

## Interpreting Between the Concept of Customary Law Community And the Concept of Indigenous People (A Theoretical Study)

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**Abstract:** *The concept/term often used in the community and in the academic world is the concepts/terms of customary law community and indigenous people. In its development, there are those who equate the two concepts, and those that distinguish them according to their point of view. Therefore, the problems that arise in our society in everyday life are the difficulty to distinguish or interpret between the two concepts, namely: what the concept of indigenous people and the concept of indigenous peoples are, and how the background of the differences between the two concepts is. The method used in reviewing the problem above was normative legal research, by studying various literature/materials, both primary, secondary and tertiary legal materials. The concept of the customary law community and the concept of indigenous peoples are used in the same sense because the subjects are the same, even though theoretically and academically the concepts are different. The difference between these two concepts/terms is due to the emergence of historically different backgrounds, such as in aspect of language, users (people, scholar, entity or scientific field, all of which use the terms to give identity to certain group of people (as subject) in a certain area).*

**Keywords:** *Customary Law Community; Indigenous People.*

### INTRODUCTION

Historically, the development of customary law in Indonesia has shown that before Indonesia became an independent country, the existence of customary law community and their customary laws had existed since the existence of their ancestors (ancient times), or the era before the arrival of Hinduism and other

religions and foreign cultures into the intact life pattern of the community. The referred custom is “Polynesian Malay custom”<sup>1</sup>. As the time went on, Hindu culture came to Indonesia, followed by Buddhist, Islamic, Christian and other cultures, each of

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<sup>1</sup> Soerojo Wignjodipoero. (1983). *Pengantar dan Asas-Asas Hukum Adat*. Jakarta: PT Toko Gunung Agung. p. 25.

which had an influence on the original culture<sup>2</sup>. According to the existing circumstances and facts, it can be said that the existing Indonesian custom is a result of acculturation between the original custom rules (pre-Hindu) and the rules of life taught by Hinduism, Islamic, and Christian cultures<sup>3</sup>.

In line with the explanation above, juridically as a legal State, Indonesia constitutionally recognizes the existence of customary law communities, as mandated in the 1945 Constitution of the Republic of Indonesia (UUD 1945), where the State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law (Article 18 B paragraph 2 of the 1945 Constitution of the Republic of Indonesia). The existence of Article 18 B paragraph 2 of the 1945 Constitution of the Republic of Indonesia is supported by Article 28 I paragraph 3 affirming that: The

cultural identities and rights of traditional communities are to be respected in conjunction with the progressing times and civilization. In addition, the juridical dimension of recognition and respect for customary law communities is contained in various laws and regulations. Although juridically there has been recognition and respect for customary law communities, but sociologically, they have not yet fully taken into account by the government. Nonetheless, the existence of customary law communities remain internally exist, especially in carrying out their customary law institutions as a necessity in regulating their communities.

Along with the existence of customary law communities seen from legal entities, the concept/term of indigenous people has also been widely used in various studies. In its development, these two concepts (customary law communities and indigenous people) are often interchanged by community, scholars and experts since the subjects are the same. However, some distinguish the concepts/terms according to their point of view based on the history or

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<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

background of the emergence of these two concepts/terms, and the cultural, religious and other dimensions. Therefore, the problem arising in Indonesian society is the difficulty to distinguish or interpret the two concepts, such as what the concepts of customary law community and indigenous people are, and how the background of difference between the two concepts is.

## METHOD

The method used in examining the problem above is a normative legal research, by studying various literature related to the problem through various legal materials including primary, secondary and tertiary legal materials.

In relation to the development of these two concepts/terms in Indonesian society, the following is a brief description of the two concepts (the concept of customary law community and the concept of indigenous people) in the theoretical level to understand the background and meaning of these two concepts.

## DISCUSSION

### Customary Law Community

A community is a form of shared life, where citizens live together for a long period of time, resulting in culture. Community is a social system as a forum for patterns of social interaction or interpersonal relationship and relationship between social groups<sup>4</sup>.

In community life, the existence of customary law community is often likened to indigenous people. Historically, this customary law community has existed before the country establishment<sup>5</sup>. In the context of customary law, Ter Haar uses the term legal alliance or legal community (*rechtsgemeenschap*)<sup>6</sup>.

