



## Legal Democratization of the Existence of Indigenous Peoples

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### Abstract

*This article describes the position of indigenous peoples who are starting to be marginalized due to the democratization process of existing laws. This article aims to show how far the process of legal democratization has progressed so that indigenous peoples are often marginalized while the law should uphold human rights. The research method used is the normative research method, and the research approaches used are the statute approach, the conceptual approach, and the analytical approach, so that they can help examine and find good research results. The democratic method begins with the freedom of the right to vote, which allows every citizen to participate in making political decisions. Each participant has equal rights in determining their own choices and also has the opportunity to be elected. The principle of a majority vote is essential to reaching decisions in the concept of democracy. "Democracy" contains three phenomena at once, namely political phenomena (power), ethical phenomena (moral teachings), and legal phenomena, which mutually form this theory with a theoretical basis that firmly rejects the authoritarian and totalitarian (political) order of power. It is based on this method that the rights and customs of indigenous peoples are increasingly marginalized.*

### 1. Introduction

Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia) reads: "Sovereignty is in the hands of the people and implemented according to the Constitution". This shows that the State of Indonesia adheres to the supremacy of the Constitution, meaning that there is no supreme law other than the Constitution, with Pancasila as the source of all sources of law. Thus, the Indonesian constitutional system will be based on a constitution, both written and unwritten. The basis for the existence of a constitution is a general agreement or agreement (consensus) among the majority of the people regarding the ideal structure with regard to the state. The existence of the state is not only to guarantee the common interests of its people but more than that, the state, as stated by Thomas Hobbes in the theory of community

agreements, is a symbol of the surrender of some of the individual rights of citizens to be managed and protected collectively (Astawa, 2009: 76).

If you look closely, there are so many international legal instruments that legitimize the existence of indigenous peoples. Among them are the ILO Convention No. 157 Year 1957 which deals with the protection and integration of indigenous peoples and tribal and semitribal communities in independent countries. This was followed by the 1989 ILO Convention 169. The main concept promoted in the 1989 ILO Convention No. 169 relates to the preservation and participation of indigenous peoples in policies and decisions that affect their survival and existence. There are several important points that are put forward in this convention, including the recognition of indigenous peoples as subjects of protected rights. Then followed by the recognition of the collective rights of indigenous peoples. In addition to the instruments mentioned above, there are also human rights principles and norms that apply to everyone regardless of the boundaries of space, time and place, because of the moral demands of human rights, which essentially look at humans not in different social strata. but there is equality. These principles and norms of human rights are interrelated and interdependent, such as the international covenant on Economic, Social and Cultural Rights (ICESCR), there is also The International Covenant on Civil Political Rights (ICCPR), Declaration Universal Human Rights (UDHR), and The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (Wattimena & Leatemia, 2021: 142-151).

Each nation and civilization has a unique character. In fact, every nation has its own character and qualities, so naturally no one is superior to another. In conjunction with the establishment of the legal system (Huntington, 1995: 5), Von Savigny stated that a legal system is part of the culture of society. Law is not born from an arbitrary act of a legislator, but is built into and can be found in the soul of society. Hypothetically, law can be said to originate from the habits of society and then be made through a legal activity (juristic activity) (Freeman, 2001: 904-905). The concept of "sivil society" requires a change towards a democratic life system, paying attention to human rights, and the absence of discrimination, where customary law should play a role in the government system, especially in village government (Nashir, 1999: 37). But on the other hand, the current of globalization demands more openness where the global community is dominant in all matters. Even with the swift current of globalization, if it is not possible to protect it, there will be no more traditional institutions and no more official villages. It is possible for the global community to control small communities so that what exists is modern law in each country. In writing this paper, the author wants to write about the democratization of law in the field of indigenous peoples.

## 2. Methods

This paper uses normative legal research methods because the focus of the study is the blurring of norms. It uses three approaches: the statute approach, the conceptual approach, and the analytical approach. The technique of tracing legal materials uses document study techniques as well as analysis of studies using

qualitative analysis. The data used is secondary data. Secondary data is data that is not obtained by researchers directly or comes from other parties in the form of written documents. Researchers obtained data by searching library materials online.

