

# Recognition Of Customary Law Communities In Regional Regulations In Indonesia

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**Abstract:** Article 18B paragraph (2) of the 1945 Constitution requires the state to recognize (recognize and respect) customary law communities (villages, gampong, nagari, negeri, kampung, etc.) along with their traditional rights. Regional Regulations as a type of legislation to provide concrete recognition of customary law communities. In regional government laws and village laws, regional authority in forming regional regulations is stated. This research is a normative juridical research. Regional Regulations (Perda) as an Instrument of Recognition Formal recognition of customary law communities must be stipulated through Regional Regulations in accordance with the mandate of the Forestry Law and the decision of the Constitutional Court Number 35/PPU-X/2012 which confirms that the confirmation of the existence of customary law communities is a delegation of authority regulated in the 1945 Constitution.

**Keywords:** Recognition, Customary Law Communities, and Regional Regulations.

## 1.

### INTRODUCTION

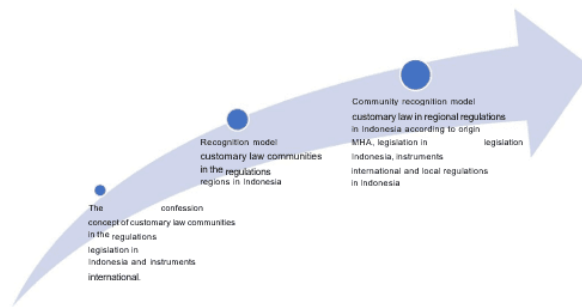
Customary Law Communities, hereinafter referred to as MHA, are a group of people who are bound by their customary legal system as citizens of a community legal association due to shared residence or on the basis of descent. As for indigenous peoples as legal subjects, legal objects. MHA in Indonesia is a society based on territorial (regional) and genealogical (descent) similarities and territorial-geneological (territory and descent), so that there is a diversity of forms of indigenous communities from one place to another.

Understanding this diversity is useful in understanding recognition of customary law community units with regional regulations. The description to gain this understanding is carried out by systematization. as follows: (1) Units of customary law communities as facts legal pluralism; (2) Regulation of customary law community units,

historical approach to Article 18 of the 1945 Constitution of the Republic of Indonesia; and (3) the meaning of political pluralism law on the recognition of customary law community units with regional regulations.

Regional regulations as a type of statutory regulation for making concrete recognition stems from the meaning of "regulated in law", namely that the regulation of the material in question does not require a separate law that specifically regulates it. Constitution as referred to in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia contains material content regarding the direction of the policy of recognition and respect for the unity of customary law community units, such as clarifying the requirements for recognition.

### 2. MATERIALS AND METHODS



This research is a socio-legal research that combines approaches in doctrinal legal research. Socio-legal studies conduct studies textually, articles in laws and regulations and policies can be analyzed critically and explained its meaning and implications for legal subjects (including marginalized groups). The data sources were obtained from literature studies, by reading, citing and analyzing library materials can be in the form of regulations, legislation, judicial decisions, government decisions and regional regulations in Indonesia, legal expert doctrines/opinions including

utilize dictionaries, encyclopedias related to the research substance.

The analysis used is legal analysis by means of interpretation law. The interpretations that will be used include grammatical interpretation, historical, philosophical, sociological and comparative. The results of the legal analysis are then presented in a qualitative descriptive manner using conclusion drawing deductively by comparing the recognition standards indigenous peoples in regional regulations in Indonesia.

### 3. Result and Discussions

#### A. Regional/State Autonomy in the International World

In the international context, the protection of indigenous peoples is governed by several key instruments, including **ILO Convention No. 169** and the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007**. These instruments emphasize fundamental rights such as indigenous peoples' ownership over land and natural resources, as well as their right to participate in decision-making through the *Free, Prior, and Informed Consent* (FPIC) procedure. FPIC ensures that indigenous communities are not marginalized or harmed when policies or development projects pose potential negative impacts on their territories, livelihoods, or cultural identity.

In federal systems, states hold a central and dominant role as the lower level of government. Most governmental powers are exercised by the states, while the federal government derives its authority from the powers delegated by them. This structure is grounded in the principle that states are sovereign entities within the federation. The distinction between federal and unitary state structures can be identified through several main aspects, including the distribution of legislative power at each governmental level, the concept of sovereignty adopted, and the theoretical foundations of governance in each system.