Quoting Cornellis van Vollenhoven's opinion, in his speech on October 2, 1901, Soepomo stated that "to find out the law, it is necessary to be investigated at any time and in any area, the nature and structure of legal alliance bodies where people controlled by the law

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<sup>4</sup> Soerjono Soekanto. (1986). *Hukum Adat Indonesia*. Jakarta: Rajawali Publisher. p.106.

<sup>5</sup> Fifik Wiryani. *Reformasi Hak Ulayat Pengaturan Hak-Hak Masyarakat Adat dalam Pengelolaan Sumber Daya Alam*. Malang: Setara Press. p.1.

<sup>6</sup> *Ibid*. p.11.

live their daily life”<sup>7</sup>. Furthermore, according to Soepomo, the explanation of the alliance agency should not be carried out in a docmatic manner, but on the basis of the community real life.

Ter Haar in his book “*Asas-asas dan Susunan Hukum Adat*” affirms that throughout the Indonesian archipelago at the level of the common people, there is social interaction within groups behaving as a unity to the best of theirselves to the world. The groups have the order and they experience their life in the group naturally, according to their nature. None of them thought to dissolve the group. These groups have its own management, own assets, and tangible and intangible possessions. These groups are legal alliances<sup>8</sup>.

Thus, the legal alliance or customary law community is a permanent organized group that has its own power and wealth in the form of material and immaterial properties<sup>9</sup>.

Hazairin provides a relatively long description of the customary law community that customary law community is a community unit with the completeness to stand alone, by having a legal unity, unitary authority and environmental unity based on joint rights to land and water for all its members”<sup>10</sup>.

If each customary law community is thoroughly examined, each has its basis and form. According to Soepomo, customary law community in Indonesia can be divided into two groups according to its structure, namely those based on genealogy and those based on the territorial area.

From the basis and form of the customary law community above, it develops into three types of customary law communities, namely: genealogical community, territorial community, and genealogical-territorial community.

#### Genealogical Community

Genealogical community or legal alliance is an organized community unit whose members are descended from an ancestor, either directly

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<sup>7</sup> R. Soepomo. (1996). *Bab-Bab Tentang Hukum Adat*. Jakarta: Pradnya Paramita Publisher. p. 45.

<sup>8</sup> B. Ter Haar Bzn. (1994). *Asas-Asas dan Susunan Hukum Adat*. Jakarta: PT Pradnya Paramita Publisher. p. 7.

<sup>9</sup> *Ibid.*

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<sup>10</sup> Hazairin in Soerjono Soekanto. (1986). *Op Cit.* p.108.

through blood relation or indirectly through marital relation or customary relation<sup>11</sup>.

This genealogical community can be divided into three types, namely: patrilineal, matrilineal, and bilateral or parental communities<sup>12</sup>.

1. Patrilineal Community

A patrilineal community is one whose lineage is traced through father's lineage (male line), not their mother's line. The Indonesian patrilineal communities include genealogical clans of Batak, Nias, Sumba, Nusatenggara, Maluku and Irian (Papua) people.

2. Matrilineal Community

A matrilineal community is one whose lineage is traced through mother's lineage (female line), not their father's line. The Indonesian matrilineal communities include kin relationships in Minangkabau, Kerinci, and Semendo in South Sumatra.

3. Bilateral or Parental Community

A bilateral or parental community is one whose the community structure is traced through parental lineage, both father's and mother's line. Thus, the kin relationship between the father's and the mother's lines are balanced or equal, each member is included in

both paternal and maternal clan, for example the communities in Java and Kalimantan.

Territorial Community

Territorial community or legal alliance is a permanent and organized community whose members are bound to a certain residential area, either physically as a place of life or spiritually as a place of worship for ancestral spirits.

Territorial community can be distinguished in three types, namely:

1. Village Community

Village community is people bound in a shared residence within their own area including several nearby *dukuhs* subject to the village apparatus residing in the village center, such as villages in Java and Bali.

2. Regional Alliance

Regional alliance is people bound in a joint residential area and controls customary communal land consisting of several hamlets or *kampung* with a common customary government center, such as: Nagari in Minangkabau, Marga in South Sumatra.

