

Protection of Indigenous Peoples (Local Beliefs) in the Context of Human Rights in Indonesia

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Abstract

This paper delves into the intricate dynamics surrounding the protection of indigenous peoples, specifically focusing on the preservation of their local beliefs, within the broader context of human rights in Indonesia. By examining the intersection of indigenous rights and human rights principles, this study seeks to illuminate the challenges and opportunities faced by indigenous communities in safeguarding their cultural heritage and spiritual practices. Drawing upon legal frameworks, case studies, and socio-political analyses, the research explores the extent to which Indonesian laws and policies align with international human rights standards in protecting indigenous peoples' rights, particularly regarding their local beliefs. Additionally, the paper addresses the complexities arising from the interaction between indigenous traditions and modern legal systems, shedding light on potential avenues for enhancing the recognition and protection of indigenous peoples' rights in Indonesia.



Through a multidisciplinary approach, this study aims to contribute valuable insights to ongoing discussions on indigenous rights, cultural preservation, and human rights advocacy in Indonesia and beyond.

KEYWORDS *Local Belief, Indigenous People Protection, Human Rights Protection, Freedom of Religion*

Introduction

The term *human rights* serve as a widely recognized concept encompassing a range of fundamental entitlements inherent to all individuals by virtue of their humanity. Often used interchangeably with terms such as "*public relations rights*," "*fundamental rights*," or "*basic rights*," human rights refer to the essential freedoms and protections afforded to every person, regardless of nationality, ethnicity, gender, religion, or other characteristics. These rights are considered universal, meaning they apply to all individuals without discrimination, and are typically enshrined in national constitutions, international treaties, and customary international law. The concept of human rights embodies principles such as the right to life, liberty, and security of person, freedom of expression, religion, and assembly, as well as economic, social, and cultural rights. These rights are seen as inherent to human dignity and are essential for the realization of individuals' full potential and well-being. The use of terms like "*fundamental rights*" or "*basic rights*" underscores the foundational nature of these entitlements, emphasizing their importance in ensuring justice, equality, and respect for human dignity in societies worldwide.¹

¹ Rahayu Rahayu, *Hukum Hak Asasi Manusia* (Semarang: Badan Penerbit Universitas Diponegoro, 2010). It is even further emphasized that human rights are a legal and normative concept which states that humans have inherent rights because they are human beings. Human rights apply anytime, anywhere, and to anyone, so they are universal. Human rights are in principle inalienable, indivisible, interrelated and interdependent. Human rights are usually addressed to the state, or in other words, it is the state that has the obligation to respect, protect and fulfill human rights,

This understanding emphasized that human rights are not merely legal or social constructs, but rather inherent attributes of human beings by virtue of their humanity. In essence, it implies that every individual possesses certain fundamental entitlements simply by virtue of being human. This interpretation underscores the universal nature of human rights, transcending national boundaries, cultural differences, or political ideologies. Regardless of background or status, every person is deemed to have an intrinsic worth and dignity that warrants protection and respect. Thus, human rights are not granted by governments or societies, but rather recognized and affirmed as inherent to human existence.

In the Indonesian context, this interpretation of human rights as fundamental rights underscores the nation's commitment to upholding the dignity and well-being of all individuals within its borders. By recognizing human rights as fundamental to human existence, Indonesia acknowledges the inherent worth and equality of all its citizens, irrespective of their background, ethnicity, religion, or social status. This interpretation also serves as a guiding principle for shaping laws, policies, and practices to ensure the protection and promotion of human rights for all Indonesians. Furthermore, it emphasizes the importance of fostering a culture of respect, tolerance, and inclusivity within Indonesian society, where the rights and freedoms of every individual are valued and upheld.²

The legal framework of the Republic of Indonesia encompasses various forms of written law, each containing provisions pertaining to

including by preventing and following up on violations committed by the private sector. In modern terminology, human rights can be classified into civil and political rights relating to civil liberties (e.g., the right to life, the right not to be tortured, and freedom of opinion), as well as economic, social and cultural rights related to access to public goods (such as the right to obtain proper education, the right to health, or the right to housing). *See also* Maurice Cranston, "Human rights, real and supposed." *Talking about Welfare*. (London, Routledge, 2018), pp. 133-144; Jack Donnelly, and Daniel J. Whelan. *International Human Rights*. (London, Routledge, 2020); Abdulla, Mariam Rawan. "Culture, religion, and freedom of religion or belief." *The Review of Faith & International Affairs* 16, No. 4 (2018): 102-115; Ilias Trispiotis, "Religious freedom and religious antidiscrimination." *The Modern Law Review* 82, No. 5 (2019): 864-896.

² Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1994), p. 334.

human rights. Primarily, these regulations are found in four key sources. Firstly, the constitution, also known as the State Basic Law, serves as the foundational document outlining fundamental rights and principles. Secondly, the decrees of the People's Consultative Assembly (MPR TAP) constitute another source of legal guidance on human rights matters. Thirdly, human rights provisions are embedded within legislation passed by the national legislature, known as laws. Finally, additional regulations addressing human rights issues can be found in implementing statutory instruments such as government regulations, presidential decrees, and other administrative guidelines. Together, these legal instruments form the basis of Indonesia's legal framework for the protection and promotion of human rights, providing a comprehensive framework for ensuring the rights and dignity of all individuals within the nation.³

The advantages of setting human rights in the constitution provide a very strong guarantee, because changes and or deletion of one article in the constitution, as in the state administration in Indonesia, undergo a very difficult and long process, including through amendments and referendums. While the weakness is that what is regulated in the constitution only contains rules that are still global, such as provisions

³ In Indonesia, as in other countries, several human rights have also been included in the constitution, both in the 1945 Constitution, the RIS Constitution, and the 1950 Provisional Constitution. Human rights are listed in the 1950 Constitution. The 195 Constitution (before the amendment) is not contained in a separate charter but is spread over several articles, especially Articles 27 to 34. *See also* Ratna Kumala Sari, and Sapto Budoyo. "Perkembangan Pengaturan Hak Asasi Manusia (HAM) dalam Hukum di Indonesia." *Jurnal Meta-Yuridis* 2, No. 2 (2019); Susani Triwahyuningsih, "Perlindungan dan Penegakan Hak Asasi Manusia (HAM) di Indonesia." *Legal Standing: Jurnal Ilmu Hukum* 2, No. 2 (2018): 113-121; Dinie Anggraeni Dewi, "Hak Asasi Manusia: Pentingnya Pelaksanaan dan Penegakan Hak Asasi Manusia di Indonesia Saat Ini." *Journal Civics & Social Studies* 5, No. 1 (2021): 90-97; Ridwan Arifin, and Lilis Eka Lestari. "Penegakan dan Perlindungan Hak Asasi Manusia di Indonesia dalam Konteks Implementasi Sila Kemanusiaan yang Adil dan Beradab." *Jurnal Komunikasi Hukum (JKH)* 5, No. 2 (2019): 12-25; Bagus Hermanto, "Rekonstruksi Penguatan Eksistensi Pengadilan Hak Asasi Manusia di Indonesia Berlandaskan Pancasila dan Statuta Roma Terhadap Pengaturan Undang-Undang Pengadilan Hak Asasi Manusia." *Jurnal Legislasi Indonesia* 16, No. 1 (2019): 89-106.

regarding human rights in the Indonesian constitution which are still global in nature. Meanwhile, if human rights are regulated through the TAP MPR, the weakness is not being able to provide legal sanctions for violators. While human rights regulations in the form of laws and implementing regulations are weak in the possibility of frequent changes

According to Law No. 26 of 2000 Article 1 concerning the Human Rights Court, in this law what is meant by:

1. Human rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld, and protected by the state, law, government and everyone for the honor and protection of human dignity.
2. Serious violations of human rights are violations of human rights as referred to in this law.
3. The Human Rights Court, hereinafter referred to as the Human Rights Court, is a special court for gross violations of human rights.
4. Everyone is an individual, group of people, whether civilian, military or police who are individually responsible.
5. Investigation is a series of investigative actions to search for and find out whether there was an incident suspected of being a gross human rights violation to be followed up with an investigation in accordance with the provisions stipulated in this Law.

Indigenous peoples are communities that live on the basis of hereditary origins in one customary territory, which have sovereignty over land and natural resources, socio-cultural life regulated by customary law, and customary institutions that manage the continuity of community life.⁴

⁴ It is even further emphasized in the UN Declaration on the Rights of Indigenous Peoples that Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human rights and international human rights law (Article 1). Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economics, social and cultural development (Article 3). See Jessie Hohmann, and Marc Weller, eds. *The UN Declaration on the Rights of Indigenous Peoples: A commentary*. (Oxford, Oxford University Press, 2018); Mandy Li-Ming Yap, and Krushil Watene. "The sustainable development goals (SDGs) and

There have been many studies showings that indigenous peoples in Indonesia have traditionally managed to maintain and enrich natural biodiversity. It is a reality that most indigenous peoples still have customary wisdom in managing natural resources. These local systems differ from each other according to local socio-cultural conditions and types of ecosystems. They generally have a system of knowledge and management of local resources that are inherited and continuously developed from generation to generation.

