Journal of Constitutional Law Society
Pusat Studi Konstitusi dan Perundang-Undangan
Universitas Bandar Lampung

CONSTITUTIONAL JURISDICTION REVIEW OF THE EXISTENCE OF INDIGENOUS LAW COMMUNITIES IN INDONESIA

TINJAUAN YURIDIS KONSTITUSIONAL TERHADAP KEBERADAAN MASYARAKAT HUKUM ADAT DI INDONESIA

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Received: August 20, 2021. Accepted: March 25, 2022. Online Published: April 2, 2022.

ABSTRACT
The purpose of this study is to find out the reasons for the formation of the Indigenous Law Community which are stated to still exist in Indonesia and the reasons why customary law is not codified in Indonesian laws and regulations. Customary law is based on Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The research method used in this article is normative legal research or commonly referred to as doctrinal law research that focuses on written regulations. The findings in this article reveal that customary law is not one of the laws in the hierarchy of laws and regulations in Indonesia because customary law is not a written law. Customary law will continue to change according to the desired interests and will ensure a sense of justice for the community because of the problems that exist in the community. Therefore, the codification of customary law is contrary to the existing law in Indonesia which was made to be valid forever. According to Satjipto Raharjo, there are 4 requirements in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia as a form of state power that determines the existence of a Customary Law Community, namely. as long as they are alive, in accordance with the development of society, according to the the principle of the unitary state of the republic of Indonesia and regulated by law.

Keywords : **Costomary Law Community; Uncodified; Indonesia Recognition.**

ABSTRAK

Tujuan dari penelitian ini adalah untuk mengetahui alasan dibentuknya Masyarakat Hukum Adat yang dinyatakan masih ada di Indonesia dan alasan hukum adat tidak terkodifikasi dalam peraturan perundang-undangan Indonesia. Hukum adat berdasarkan Pasal 18B ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Metode penelitian yang digunakan dalam artikel ini adalah penelitian hukum normatif atau biasa disebut dengan penelitian hukum doktrial yang berfokus pada peraturan yang tertulis. Temuan dalam artikel ini mengungkapkan bahwa, hukum adat bukanlah salah satu hukum dalam hierarki peraturan perundang-undangan di Indonesia karena hukum adat bukanlah hukum tertulis. Hukum adat akan terus berubah sesuai dengan kepentingan yang diinginkan dan akan menjamin rasa keadilan bagi masyarakat karena permasalahan yang ada di masyarakat. Oleh karena itu kodifikasi hukum adat bertentangan dengan hukum yang ada di Indonesia yang dibuat untuk berlaku selama-lamanya. Menurut Satjipto Raharjo ada 4 syarat dalam Pasal 18 B ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 sebagai bentuk kekuasaan negara yang menentukan ada tidaknya Masyarakat Hukum Adat adalah selama masih hidup, sesuai dengan perkembangan masyarakat, menurut prinsip negara kesatuan republik Indonesia dan diatur dalam undang-undang.

Kata Kunci : Masyarakat Hukum Adat; Tidak Terkodifikasi; Pengakuan Indonesia.

I. INTRODUCTION

Humans are social beings who in their lives need humans and other living things. So far no human being can live alone, because humans will not be able to carry out complex activities alone. The first human interaction starts from the smallest form, namely family, kinship and then becomes a society. Starting from the community of certain areas to become a diverse and complex society called the state. Humans in living their lives must have their own desires and interests, for that it is definitely necessary to have a form of cooperation and in its implementation there is the possibility of a collision between interests. Judging from the interests of each person, there needs to be a rule that prevents conflicts between these interests with one another. Therefore, there is a need for norms that regulate this. These norms include the norms of decency, moral norms, religious norms, and legal norms.

Custom is a reflection of the personality of a nation whose incarnation comes from the soul of the nation concerned from time to time. One of the manifestations of norms that live in society is customary law. Customary law is the embodiment of the soul and personality of the nation from time to time. As a result of this incarnation, every nation in the world has its own customs that are different from one another.

The term customary law used today is a translation from the Dutch language, namely Adatrecht[1], used to give a name to a system of social control (social control), this term was used in the book "De Atjehers" in 1894 written by C. Snouck Hungronje.[2] Basically, the term customary law is given to identify the original law of the Indonesian people, to distinguish it from the law for European groups. This happens because the parties who provide scientific and systematic studies on customary law are Europeans who came to the archipelago.