3. Village Union

Village union is a combination of several village alliances located side by side, where they hold agreement to cooperate. To maintain the mutual needs, a management body is formed consisting of village

<sup>11</sup> Hilman Hadikusuma. (2003). *Pengantar Ilmu Hukum Adat*. Bandung: CV Mandar Maju. p.108.

<sup>12</sup>*Ibid.*

administrators, such as: Subak in Bali, Huta-Huta Alliance in Batak tribe<sup>13</sup>

#### 4. Genealogical-Territorial Community

According to Soepomo, genealogical-territorial community is where legal alliance membership shall fulfill two conditions, namely: it shall be included in a genealogy unit; and it shall reside in the legal alliance area<sup>14</sup>. For example: Uma in Mentawai Island, Curia with its Huta-Huta in Tapanuli area, Marga with hamlets in South Sumatra, Marga with Tiyuh-tiyuh in Lampung and Nagori in Maluku<sup>15</sup>.

According to Hilman Hadikusuma<sup>16</sup>, customary law community or customary law alliance lives with its own community law based on territorial or genealogical ties, and/or a combination of both genealogical-territorial ones. Ideally, the legal community or legal alliance is alive today, but there have been many shifts and changes due to changes in people's lives, especially in areas used as the object of development.

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<sup>13</sup>Tolib Setiady. (2009). *Intisari Hukum Adat Indonesia (Dalam Kajian Kepustakaan)*. Bandung: Alfabeta Publisher. p. 82-83.

<sup>14</sup>R. Soepomo. (1996). *Op Cit.* p.47-51.

<sup>15</sup> Tolib Setiady. (2009). *Op Cit.* p. 83.

<sup>16</sup> Hilman Hadikusuma. (2003). *Op Cit.* p.106.

### Indigenous People

The concept of indigenous people is often referred to by other names, such as traditional community, native community, original charcoal and so on. There are also those who refer to the customary law community because this is emphasized due to having the power to regulate and manage their citizens<sup>17</sup>.

Historically, the discourse of indigenous people has gone hand in hand with the history of modern colonialism around the sixteenth century. Since that time, those who inhabited the territory which was then controlled and colonized by the colonialists were referred to as indigenous, native or aboriginal<sup>18</sup>.

The term "indigenous people" is commonly used in referring individuals and groups who are descendants of native people living in a country<sup>19</sup>. The term "indigenous" comes from the Late Latin, "indiginea" used to distinguish between people born in a certain

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<sup>17</sup> I Dewa Made Suartha. (2015) *Hukum dan Sanksi Adat Perspektif Pembaharuan Hukum Pidana*. Malang: Setara Press. p. 29.

<sup>18</sup> Rafael Edy Bosco. (2006). *Hak-Hak Masyarakat Adat Dalam Konteks Pengelolaan Sumber Daya Alam*. Jakarta: Elsam (Institute for Community Research and Advocacy). p. 5.

<sup>19</sup> *Ibid.*, p.52

place and those who came from other places (*advenae*). Therefore, the semantic root of the term has a conceptual element: prior or earlier in time<sup>20</sup>.

Today, the term *indigenous* refers more broadly to the heirs that inhabit the region, namely areas inhabited long before being colonized or controlled by foreign nations, which are now dominated by other people, both foreign and other tribes<sup>21</sup>.

In other countries, there are many terms used to refer to indigenous people, for example *first people* among anthropologists, *first nation* in the United States and Canada, *indigenous cultural communities* in the Philippines, *indigenous nation* and *native people* in Malaysia. While in the United Nations (UN), it was agreed to use the term *indigenous peoples* as contained in all documents discussing one of the draft UN declarations, namely the draft of *the UN Declaration of the Right of the Indigenous Peoples*<sup>22</sup>.

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.* p. 5

<sup>22</sup> Husein Alting. (2010). *Dinamika Hukum Dalam Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat Atas Tanah (Masa lalu, Kini dan Masa Mendatang)*. Yogyakarta: LaksBang Pressindo. p.44.

In their political discourse and human rights movement, this term is commonly called *indigenous peoples* (in English). Referring to the United Nations formulation, they are called indigenous because their roots are hereditary into an inseparable unit with the inhabited land and territory (in the sense of returning to the area after experiencing marginalization or forced eviction). They are also called *peoples* in the sense that they are unique communities with their existence and identity continuously passed down from generation to generation, connecting them to the community, ethnicity, or nation and their past history<sup>23</sup>.

