

The Paradigm of Homo Sacer's Legal Subjects in the Framework of Democracy and Contemporary Law in Indonesia

Ahmad¹, Fahri Aldifha Karunia²

Email : ahmad.law17@gmail.com, aldifakurnia@gmail.com

ABSTRAK

Keadaan demokrasi dan hukum kontemporer abad-21 meninggalkan jejak permasalahan yaitu teresklusinya subjek hukum yang data kehidupannya tidak dapat terverifikasi oleh hukum negara. Penulisan ini bertujuan untuk menganalisis paradigma subjek hukum *homo sacer* dalam kerangka demokrasi dan hukum kontemporer di Indonesia. Metode penelitian yang digunakan adalah penelitian normative dengan pendekatan deksriptif analisis. Hasil pembahasan bahwa demokrasi dan hukum kontemporer di Indonesia saat ini sudah tidak lagi mengenal batas-batas keadaan normal dan keadaan yang tidak normal, saat Presiden atau *sovereign* mengatakan negara dalam keadaan pengecualian (*state of exception*) hukum yang berlaku untuk melindungi hak-hak warga negara disuspensikan dan menciptakan subjek hukum baru yaitu *bare life* atau hidup telanjang sebagaimana pendapat filsuf Giorgio Agamben. Subjek hukum tersebut diinklusi sekaligus teresklusi oleh peraturan negara karena tata kehidupannya tidak dapat terverifikasi yang membuat posisi subjek hukum tersebut tidaklah jelas dalam hukum dan demokrasi, subjek hukum tersebut adalah *homo sacer* (manusia suci). Adapun tiga contoh dari subjek *homo sacer* dalam lanskap hukum dan demokrasi di Indonesia adalah: orang-orang PKI, Ahmadiyah, dan HTI.

Keywords: Keadaan Pengecualian, *Homo Sacer*, *Sovereign*

ABSTRACT

The state of democracy and contemporary law in the 21st century leaves a trail of problems, namely the exclusion of legal subjects whose life data cannot be verified by state law. This paper aims to analyze the paradigm of homo sacer legal subjects within the framework of democracy and contemporary law in Indonesia. The research method used is normative research with a descriptive analysis approach. The results of the discussion that democracy and contemporary law in Indonesia currently no longer recognize the boundaries of normal and abnormal conditions, when the President or the sovereign says the state is in a state of exception to the law that applies to protect the rights of citizens. suspended and created a new legal subject, namely bare life or naked life as argued by the philosopher Giorgio Agamben. The legal subject is included as well as excluded by state regulations because the way of life cannot be verified which makes the position of the legal subject unclear in law and democracy, the legal subject is homo sacer (holy human). The three examples of homo sacer subjects in the legal and democratic landscape in Indonesia are: PKI, Ahmadiyah, and HTI people.

Keywords: *Exceptional Circumstances*, *Homo Sacer*, *Sovereign*

¹Senior Lecture of Law Faculty, Muhammadiyah Tangerang University, Tangerang City, Indonesia.

²Student of Law Faculty, Muhammadiyah Tangerang University, Tangerang City, Indonesia

A. Introduction.

Today, the contemporary democratic system has been highly developed both from the point of view of the state and the point of view of the resulting legal products, democracy first developed in Greece during the Archaic period in 8 BC (BC) with the term "Isonomia" in Greek if we interpret it as "Equality",¹ Democracy, which was first present in Greece, was aimed at providing equality to all citizens of the polis or the state, by involving all citizens except women and slaves, to conduct elections for high-ranking state councils, for example in Greece the Aeropagos Council was elected by election. the general term today used in the agora or the marketplace where jurists and philosophers congregated. As according to Aristotle, the polis or the state is created because of the desire of human subjects to protect their life rights and property ownership rights collectively with several other human subjects wherein the polis or state is used as a forum or place to accommodate their rights and their aspirations. , quality of life from Zoe (natural life) to Bios (political life).²