Customary law contains noble values that are identical to social life such as deliberation to reach consensus, religious magic, justice and mutual cooperation. All the values mentioned are the practice of Pancasila, this is the philosophical reason for the implementation of customary law. The customary law system leads to uncodified legal regulations that grow and develop and are maintained with public awareness. The type of customary law is traditional in nature based on the will of the ancestors. So that the rule of law is always given a very big award for the sacred will of the ancestors. Therefore, the will to do or not to do something is returned to the sacred will of the ancestors as a benchmark for the will to be done. The rules in customary law can also change as seen from the influence of changing events and life circumstances. These changes are often not realized, sometimes even unknown to the public. This happens in certain social situations in people's lives.

Based on these uncodified legal sources, customary law can show its ability to adapt and be flexible. Communities whose lives are based on customary law are called Customary Law Community. The term customary law community is a translation of the term rechtsgemeenchappen.[3] This term was first found in B. Ter Haar Bzn's book entitled *Beginselen en Stelsel van Het Adatrecht*[4]. Customary law communities are formed by a fundamental style, namely the way of life of mutual assistance, where the public interest is prioritized, while individual interests are surrounded by public interests. This living culture begins with the community's view of harmony or unity which makes the community on the path of togetherness which is called the communalistic view. Hazairin revealed that "Customary law communities are community units that have the features to be able to stand on their own, namely having a legal unit, a unitary authority and a unitary environment based on shared rights to land and water for all its members, all members are equal in rights and his obligations. Their livelihoods are communal, where mutual assistance, mutual assistance, feeling and shame play a big role".[5]

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[1] Van Ossenbruggen, Mr. F. D. E. (2020). Prof. Mr. Cornelis Van Vollenhoven Als Ontdekker Van Het Adatrecht. *Bijdragen Tot de Taal-, Land- En Volkenkunde*, *90*(1), ii–xli. https://doi.org/10.1163/22134379-90001414

[2] Amin, S. (2016). Studi Pendudukan Aceh Dalam De Atjehers. *Mozaic : Islam Nusantara*, *2*(2), 43–64. https://doi.org/10.47776/mozaic.v2i2.83

[3] Nugroho, Sigit, S.H., M. H. (2016). *Pengantar Hukum Adat Indonesia. Alumni, Bandung* (p. 128).

[4] Victor, P. (1949). Adat Law in Indonesia. *International Affairs*, *25*(3), 388–389. https://doi.org/10.2307/3016797

[5] Zaelani, Z. (2020). Hukum Islam Di Indonesia Pada Masa Penjajahan Belanda: Kebijakan Pemerintahan Kolonial, Teori Receptie In Complexu, Teori Receptie Dan Teori

Furthermore, in the development of the mention, customary law communities are more commonly found when legal experts examine the issue of natural resources. Legal studies on natural resources are often discussed between the meeting of the will and rules of customary law communities and the State. The terms and conditions for respect and acknowledgment of customary law communities have been regulated in the laws and regulations concerning natural resources produced by the state. Regulations on customary law communities are put in place as part of local government regulations. The term customary law community in the regulation is "Unity of Indigenous Law Community". The highest regulation regarding customary law communities is contained in the 1945 Constitution of the Republic of Indonesia of the Second Amendment, namely Article 18 B paragraph (2) which reads "The state recognizes and respects customary law community units along with traditional rights as long as they are still live and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated in law."

Before it was stated in the 1945 Constitution of the Republic of Indonesia, the Second Amendment, there were several laws and regulations that had already declared it. For example, Article 4 paragraph (3) of Law Number 41 of 1999 concerning Forestry, which reads "The control of forests by the State shall continue to pay attention to the rights of customary law communities, as long as in fact they still exist and their existence is recognized, and does not conflict with national interests."

The same thing is also regulated in Article 2 paragraph (4) of Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, Article 2 paragraph (4) which reads "The above implementation right of control from the State can be delegated to the Suatantra and customary law communities, just as necessary and not in conflict with national interests, according to the provisions of Government Regulations."

However, the above law does not describe in detail the concept of "Customary Law Community". Law No. 41/1999 states that indigenous peoples "as long as they exist in reality", "are recognized for their existence". This is what causes the possibility of different interpretations, resulting in a conflict of norms in practice in Indonesia in the field of state administration, especially in the relationship between respect, recognition, and power. This situation causes respect and recognition aimed at customary law communities cannot be carried out.