Indigenous peoples are a unit of society within a customary territory that is autonomous, in which they regulate their life system independently (among other things: law, politics, economy, etc.) by the community itself, not formed by other forces, for example a village unit with its Village Community Resilience Institute. The life of indigenous peoples' communities is now not completely autonomous and apart from the process of integration into the organizational unity of the life of the nation-state which is large-scale and has a national format. So that the formulation regarding indigenous peoples made in the pre-independence period tended to be rigid in the static conditions of indigenous peoples without pressure for change.⁵

As well as the definition of customary law is a legal system that is known in the social environment in Indonesia and other countries such as Japan, India, and China. Customary law is the original law of the nation Indonesia. The source is regulations law_unwritten that grow and develop and are maintained with the legal awareness of the community. Because these regulations are not written and develop, customary law has the ability

indigenous peoples: another missed opportunity?." *Journal of Human Development and Capabilities* 20, No. 4 (2019): 451-467; Rodolfo Stavenhagen, "Indigenous rights: some conceptual problems." *Constructing Democracy*. (London, Routledge, 2019), pp. 141-159; Maivân Lãm, *At the Edge of the State: Indigenous Peoples and Self Determination*. (London, BRILL, 2021); Martin Crook, Damien Short, and Nigel South. "Ecocide, genocide, capitalism and colonialism: Consequences for indigenous peoples and glocal ecosystems environments." *Theoretical Criminology* 22, No. 3 (2018): 298-317.

⁵ Martua Sirait, "Bagaimana Hak-Hak Masyarakat Hukum Adat dalam Mengelola Sumber Daya Alam Diatur", *Southeast Asia Policy Research Working Paper*, No. 24, p. 5.

to adapt and be elastic. Apart from that, customary law communities are also known, namely a group of people who are bound by their customary legal order as joint citizens of a legal alliance because of the similarity of residence or on the basis of heredity.

Maria SW Sumardjono interprets customary law community as a society that arises spontaneously in certain areas with a great sense of solidarity among its members and views non-members as outsiders, using their territory as a source of wealth that can only be fully utilized by its members, utilization by outsiders must be with permission and the provision of certain rewards in the form of recognition.⁶ In the literature and legislation there are two mentions of the term indigenous peoples, namely some who call it indigenous peoples and some who call it customary law communities. Nevertheless, these differences in terminology do not deny or emphasize customary rights owned by the community concerned.⁷

The International Labor Organization (hereinafter referred to as the ILO) issued ILO Convention No. 169 of 1989, which defines indigenous peoples as people who live in independent countries where social, cultural, and economic conditions distinguish them from other parts of society in the country, and their status is regulated, either wholly or partly by the customs and traditions of the community custom or by special laws and regulations.⁸

The term indigenous peoples began to go global, after in the 1950s the ILO, a world body at the United Nations (hereinafter referred to as the UN) popularized the issue of indigenous peoples or indigenous peoples. After being exhaled by the ILO as a global issue in UN institutions, the World Bank also adopted the issue for development funding projects in a number of countries, through the OMP (1982) and OD (1991) policies, especially in third countries, such as in Latin America, Africa, and Asia Pacific. The emergence of indigenous peoples' issues began with various protest movements of indigenous peoples in North

⁶ Abrar Saleng, *Hukum Pertambangan* (Yogyakarta: UII Press Andico Multiplay, 2004), pp. 51-53.

⁷ Lisman Sumardjani, *Konflik Sosial Kebutuhan* Bogor, 2007, p. 1.

⁸ Abrar Saleng, pp. 4-7.

America who demanded development justice, after the presence of a number of transnational mining companies operating in their management areas, and the development of a number of conservation areas by the US and Canadian governments.⁹

The Inuit community in Alaska is a victim of the unfair development of the mining industry in the United States. In Canada, the Inuit community who are part of the country's territory also protested against the Canadian government's policy that forced them to leave the managed area for villages on the outskirts of town, because oil and gas and coal companies would manage the area. In the central United States, the development of the Mississippi National Park also removed the management rights of other indigenous Indian communities, such as the Mohak. Meanwhile, the development of Rocky Mountain National Park in the west also threatens the life of the Apache Indians. Various protests from native peoples on the plains of North America in the 1950s provoked a reaction from the ILO as a United Nations agency engaged in labor protection issues. Therefore, The ILO then conducted various field research, and in 1957 the ILO issued Convention No. 107 and Recommendation No. 104 concerning the Protection and Integration of Indigenous Peoples and Tribal Communities. In 1989, the Convention was renewed by the ILO with Convention No. 169.¹⁰ Issues of injustice felt by various indie communities or native peoples have influenced the ILO to bring up its generative issues, namely indigenous peoples. By the NGO movement (non-governmental organizations) in Indonesia, it was then adopted and translated into the vocabulary of indigenous peoples, especially at the meeting entitled Workshop on the Development of Indigenous Peoples' Legal Resources on the Management of Natural Resources in Forest Areas, which took place from 25 to 29 May 1993, in Toraja, South Sulawesi. The issue of indigenous peoples is increasingly gaining its place in the civil society movement through the declaration of

⁹ Azmi A. R Siradjudin, *Pengakuan Masyarakat Adat dalam Instrumen Hukum Nasional*, (Sulawesi Tengah: Yayasan Merah Putih, 2014).

