus, according to the law, not all customary law communities and indigenous peoples can have legal status to defend and protect their traditional rights. (1) its existence is still alive and recognized, (2) in accordance with the development of society, (3) the principles of the Unitary State of the Republic of Indonesia, and (3) regulated in law. Thus, according to the law, not all customary law communities and indigenous peoples can have legal status to defend and protect their traditional rights. (1) its existence is still alive and recognized, (2) in accordance with the development of society, (3) the principles of the Unitary State of the Republic of Indonesia, and (3) regulated in law. Thus, according to the law, not all customary law communities and indigenous peoples can have legal status to defend and protect their traditional rights (Rahman et al., 2011).

The Indigenous Law Teaching Association (APHA) approved the nomenclature of the Indigenous Peoples Bill. This Indigenous Peoples Bill seeks to unite Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The existence of customary law communities as subjects of customary law has acquired its place and there is no doubt about its existence as stipulated in Article 18B paragraph (2) The 1945 Constitution of the Republic of Indonesia. However, academically, it is necessary to distinguish between customary law communities and indigenous peoples (Muhammad, 1997; Vollenhoven, 1981).

Table. 1 Differences between Indigenous Peoples and Customary Law Communities

Differentiating Aspect	Culture	Customary Law Community
Scope	Wider	Tighter
Relationship with land as an object of rights	Communal rights	Property rights and customary rights (collective rights)
Its position as a legal subject	Customary law	Customary law

If indigenous peoples are subject to customary law, then what is the difference between customary law and customary law? The difference between the two, as follows:

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Table 2. Differences between Customary Law and Customary Law

Differentiating Aspect	Common Law	Customary law
Characteristics	There is no element of religious magic	There is a magical-religious element (ritual)
Form	Regulated in the Civil Code (gewoontecht, customary law, convention), see Articles 1571, 1578, 1583, 1585 and 1586 of the Civil Code	Not regulated in the Civil Code (adatrecht, adatlaw) but in Algemeene Bepalingen van Wetgeving, Regerings Reglement, and Indische Staatsregeling
Location (domicile)	Anywhere around the world	Only in customary law communities in Indonesia
Legal subject	Culture	Customary law community
Applies to	Everyone is a member of society	Only for Indigenous people

What about traditional society? Is traditional society also a legal subject? The existence of traditional society, both academically and technically, is not much known. People only know that traditional society is a group of people who still maintain the mindset, way of life, or way of working of their ancestors from generation to generation. The existence of traditional communities is known only in Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The only definition of traditional society is Article 1 number 33 of Law no. 1 of 2014 concerning Amendments to Law no. 27 of 2007 concerning the Management of Coastal and Small Islands, as implementing regulations of Article 33 of the 1945 Constitution of the Republic of Indonesia. Article 1 point 3 of Law no. 1 of 2014, as follows:

Traditional communities are traditional fishing communities whose traditional rights are still recognized in carrying out fishing activities or other legal activities in certain areas within archipelagic waters in accordance with international law of the sea principles.

If you look at the wording of the article it only concerns traditional fishermen because the areas that are regulated are the coast and small islands. And, if interpreted extensively, then the term "traditional fishing community" can also be replaced by "traditional agriculture, traditional markets, traditional breeders, and/or traditional traders". In addition, there are almost no laws and regulations that deal with traditional society, so knowledge about such matters is very limited. In several laws there is the term isolated community, backward community. However, all of this has nothing to do with Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Therefore, if agreed (Riyanto, 2019), What about kingdoms/sultanates/kingdoms as legal subjects? In the context that is being discussed, kingdoms/sultanates/kingdoms are part of a political society, because forms of government like this exist everywhere in the world. Kingdoms/sultanates/kesunans are subjects of state law (politics), they are not customary law communities. And, if the notion of traditional society is part of the adat community, then the kingdom/sultanate/kesunan is included in the adat community or traditional society. This requires a political agreement from the DPR as legislators or judges as legislators through jurisprudence.

However, if we analyze the definition of customary law made by Ter Haar in his 1937 speech which said that:

"Ignoring the written part which consists of village regulations, the king's decrees - are all the regulations that are embodied in the decisions of the Legal Functionaries = certainty (in the broadest sense) having

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authority (macht, authority) and influence and which in practice applies immediately (spontaneously) and is complied with wholeheartedly.

From this definition, it includes a kingdom/sultanate or a sultanate. Likewise, if we read Article 1 number 1 Permendagri No. 52 of 2014 concerning Guidelines for the Recognition and Protection of Indigenous Peoples, as follows:

Customary law communities are Indonesian citizens who have distinctive characteristics, live in groups in harmony according to their customary laws, have ties to ancestral origins and/or the same place of residence, have a strong relationship with land and the environment, and have a value system that determines economic institutions. , political, social, cultural, legal and utilize a certain area for generations.

However, actually in that kingdom/sultanate/kesunan there are customary law communities within it. For example, in the Yogyakarta Sultanate there are customary law communities called villages, as well as in Madura and Bali. In Madura, in the past, there was the Kingdom of Songenep (Sumenep), within which there were customary law communities called villages. The villages in Madura are genealogical-territorial in nature. Those that are genealogical in form are called tanean lanjang, while those that are territorial are called villages led by Kalebun (Village Head).

This is also the case in Bali, such as the Kingdom of Karangasem or Buleleng which once ruled as far as Banyuwangi (East Java) in which there is a customary law community called a village, namely Pekraman Village. In the Sultanate of Kutai Kertanegara there is the Law on the Kingdom of Kutai Ing Martadipura in Article 7 which states that there are 2 communities, namely indigenous peoples and non-indigenous people. Non-indigenous people are immigrants whose rights are also protected by the sultanate. However, there are indigenous peoples who have the same rights as members of the kingdom/sultanate, although there are differences as exceptions, for example the Sultan is of Malay descent.