### 3. Results And Discussion

#### 3.1 Customary Law Community

Adat is a cultural notion consisting of cultural values, norms, habits, institutions, and customary laws that are commonly practiced in an area. If these customs are not implemented, confusion will occur, which will result in unwritten sanctions by the local community against perpetrators who are considered deviant. In 1893, Snouck Hurgronje, in A. Soehardi, introduced the term customary law as a name for Indonesian people's law, which was not codified (Soehardi, 1954: 45). Van Vollenhoven explained that "customary law is unwritten law that does not originate from regulations made by the former Dutch East Indies government or other tools of power that were held solely by the former Dutch powers (Van Vollenhoven, 1987: 6). Ter Haar explained that customary law is the whole of the rules that are embodied in the decisions of legal functionaries (in a broad sense) that have authority and influence and which, in practice, apply and are immediately obeyed wholeheartedly (Sudiyat, 1989: 7).

Basically, indigenous peoples in Indonesia can be divided into two groups according to the composition of the community, namely based on the regional environment (territorial) and hereditary (genealogical) ties. Customary law communities, organized based on the regional (territorial) environment, are customary law communities whose members feel united by the existence of a bond between each of them and the land they have inhabited since their birth for generations with their parents and previous ancestors. Indigenous peoples who are structured on the basis of heredity (genealogical) are members of customary law communities whose members feel bound in an order based on the belief that they all come from the same ancestry, according to the mother or father or both (Hazairin, 1970: 44).

In the composition of the customary law community based on heredity (genealogical), it means that a person becomes a member of the customary law community concerned because he becomes or considers himself descended from a single father (male ancestor) through the male lineage, or from a mother (female ancestor) through the female lineage, or through the lineage of the father and mother (Muhammad, 1998: 32). Indigenous peoples are a permanent and orderly community unit whose members are not only bound to the residence of a certain area, both in worldly terms as a place of life and in spiritual terms as a place of worship of ancestral spirits (territorial), but also bound by ties derived from blood ties and/or the same kinship from one ancestor, either indirectly due to marital ties or customary (genealogical) ties (Hadikusuma, 2003: 108-109). Every indigenous community has customary law, which is used to regulate all issues that arise in the customary environment. Customary law is a collection of rules of conduct that only apply to

indigenous Indonesians or indigenous peoples, which are coercive and have not been codified in the form of laws and regulations (Manan, 2003: 221).

Indigenous peoples is a general term or concept used in Indonesia to refer to customary law communities (*adat rechtsgemeenschappen*) that already existed during the Dutch East Indies occupation at that time (Azra, 2000: 110). In legal science and theory, they are formally known as Indigenous Peoples, but in recent developments, indigenous Indonesians have refused to be grouped in such a way, considering that customary matters concern not only the law but all aspects and levels of life. The concept of indigenous peoples, also called customary law communities, has been developed by legal and social science scholars since the Dutch colonial period. Indigenous people itself is a concept to designate indigenous communities (*adat rechtsgemeenschappen*), which constituted the largest part of the population of the Dutch East Indies at that time (Wikipedia, n.d.).

#### **a. Customary Law**

The definition of customary law itself is a living law because it embodies the real legal feelings of the people according to their own nature; customary law is continuously in a state of growing and developing like life itself (Soepomo, 1993: 3). Customary law is the original law of Indonesia. *Adat* itself comes from the Arabic word, which means habit. This habit is imitated and eventually applies to all members of society. Customary law is not written but is obeyed by members of indigenous peoples. Customary law is a form of custom that has legal consequences. Customary law is different from written law in terms of the form of sanctions given to people who commit violations (Muhammad, 1998: 61). The form of customary law sanctions focuses on the moral and material aspects; customary law does not recognize prison as a place for convicts to serve the sentence determined by the judge. There is an understanding of customary law put forward by experts and researchers related to this field, namely (Muhammad, 1998: 19): Bushar Muhammad, Customary law is a law that regulates especially the behavior of Indonesian people in relation to one another, whether it is the whole custom and habit (*decency*) that actually lives in indigenous peoples because it is embraced and maintained by members of that society, as well as those that are the entirety of the regulations that recognize sanctions for violations and that are stipulated in the decisions of customary rulers, namely those who have the authority and power to make decisions within the customary community.

Prof. Soekanto formulates customary law: It is this customary law complex, which is mostly not written down, not codified, and coercive in nature, that has sanctions (from that law), so it has legal consequences. This law complex is called customary law (Abdulrahman, 1984: 18). According to Soepomo, customary law is a living law because it embodies the real legal feelings of the people. In various seminars, the law that lives in society (the "living law") that is commonly used to develop shows various kinds of laws that grow and develop by themselves in society, which, according to Satjipto Raharjo, will still exist as a completeness of national law. The mention of customary law as unwritten law does not reduce its role in providing

distribution from customs, which express interests that are not expressed in written law.