The description above shows that the term indigenous people comes from English, distinguished by the term customary law community which is a translation of the term *rechtsgemenschap* (Dutch language)<sup>24</sup>.

The term of *indigenous people* is widely used by activists of non-governmental organizations and indigenous people organizations. The use of the term indigenous people is considered to have broader meaning when compared to the term

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<sup>23</sup> Rafael Edy Bosco. (2006). *Op Cit.*

<sup>24</sup> Husein Alting. (2009). *Op Cit.* p. 43.

customary law community which narrows the entity of indigenous peoples limited to only legal entities. The term indigenous peoples is believed to have a broad dimension of meaning rather than merely a legal aspect, in the sense that indigenous people are closely related to cultural, religious and other dimensions<sup>25</sup>.

In Indonesia, the term of indigenous people is not translated into “*masyarakat asli*”, but rather *masyarakat adat*. The use of the term *masyarakat asli* may cause sharp polemics that may even be a source of conflict, while the use of the term *masyarakat* is considered more popular. Although the term of indigenous peoples is translated as *masyarakat adat*, the definition of *masyarakat adat* is similar to the general definition of indigenous peoples<sup>26</sup>.

Until now, there has been no universally agreed definition of “indigenous peoples”. Difficulties in making generally accepted definition may be the result of the fact that indigenous peoples are very diverse in their culture and social structure, so that an exact and inclusive definition

cannot be applied in the same way throughout the world. Another reason is political, in which some countries object to the use of the term “indigenous” directed towards some of their communities, while other countries strongly object to the use of the term “peoples” because it may have implications for the emergence of self-determination rights<sup>27</sup>.

In the Congress of the Archipelago Indigenous Peoples in March 1999, it was agreed that indigenous peoples are: groups of people who have ancestral origins (hereditary) in certain geographical areas, and have a system of values, ideology, economy, politics, culture, social and own territory<sup>28</sup>.

Whereas the ILO convention No. 169 of 1989 concerning Indigenous Peoples in Independent Countries interpreted the Indigenous Peoples as ethnic groups inhabited in independent countries whose social, cultural and economic conditions differ from other community groups or ethnic groups inhabited a country since the time of colonization with its

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

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<sup>27</sup> Rafael Edy Bosko. (2006). *Op. Cit.* p.53.

<sup>28</sup> Husein Alting. (2009). *Op Cit.* p.44.

own economic, cultural and political institutions<sup>29</sup>.

The work of Firsty Husbani on the World Bank concludes a number of criteria for indigenous people group, namely<sup>30</sup>:

- a. Closeness of relationship with the area of descent and natural resources in the area.
- b. Determining identity and being identified by others as members of a different cultural group.
- c. Having a native language often different from national language.
- d. Having customary institution in the social and political fields.
- e. Their production is mainly sub-system oriented.

Jose Martinez Cobo, in his study on “Discrimination Against Indigenous Peoples”, defines indigenous peoples as a community group or ethnic group that has a continuation of historical relations between the pre-invasion period and the post-invasion period that developed in their territory, they consider themselves different from

other groups or part of the wider community<sup>31</sup>.

Approximately 350 million of the world’s population are indigenous people. Most live in remote areas. They consist of approximately 5000 people spreading in the world<sup>32</sup>. According to The World Conservation Union in 1997, out of about 6,000 cultures in the world, 4000-5000 of them are indigenous people or about 80 percent of all cultural communities in the world<sup>33</sup>.

In Indonesia, there are more than a thousand groups of indigenous peoples, who are at different levels of social economic development. They live in small groups in the mountains, jungles, mountain slopes, vast swamps, on the coast, islands and at the sea. At the local level, they often refer to themselves and are known by the surrounding community according to their respective tribes<sup>34</sup>.

Indigenous peoples are formed based on blood (genealogical) ties or based on territorial ties. Indigenous peoples based on genealogical ties are

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<sup>29</sup>Ricardo Simarmata. (2002). *Menyongsong Berakhirnya Abad masyarakat Adat Resistensi Pengakuan Bersyarat*. This paper has been presented in Regional Environmental Management Training, Environmental Research Center of IPB, dated July 5.

