

## Juridical Consequences of Article 17 Paragraph (3) of Sekadau Regency Regional Regulation No. 8/2018 on the Recognition and Protection of Customary Law



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**ABSTRACT:** Recognition and protection of Indigenous Peoples already exist in the Indonesian Constitution, especially Article 18B and Article 28I of the 1945 Constitution which recognize Indigenous Peoples, so the regions should support them. The object of this research is the existing Regional Regulation in Sekadau Regency, namely Regional Regulation No. 8/2018, especially Article 17 paragraph (3), this research intends to analyze the provisions of the article supporting the recognition and protection of MHA or actually burdening MHA to fight for their rights, so that the process of administrative requirements becomes increasingly complicated. A Regional Regulation (hereinafter referred to as Perda) regulates the recognition and protection of indigenous peoples in Sekadau District. The number of indigenous peoples that have been recognized by the Perda is 5 (five), even though there are many indigenous peoples in the district. This research uses normative legal research methods, then a descriptive approach, then the sources needed by this research are secondary data. Secondary data includes primary legal materials and secondary legal materials, processed and analyzed using qualitative methods. This research found that the regulation of Regional Regulation Number 8/2018, especially Article 17 paragraph (3) has not been adhered to optimally. This is because there are inhibiting factors in the form of the funds required are not small and the Government has not carried out its obligations to the rights of MHA in Sekadau Regency optimally in terms of providing assistance to MHA in fighting for the recognition of the existence of MHA.

**KEYWORDS:** implementation, local regulations, indigenous peoples, customary communities, protection

### I. INTRODUCTION

The Indonesian state is a state that is guided and has a philosophical foundation, namely Pancasila, the 1945 Constitution (hereinafter abbreviated as the 1945

Constitution). The purpose of the nation and state based on the 4th paragraph of the 1945 Constitution is to protect the entire Indonesian nation and the entire Indonesian homeland and to advance the general welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace and social justice. The 1945 Constitution guarantees the protection of the Indonesian people without exception. What should not be forgotten is the existence of indigenous peoples, the arrangements are clear in Article 18B, Article 25, Article 28I of the 1945 Constitution, then the Regulation of the Minister of Home Affairs (hereinafter abbreviated as Permendagri), namely Permendagri Number 52 of 2014 concerning the main rights that must be handled in providing recognition and protection to MHA, these regulations become the basis for ensuring the existence of MHA in the life of the Indonesian State. The existence of MHA is a necessity in the Unitary State of the Republic of Indonesia (hereinafter abbreviated as NKRI). There are still many laws and regulations that do not accommodate the urgency of recognition and protection of MHA. One of the regulations accommodating the existence of MHA is the Sekadau District Regulation. The fact proves that the regulation has not been well implemented in terms of accommodating the rights of MHA, the highlight is Article 17 paragraph (3) which regulates the requirements for identification of MHA, as stated in Article 17 paragraph (1). That identification must hold 7 (seven) aspects, including the history of the existence of MHA; MHA territory; customary law; customary assets and goods; customary institutions; customary government structures; and customary justice systems. The provisions in Article 17 paragraph (3) are quite complex, due to the many provisions of the article. The importance of Regional