Prof. Soeripto said customary law is all the customary rules and regulations of legal behavior in all Indonesian people's lives, which are generally unwritten and which the community considers appropriate and binding on community members. Because there is an awareness of general justice, these rules and regulations must be maintained by legal officers and community officers by force or threats of punishment (sanctions). Hilman Hadikusuma explained that customary law is a custom accompanied by sanctions. If there are customs that do not have sanctions, then these are in the form of rules of behavior that continuously apply in society, so they are referred to as normative habits (Pide , 2014: 4-5). Therefore, the point of demarcation between customary law and custom itself is not clear. Hilman Hadikusuma added that customary law can also be said to be the law of customary violations. Customary law is the set of rules that serve as guidelines for behavior in order to establish a balance between social life (Hadikusuma, 2003: 9).

### **b. Customary Institution**

In the elucidation chapter of the Village Law, point 12, the Unitary Traditional Village Institution of customary law communities that are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia is the center of community life that is independent. In this customary law community unit, there are known customary institutions that have grown and developed in the life of the community. In their existence, customary law communities have customary law areas and rights to assets within these customary law areas, and they have the right and authority to regulate, manage, and resolve various problems in the lives of village communities related to applicable customs and customary law. Village customary institutions are partners of the village government and other village institutions in empowering village communities.

Customary institutions are a forum or organization that has a role and function in the community structure formed by the community so that people's aspirations for traditional village governance are contained. A village customary institution is a social institution formed in a certain customary law community with jurisdiction over and rights to assets within the customary law area and the right and authority to regulate, manage, and resolve various problems in village community life related to customs and applicable customary law (H et al., 2016: 309). A customary institution is a container or organization where, in the settlement of a dispute or conflict, there is deliberation between traditional apparatus, which can be called customary deliberation. Where customary deliberations are carried out in society to realize the goals of living together according to customary law rules (Hadikusuma, 1981: 94).

## **3.2 Democracy**

The word "democracy" comes from two words, namely, *demos*, which means people, and *Kratosos/cratein*, which means government. Democracy itself, according to Hans Kelsen, means that the "will" expressed in the state legal order is identical to the will of the legal subjects (Kelsen, 2018: 402). Direct democracy is democracy with

the highest relative degree and is characterized by the fact that lawmaking as well as executive and judicial functions are primarily carried out by the people in large meetings or general meetings for the mechanism of the state government system in an effort to realize the people's sovereignty (*citizen power*). over the country run by the government of that country (Soehino, 2000: 146).

Democracy is a concept of government that is synonymous with popular sovereignty. Where the concept of democratic government places the people as the holders of the highest authority in carrying out the government of a country. Democracy is primarily an idea that presupposes that power is from, by, and for the people. In a more participatory sense, democracy is even referred to as the concept of power from, by, for, and with the people. This means that power is basically recognized as coming from the people, and because of that, it is the people who actually determine, give direction, and carry out the life of the state (Asshiddiqie, 2012: 293).

As stated by Titik Triwulan Tutik, "democracy itself, etymologically (language review), consists of two words derived from Greek, namely "demos," which means people (residents of a place), and "cretein" or "cratos," which means power (sovereignty) (Tutik, 2011: 67). Thus, it can be interpreted that democracy is a system of government in a country whose government is carried out by the people. While defining democracy, Joseph A. Schemeter argues that "democracy is an institutional plan to reach political decisions where individuals gain the power to decide how to compete competitively over the voice of the people (Fatah, 1994: 8-9). The narrow definition of democracy was put forward by Joseph Schumpeter, who said that "democracy is a political mechanism for selecting political leaders. It is the citizens who elect the political leaders who compete for votes, and it goes on with the next leader (Sorensen, 2014: 14).

According to Munir Fuady in *The Concept of a Democratic State*, what is actually meant by democracy is a system of government in a country where citizens naturally have rights, obligations, positions, and powers both in carrying out their lives and in participating in state power, where people have the right to participate in running the country or supervising the exercise of power either directly (for example, through the public sphere) or through representatives who have been elected in a fair and honest manner with a government that is run solely for the benefit of the people, so that the system of government in the country comes from the people, is run by the people, and is for the people, so that democracy is (Fuady, 2010: 2). According to Sartori, democracy is a general or universal term, and there is no democratic system that applies to all nations (Sulardi, 2012: 23).