In the thought of contemporary Italian Political and Legal Philosopher Giorgio Agamben in his reading of democratic life in Greece, he argues that in the Greek vocabulary there is no one word to describe the quality of life, there are always two words in saying the quality of life, Zoe (natural life) and Bios (political life).), where Zoe's natural life is always marginalized and Bios's political life is always prioritized in the polis or the state, in his thinking Agamben gives a new perspective in the form of justice in Aristotelian thought between Zoe and Bios, according to him, Aristotle has given a definite quality of life distinction where natural life In an inclusive and at the same time excluded policy, Agamben means in his reading that Agamben argues that Zoe's natural life eventually becomes a member of a policy or state, but at the same time Zoe is finally excluded by state law because her quality of life does not match the quality of life. which has been regulated in a policy or state law product.³

Agamben which refers to Aristotle's thoughts on Zoe and Bios according to which the two qualities of life become a binary opposition or a form of word resistance for Agamben, as later in a state of emergency or a state in a state of emergency. *state of exception* appears a life

¹ Werner Jaeger Padeia, *The Ideals of Greek Culture*, (Vol, Archaic Greece-The Mind of Athens), Oxford University Press, 1933, hlm 111.

² Hannah Arendt, *The Public and The Private Realm*, Dalam The Portable Hannah Arendt (editor peter Baehr), Penguin Books, 2000, hlm 23.

³ Giorgio Agamben, *Homo Sacer(Sovereign Power and Bare Life)* Diterjemahkanoleh Daniel Heller-Roazen (Stanford, CA California:Standford University Press, 1998), hlm 7.

that is bare life or naked life.⁴ With this matter regarding Agamben, who believes that Zoe or natural life undergoes two processes, namely inclusion and exclusion because Zoe's quality of life is not in accordance with the quality of life that has been regulated by the state, the next question is when Zoe experiences both processes according to Agamben, both processes occur at the same time. a state of abnormal state situation or state of exception when an individual's rights to life are taken away by the state or the police and made into a bare life, a life whose rights to life are only recognized from a biological point of view just like animal life.⁵

Thus, the initial prologue of the typography of various problems regarding the position of the homo sacer subject has been presented which has been brought to life by the sovereign Sovereign in a state of exception. As for some of the problems that will be raised in this paper as follows: First, how is the relationship between normalization of emergency situations and the emergence of legal subjects Homo sacer? Second, Where is the Position of Homo Sacer's Legal Subjects in the Landscape of Democracy and Contemporary Law in Indonesia?

B. Research Metodology

The research in this writer uses a normative juridical approach. The point is that this research focuses more on literature studies and news studies, documentary studies on the provisions of laws and regulations, in this case the 1945 Constitution, Law no. 17 of 2013 concerning Community Organizations and Perppu No. 2 of 2017 concerning Social Organizations The specifications of this research are descriptive analytical, where the analysis is carried out critically using various theories related to the issues raised.

C. Finding & Discussion

1. The Relationship of Emergency Normalization With the Appearance of Homo Sacer Legal Subjects

Terminology of the word State of Exception or state in exclusion, this comes from the ancient Roman law term which has the term *iustitutum* which when reconstructed in meaning is a legal suspension which etymologically is *sicu solstitium dicitur (iustitutum)* which means when "the law does not move", literally The term *iustitutum* in ancient Roman times meant a court holiday because the law was declared invalid, but in the current era the

⁴ Giorgio Agamben, *State Of Exception*, Diterjemahkan oleh Kevin Attel, (Chicago:The University Of Chicago Press),2005, hlm 1.

⁵ Giorgio Agamben, *Means With Out Notes Politics End*, diterjemakan oleh Veincenza Binetti and Cesare Casarino, (Mineapolis: University of Minnestota Press, 2000), hlm 4

meaning is even more complex and the meaning is a temporary suspension of the law.⁶ In exceptional circumstances it describes a situation where something that is not allowed in the state or constitution, is allowed for the protection of the state constitution and the law in a dangerous situation, such as the state in a state of civil war, rebellion, revolution, and foreign invasion, in the circumstances of the exclusion or known with an emergency, the President who is the executive party has full authority in determining the emergency.⁷