¹⁰ Azmi A. R Siradjudin, pp. 89-91.

the formation of the Alliance of Indigenous Peoples of the Archipelago (AMAN) in 1999 in Jakarta.¹¹

Indigenous Peoples' Rights Issues: Problems and Challenges

In the Indonesian context, indigenous peoples have experienced ups and downs of discriminatory, manipulative and semi-accommodating treatment from time to time. In the Dutch colonial era, indigenous peoples were recognized through IGO (*Inlandshe Gemeente Ordonantie*) Staatsblad 1906 No. 83 which regulates villages in Java and Madura and IGOB (*Inlandshe Germente Ordonantie Biutengewsten*) Staatsblad 1938, No. 490 which recognizes customary governance structures in ten areas outside Java and Madura. However, the policy of recognition of local/customary institutions was basically part of the Dutch Colonial economic control politics through the manipulation of local obedience structures to power structures. Through the village head or traditional leaders who were trusted and obeyed by their residents, villagers could be ordered to do forced labor (*dwang cultuur*), collect taxes and so on for the benefit of the Dutch Colonial Government.¹²

During the New Order era, multiple identities, including indigenous peoples, were integrated so that they were unified, uniform and centralized. The New Order's political economy was behind this policy. In the context of land rights, national agrarian law thinkers say that after being integrated into the state, the concept of customary community customary rights is elevated to become national customary rights through the concept of State Controlling Rights. That is, when the state is present, communal ulayat is silenced. In fact, the customary law of the country, according to a professor of law, was transferred to the central government as the highest authority, the holder of the right to control/ulayat over the entire territory of the country. Then, based on the concept of state ulayat, a number of areas previously claimed by indigenous peoples as customary areas, were divided into concession areas.

¹¹ Azmi A. R Siradjudin, pp. 98-99.

¹² Y. Zakaria, *Abih Tandeh: Masyarakat Desa Dibawah Rezim Orde Baru* (ELSAM, Jakarta, 2016), pp. 47-48.

In the current era, under the banner of regional autonomy, indigenous peoples are again recognized for their existence but must fulfill certain conditions, among others, must be in accordance with the times and laws and regulations. However, many existing laws and regulations are still a legacy of the New Order's legal politics. For example, the New Order version of state ulayat is still intact. In Law No. 41 of 1999, article 1 letter (f) states that "*customary forest is a state forest that is in the territory of customary law communities*". This formulation broke the hopes of indigenous peoples to return their lands which had previously been taken by force for the political economy of the past political regime.

In short, colonialism until Indonesia became independent seemed to exist among indigenous peoples to suck up their economic resources through the manipulation of various structures, institutions, value systems and the obedience of indigenous peoples.

After the reform, the government should have introduced human rights values that uphold the liberation of pluralism, the uniqueness and uniqueness of the Indigenous Peoples. Although Indonesia did not ratify or sign ILO Convention 169 of 1989 but at least the government can take the ratio of thoughts and experiences that are developing in the international world today, of course the ratio of thoughts that is adapted to the conditions of our country, for example, namely the limitation of the right to self-determination because if it is not limited to rights which are human rights This would be dangerous because it could be used as a basis for certain parties to threaten the integrity and unity of the state. In other words as long as the government does not adopt the ratio of thinking that is developing in the international world today, it can be said that the government adheres to the ratio and the application of colonialism practices as was done by the Dutch East Indies Government against the Indonesian Nation by imposing Agrarische Wet 1870 with its *Domeinverklaring* principle¹³ to provide justification for the deprivation of

¹³ Lands included in the state *domei* are lands whose ownership cannot be proven either individually or jointly by the villagers and includes land that is not being cultivated or has been left idle for more than three years. In this case, the community's fish ownership rights are only recognized on lands that are continuously cultivated, Gamma Galudra. "Memahami Konflik Tenurial melalui Pendekatan Sejarah: SIUS! Kasus di Lebak, Banten", *World Agroforestry*, 2006

the customary rights of the Indigenous Peoples. As well as the enactment of articles 1181 and 1281 *Indische Staatsregeling* (IS) (Stbld 1925 No. 447) where the recognition in this regulation is an acknowledgment that is strict in nature¹⁴.