While in its development, as a measure in assessing a democratic government political system, at least there must be 3 basic principles as follows (Ilmar, 2014: 64): 1). Upholding ethics and integrity as well as morality in government politics so that it becomes a working basis for the political, economic, and social systems in administering government; 2). The use of the principle of constitutionalism firmly in the system of government administration and adherence to the rule of law in force;

3). Implementation of public accountability, where people who hold or occupy public government positions must be held accountable by the people.

According to Soekarno, democracy is the "people's government". Furthermore, for Soekarno, democracy is a way of forming a government that gives the people the right to participate in the process of government. However, the democracy that Soekarno wanted and conceptualized did not want to imitate the modern democracy that was born from the French Revolution, because according to Soekarno, the democracy produced by the French Revolution was a democracy that only benefited the bourgeoisie and became a place for capitalism to grow. More specifically, Soekarno's conception of democracy is contained in his concept of thought, namely Mahayana. Marhaenism, which was Soekarno's thought when he was still studying as a student in Bandung, In essence, Mahayana Buddhism often becomes a tool for social, political, and economic analysis in Indonesia. Marhaenism consists of three points, or what is referred to as "Trisila", namely (Soekarno, 2005: 169-171): 1). Socio-nationalism, which means the Indonesian nationalism that Soekarno wanted, was nationalism that had a social character by placing human values within the nationalism itself, so it was not a chauvinist nationalism; 2). Socio-democracy, which means that the democracy desired by Soekarno is not merely political democracy but also economic democracy and democracy that departs from the local wisdom values of Indonesian culture, namely deliberation for consensus; 3). Belief in the One and Only God, which means that Soekarno wanted every Indonesian citizen to be a human being who acknowledges the existence of God (theist), whatever their religion.

### 3.3 Indigenous People's Democracy

In broad outline, the country of Indonesia adheres to a democratic system. It can be said that democracy is a form of government in which the formulation of policies, directly or indirectly, is determined by the majority vote of citizens who have the right to vote and be elected, through a forum for the formation of their voices in a state of freedom and without coercion. This general definition, at least, is in line with what Joseph Schumpeter stated in his classic book, *Capitalism, Socialism, and Democracy*, which said that democracy is the will of the people and the common good. The current feature of democracy is that every decision is always based on an excess of votes. Here, there is always a struggle to get the most votes on every issue between groups. The big group gets the most votes, while the small voice suffers defeat. Nevertheless, the struggle for democracy in the struggle for the most votes is not a matter of life or death. Because even small groups still have the right to sit in government. So, it's different from the struggle in an autocratic or dictatorial government, where the losing group, namely the people's group that doesn't belong to the dictatorial group or party, doesn't mean anything at all (Kansil, 2008: 42-43).

The method of walking democracy begins with the freedom of the right to vote for every citizen to participate in making political decisions. Each participant has equal rights in determining their own choices and also has the opportunity to be elected. The principle of a majority vote is essential to reaching decisions in the

concept of democracy (Nurtjahjo, 2006: 67). "Democracy" contains three phenomena at once, namely political phenomena (power), ethical phenomena (moral teachings), and legal phenomena, which mutually form this theory with a theoretical basis that firmly rejects the authoritarian and totalitarian (political) order of power (Nurtjahjo, 2006).

It can be concluded that democracy is viewed as a whole and that democracy is an idea of political order. The focus is more on the concept of power based on the will of the people, so democracy is part of the big discussion of politics, political philosophy, and social ethics, of course, including the discussion of political ethics. This is an appreciation, order, and management of the state that is desired and approved by the people through a majority vote. So it can be concluded that democracy is only one of the phenomena of power management in a state institution that determines the voice of the majority of people who are free and have equal rights to be the determinant. Democracy can then be affirmed as a form of state government in addition to other forms that we are familiar with, such as monarchy, and aristocracy. The Village Head Electoral System is a real form of democracy in the democratization of indigenous peoples, the election system regulated in the Village Law directs indigenous peoples to continue to exist in the development of democratic politics in Indonesia.