A state of exclusion or an emergency is a situation in which a fast and instant legal content material is needed to resolve the emergency, and often in such circumstances the content of the law conveys a pre-existing law for the sake of accelerating the return of an existing situation. normal, but the fact is that instead of normalizing the normal situation again, it makes the abnormal situation normal through the proposition of laws and regulations. It can be seen here that the state of exclusion according to Agamben has two faces, namely potentiality and actuality, the nature of potentiality indicates that the state of exclusion can suspend the constitution and the law that was previously in force, while the actual nature of the state of exclusion becomes absolute where all citizens are placed within the scope of law and nothing is outside the law except the President or the sovereign power.⁸

A situation in which normal and abnormal conditions cannot be distinguished is a form of configuration of the face of contemporary democracy and law when the President or the sovereign announced a state of emergency and the fact is that sociologically human life is still running normally and community activities are still running. What is abnormal in fact, according to Agamben, is the same as making the distinction between fact and law indistinguishable from each other .⁹ If we context it with the legal and political situation in Indonesia, it will be clear if we refer to the issuance of Regulation in Lieu of Law or Perppu which is as regulated in Article 22 Paragraph 1 of the 1945 Constitution which gives the President the authority to issue emergency legal products and regulations or legal products. previously suspended and replaced with the emergency law product.¹⁰

⁶ Agamben Giorgio, *State Of Exception*, *Op.Cit*, hlm 2.

⁷ Andrianovia Tolotra, *The U.S. Homeland Security's Biopolitics in the Age of Terorisme*, (Jurnal Mozaik Humaniora vol. 16 No.1, 2016), hlm 5.

⁸ Giorgio Agamben, *Pontentialities: Collected Essays Sovereign Power and Bare Life*, diterjemahkan Danniell Heller-Roazen, (Stanford CA: Standford University Press,1999), hlm 177.

⁹ Giorgio Agamben, *Homo Sacer(Sovereign Power and Bare Life)*, *Op.Cit*, hlm24.

¹⁰ M. Beni Kurniawan, *Konstitusi Perppu Nomor 2 Tahun 2017 Tentang Ormas Ditinjau Dari UUD 1945*, Jurnal Konstitusi, Volume 15, Nomor3, September 2018, hlm 459-460

An emergency situation not only shows how difficult it is for us to locate normal and abnormal conditions, but according to Agamben, in these circumstances a new legal subject emerges whose life data is not part of the state.¹¹ The legal subject is not issued by law but according to Jean Luc Nancy the legal subject has been abandoned by law (abandonment), the legal subject is Homo Sacer or holy man. Homo Sacer appears when abnormal conditions and normal conditions cannot be distinguished from each other, and not only that, the legal subject of this homo Sacer has been absorbed by his life rights and only leaves his biological data without having adequate protection or legal supplements..¹²

1. Position of Homo Sacer's Legal Subjects in Indonesia's Contemporary Law and Democracy Landscape

Agamben sees that the study conducted by Michel Foucault on biopolitics, which according to him is a concept that will replace sovereign power in the 17th century, does not emphasize the rights of human life, where in sovereign power the rights of one's life and death have been determined by sovereign power. Foucault is of the view that this biopolitical concept can make mankind out of the shackles of sovereign power that always monitors it or what Foucault can say is the Panopticon, by placing human freedom to fight the impossibility that occurs in the era of sovereign power, with the concept of biopolitics, according to Foucault, can facilitate discipline and regulation. human population, for example, in the era of sovereign power, someone who commits a criminal crime will definitely be immediately sentenced to death without giving space to epistemic why that person commits the act, but in the concept of biopolitics according to Foucault, it does not focus on one individual but the focus is on the population when someone commits an act. criminal act the action taken was not to kill him but to find out sociologically, economically and psychologically why this person committed this act so that later he could minimize the action. is that a crime?.¹³

Foucault's view according to Agamben only focuses on mental hospitals, schools, and psychiatry, and according to Agamben Foucault does not see that biopolitics that runs in public spaces such as Nazi concentration camps or Guantanamo makes it indistinguishable again

¹¹ Giorgio Agamben, *Means Without Ends: Notes Towards Politics*, Op.Cit, hlm 13.