The ambiguity of the use of this term also adds to the confusion of what is meant by customary law communities contained in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia using the term customary law community units. Other regulations in the field of law use different terms such as: traditional communities, customary law communities, and indigenous peoples. If we look further into the provisions of Article 5 of the Law of the Republic of Indonesia Number 41 of 1999 concerning Forestry, the term customary law community still does not have a clear meaning. The problem is, this diversity does not only involve mention,

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Teceptio A Contrario Atau Teori Receptio Exit. *KOMUNIKE*, *11*(1), 128–163. https://doi.org/10.20414/jurkom.v11i1.2279

but also has an impact on the diversity of meanings on the institutional boundaries of the customary law community. In the applicable realm of normative provisions, a firmer translation is needed, both regarding the definition, forms and types of customary law communities, so that recognition and protection for indigenous peoples can be carried out by the State. Protection and recognition carried out by the State against customary law communities can be realized if there is a legal basis in the form of statutory regulations.

In some laws and regulations in terms of explaining what is meant by customary law communities, reloading the provisions of Article 18B of the 1945 Constitution of the Republic of Indonesia as the original editor. As a result, there is no statutory regulation that includes an adequate explanation of what a customary law community is. Thus the normative provisions regarding what are meant by customary law community units are not yet clear, especially regarding the requirements for their recognition to be able to fulfill the requirements, "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". Based on this description, it can be identified several problems regarding what makes customary law communities still exist, and are the rules regarding customary law not codified in Indonesia?

II. METHOD

The research method used in this article is normative legal research or commonly referred to as doctrinal law research that focuses on written regulations (law in book). Meanwhile, the approach that will be used is the statutory approach and the case approach. The analytical technique that will be used to solve the problems raised in this research is to use descriptive and qualitative interpretation techniques.[6]

III. ANALYSIS AND DISCUSSION

a. The Existence of Indigenous Law Communities

Customary law is a term given by legal scientists in the past to groups, guidelines and facts that regulate and regulate the lives of the Indonesian people. Scientists at that time saw that the Indonesian people, who lived in remote areas, lived in order and they lived an orderly life by following the rules they had made themselves.[7] According to M Kosnoe, there are differences between the concepts of Western law and customary law.[8] In Western law, individuals are seen as independent and free beings and have interests, and each individual will be determined to fulfill his wishes to the fullest. For this reason, it is necessary to have sanctions as a guarantee condition so that

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[6] Sonata, D. L. (2015). Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum. *Fiat Justisia:Jurnal Ilmu Hukum*, *8*(1). https://doi.org/10.25041/fiatjustisia.v8no1.283

[7] Sulastriyono, S., & Intaning Pradhani, S. (2018). Pemikiran Hukum Adat Djojodigoeno dan Relevansinya Kini. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, *30*(3), 448. https://doi.org/10.22146/jmh.36956

[8] Hayati, N. (2016). Peralihan Hak Dalam Jual Beli Hak Atas Tanah (Suatu Tinjauan terhadap Perjanjian Jual Beli dalam Konsep Hukum Barat dan Hukum Adat dalam Kerangka Hukum Tanah Nasional). *Lex Jurnalica*, *13*(3).

there are no violations of the rights of others. This is different from the concept of customary law, which views individuals as part of society and has a strong togetherness and communal nature.[9]

In the Dutch colonial era, the first source of law to look at was Article 75 of the Regerings Reglement, which took effect on January 1, 1920, which stated that European Law would apply to Europeans and to Indigenous Indonesians, but on condition that the Indigenous Indonesians stated voluntarily that he would submit to European Law. Meanwhile, in the civil field for other groups of Indonesians, customary law will apply on condition that it does not conflict with generally recognized principles of justice. On the other hand, if the existing legal regulations conflict with the basics of justice or there is a problem that is not regulated in customary law, then the judge is obliged to use the general principles of European civil law as a guide. Article 75 of the Regerings Regulation is emphasized by Article 130 of the Indische Staatregeling which states that regions are given the freedom to adopt their own laws.[10] After Indonesia's independence on August 17, 1945, the day after that, on August 18, 1945, the 1945 Constitution of the Republic of Indonesia was stipulated. The legal basis for the application of customary law when the colonial era entered the territory after Indonesia's independence was through Article II of the Transitional Rules of the Act. The 1945 Constitution of the Republic of Indonesia, which stipulates that all existing state bodies and regulations are still valid, as long as new ones have not been enacted according to the Constitution. In the early days of independence, an understanding emerged that wanted to fight for the realization of national law by elevating people's law, namely customary law, into national law.[11] The pioneers of this idea are mostly old people, an idea that was put forward from the beginning by the previous generation of nationalists, who stated that customary law deserves to be adopted as modern national law.[12]