#### 4. Conclusion

Indigenous peoples are an inseparable part of the State of Indonesia, increasingly modern legal developments require indigenous peoples to participate in every development of this era, and the rules that are made certainly accommodate every community's rights, the same is the case with what Bung Karno said, that democracy as a change that is present for the oppressed, society in its existence, can be able to follow the development of today's law. Customary institutions can play a similar role. The institution reflects the original structure of the village, which grows and develops at the initiative of the village community. Thus, as part of the village community initiative, the principles of democracy can also be developed from this institution. As partners in the village government, both (LKM and customary institutions) are also responsible for implementing democracy in the village, while as part of the village, both are also responsible for developing democratic life.

#### References

- Abdulrahman. (1984). *Hukum Adat Menurut Perundang-Undangan Republik Indonesia*. Cendana Press.
- Asshiddiqie, J. (2012). *Hukum Tata Negara dan Pilar Demokrasi, Serpihan Pemikiran Hukum dan HAM*. Konstitusi Press.
- Astawa, I. G. P. (2009). *Memahami Ilmu Negara dan Teori Negara*. Refika Aditama.
- Azra, A. (2000). *Demokrasi, Hak Asasi Manusia, Masyarakat Madani*. ICCE UIN Syarif Hidayatullah.



- Fatah, S. (1994). *Masalah dan Prospek Demokrasi di Indonesia*. Ghalia Indonesia.
- Freeman, M. D. A. (2001). *Lloyd's Introduction to Jurisprudence*. Sweet & Maxwell Ltd.
- Fuady, M. (2010). *Konsep Negara Demokrasi*. Refika Aditama.
- H, D., Sujadi, F., Dian, A., Ambarjaya, B. S., Rahmatia, D., UW, J., S, D., & Sulfiawan, W. (2016). *Pedoman Umum Penyelenggaraan Pemerintah Desa: Landasan Hukum dan Kelembagaan Pemerintahan Desa*. Media Pustaka.
- Hadikusuma, H. (1981). *Hukum Ketatanegaraan Adat*. Alumni.
- Hadikusuma, H. (2003). *Pengantar Ilmu Hukum Adat Indonesia*. Mandar Maju.
- Hazairin. (1970). *Demokrasi Pancasila*. Bina Aksara.
- Huntington, S. P. (1995). *Gelombang Demokrasi Ketiga*. Grafiti Press.
- Ilmar, A. (2014). *Hukum Tata Pemerintahan*. Prenada Media Group.
- Kansil, C. S. T. (2008). *Hukum Tata Negara Republik Indonesia*. Jakarta: Rineka Cipta.
- Kelsen, H. (2018). *Teori Umum Tentang Hukum dan Negara* (R. Muttaqien (trans.)). Nusa Media.
- Manan, A. (2003). *Hukum Islam Dalam Berbagai Wacana*. Pustaka Bangsa Press.
- Muhammad, B. (1998). *Azas-Azas Hukum Adat Suatu Pengantar*. Pradnya Paramita.
- Nashir, H. (1999). *Pragmatisme Politik Kaum Elite*. Pustaka Pelajar.
- Nurtjahjo, H. (2006). *Filsafat Demokrasi*. Sinar Grafika Offset.
- Pide, A. S. M. (2014). *Hukum adat : dahulu, kini, dan akan datang*.
- Soehardi, A. (1954). *Pengantar Hukum Adat Indonesia*. S-Gravenhage.
- Soehino. (2000). *Ilmu Negara*. Liberty.
- Soekarno. (2005). *Dibawah Bendera Revolusi*. Yayasan Bung Karno.
- Soepomo, R. (1993). *Hukum Adat*. Pradnya Paramita.
- Sorensen, G. (2014). *Demokrasi Dan Demokratisasi (Proses dan Prospek dalam Sebuah Dunia yang Berubah)*. Pustaka Pelajar.
- Sudiyat, I. (1989). *Azas-Azas Hukum Adat*. Liberty.
- Sulardi. (2012). *Menuju Sistem Pemerintahan Presidensiil Murni*. Setara Press.
- Tutik, T. T. (2011). *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen*. Kencana Prenada Media Group.
- Van Vollenhoven, C. (1987). *Penemuan Hukum Adat*. Djambatan.
- Wattimena, J. A. Y., & Leatemia, W. (2021). Legal Legitimacy of Indigenous Peoples' rights In Natural Resources Management: The Case In Seram Barat. *Awang Long Law Review*, 4(1), 142-151.
- Wikipedia. (n.d.). *Masyarakat adat*. Wikipedia.Org.  
[https://en.wikipedia.org/wiki/Masyarakat\\_adat](https://en.wikipedia.org/wiki/Masyarakat_adat)