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Government participation (hereinafter abbreviated as Pemda) in helping to facilitate the needs of MHA to fulfill the provisions of Article 17 paragraph (3). If the local government is passive, MHA will have to fight for the recognition of their existence independently, which is the duty of the state and MHA through the local government based on the Sekadau District regulation. The provisions in Article 17 paragraph (3) are very complex and require support from the local government in the form of human resources in facilitating activities and financial support in the form of funding. The author is interested in knowing the reasons why the provisions of Article 17 paragraph (3) cannot be maximally realized, hence the title "Juridical Consequences of Article 17 paragraph (3) of Sekadau Regency Regional Regulation No. 8/2018 on the Recognition and Protection of Indigenous Peoples to the Local Government". The formulation of the research problem is how the juridical consequences of Article 17 paragraph (3) of the Sekadau Regency Regional Regulation Number 8 of 2018 concerning Recognition and Protection of Indigenous Peoples. This research aims to find out the juridical consequences of Article 17 paragraph (3) of Sekadau Regency Regional Regulation Number 8 of 2018 concerning Recognition and Protection of Indigenous Peoples. This research has not been conducted by any party before, so in terms of proving the originality of this research, it is based on research that discusses the reasons for a regional regulation in relation to MHA that has not been implemented in a region. Some of them are as follows. First, the local regulation in Merangin Regency, namely Local Regulation No. 08/2016, which regulates the recognition and protection of the Serampas Clan Indigenous Peoples in Jambi Province, precisely in Jangkat District, Merangin Regency. The difference with our research is that it appears that the regional regulation has not been implemented properly in Merangin Regency due to the lack of legal awareness of the community towards the regulation, while we focus on Sekadau Regency Regional Regulation Number 8 of 2018. Secondly, research on local regulations in West Kutai Regency, namely Local Regulation No. 12/2006, concerning the Inauguration and Development of Indigenous Peoples. The difference with our research is that it focuses on obstructed communication due to the distance between villages, legal awareness of the community to enforce local regulations is still lacking, then funding is still inadequate, then the organizational structure of the customary law community can be said to be still simple. Third, research on the use of customary law when applied to the settlement of crimes according to Perda No. 1/2012. The research was conducted in Riau Province, precisely in Selensen Village, Indragiri Hilir Regency, the difference with our research is that it appears that the provisions of the Perda have not been heeded in the part of the settlement of criminal acts that are still resolved by the police institution, whereas it should be resolved by the Customary Law Institution, then also the sanctions given to perpetrators of criminal acts still do not provide a deterrent effect. Fourth, the implementation of MHA recognition is based on existing local regulations in Landak Regency, namely Landak Regency Regional Regulation Number 15 of 2017, especially Article 6 Paragraph (3) jo. Article 7, is different from the research we will conduct, because this research focuses on the ineffectiveness of the regulation because there is no clarity on the committee that carries out validation and identification of MHA.

### **II. METHODS OF RESEARCH**

This type of research uses normative legal research methods using deductive reasoning, namely general to specific. This research requires secondary data in the form of primary legal materials and secondary legal materials. All data is analyzed using qualitative methods. Primary legal materials consist of the 1945 Constitution, Permendagri Number 52 of 2014 concerning Recognition and Protection of Customary Law Communities, Regional Regulation of Sekadau Regency Number 8 of 2018 concerning Recognition and Protection of Customary Law Communities, Sekadau Regent Regulation Number 13 of 2020 concerning Guidelines for Identification, Verification, Determination of Customary Law Communities in Sekadau Regency. Secondary legal materials consisting of various books, journals and the Decision of the Constitutional Court, namely Number 35/PUU-X/2012, Decree of the Regent of Sekadau Number 189/313/DPMD.C/2020 concerning the Establishment of a Committee for the Protection and Recognition of Indigenous Peoples in Sekadau Regency.

### **III. RESULT AND DISCUSSION**

#### **A. Definition of Customary Law**

The term 'customary law' was coined by Dr. Snouck

Hurgronje. The term is found in his book entitled *De Atjehers*. Through the book, he alluded to *Adatrecht* or the Indonesian translation translated as customary law. Customary law is emphasized in terms of its application to the people of Bumi Putra. *Kaum Bumi Putra* is known as a term to nickname native Indonesians during the Dutch East Indies rule when it ruled the archipelago. In the book *Adatrecht*, it is said that customary law applies to people who are indigenous Indonesians. Furthermore, customary law becomes an object of science within the framework of positive law, that it becomes one of the subjects, especially in the law faculties of universities in Indonesia.

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1. Ter Haar argues that customary law is all the rules, these rules are the incarnation of the decisions of legal functionaries in a broad sense. Customary law has authority and impact in its implementation, namely immediately applies in society and is obeyed wholeheartedly (Hilman Hadikusuma, 2003)

2. Cornelis Van Vollenhoven argues that customary law is a collection or set of rules. The rules discuss behavior that is applied to the natives. The rules contain sanctions because they are legal rules.

3. Raden Soepomo said that customary law is an equation of law in unwritten form. Not a law contained in regulations formed by the legislature, but a living law. Customary law is a treaty on state legal institutions at the provincial and parliamentary levels. Customary law can be said to be a collection of rules that are customary in society. These rules are organized and survive in the social life of a nation, whether applied in cities or villages.

4. According to Dr. Hilman Syahrial Haq, et al, customary law is defined as the law of the Indonesian people, because it lives in Indonesian society. The law becomes one of the cultural emanations, certainly a guide to life and Indonesian identity. It is one of the most important aspects of a nation so that its existence must be maintained. (Hilman Syahrial Haq, 2022

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### **B. Masyarakat Hukum Adat Menurut Para Ahli**

1. According to Holleman, Masyarakat Hukum Adat is divided into forms, either in the form of kinship groups, territorial groups, and a mixture of the two. The most important thing lies in the rules that are always held and maintained by members of a legal community in the customary law. Customary law regulates a unique way of life, as well as regulating the functions of a community group.