The Role of Human Rights Instrument in the Protection of Indigenous Peoples Belief in Indonesia

Basically, human rights have a good purpose and have been recognized in the world and have been established. Human rights are basically general or universal because it is believed that some rights that humans have do not have differences based on nation, race, or gender, including: (a) recognition of indigenous peoples by the indigenous peoples themselves, (b) recognition of the existence of indigenous peoples by a judiciary based on a court decision, and (c) recognition of the existence of indigenous peoples by an Indigenous Peoples Council elected by the Indigenous Peoples. Authority over the pattern of management of forest resources is based on original knowledge that exists and grows in the community with all the norms that regulate boundaries and sanctions.¹⁵ Based on some of the human rights formulations above, conclusions can be drawn about the basic characteristics of human rights, namely as follows:

1. Human rights do not need to be given, bought or inherited. Human rights are part of human automatically
2. Human rights apply to everyone regardless of gender, race, religion, ethnicity, political views, or social and national origin.

accessed from <<https://www.worldagroforestry.org/publication/memahami-konflik-tenurial-melalui-pendekatan-sejarah-studi-kasus-di-lebak-banten-0?kid=2542>>

¹⁴ Anggoro, Teddy. "Kajian Hukum Masyarakat Hukum Adat dan HAM dalam Lingkup Negara Kesatuan Republik Indonesia." *Jurnal Hukum dan Pembangunan* 36, No. 4 (2006): 487-498.

¹⁵ Jawahir Thontowi, "Pengaturan Masyarakat Hukum Adat dan Implementasi Perlindungan Hak-Hak Tradisionalnya." *Pandecta Research Law Journal* 10, No.1 (2015).

3. Human rights cannot be violated. No one has the right to violate and restrict others
4. Human Rights Goals, namely as follows:
5. Human rights are a tool to protect people from violence and abuse of their hands.
6. Human rights develop mutual respect between humans
7. Human rights encourage action based on awareness and responsibility for ensure that the rights of others are not violated

The model for implementing and safeguarding the rights of indigenous and tribal peoples is primarily observed through the execution of government policies and programs across various sectors. However, a significant challenge persists in the form of sectoralism, which stems from the fragmented legal framework governing the rights of indigenous and tribal communities. This fragmentation results in distinct legal regimes with their own procedural mechanisms, exacerbating the issue of sectoralism in rights implementation.

Sectoralism manifests in three key aspects of indigenous rights protection: land and natural resource rights, governance rights, and cultural identity rights. Across these dimensions, sectoralism poses obstacles to cohesive and comprehensive rights protection efforts. To illustrate, different government agencies or ministries may oversee policies and programs related to indigenous rights, leading to disjointed approaches and uneven outcomes. In the subsequent analysis, the nuances of sectoralism in indigenous rights implementation are elucidated, highlighting the complexities inherent in navigating multiple bureaucratic channels to secure indigenous rights across various domains.

Table 1. Model for implementing the rights of indigenous peoples by agencies/ministry

No	Rights Protection Aspect	Coordinating Ministry	Sector	Related Agencies/ Ministries	Policies & Programs
1	Control over land and natural resources	Coordinating Minister for Economic Affairs	Agrarian (Land)	Ministry of Agrarian Affairs and Spatial	Certification of communal rights of indigenous peoples

No	Rights Protection Aspect	Coordinating Ministry	Sector	Related Agencies/ Ministries	Policies & Programs
				Planning/Head of BPN	
			Forestry	Ministry of Environment and Forestry	Determination of customary forest Forestry Conflict Resolution
		Coordinating Minister for Maritime Affairs	Sea and Fisheries	Ministry of Maritime Affairs and Fisheries	Empowerment of coastal customary law communities and small islands
2	Government	Coordinating Minister for Politics and Security	Village government	Ministry of Home Affairs	Traditional Village Development and Governance
3	Cultural Identity	Coordinating Minister for Human Development and Culture	Education and culture	Ministry of Education and Culture	Special service education for remote indigenous peoples
			Village Empowerment	Ministry of Villages, Development of Disadvantaged Regions and Transmigration	Empowerment of indigenous village communities
			Social welfare	Ministry of Social Affairs	Remote Indigenous Community

No	Rights Protection Aspect	Coordinating Ministry	Sector	Related Agencies/ Ministries	Policies & Programs
					Empowerment

The Table 1 shows a number of matters related to the implementation of policies and programs regarding indigenous and tribal peoples, namely, *First*, the implementation of the management of customary law community rights is carried out sectorally by all coordinating ministries in the cabinet structure and seven sector ministries. The implementation model for managing the rights of sectoral indigenous peoples is then derived in the implementation model of policies and programs in each ministry. This condition resulted in the implementation of the fulfillment of the rights of indigenous peoples separately to the level of policies and programs, making it difficult to fulfill the rights of indigenous peoples as a whole and in an integrated manner.