In the provisions of the 1945 Constitution of the Republic of Indonesia, explicitly there is not a single article that states the application of customary law in Indonesia. This is different when compared to the Constitution of the United States of Indonesia, which constitutionally can find articles which are the legal basis for the application of customary law, as stated in Article 146 paragraph (1) which states that judicial decisions must contain reasons and in cases of punishment must mention the statutory rules and customary law rules that are the basis for the punishment. Article 146 paragraph (1) of the

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[9] Made Suwitra, I., Nyoman Sukandia, I., Wayan Subawa, I., Wayan Arthanaya, I., Gayatri Sudibya, D., & Putu Sawitri Nandari, N. (2020). Waste Management Based on Banjar and Customary Village in Denpasar City-Bali. *International Journal of Law and Society*, *3*(1), 12. https://doi.org/10.11648/j.ijls.20200301.13

[10] Erniwati, E. (2019). Identitas Etnis Tionghoa Padang Masa Pemerintah Hindia Belanda. *Patanjala : Jurnal Penelitian Sejarah Dan Budaya*, *11*(2), 185. https://doi.org/10.30959/patanjala.v11i2.482

[11] Soekanto, S. (2017). Kedudukan Dan Peranan Hukum Adat Dalam Pembangunan. *Jurnal Hukum & Pembangunan*, *15*(5), 466. https://doi.org/10.21143/jhp.vol15.no5.1168

[12] Redi, A., Sitabuana, T. H., Hanifati, F. I., & Arsyad, P. N. K. (2020). The Role of Local Wisdom in Protecting Mangrove Forest in Bali Province. Atlantis Press. https://doi.org/10.2991/assehr.k.200515.009

Constitution of the Republic of the United States of Indonesia is reaffirmed in Article 104 (1) of the Provisional Constitution of 1950.

The existence of the Indigenous Law Community is recognized in Article 18 of the 1945 Constitution of the Republic of Indonesia which states that the division of Indonesia's territory into large and small areas, with the form of government structure determined by law, taking into account and remembering the basis of deliberation in the state government system, and in the right of origin in special areas. In the explanation it is stated "In the territory of the State of Indonesia there are approximately 250 zelfbesturende landchappen and volksgetneenschappen, such as villages in Java and Bali, the state in Minangkabau, hamlets and clans in Palembang and so on. These areas have an original composition, and therefore can be considered as special areas. The existence of the Indigenous Law Community was strengthened by the issuance of the Basic Agrarian Law. The Basic Agrarian Law which is the foundation of national agrarian law is based on customary law regarding land, which is simple and guarantees legal certainty.[13] In the a quo law, customary law occupies an important position because it inspires all the materials of the Basic Agrarian Law. It's a shame that the Basic Agrarian Law is not implemented properly, many laws and regulations governing land tenure issues deviate from the Basic Agrarian Law. Along with the change in political and economic development from its character that emphasizes equity (socialism) to growth (capitalism), the Basic Agrarian Law loses its socio-economic legitimacy and remains the legal legitimacy.[14] The Basic Agrarian Law which was originally intended as an umbrella law (Umbrella Act) but in reality the derivative laws and regulations did not comply with it, this was especially the case with the change of regime from the old order to the new order which emphasized economic development as a policy basis, so Entry of foreign investment on a large scale and legalized by Law No. 1 of 1967 concerning Investment and so on.

Strengthening Customary Law Communities reappears in the amendment of Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia stating "The State recognizes and respects the unity of indigenous peoples and their traditional rights as long as they are still alive and in accordance with community development and the principles of the State. Unity of the Republic of Indonesia as regulated by law". In addition, the enactment of Law Number 6 of 2014 concerning Villages brings great hope for the existence of Indigenous Law Communities. This is because the a quo Law gives full attention to the existence of the Indigenous Law Community. The main regulation that recognizes Indigenous Law Communities is contained in Article 1 number 1 which states that "Villages are traditional villages and villages or what are called by other names". In this arrangement, it is clear that the existence of the Traditional Village is on par with the Village in general. The interesting thing in the ups and downs of the existence of the

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[13] Martini, S., Ash-Shafikh, M. H., & Afif, N. C. (2019). Implementasi Reforma Agraria Terhadap Pemenuhan Harapan Masyarakat Yang Bersengketa Lahan. *BHUMI: Jurnal Agraria Dan Pertanahan*, *5*(2), 150–162. https://doi.org/10.31292/jb.v5i2.367