2. According to Surodjo Wignjodipuro, the condition of MHA has existed since before Indonesian independence, MHA lived side by side with the Dutch East Indies government. This is proof that the colonial government had already regulated and recognized the existence of MHA as one of the aspects included in the framework of their autonomous government (Surojo Wignjodipuro: 1973)

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3. Maria S.W. Sumardjono argues that the existence of MHA was initially spontaneous, arising in certain areas. The thing that makes them MHA is that there is a high sense of solidarity among members of the community, they have the same idea that they are members of a customary alliance, not outsiders. They have territories, which they use as a source of wealth. The rule is that customary territories can only be utilized by members of the customary alliance, although there is dispensation in terms of utilization. Outsiders to their customary alliance may utilize the land in their customary territory as long as they give permission and pay a fee to the customary alliance (Abrar Saleng, 2004).

### **C. Legal Basis for the Existence of MHA**

1. Article 18B paragraph (2) of the 1945 Constitution, the State recognizes and gives respect to the various and diverse unity of MHA in the territory of the State of Indonesia, not forgetting also the traditional rights they have as long as they still exist in the lives of MHA in line with the development of the nation, society and various principles of the Republic of Indonesia as contained in various laws and regulations, especially in the form of laws.

2. Article 28I paragraph (3) of the 1945 Constitution, that customary or cultural identity, various traditional community rights are given respect as long as they are in line with the times and the progress of the world.

3. Article 32 paragraph (1) of the 1945 Constitution, that the state pays special attention to Indonesian national culture, especially in the midst of world progress. The steps taken by the state are to provide guarantees in terms of freedom to the community to maintain and develop various cultural values. 4. The decision of the Constitutional Court in Number 35/PUU-X/2012, there are 3 (three) criteria to determine the condition of the community in MHA, their recognition as legal subjects, so that they can certainly litigate in the Constitutional Court.

a) The first criterion, a recognized MHA unit that still exists in the de facto view still exists from a territorial aspect, as well as genealogical, functionally contains at least one and / or a set of various aspects, as follows.

- 1) there are people in the community who have a sense of group;
- 2) there is a customary system of government;
- 3) the availability of customary property and various assets;
- 4) Various tools or equipment of customary norms are available, especially in MHA from the territorial aspect; 5) there is an element of a certain territory.

b) Criterion Two, the unity of MHA including their traditional rights does not conflict with the development of society in general if, as follows.

- 1) Its existence is recognized by other legislation, especially laws and sectoral, regional regulations. This is an illustration of the development of various values that are considered ideal in the development of society at the present time; and
- 2) The content of the various traditional rights is indeed given recognition and respect by the members of the adat community and the wider community, especially in accordance with various human rights).

c) The third criterion is that the unity of the MHA and their various traditional rights does not conflict with the principles of the Republic of Indonesia, especially that the existence of the customary alliance does not adversely affect or disturb the Republic of Indonesia, as follows (Yando Zakaria, 2018)

1) The existence of MHA does not pose a threat to the existence or guarantee of the sovereignty and integrity of the Republic of Indonesia; and

2) The substance or content of customary law norms is in line with the legislation, and must even be in accordance with the law. Based on the formulation of the problem, the answer is that law is one of the instruments or parts used by the government in terms of exercising authority and mandate. The authority exercised must provide certainty, provide benefits, provide justice, and create prosperity for all citizens. Indonesia has the state guidelines of the 1945 Constitution. Article 1 paragraph (3) states that Indonesia is called a state of law, so Indonesian life is guided by law. Law is realized through legislation, one of which is in the form of laws. Law Number 23 Year 2014 regarding Regional Autonomy. In Article 1 paragraph (6), it is stipulated that the Region means that the region is authorized and obliged to provide arrangements and management in the region within the framework of the Republic of Indonesia. In the regulation of regional authority, the local government has the authority to regulate its regional affairs, including the authority to make local regulations, for example the Regional Regulation of Sekadau Regency Number 8 of 2018 concerning the recognition and protection of MHA has a philosophical basis in the form of the existence of MHA, Customary Law and Customary Institutions in the Regency is a component of wealth, in this case socio-cultural wealth. This wealth has value and brings benefits to the community, so it should not be extinct or lost. Instead, it must be maintained and developed, which is the task of MHA. In addition, it is also an asset for the local government for regional development in the district.