Until now, there has been no ministry or central government agency that has the specific authority to integrate all implementation matters of fulfilling the rights of indigenous and tribal peoples. In the absence of ministries and agencies that integrate the implementation of the implementation of customary law communities, the recognition of indigenous peoples and their rights is not managed in an integrated manner but placed in the policies and programs of each sector ministry.

Second, sectoralism of management and programs related to indigenous and tribal peoples in government structures has the potential to create overlapping implementation, namely in terms of; (1) overlapping the implementation of the customary village program by the ministry of home affairs and the ministry of villages, development of underdeveloped areas and transmigration by separating the respective affairs of village government in the hands of the ministry of home affairs with managing village community empowerment by the ministry of villages, development of underdeveloped areas and transmigration reduces enthusiasm The Village Law integrates self-governance by combining original government (origin) with the community as a customary law community unit. (2) overlapping implementation of the recognition of customary law

community customary rights in the natural resources sector, namely the program for issuing communal rights certificates by establishing customary forests. Issuance of communal certificates located in forest areas experiences "legal uncertainty" because the authority to determine customary forests is in the hands of the Ministry of Environment and Forestry with the condition that the customary law community is determined first, while the arrangement of communal rights also covers customary areas in forest areas.¹⁶

In addition, the impact of sectoralism in the management of indigenous peoples is the resettlement of indigenous peoples who are geographically isolated and tend to be subsistence (remote indigenous communities). This resettlement is local transmigration to condition remote indigenous communities to 'live decent' in the category of modern society, and to make it easier for them to access social and public services at the center of government. Problems arise when these communities follow this pattern of local transmigration by leaving their customary territories, which are generally located in forest areas and are forced to change their livelihood production patterns by the standards of modern society. Sectoralism is the cause of the adoption of this policy, because a narrow understanding of remote indigenous communities is only a matter of social and public services.

At the regional level, sectoralism in the implementation of management and programs for the protection and fulfillment of indigenous and tribal peoples continues. An important issue related to local government is the matter of determining customary law communities and their rights, especially in the field of natural resources and governance with separate delegations of authority. This condition cannot be separated from the overlapping and sectoral legal framework of the rights of indigenous peoples.

The legal framework occurs up to the operational level. The Ministry of Home Affairs as the parent of the regional government carries out the

¹⁶ Nurul Firmansyah, "Perlindungan Masyarakat Hukum Adat Dalam Kerangka Hak Asasi Manusia", *Online*, 2017, available at <<https://nurulfirmanasyah.wordpress.com/2017/05/24/perlindungan-masyarakat-hukum-adat-dalam-kerangka-hak-asasi-manusia/>>

issuance of policies that overlap with each other, namely setting up customary villages through regional regulations based on the Village Law and establishing customary law communities through regional head decrees based on Permendagri No .52 of 2014. The two guiding policies are implemented by the same agency, namely the Ministry of Home Affairs with overlapping regulatory substance.

As a result, First, the Regional Government does not have strong guiding standards for the implementation of holistic and integrated recognition of indigenous peoples. Second, the implementation of the determination of customary law communities and or customary villages is not through an integrated program from the center to the regions but depends on the dynamics regional politics.

But in reality, the enforcement of these regulations does not meet the elements which are important elements of law enforcement, namely legal certainty (*rechtssicherheit*), expediency (*zweckmassigkeit*) and justice (*gerechtigkeit*).¹⁷ Because in practice the implementation of these regional regulations is not directed at preserving and maintaining native customs but rather directed at actions to modernize and take economic advantage from the existence of the Indigenous Peoples. For example, in the Baduy Customary Law Community, the Regional Government of Lebak Regency has made Sarmedi (Outer Baduy Resident) a public figure in building a prosperous family, even though this is not in accordance with the *pikukuh* (customs) held by the Baduy community, namely living concerned in simplicity.

What is even more concerning is that sometimes there are inconsistent actions taken by the Regional Government by making policies and regulations whose substance is contradictory to the regulations on the protection and recognition of Indigenous Peoples. For example, this happened to the Baduy customary law community where one year after the enactment of the Lebak Regional Regulation No. 13 of 1990 concerning the Guidance and Development of Baduy Community Customary Institutions in Lebak District Level II Region, in 1992 the Lebak Government issued a Regional Regulation concerning Retribution

¹⁷ Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar* (Yogyakarta: Liberty, 1999), pp. 145-146.

for Tourism Areas wherein the regional regulation placed the Baduy into seven "commercialized" tourist attractions in Lebak, even though according to *Baduy pikukuh* contact with outsiders must be limited, but the Regional Government of Lebak Regency actually invites outsiders to make contact with the Baduy people, by making the uniqueness and exoticism of the Baduy as 'trade goods'. This shows that the government is actually carrying out systematic actions of destroying the customs of the Baduy people and their rights because they allow and even provide space for the entry of modernism through visiting tourists, even though this is contrary to the stubbornness of the Baduy people who adhere to the values of simplicity.