[14] Hastiyanto, F. (2019). Perencanaan Pembangunan Dan Gerakan Sosial Dalam Reforma Agraria Di Indonesia. *Kybernan: Jurnal Studi Kepemerintahan*, *5*(2), 18–28. https://doi.org/10.35326/kybernan.v5i2.369

Customary Law Community is the legal recognition. So far, in practice, the government's acknowledgment of Indigenous Law Communities and their rights is very rare or almost never occurs. The difficulty of recognizing this customary law community is because it is related to the problem of indigenous peoples' demands for land and other natural resources.[15]

From a historical perspective, the Indigenous Law Community has an old historical and cultural background. The existence of the Indigenous Law Community existed long before the existence or formation of this country. Dr. C. Snouck Hurgronje (1857-1936) with his De Atjehers[16], then Prof. Cornelis van Vollenhoven (1874-1933), his works Het Ontdekking van Adatrecht, Orientatie in het Adatrecht van Nederlandsch-Indie (1913) and Het Adatrecht van Nederlandsch-Indië. Then Ter Haar with his work Beginselen en Stelsel van het Adatrecht (1939) who researched Indigenous Law Communities during the colonial period. The Customary Law Community according to Van Vollenhoven is a legal community that refers to human units that have an orderly structure, a fixed area, rulers or administrators, and have assets, both tangible assets (land, inheritance) and property. intangible (titles - peerage).[17] Ter Haar in his book Beginselen en Stelsel van Het Adatrecht (1939) said that throughout the Indonesian archipelago, at the grassroots level, there are social groups living within groups who behave as a unit towards the outside world, both physically and mentally. The groups have a fixed and eternal arrangement, and the people of that group each experience their life in groups as a natural thing, according to the nature of nature. None of them had any thoughts of the possibility of disbanding the group. The human group also has its own administrator and has property, worldly and supernatural property, such a group is a legal alliance.[18] Based on Ter Haar's opinion, the Customary Law Community can be formulated, namely: first, a structured human unit; second, settle in a certain area; third, have or have a ruler, and; fourth, having tangible or intangible wealth, where the members of each unit experience life in society as a natural thing according to nature and the members of the Customary Law Community have no thoughts or tendencies to dissolve the bond or break away from the bond for as long as possible. - ever. According to the basic structure, the structure of the MHA alliances in Indonesia can be classified into two groups:[19]

1) Geneology: Geneology is membership of a unit based on factors based on blood ties, ties of descent. In genealogical legal alliances, there are three basic types of hereditary ties, namely::
    a) Blood ties according to the father line (patrilineal), as in the Batak, Nias and Sumbanese tribes;

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[15] Mungkasa, O. (2014). Reforma Agraria Sejarah, Konsep dan Implementasinya. *Buletin Agraria Indonesia*, *1*, 1–16.

[16] BEWA, R. (2007). Hukum Tata Negara Indonesia. *Jakarta: Raja Grafindo Persada*, 1–93.

[17] Victor, P. (1949). Adat Law in Indonesia. *International Affairs*, *25*(3), 388–389. https://doi.org/10.2307/3016797

[18] Sigiro, L. H. (2016). Analisis Hukum Tentang Pendaftaran Tanah Ulayat Yang Menjadi Hak Perorangan Pada Tanah Ulayat Di Kabupaten Dairi. *Premise Law Journal*.

[19] Victor, P. (1949). Adat Law in Indonesia. *International Affairs*, *25*(3), 388–389. https://doi.org/10.2307/3016797

b) Blood ties according to the maternal line (matrilineal), as in Minangkabau;
c) Blood ties according to the mother and father line (parental) as in the Javanese, Sundanese, Acehnese, Dayak tribes. Here to determine a person's rights and obligations, family from your father's side is the same as family from your mother's side.

2) Territorial: Territorial, namely membership of a unit bound to a certain area, this is a factor that has the most important role in every emergence of legal alliances. Those who from time immemorial or since their ancestors lived in the area of the community generally have an important position in the community. Legal partnerships based on territory can be divided into three types, namely:
   a) Village Alliance, is if there is a group of people tied to a place of residence, which has these boundaries there may be a main village or hamlets, including isolated hamlets which are emanations from the main village and do not stand alone. . An example is the villages in Bali.
   b) Regional Alliance, is if in a certain area there are several villages, each of which has a similar arrangement and management, each may be said to live independently, but all of them are subordinate parts of the region, have property and control forests and jungles between and the lands they inhabit. Examples are the Curia in Angola and Mandailing, which have huts within the region, and clans in South Sumatra with hamlets located within them.
   c) Alliances from several villages/villages are several village alliances located close together holding a consensus to maintain common interests, for example, will provide irrigation. For example, the huta-huta union found in the Batak tribe.