¹² Jean Luc Nancy, *The Birth To Presence*, Diterjemahkan oleh Brian Holmes, (Stanford CA: Stanford University Press, 1983), hlm 43-44.

¹³ Michel Foucault, *The History Sexuality Volume 1: An Introduction*, Diterjemahkan oleh Robert Hurley, (London: Allen Lane, 1990), hlm 139-140.

between zoe (natural life) and Bios. (political life).¹⁴ Agamben argues that biopolitics and sovereign power are the same because Foucault's biopolitical concept introduces zoe into the political space and at the same time excludes zoe from the level of state life. , but also not bios, namely political humans because they have been excluded at the state level, bare life is a human subject whose position is gray in contemporary law and politics. Agamben does not see that the concept of biopolitics is a new dawn concept for human subjects to be free from the shackles of sovereign power.¹⁵

The concept of bare life, according to Agamben, is the embryo or forerunner of what Agamben often says is a homo sacer or a sacred man. Actually the terminology concept of the word homo sacer has the meaning of "holy man" but this Homo sacer can be killed by anyone and the act of killing it gets the right of impunity by law, indeed this conceptual understanding of Homo Sacer is paradoxical on the one hand it is said to be a holy man but on the other hand he is a holy man. is a human being whose rights can be killed, this Homo sacer experiences inclusiveness and exclusivity in the profane worldly life and the life of the heavenly world, he is not accepted in this mortal world and also does not exist in the supra-sensory world..¹⁶

In his book Agamben entitled *Homo Sacer (Sovereign Power and Bare Life)*, Agamben aims in this book to show that this new life in contemporary democracy is not the protection of citizens by the sovereign power (government) but the abandonment of life carried out by the sovereign. the sovereign Sovereign. Homo Sacer is a form of neglect of that life, an example of Homo Sacer according to Agamben that occurs in contemporary democracy is the Jews who experienced mass killings carried out by Hitler's Nazi Regime where life was absorbed in a concentration camp and the Jews no longer had rights. The right to life that he has is his biological life only.¹⁷

This homo sacer subject appears as a subject that in the ancient Greek era only existed on the edge of politics and did not enter the political level, but contemporary democracy currently includes this homo sacer subject at the political level but at the same time excludes it from the political level. As explained in the previous section, this proof of homo sacer is present in the public sphere when the sovereign Sovereign makes normal and abnormal conditions indistinguishable from each other. In an emergency situation or state of exception, the sovereign

¹⁴ Giorgio Agamben, *Profanation*, Diterjemahkan oleh Jeff Fort (New York: Zone Books, 1999), hlm 73.

¹⁵ Giorgio Agamben, *Homo Sacer(Sovereign Power and Bare Life)*, *Op.Cit*, hlm 12.

¹⁶ Giorgio Agamben, *Profanation*, *Op.Cit*, hlm 75.

¹⁷ Giorgio Agamben, *Homo Sacer(Sovereign Power and Bare Life)*, *Op.Cit*, hlm 115.

sovereign has the authority to suspend the previously applicable law and replace it with the emergency law product, which actually also suspends the human rights and lives of the human subject, as in another example in the Guantanamo Camp for human rights. and the life rights of Al-Qaeda prisoners were suspended by the American military after the terrorism carried out by the Al-Qaeda group at the WTC building on September 11, 2001 and also the Rohingya people whose rights to life and human rights were removed by Myanmar government and Myanmar Military.¹⁸