<sup>30</sup>Fifik Wiryani. *Op Cit*. p.11.

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<sup>31</sup> Jose Martinez Cobo in Husein Alting. (2009). *Loc Cit*.

<sup>32</sup> Rafael Edy Bosko. (2006). *Op. Cit.* p. 1.

<sup>33</sup> *Ibid.* p.2.

<sup>34</sup> *Ibid.* p.11

those consisting of population bound solely due to the descendants of a common ancestor. Indigenous peoples based on territorial ties are community whose members are bound to a certain area of their residence. In addition, there is a combination of indigenous people, namely territorial-genealogical indigenous peoples.

### Differences between Indigenous People and Customary Law Community

From the description of the concept of customary law community and the concept of indigenous people, it can be drawn several theoretical differences seen from various dimensions as the following table below:

No.	Customary Law Community	Indigenous People
1	In the aspect of term: Customary Law Community is derived from Dutch language: <i>Rechtsgemeenschap</i>	In aspect of term: Indigenous people is derived from English.
2	The concept/term of customary law community emerged and used by customary law expert	The concept/term of indigenous people is mainly used by activists of non-governmental organizations (NGOs) and indigenous people organization.
3	The emergence of the concept of customary law community is functioned for academic-theoretical purposes.	The emergence of the concept of indigenous people is mainly related to human rights (violation of human rights, especially the rights of indigenous people).
4	The concept of customary law community is use to give identity to indigenous group who has its own legal system and tradition, to distinguish it from Far European and Eastern groups with written legal systems and traditions.	The concept of indigenous people is used to refer to ethnic groups in independent countries whose social, cultural, and economic conditions differ from other community groups.
5	The use of concept/terms of customary law community is used for a legal entity.	The concept/terms of indigenous people has broader meaning, and is closely related to cultural, religious dimensions and other dimensions.

The description of the table of differences between the two concepts above shows that the use of the

concept of customary law community is mainly in a legal entity, while the use of the concept of indigenous

people is considered to have broader meaning because it is related to cultural, religious and other aspects. Based on further exploration, the meaning of customary law community is not limited to a legal entity, but it has broader meaning because customary law community, the customary authorities and all of the attributes are sourced from the traditional culture of the people, and are adhered to the religious aspect as one of the features in customary law, namely: the magical religious feature adopted by the customary law community. In addition to the differences above, it can be seen some similarities, namely:

- a. Historically, customary law community or indigenous people have existed since the ancestors before the formation of the country.
- b. Substantially, the subjects of these two concepts are the same.
- c. Customary law community or indigenous people have ancestral origins from generation and generation in a particular region.
- d. Sociologically, seeing from the definition of community, customary law community or

indigenous people is a community (it is just that: not all communities are customary law community or indigenous people).

- e. Juridically, the existence of customary law community or indigenous people is recognized and respected by the state (see Article 18 B paragraph 2 and Article 28 I paragraph 3 of the 1945 Constitution)
- f. The basis of the composition of customary law community or indigenous people is based on geneological and territorial ties.

## **CONCLUSION**

The concept of customary law community and the concept of indigenous people are often used interchangeably since the subjects are the same, even though they are academically different. The difference between these two concepts/terms is due to its emergence that is historically different from the concept/terms currently used by the users (including people, scholar, entity and scientific field, all of which use the terms to give identity to certain group of people (as a subject) in a particular region).

The concept of customary law community is theoretically derived from the Dutch language: *Rechtsgemeenschap* which emerges and is used by experts, and is mainly functioned for theoretical-academic purposes, used to give identity to indigenous groups with their own legal traditions, to distinguish them from European and Far East groups which have a written legal tradition, and its use is mainly for legal entity.

The concept of indigenous people is theoretically derived from English. This term is commonly used by activists of non-governmental organizations (NGOs) and indigenous peoples' organizations, the emergence of this concept is mostly related to human rights violations, especially the rights of indigenous peoples, used to refer to ethnic groups in independent countries whose social, cultural and economical conditions are different from other community groups, and has the broader meaning related to cultural, religious and other dimensions. Although these two concepts are theoretically different, their use does not dichotomize these two concepts, but can be used as needed, which is important to be

consistent in using them. The concept of customary law community is used when referring to legal entities, while the concept of indigenous people is used when referring beyond legal entities.

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