International Human Rights Law for the Indigenous Peoples Protection

This recognition in international human rights law is a number of the most important legal documents within the scope of the United Nations¹⁸, that is:

1. International Convention on the Elimination Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights (Human Rights Committee)
3. International Covenant of Economic, Social and Cultural Rights (The Committee on Economic, Social and Cultural Rights)
4. Convention on the Elimination of all Forms of Racial Discrimination (CERD Committee)
5. International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW Committee)
6. Convention on the Rights of the Child (Committee of the Rights of the Child)
7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture)

¹⁸ Frans Bona Sihombing, *Ilmu Politik Internasional (Teori Konsep dan Sistem)*, (Jakarta Ghalia Indonesia, 1994), pp. 240-242

8. Convention against Genocide and Declaration of the Right of Peoples to Peace.

Besides that, there are also a number of norms and guidelines used by a number of transnational institutions such as the World Bank, UN agencies such as the ILO with ILO Convention 169 and the Convention on Biological Diversity (CBD). The reports of the UN Committee on Economic, Social and Cultural Rights also emphasized the need to ensure the participation of indigenous and tribal peoples in making decisions that have an impact on their lives. And emphasized to its member states (State parties) to consult and seek the consent of the indigenous peoples concerned.

The Convention on Biological Diversity (CBD), which has been ratified by Indonesia, also explicitly states the rights of indigenous and tribal peoples to agree or reject a plan or implementation of development in their territory. Articles 8 j and 10 c of this Convention have been the subject of debate in various CBD meetings known as the Conference of the Parties (COP) which took place for the 8th time, 2006, in Curitiba, Brazil, still with one of the main agenda discussing the two articles. .

In addition, there are also multilateral agencies that pay special attention to the existence and rights of indigenous peoples in the world. The International Labor Organization (ILO) or the International Labor Organization, is one of the institutions that has become the most widely used reference in the struggle for indigenous peoples or indigenous peoples throughout the world because it puts forward the rights and existence of indigenous and tribal peoples. Even so, there are things that must be observed in terms of ILO Convention 169. The rights standards set out in this convention are in the form of general standards or guidelines. Thus, if a country's legal system regulates the rights of indigenous peoples in more detail than what is regulated in ILO Convention 169, it becomes a question of what is the relevance of ratifying this Convention.

It is important to note that although all of these instruments talk about the rights of indigenous peoples or indigenous peoples, the basic principles adopted by many countries are still individual-based human rights. The British government, for example, stated that the British government rejected the concept of rights of indigenous peoples[. This can be seen, for example, in the invitation issued by the Foreign and

Commonwealth Office (FCO) to NGOs and Indigenous Peoples Organizations in the UK for a meeting in 2002 to discuss the position of the United Kingdom (UK) on the Draft Indigenous Peoples Declaration. In the invitation it was written:

The UK Government has a clear position on the notion of collective human rights: with the exception of the right to self-determination (ICCPR Article 1 (1) and ICESCR), we do not accept the concept of collective human rights. In legal framework, human rights are an appeal to countries to treat individuals in accordance with international standards. Therefore, the UK will not accept the use of the term indigenous people rights in the framework of human rights. In the United States and Canada, the debate on the right of self-determination is focused on the external and internal right of self-determination. How this right is explained can be seen in the excerpt below:

The internal Rights of self-determination basically provide for a "People" to be able to have a full voice within the legal system of the overall nation state, control over natural resources, the appropriate ways of preserving and protecting their culture and way of life and to be able to be a visible partner or participant with strong powers within the overall national polity. External self-determination arises when a People finds that this internal concept is not being accepted and the Right to full sovereignty, including the Right to international recognition of that People, comes into play.

It is quite clear from both concepts that the right of self-determination in North America extends within states, and not to create a new state within an existing one. However, there is a key word that is very decisive in the two quotations above, which makes the issue of rights an arena for political struggle. The keyword is international recognition. International recognition determines whether a community/nation group is accepted as a fully sovereign society/nation or not. Therein lies the aspect of the political struggle. International lobbying, negotiating power and even armed struggle are some of the ways in which the right to self-

determination is attained. An example of this political struggle in Indonesia is Timor Leste.

In contrast to the situation in North America, the countries of Norway, Finland, Sweden, for example, are very advanced in promoting the right of self-determination for the Saami people. The Saami people are indigenous peoples spread across the countries of Finland, Sweden, Norway and Russia. In the first three countries there is a movement that is strong enough for self-determination of the Saami people. The manifestation of this political struggle, one of which can be seen from the formation of the Saami Parliament. This organization was formed on December 31, 1993 as a governmental authority with 31 members, elected by the Saami people. On 24 February 2005, the first Saami Parliamentary Conference was held which was attended by Saami people from the four countries mentioned above. In the Norwegian system of government, Sweden and Finland, the voice of the Saami people is represented by the Saami Parliament which also serves as the internal governing authority for the Saami people. The Saami Parliament is one of the institutional forms of indigenous peoples which is widely recognized as one of the highest achievements, apart from the achievements of indigenous peoples in Canada who form an autonomous region in the northern hemisphere.