The recognition of the Indigenous Law Community has been carried out since Indonesia was founded. Article 18 of the 1945 Constitution of the Republic of Indonesia is the first stage of recognition in the Indonesian National context. The second stage of recognition is carried out through Law Number 5 of 1960 concerning Agrarian Principles. The third stage of recognition was carried out by the New Order regime. Recognition of the fourth phase was carried out after the amendment to the Basic Law by bringing up several laws. Each of these acknowledgments is interpreted to vary according to the tastes of the current rulers in Indonesia. Recognition of the existence of Indigenous Law Communities in the Constitution before the amendment is acknowledging the existing community with all the systems that apply therein. This refers to the meaning of the word "original arrangement". Because of this authenticity, it is considered as something special. Origin rights are rights which in the concept of legal politics are known as innate rights and not given rights. According to R. Yando Zakari, by referring to the

village as the original arrangement, the village is a 'social, economic, political and cultural association' which is different in essence from an 'administrative alliance' as meant by 'village government'. As the original structure, villages often manifest themselves as what Ter Haar calls a dorps republic or 'small country', as opposed to the word 'big country' which refers to a modern state order.[20] In the sense as stated above, the meaning of the original composition is not interpreted as singular, but must have certain criteria. Recognition of them is carried out as it is, no efforts from the state are allowed to uniform it. Article 18 B paragraph (2) concerning the recognition, respect and protection of Human Rights deserves to be questioned. This article often absorbs provisions in the Basic Agrarian Law which provides conditional recognition. Satjipto Raharjo[21] mentions four requirements in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia as a form of hegemonic state power that determines the existence or absence of Customary Law Communities. Meanwhile, Soetandyo Wignjsoebroto considered that the four requirements, both ipso facto and ipso jure, would be easily interpreted as the confession requested, with the burden of proof that the indigenous peoples still exist by the community itself, with the policy of admitting or not acknowledging unilaterally being in the hands of the central government.[22] Meanwhile, Rikardo Simarmata mentioned four requirements for indigenous peoples in the 1945 Constitution of the Republic of Indonesia after the amendments have a history that can be traced back to the colonial period.[23] Requirements for indigenous peoples already exist in Aglemene Bepalingen, Regering Regering (1854) Indische Staatregeling (1920 and 1929) which states that indigenous and foreign easterners who do not want to submit to European Civil law, religious laws, institutions and customs of the community apply. , "as long as it does not conflict with generally recognized principles of justice". Such requirements are discriminatory because they are closely related to the existence of culture. The orientation of the emerging requirements is an attempt to subjugate customary/local law and try to direct it into formal/positive/national law. This perspective is used by legislators in

[20] Zakaria, R. Y. (2016). Strategi Pengakuan dan Perlindungan Hak-Hak Masyarakat (Hukum) Adat: Sebuah Pendekatan Sosio-Antropologis. *BHUMI: Jurnal Agraria Dan Pertanahan*, *2*(2), 133. https://doi.org/10.31292/jb.v2i2.66

[21] Satjipto rahardjo. (2013). Eksistensi Hukum Pidana Adat Di Indonesia. *Fakultas Hukum Universitas Jayabaya*, *2*(2), 3284–3312.

[22] Nizammudin, N. (2016). Hak Menguasai Negara Dalam Sistem Tata Kelola Minyak Dan Gas Bumi: Analisis Putusan Mahkamah Konstitusi Nomor 36/Peraturan Perundang-Undangan-X/2012. *Jurnal Hukum Dan Peradilan*. Retrieved from http://www.jurnalhukumdanperadilan.org/index.php/jurnalhukumperadilan/article/view/30

[23] Simarmata, R. (2018). Pendekatan Positivistik dalam Studi Hukum Adat. *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, *30*(3), 463. https://doi.org/10.22146/jmh.37512

positioning Indigenous Law Communities in various laws whose material relates to Indigenous Law Communities.

a. Codification of Customary Law in Indonesia

According to the Black Law Dictionary 9th Edition, the notion of codification is "Codification - the process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law into an ordered code." The purpose of legal codification is to obtain a rechtseenheid (legal unit) and a rechts-zakerheid (legal certainty). What is considered a first national codification is the French Civil Code or the Napoleonic Code. Named the Code Napoleon because it was Napoleon who ordered and promulgated the French Law as a National Law at the beginning of the eighteenth century after the end of the political and social revolution in France. Examples of codification are criminal law in the Criminal Code, civil law in the Civil Code, commercial law in the Commercial Code.