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Based on this foundation, it is important for the local government to encourage the recognition and protection of indigenous peoples, which is the mandate and regulation of the Regional Regulation. In addition, a derivative regulation was formed, namely Sekadau Regent Regulation Number 13 of 2020. In order to carry out the mandate of the Perda, the Regent issued Sekadau Regent Decree Number

189/313/DPMD.C/2020, which is tasked with ensuring the implementation of the increasing recognition and protection of MHA and following up on various inputs and aspirations from MHA to the Regional Government, especially in the planning stage, managing and supervising programs that are programs in the framework of development aimed at the availability of funds, protection and guarantee of MHA rights.

So far there are 9 (Nine) Indigenous Peoples in Sekadau District who are fighting for their rights in terms of their existence being recognized and protected as Indigenous Peoples, but only 4 (four) Indigenous Peoples have been recognized and protected by the local government, namely the Dayak De'sa Indigenous Peoples in Sekadau Hilir Sub-District, Tapang Semadak Village to be precise; Dayak Kancikgh Indigenous Peoples in Nanga Taman Sub-district, precisely in the villages of Nanga Mongko, Nanga Engkulun, and Semerawai, along with Dayak Koman Indigenous Peoples in Nanga Mahap Sub-district, precisely in the villages of Tamang and Cenayan. The granting of the Regent's Decree is a form of recognition and protection in accordance with the mandate of the Regional Regulation and is an important milestone for indigenous peoples in Sekadau Regency to realize their sovereignty over their customary lands and territories, affirming that the existence of indigenous peoples cannot be separated from their customary territories and forests and guaranteeing their rights as an entity and protected from various forms of discrimination.

The presence of Local Regulation No. 8/2018 is an exciting thing for MHA in Sekadau, they are happy to take part as legal subjects in the recognition of their rights and are also protected within the framework of the Republic of Indonesia. However, in the midst of this excitement, there are still problems. The main problem is the fulfillment of administrative requirements needed for the recognition of MHA, starting from the preparation of social data and the documentation process, as well as the preparation of spatial data for the implementation of mapping of indigenous territories, which requires large costs and high technical capabilities. In this case, the local government as a policy maker should be able to provide support in the form of providing facilities in the implementation of fulfilling administrative needs. The fact that the local government has not been able to facilitate these needs is not in accordance with Article 26, Article 27, Article 28 of the regulation which states that it guarantees that the local government must be prepared to provide facilities, facilities, infrastructure, funds in providing recognition and protection of MHA. In the Sekadau District APBD from 2019 to 2021, there is no budget for the needs of MHA, but it is focused on resolving COVID-19. The obstacles experienced by MHA have been felt in the document preparation stage, because they have to provide a lot of time, energy and costs. There has been synergy and coordination between the local government and NGOs (Non Government Organization) as a companion institution, but the resources available are still limited so that the presence of NGOs as a companion institution is still unable to accommodate the needs of all MHA in Sekadau District. The burden placed on MHA and NGOs will be difficult to implement if there is no support from the local government. If local governments are passive and only wait for proposals for recognition and protection of MHA, it will be difficult for MHA to fight for their rights, even though MHA are legitimate legal subjects as stipulated in the constitution. The local government should be active in the framework of the joint task of carrying out the mandate of the Regional Regulation, not just passive. If the local government is passive, it can show that the political will of the Sekadau local government is still weak, therefore the implementation of the local regulation has not been maximized.

### **IV. CONCLUSIONS**

Sekadau District Regulation No. 8/2018, specifically Article 17 paragraph (3), has not been able to accommodate administrative requirements for MHA in Sekadau District due to budget constraints from the local government. This is due to the regulation of the article that is not commensurate with the reality of the available budget. The arrangements contained in the Perda in terms of providing recognition and protection to MHA in Sekadau District are difficult to do because they go through a series of stages that are quite long and many so that they need a lot of money. There is not much money available. Article 17 paragraph (3) is not in accordance with the conditions of MHA who experience limited human resources to help facilitate capacity building activities to jointly conduct participatory mapping, often MHA have difficulty in realizing participatory mapping because it certainly requires a variety of resources. Therefore, Article 17 Paragraph (3) should be the joint responsibility of the Sekadau District Government, which is still difficult to implement. Local governments should have juridical consequences in facilitating MHA, after all, local governments are representatives of the central government in the regions so that facilitating MHA to obtain their rights should be the responsibility of the local government, not only borne by MHA. Local governments must be active in providing justice for MHA, one of which is by helping to facilitate the needs of MHA, as well as to show that local governments are present so that MHA can obtain legal certainty as legal subjects.

## Juridical Consequences of Article 17 Paragraph (3) of Sekadau Regency Regional Regulation No. 8/2018 on the Recognition and Protection of Customary Law

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