#### B. Regional Autonomy and the Authority to Recognize Indigenous Communities in Indonesia

Constitution as referred to in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia contains material content regarding the direction of the policy of recognition and respect for the unity of customary law community units, such as clarifying the requirements for recognition.

Article 18B paragraph (2) has been further interpreted in several Constitutional Court decisions, one of which is stated in Constitutional Court Decision Number 31/PUU-V/2007, which states that the court deems it necessary to determine criteria or benchmarks for fulfilling the provisions of the 1945 Constitution, namely that the customary law community unit:

1. is still alive;
2. is in accordance with societal developments;
3. is in accordance with the principles of the Unitary State of the Republic of Indonesia; and
4. is regulated by law.

Furthermore, according to the court, a customary law community unit, to be considered *de facto* alive (actual existence), whether territorial, genealogical, or functional, must contain at least the following elements:

- (i) the existence of a community whose members have an in-group feeling;
- (ii) the existence of customary government institutions;

- (iii) the existence of customary assets and/or objects; and
- (iv) the existence of customary legal norms. Specifically, in territorial customary law communities, this element also exists:
- (v) the existence of a specific territory.

The recognition of indigenous peoples' rights through regional legal instruments has been practiced long before the issuance of ministerial regulations on agrarian affairs. Following **Constitutional Court Decision No. 35/PUU-X/2012**, the urgency to acknowledge the existence and rights of indigenous peoples has increased significantly. This decision requires the issuance of regional legal products either Regional Regulations (Perda) or Regional Head Decrees to implement operational guidelines, such as:

1. Minister of Home Affairs Regulation No. 52 of 2014 on Guidelines for the Recognition and Protection of Indigenous Law Communities;
2. Minister of Environment and Forestry Regulation No. P.32/Menlhk-Setjen/2015 on Forest Rights;
3. ATR Regulation No. 10 of 2016 on Procedures for Determining Communal Rights on the Lands of Customary Law Communities and Communities Living in Certain Areas.

Customary law communities (Masyarakat Hukum Adat/MHA) are social entities with significant historical and cultural value. Their traditional rights over territories and natural resources have been acknowledged through various national and international legal instruments. In Indonesia, the primary legal mechanism for protecting indigenous communities is the issuance of regional regulations (Perda), which function as formal instruments of recognition and protection. At the global level, indigenous rights are reinforced through international frameworks such as ILO Convention No. 169 and UNDRIP.

The form of the state serves as a fundamental basis for governance. In Indonesia, Article 1 paragraph (1) of the 1945 Constitution firmly establishes Indonesia as a **unitary state in the form of a republic**, meaning all governmental authority operates under the principles of unity and republicanism. To ensure governance reaches every region including remote areas Indonesia implements regional autonomy. Regional governments and Regional People's Representative Councils administer governmental affairs based on autonomy and co-administration tasks, while remaining bound to the principles of the Unitary State of the Republic of Indonesia. This framework is clearly regulated in **Law No. 23 of 2014 on Regional Government**.

Regional autonomy is a component of decentralization, granting authority to local governments to regulate and manage local interests independently. This system became more prominent during the Reform Era, beginning with **Law No. 22 of 1999**, later refined by **Law No. 23 of 2014** and **Law No. 9 of 2015**. Its aims include improving public services, empowering communities, and developing local potential within the unity of Indonesia. The shift toward autonomy was driven partly by the 1997 Asian financial crisis, which encouraged greater delegation of authority from the central government to the regions to enhance responsiveness to local needs.

In terms of recognizing indigenous communities, regional autonomy provides institutional space for local governments to protect communities with their own governance structures, legal systems, and cultural traditions. Article 18B paragraph (2) of the 1945 Constitution explicitly affirms that the state recognizes and respects customary law communities as long as they remain in existence and align with societal development and national principles. This authority is crucial for maintaining indigenous identity, land rights, and cultural preservation as part of inclusive regional development. However, the implementation of indigenous recognition within the autonomy framework faces multiple challenges, including overlapping authority between central and regional governments, weak harmonization of regional regulations with indigenous interests, and limited capacity of local governments in managing indigenous community affairs. Thus, regional autonomy serves not only as an administrative mechanism but also as an essential tool for promoting justice, cultural preservation, and equitable governance.