Furthermore, after we know the example of homo sacer in contemporary democracy today in outline in Agamben's thinking, the author would like to point out that the subject of homo sacerism is also found in the context of Indonesian law and democracy, such as the people accused of the PKI during the New Order era, where at that time These people were brought to life by the sovereign, namely the New Order government, human rights and other rights of life were temporarily suspended, but they were actually permanent in nature which made the PKI people get violent even to the point of these people. who was killed by the new order regime on the grounds that the country was in a state of emergency.¹⁹ Another example of homo sacer in Indonesia is the followers of Ahmadiyah teachings and members of Hizbur Tahrir Indonesia (HTI), both sects of religious teachings are labeled by the Indonesian government as heretical sects and contrary to the teachings of Islam in general, this case applies to Ahmadiyah people. which occurred around 2001 where the chronology of the case occurred in West Nusa Tenggara, and several big cities on the island of Java such as Sukabumi and Bekasi. These crimes include the destruction of the houses of the Ahmadiyya, the destruction of their houses of worship, and not to mention acts of violence that have resulted in several fatalities..²⁰

It is different with the members of the HTI mass organization which in 2017 was a legally legal organization called a prohibited mass organization under Indonesian law and was dissolved with the legal product of Perppu No. 2 of 2017 concerning Social Organizations and through the Decree of the Minister of Law and Human Rights No. AHU-30.AH.01.08 of 2017 concerning the revocation of the Decree of the Minister of Law and Human Rights No. AHU-0028.60.10.2014 concerning Legalization of Establishment of Legal Entities for HTI

¹⁸ Agamben Giorgio, *State Of Exception, Op.Cit*, hlm 5.

¹⁹ Heyder Affan, *Dosa Turunan Dicap PKI Keluarga Penyintas 65 Masih Mengalami Diskriminasi : 'Jangan Bedakan Kami*, <https://www.Bbc.com/Indonesia> (Diakses Pada Hari Minggu 2 Januari 2022, Pukul: 9:30)

²⁰ Majalah Basis, *Demokrasi Sebagai Kamp Konsetrasi*, Maret, 2020, No-03-04

Associations. With the issuance of the revocation of the HTI Legal Entity Decree,²¹ The HTI mass organizations were dissolved by the Indonesian government on the pretext that the ideology adopted by HTI, namely the Khilafah, was contrary to the Pancasila ideology and the 1945 Constitution of the Republic of Indonesia, but the procedure for disbanding HTI organizations was not in accordance with Law No. 17 of 2013 Article 64 paragraph 2 which requires that the disbandment of mass organizations must be through court decisions. In this case, why article 64 paragraph 2 of Law No. 17 of 2013 cannot apply in the case of this HTI organization, because the legal product has been suspended and has been replaced with the Perppu legal product because according to the government the situation is already considered an emergency.t.²²

Thus, if we reflect on the previous question regarding the position of the subject of homo sacer in democracy and contemporary Indonesian law, we must first find a sample of who the legal subject is who deserves to be called a homo sacer, and it has been found that there are three examples that the author has described, namely : people accused of PKI, Ahmadiyah followers, and HTI members. Worse yet, the people accused of the PKI and the Ahmadiyya are examples of severe bare life in Indonesian democracy, because there are several fatalities that were killed without the person who killed the person being punished, it's like the person who killed the person was getting supplements from the law..²³ It is different with the HTI members, whose human rights are suspended and distorted within the scope of Indonesian law, without being given the opportunity to defend or question where the faults of their organization's ideology are accused of contradicting the Pancasila ideology before the trial. With this in mind, if the writer wants to answer the question regarding the position of the legal subject of homo sacer in Indonesian law and democracy, the author agrees with Agamben that the position of the subject is not clear because on the one hand he is included through the laws that are inherent in him but on the one hand the law excluded him because his quality of life is not in accordance with what is regulated by the law. As according to Agamben, the homo sacer subject refers to Alain Badoiu's thought that the condition experienced by the homo sacer is an excrescent theorem, where he is only represented through the recognition of an organization within its

²¹ Agus Sudibyo, *Demokrasi dan Kedaruratan (Memahami Filsafat Politik Giorgio Agamben)*, (Tangerang: Marjin Kiri, 2019), hlm 272

²² Agamben Giorgio, *State Of Exception, Op.Cit*, hlm 2.