Article 7 of the Law on the Kingdom of Kutai Ing Martadipura, the indigenous people consist of: Dayak, Malay and Banjar. The Dayak indigenous peoples consist of: Modang Dayak, Bahau, Tanjung, and Basap Dayak. In fact, within each Dayak community there is a genealogical customary law community in the form of a Huma-Betang or longhouse. Thus, kingdoms/sultanates/kesunans are basically political societies, not customary law communities, because within each kingdom, customary law communities have their own customary law.

Nomenclature of Indigenous Peoples in the Indigenous Peoples Bill

The use of the Indigenous Peoples nomenclature in the Indigenous Peoples Bill basically has no constitutional basis, no legal basis. If there is no legal basis, then the law (if it is punished) has no binding power, coercive power, or effective power (geldings). In order to have binding power, coercive power, or effective power, it must have a constitutional legal basis. It is on the basis of the constitution that the notion of indigenous peoples is made synonymous with customary law communities and/or traditional communities. Thus, the way is closed for material review to the Constitutional Court (Jufri & Sjaiful, 2015).

The drafters of the Indigenous Peoples Bill used the nomenclature 'Indigenous Peoples' as an effort to accommodate two terms in the constitution, namely Customary Law Community in Article 18 B paragraph (2) and Traditional Society in Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, in my opinion 'maybe' necessary. The actualization of the two articles of the 1945 Constitution of the Republic of Indonesia needs to be carried out with only one law as a result of a political compromise. Or, if the DPR wants to hold deliberations and accommodate the understanding that indigenous peoples are synonymous with customary law communities and traditional communities, then the Formation of the Indigenous Peoples Bill is based on Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Because, recognition and protection of both communities is mandatory carried out by the state. However, it must be understood that between customary law communities and traditional communities are very different (Rato, 2013).

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At a seminar conducted by APHA (Indigenous Peoples Association) some time ago, there were 2 reasons for using the nomenclature of the Indigenous Peoples Bill, namely: a) in Article 18 B paragraph (2) and Article 28 I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, using the term 'in law' means the formation of a law to provide recognition and protection of 'customary law communities' or 'traditional people' not with one specific law, but in several laws, and this has been done; b) laws that recognize and protect customary law communities have indirectly been carried out with Permendagri No. 52 of 2015.

However, as has been discussed, customary law is obliged to contain customary law subjects, namely customary law communities and customary law community individuals as members. In addition to customary law subjects that are obligatory to exist are legal objects consisting of objects and assets as objects of the rights of legal subjects, especially land. After these two elements are fulfilled, the third element is the relationship between the subject of customary law and the object of customary law, namely the rights of customary law communities and their members over objects and assets. This relationship is called rights and obligations such as property rights that are or are attached personally and customary rights that are attached collectively, as well as personal obligations and community obligations.

These relationships are born from unilateral or multi-party legal actions. The unilateral ones, for example, establishing villages, building new villages, clearing forests, while many parties, for example, land transactions are called sales (offhand sales, mortgage sales, and annual sales), transactions related to land (lease, profit sharing). It is from these relations that give birth to rights and obligations, so that by itself according to law legal protection for these rights arises.

We return to the Indigenous Peoples Bill, as it has been said that the Indigenous Peoples Bill has no legal basis in the constitution (1945 Constitution of the Republic of Indonesia). Several laws such as the Law on Plantations, the Forestry Law, and Permendagri No. 52 of 2014 concerning the Recognition and Protection of Indigenous Peoples, only stipulates Indigenous Peoples as customary law subjects. Meanwhile, the rights of indigenous peoples as legal subjects are very limited in regulation, and there is even a tendency for restrictions.

These restrictions have had a negative impact, namely opening up space for criminalization of indigenous peoples when they fight for their rights. For example in customary law communities in Mesuji, Papua, Bali, Banyuwangi, Central Java, and so on. Therefore, there is a need for a special law regarding Indigenous Peoples as subjects of customary law in which there are rights to the land and agrarian resources contained therein, as well as legal protection when they fight for their rights.

This legal protection is a state obligation as stipulated in Law no. 33 of 1999 concerning Human Rights. The rights of indigenous peoples as subjects of customary law are not only limited to land and agrarian resources, but are broader than that. Customary law scholars have provided an understanding of rights to objects that are objects of customary law, which objects are also objects of the rights of the legal subject.

According to customary law, what is meant by objects includes both tangible and intangible objects. Tangible objects consist of land and non-land, this categorization is not meaningless. Tangible objects called land are regulated by land law, while non-land objects are regulated by debt law (customary law regarding agreements/agreement) (Rato, 2018).

Conclusion

After paying attention to the brief review above, there are several things that can be concluded from this paper, namely: (1) a. The legal status of customary law community units is clear and regulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia with several implementing regulations such as Permendagri No. 52 of 2014 concerning Recognition and Protection of Indigenous Peoples. However, even though it has been recognized as a subject of customary law, its rights over objects are as a matter of facti objects their rights have not been set; (2) The legal status of indigenous peoples as legal subjects has no legal basis in the Constitution or the 1945 Constitution of the Republic of Indonesia.

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From these conclusions, there are several suggestions that political consensus is needed through the Legislative, Executive and Judiciary Institutions to state that customary law community units, customary law communities and indigenous peoples are identical.

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