Another debate that illustrates the strong political struggle of indigenous peoples is in terms of the term peoples instead of using the term people. This can be seen in the proceedings at the World Summit on Sustainable Development which took place in Johannesburg, South Africa, in 2002. One of the important results is the recognition of the very important role of indigenous peoples which is formulated in Article 22 which reads We reaffirm the vital role of indigenous people in sustainable development. This debate shows the political struggle between individualism in the human rights movement and collectivism. The question from groups that reject the word peoples is that the word states that there are collective rights of a group of people that can be categorized as human rights. However,

In his analysis of collective rights in international legal instruments, Fergus Mackay of the Forest Peoples Program shows that there are a number of instruments that include collective rights as human rights. Some of them can be mentioned here, namely the Convention on the

Elimination of All Forms of Racial Discrimination; International Labor Organization Convention No. 107 (1957) and 169 (1989); and the UNESCO Declaration on Race and Race Prejudice (1978).

Indonesian National Law for Indigenous Peoples Protection

It is also difficult to trace the definition of who a customary (*legal*) community is in national laws and regulations. The following examples illustrate the difficulty.

1. In Law No. 41 of 1999 there is an explanation of what customary law community is, but there is no explanation of *adat* community, even though both terms are used.
2. The same thing can be found in several other laws and regulations. Several laws such as Law No. 24 of 2003 *jo.* Law Number 8 of 2011 The Constitutional Court has absolutely no explanation
3. Only Law No. 21 of 2001 on Special Autonomy for Papua
According to Law No. 21/2001, regarding Special Autonomy for Papua:
 1. The Customary Law Community are members of the indigenous Papuan community who have lived in a certain area since their birth and are bound and subject to certain customary laws with a high sense of solidarity among their members.
 2. Indigenous Peoples are indigenous Papuans who live in a territory and are bound and subject to certain customs with a high sense of solidarity among their members

Meanwhile, according to Qanun No. 14 of 2002: Indigenous peoples are a group of people who live in a certain area for generations based on the similarity of territory and or blood relations who have their own customary territories and customary institutions. Otsus Papua distinguishes customary law communities and indigenous peoples only based on the aspect of birth in the community or not. Both emphasize the relationship of 'living in a certain territory and subject to certain customary laws'. It is clear that in Otsus, these two categories have the same customary law, territory and solidarity.

If we examine a number of laws such as the Forestry Law, the Basic Agrarian Law, the 1945 Constitution, recognition of the existence of customary (legal) communities is conditional recognition. The difficulty in such an acknowledgment is that a number of criteria cannot be used as a firm standard to determine whether or not a community exists. The implication is of course on the rights claimed. Conformity with the times and adherence to customary law in Law no. 41 concerning Forestry, for example, is very difficult to use as a criterion for determining whether or not an indigenous people community exists¹⁹.

One thing that needs to be observed is that the category of customary law community was created and encouraged in the policy of the Dutch colonial government to map socially and politically the existence while at the same time differentiating the legal treatment of the *rechtsgemeenschap* group from European and Eastern European communities.

Conclusion

From the above data we can conclude that indigenous peoples are in an effort to protect human rights regarding the basic characteristics of human rights, the implementation model for fulfilling and protecting the rights of indigenous and tribal peoples is more concretely seen in the implementation of government (central government) policies and programs in each sector. Sectoralism is still a crucial issue in the implementation of the rights of indigenous and tribal peoples. Sectoralism arises as a result of a model legal framework for the protection and fulfillment of the rights of indigenous peoples which is regulated in different legal regimes with their own procedures. In the Indonesian context, indigenous peoples have experienced ups and downs of discriminatory, manipulative and semi-discriminatory treatment, accommodating from time to time. In the Dutch colonial era, indigenous peoples were recognized through IGO (Inlandshe Gemeente Ordonantie) Staatsblad 1906 No. 83 which regulates villages in Java and Madura and IGOB (Inlandshe Germente Ordonantie Biutengewsten) Staatsblad 1938, No. 490 which recognizes customary governance structures in ten areas

¹⁹ Winahyu Erwiningsih, *Hak Menguasai Negara Atas Tanah* (Total Media, Yogyakarta, 2009), pp. 205207.

outside Java and Madura. In International Recognition the rights of indigenous peoples are recognized through international organizations.

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