#### **Legal Basis for Regional Autonomy in the Recognition of Indigenous Communities**

1. **1945 Constitution (Article 18B Paragraph 2)**  
The Constitution acknowledges and respects customary law communities and their traditional rights, forming the primary constitutional basis for the recognition of indigenous peoples.
2. **Article 67 of Law No. 41 of 1999 on Forestry**  
This law outlines the criteria for recognizing indigenous communities, including social structure, customary institutions, clearly defined customary territories, adherence to customary law, and reliance on forest resources. Recognition is formalized through Regional Regulations (Perda), giving regional governments a significant role.
3. **Minister of Home Affairs Regulation No. 52 of 2014 (Permendagri)**

This regulation provides technical guidelines for regional governments on the identification, verification, validation, and determination of customary law communities. Recognition is issued through Regional Head Decrees, or through Joint Regional Head Decrees if the communities span multiple jurisdictions.

The regulation emphasizes the authority of regional leaders to determine the existence of customary law communities, as stated in Article 6 paragraph (2), which requires the Regent/Mayor to issue a Decree based on recommendations from the Indigenous Community Committee.

The process for indigenous legal communities to gain recognition and the issuance of regional regulations regarding such recognition is very lengthy. According to Minister of Home Affairs Regulation No. 52 of 2014 (Permendagri) concerning Guidelines for the Recognition and Protection of Indigenous Legal Communities, there are three major stages: Identification, Verification and Validation, and Determination. Each of these stages is very lengthy in practice and presents its own challenges.

For example, in the Identification stage, the indigenous legal communities involved, together with the appointed committee, must be able to identify their history, customary territories, customary laws, and assets. In reality, in identifying these matters, indigenous legal communities rely on oral history passed down from generation to generation and natural boundaries to mark their territories, which are often lost due to natural factors. Another fact is that several regional regulations that have been issued represent efforts and encouragement from indigenous communities to gain recognition as they face agrarian conflicts, particularly over competing claims to their customary land. This is evident in the Mentawai and Kajang customary communities.

Regional regulations on recognition are not the ultimate goal of efforts to protect and fulfill the rights of indigenous communities, but rather an initial step that must be followed by other concrete measures. Following the issuance of regional regulations on the recognition of indigenous communities, other legal steps must be taken. These include programs to protect and fulfill the rights of indigenous communities (such as access to education, health care, economic access, the right to identity, guarantees of religion and beliefs, recognition and protection of land and territorial boundaries, and other rights), as well as facilitating conflict resolution between indigenous communities and companies by guaranteeing their rights.

This will ensure that the rights of indigenous communities are truly protected and fulfilled.

#### 4. CONCLUSIONS

Regional regulations on recognition are not the final objective in providing protection and fulfillment of the rights of indigenous law communities; rather, they represent an initial step that must be followed by further concrete actions. Once regional regulations on the recognition of customary law communities are enacted, they must be strengthened through additional legal and administrative measures. These include programs for the protection and fulfillment of community rights such as access to education, healthcare, economic opportunities, identity rights, religious and belief guarantees, recognition and protection of land and territorial boundaries, and other fundamental rights. In addition, mechanisms must be provided to facilitate conflict resolution between customary communities and private companies to ensure that community rights are respected and upheld. Only through these follow-up actions can the rights of indigenous legal communities be genuinely protected and fulfilled.

Protection of customary law communities (MHA) in Indonesia has received growing attention from regional governments, evidenced by the issuance of regional regulations specifically designed to recognize and safeguard their existence and rights. These regulations function as legal instruments to protect customary territories, local wisdom, and natural resources that serve as vital sources of livelihood for indigenous peoples. Regional authority to grant recognition to Indigenous Communities is regulated not only by the constitution and laws, but also technically by:

- 1) Minister of Home Affairs Regulation No. 52 of 2014 concerning Guidelines for the Recognition and Protection of Indigenous Communities.
- 2) Minister of Environment and Forestry Regulation No. P.32/Menlhk-Setjen/2015 concerning Private Forests.
- 3) Minister of Agrarian Affairs and Spatial Planning Regulation No. 10 of 2016 concerning Procedures for Determining Communal Rights to Land of Indigenous Communities and Communities Residing in Certain Areas.

In 2021, there were 158 regional legal products concerning Indigenous Communities, each consisting of 11 Provincial Regulations, 1 Gubernatorial Regulation, 57 Regency/City Regulations, 2 Regent Regulations, and 87 Regent Decrees, 37 of which are distributed across 23 Provinces and 65 Regencies. Of the 65 regencies that have regional legal products related to indigenous communities, 30 have implemented them to the point of establishing indigenous communities and their customary territories. Five regencies have only established indigenous community committees, and 30 regencies have not

yet implemented the established regional legal products.

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