²³ Giorgio Agamben, *Means With Out Notes Politics End, Op.Cit*, hlm 10.

scope but not presented or recognized by the state. This is the reason Agamben said that the biopolitics that took place in contemporary democracies has made democracy a concentration camp where zoe and bios are indistinguishable in the current public sphere and this incident only creates a new legal subject, a homo sacer whose position in law is unclear because he has been in biopolitics. by the sovereign sovereign and leaving only biological data, under these conditions, virtually the homo sacer subject is at risk of violence because his life and human rights are not represented in the configuration of democracy and state law..²⁴

D. Conclusion.

After the author describes the results of the previous discussion in which the various explanations are the results of the analysis to answer the two main problems of this paper. There are several points that the author can draw from this discussion as follows:

1. That the current legal conditions and contemporary democracy create a new invariant in the scale of the discussion of the state in an emergency, in which there are implications and a new thesis regarding the emergency, according to Giorgio Agamben, because what is called a normal and abnormal situation can no longer be distinguished in gradation with each other, this is the invariant normalization of the emergency situation contained in the proposition of the current legal product and the normalization of the emergency situation occurs as a postulate of the emergence of homo sacer legal subjects who have been brought to life by the sovereign sovereign in this situation.
2. There were two qualities of life in Greece at that time, namely zoe and bios, where zoe's position was outside the law and bios had a position within the law and the state. In Agamben's thought it emerged that the new legal subject was in the middle between zoe and bios, namely homo sacer or sacred man, he experienced radical legal implications, namely being both included and excluded which made his position in law and democracy unclear, for example homo sacer in Indonesian law and democracy are the people accused of the PKI, followers of the teachings of Ahmadiyah and the HTI organization that the author uses as an example. As Agamben argues that all of humanity today has the potential to become a homo sacer, it is only a matter of time.

²⁴ Giorgio Agamben, *Homo Sacer (Sovereign Power and Bare Life)*, Op.Cit, hlm 45.

References / Bibliography :

Books :

- Agamben Giorgio, *State Of Exception*, Diterjemahkan oleh Kevin Attel, Chicago:The University Of Chicago Press,2005
- _____, *Homo Sacer (Sovereign Power and Bare Life)*Diterjemahkan oleh Daniel Heller-Roazen Stanford, CA California:Standford University Prees, 1998
- _____,*Means With Out Notes Politics End*, diterjemakan oleh Veincenza Binetti and Cesare Casarino, Mineapolis: University of Minnestota Press, 2000
- _____, *Profanation*, Diterjemahkan oleh Jeff Fort New York: Zone Books, 1999
- Arendt Hannah, *The Public and The Private Realm*, Dalam The Portable Hannah Arendt editor peter Baehr Penguin Books, 2000
- Foucault Michel, *The History Sexuality Volume 1: An Introduction*, Diterjemahkan oleh Robert Hurley, London: Allen Lane,1990
- Jean Luc Nancy, *The Birth To Presence*, Diterjemahkan oleh Brian Holmes, Stanford CA: Stanford University Prees, 1983
- Sudibiyo Agus , *Demokrasi dan Kedaruratan (Memahami Filsafat Politik Giorgio Agamben)*, (Tangerang: Marjin Kiri, 2019)

Journal &Magazine

Kurniawa Beni, M. *Konstitusi Perppu Nomor 2 Tahun 2017 Tentang Ormas Ditinjau Dari UUD 1945*, Jurnal Konstitusi, Volume 15, Nomor3, September 2018, hlm 459-460

Tolotra Andrianovia, *The U.S. Homeland Security's Biopolitics in the Age of Terorisme*, Jurnal Mozaik Humaniora vol. 16 No.1, 2016, hlm 5.

Werner Jaeger Padeia, *The Ideals of Greek Culture*, Vol, Archaic Greece-The Mind of Athens), Oxford University Prees, 1933, hlm 111.

Majalah Basis, *Demokrasi Sebagai Kamp Konsetrasi*, Maret, 2020, No-03-04

Internet :

Heyder Affan, *Dosa Turunan Dicap PKI Keluarga Penyitas 65 Masih Mengalami Diskriminasi : 'Jangan Bedakan Kami*, <https://www.Bbc.com/Indonesia>
(Diakses Pada Hari Minggu 2 Januari 2022, Pukul: 9:30)