Codification is the process of collecting laws in a particular area to produce a code of law. According to R. Soeroso, legal codification is legal bookkeeping in a set of laws in the same material.[24] The purpose of legal codification is to obtain legal certainty and unity. According to Satjipto, the purpose of codification is to make the existing set of rules logically, simple, definite, easy to master and harmonious. Laws that have been codified will be arranged in a complete and orderly manner. While what is meant by customary law is rules that are not codified and not also written but are still obeyed by the people in Indonesia because they have sanctions if the customary law is violated.

Codification and Unification are 2 different things. Unification is the unification of laws that apply nationally or the unification of national laws, while codification is the bookkeeping of laws in a set of laws in the same material. Examples of codification are criminal law in the Criminal Code, civil law in the Civil Code, and commercial law in the Commercial Code. While an example of unification is the establishment of Law Number 1 of 1974 concerning Marriage as a unification and uniformity of law to be enforced in Indonesia as a national law that regulates marriage. In Indonesia, prior to codification or applicable national law was customary law. According to V. Vollenhoven in Indonesia there are 19 kinds of customary law communities or rechtsgemeenschappen. Each rechtsgemeenschap has its own customary law which is different from the customary law in other rechtsgemeenschap, so that for the entire territory of Indonesia there is no legal unity and certainty. So nationally there is no legal unity and legal certainty because each region uses its own laws which differ from one another. So for the sake of legal unity and certainty, Indonesia needs laws that are national in nature, which apply to all Indonesian citizens. Therefore, it is necessary to codify.

Indonesia adheres to the Continental European legal system which is also known as Western law. In the Continental European legal system, written law dominates over unwritten law. Written law is considered to have more functions in regulating society than unwritten law. In the Continental

[24] Purba, H. (2007). Pengantar Ilmu Hukum Indonesia. *Rineka Cipta*. Retrieved from http://jdih.padangpanjang.go.id/public/monografi/PIH.pdf

European legal system, unwritten law is only considered as a complement to written law, which means that if there is a case where the arrangements have been written in the laws and regulations, the rules will be enforced even though the rules are contrary to the customary law that applies in the community. Western law and customary law are very different, this is because of the different schools of thought of Westerners and Indonesians. Westerners themselves believe that every individual is the center of legal interest, so that his independence, property and life must be protected by the state. Meanwhile, Indonesians believe that the administration of law in Indonesia is not individually but as a group, so that each person is distinguished which one is important and which one is not important in the group. For example, in Western law people are prohibited from acting alone to enforce the law if someone violates it, whereas in Customary Law there are some who allow to enforce the law if someone violates it. In the Batak area, there is such a thing as mambe-ongkon, which means that if someone kidnaps a woman, those who know about the incident may punish the perpetrator by tying him up with wood until one of his family pays a traditional fine. Customary law is religious-magical while Western law is rational. Western law does not know what magic is while Customary Law knows what magic is. For example, in Javanese custom, if someone is suspected of using magic, a ritual of pocong oath will be performed using a shroud. This oath is believed by the Javanese to have magical powers and the person who lies in this pocong oath is believed to die quickly not long after he takes the oath. In its own history, before the codification of law in Indonesia, the applicable law in Indonesia was customary law. However, according to most legal experts in Indonesia, customary law cannot be used as national law because customary law is a primitive, ancient law, and still views people's origins depending on the customs adopted. Therefore, customary law is deemed unsuitable for use in modern society, which considers all people to be equal before the law, regardless of their origins. According to Van Vollenhoven, there are 19 kinds of customary law communities in Indonesia, each of which is different from other customary law, so it cannot be combined and it is certain which law will apply. Therefore, Indonesia needs a law that can apply to all Indonesian people, namely with the codification of law.

Customary Law is not one of the laws in the Hierarchy of Legislation in Indonesia because Customary Law is not a written law. However, customary law is still formally recognized in the form of habits, judges' decisions and expert opinions. Customary Law also does not recognize a system of law violations that are pre-determined or often referred to as the Prea-existente regels system as stated in the "Legality Principle" as stated in Article 1 of the Criminal Code. So, if a judge finds a customary case, he has to find the law that will be applied in that case by taking jurisprudence or he can also consult with a customary leader who understands the custom. Jurisprudence is a means of fostering customary law that can follow the dynamic development of customary law. The judge cannot refuse a case that is brought to him even though the law is incomplete or even unclear. An example of a case is in a patrilineal society, girls are considered not to be heirs of both parents, but boys who are entitled to inherit the inheritance of their parents. However, in jurisprudence, girls are recognized as heirs of both parents the same as boys.

Customary law has several advantages, namely in accordance with a sense of justice, not rigid and also responsive. However, customary law also has a drawback, namely the lack of legal certainty because the times are increasing, the customary law will change continuously following the development of the times. The lack of legal certainty here means that it does not guarantee that in solving a problem the rules used in one case will be applied differently from other cases. It is different from written law which will treat everyone equally before the law. Customary law which often changes from time to time according to the desired interests will ensure a sense of justice for the community because the problems that exist in the community will also continue to develop from time to time. Therefore, written laws that are made to last as long as possible will also be left behind from the problems that arise in the community. Indigenous peoples are also voluntarily aware of the norms of good and bad. Meanwhile, modern society is aware of the norms of good and bad because of the coercive nature of the law, so that modern society's legal propriety is due to their fear of sanctions, not because of upholding the rule of law. The reason Customary Law can be obeyed is because:[25]

1) Customary law is born from the community itself so it is obligatory to obey it.
2) In accordance with the spirit and sense of justice possessed by the community.
3) If it is not obeyed, it will result in sanctions for those who violate it.

The values and norms contained in customary law will be strongly held and obeyed by customary law communities. Customary law also has an elastic ability and can also adapt itself to developments from time to time. Because in Indonesia there are so many indigenous tribes scattered throughout Indonesia, therefore Customary Law will only bind certain communities, which means that the customary law in tribe A is not the same as the customary law in tribe B. The non-codification of customary law means that the law is not in the form of a book. as well as other, more standard forms.

Customary law itself was born from the thoughts and ideals of the Indonesian people. The existence of customary law is also very important in the formation of national law in Indonesia as one of the main sources in the formation of legislation in Indonesia. According to Sulistyowati, customary law is a law that will continue to change depending on the way of thinking, ruling and having knowledge of the customary law community. Because of this, the codification of customary law is contrary to the existing law in Indonesia, which was made to be valid as long as possible, as is the case with the existing law in Indonesia.

IV. CONCLUSION

[25] Mukmin, A. (2020). Kedudukan Hukum Adat Dalam Era Reformasi. *Yuriska : Jurnal Ilmiah Hukum*, *2*(2), 131. https://doi.org/10.24903/yrs.v2i2.107

The recognition of the Indigenous Law Community has been carried out since Indonesia was founded. Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia is the first stage of recognition in the context of National Law. The second stage of recognition is carried out through Law Number 5 of 1960 concerning Agrarian Principles. The third stage of recognition was carried out by the New Order regime. The fourth phase of recognition was carried out after the amendment of the Constitution by bringing up several laws. Each of these acknowledgments is interpreted to vary according to the tastes of the current rulers in Indonesia. Recognition of the existence of Indigenous Peoples in the Constitution prior to the amendments is acknowledging the existing communities with all the systems that apply therein. This refers to the meaning of the word "original arrangement". Because of this authenticity, it is considered as something special. Article 18 B paragraph (2) concerning the recognition, respect and protection of Human Rights deserves to be questioned. This article often absorbs provisions in the Basic Agrarian Law which provides conditional recognition. The four requirements in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia are a form of hegemonic state power that determines the existence or absence of Customary Law Communities. Customary Law is not one of the laws in the Hierarchy of Legislation in Indonesia because Customary Law is not a written law. However, customary law is still formally recognized in the form of habits, judges' decisions and expert opinions. Customary law has several advantages, namely in accordance with a sense of justice, not rigid and also responsive. However, customary law also has a drawback, namely the lack of legal certainty because the times are increasing, the customary law will change continuously following the development of the times. The lack of legal certainty here means that it does not guarantee that in solving a problem the rules used in one case will be applied differently from other cases. It is different from written law which will treat everyone equally before the law. Customary law which often changes from time to time according to the desired interests will ensure a sense of justice for the community because the problems that exist in the community will also continue to develop from time to time. Therefore, written laws that are made to last as long as possible will also be left behind from the problems that arise in the community. Indigenous peoples are also voluntarily aware of good and bad norms.

ACKNOWLEDGMENTS

Thanks for the excellent corrections and input from the editorial board, a good combination of data and bibliography can be found in this article.

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