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aplreview <aplreview@cityu.edu.hk> Mar 18, 2019, 2:43 PM

to me

Dear Author,

Thank you for giving us the opportunity to read your article entitled “State Failure in Recognition and Protection of Indigenous Peoples over Natural Resource Access in East Kalimantan ". After our review, I am happy to inform you that your article will be published in Volume 27 of Asia Pacific Law Review.

Your article will be passed to my colleague, Ms Pinky Choy to follow up the typeset procedure. Thanks again for your submission to APLR and we wish you a happy new year!

Yours sincerely,
Lala Wong
on behalf of LIN Feng, Editor of Asia Pacific Law Review

D

Dr. Muhammad Muhdar Sh, M.Hum <muhamadmuhdar@fh.unmul.ac.id> Mar 24, 2019, 8:51 PM

to aplreview

Dear Editor,
It is indeed a happy news for me. I am really appreciative of this consideration to accept my article and constructive suggestions made by reviewers in the past months.

I am looking forward to the publication of the article.

Regards,
Muhamad Muhdar

Miss CHOY Dick Wan Pinky <lwpinky@cityu.edu.hk>

Aug 23, 2019, 3:00 PM

to aplreview, me

Dear Author,

Concerning your paper "State Failure in Recognition and Protection of Indigenous Peoples over Natural Resource Access in East Kalimantan", while we have accepted it for publication, we still need you to do the following before we could arrange the paper to be published:

1) We have edited and copyedited it by using track changes in the attached file. Please check the track changes and decide whether to accept or reject those changes. For the parts highlighted in yellow, those parts are either unclear in meanings or the English of those parts need to be improved.
2) Please check the whole paper again to make sure that the grammar, tenses, small/capital letter usage (e.g. Constitution/constitution, Regency/regency, Village/village, State/state, Government/government), and singular and plural usage (e.g. peoples/people, companies/company, land/lands) are correct and consistent throughout the whole paper.
3) Please use the special terms consistently throughout the whole paper (e.g. Indonesian 1945 Constitution/1945 Constitution of the Republic of Indonesia).

Since we found that the English of the paper needs substantial improvement, we urge you to find a native English speaker to help you in improving it before sending us a revised version.

Please note that all the aforementioned changes should be made to the file attached to this email. Once all the amendments are done, please send us a clean copy of the revised (and finalized) version of the paper as soon as possible and **by 6 September 2019 (Friday) at the latest**.

Should you have any query regarding this matter, please do not hesitate to contact us. Thank you.

Best regards,

Pinky Choy
Asia Pacific Law Review (APLR)
School of Law
City University of Hong Kong

State failure in recognition and protection of indigenous peoples over natural resource access in East Kalimantan

Muhamad Muhdar, Muhammad Tavip and Rahmawati Al Hidayah,

ABSTRACT
This article investigates the factual conditions of the performance of the Indonesia legal system in providing recognition and protection to the indigenous peoples in the management of natural resources, including the patterns of legal relationships with regard to the land ownership in the indigenous peoples' controlled areas. This study is supported

by the information obtained from selected sample areas in East Kalimantan: Paser Mayang Village of Pasir Regency (coastal issues), in addition to Lamin Telihan Village, Lamin Puluh Village, and Teluk Bingkai Village of Kutai Kertanegara Regency (land and forest issues). The ever growing strength of the legal unification that carries the spirit of legal certainty has reduced the use of customary law in maintaining access to and legal guarantee over the management of natural resources. The superiority of state law is further applied by the companies that have the support of the State through the licensing systems in their control of the natural resources. Considering the limited resources that the indigenous peoples have to satisfy the requirements to acquire the licenses, the indigenous peoples will surely be losing their control of their own lands to the companies or corporations, and hence slowly degrades the identity of the indigenous peoples. The weakness of the legal protection over the areas administered by the indigenous peoples evidently confirms the failure of the state in the recognition and the protection of the indigenous peoples.

KEYWORDS
recognition, protection, failure, access, indigenous peoples, natural resources

I. Introduction

Article 18B(2) of the second amendment of the Indonesian 1945 Constitution has given recognition to the presence of customary community or indigenous community, also known as indigenous peoples. The law declares that:

> The state recognizes and respects integrated legal indigenous communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.[1]

This is the principal legal system in the State of Indonesia that gives indigenous peoples recognition and protection that they have long aspired for. The constitutional formulation proves that the State recognizes as well a prevailing customary law that has governed the indigenous peoples. A community where there is another legal order, or source of law, other than the State Law is considered to be practicing legal pluralism.[2] In Hooker's words, legal pluralism is defined as 'the existence of multiple systems of legal obligations … within the confines of the state'.[3]

The legal pluralism that now gains currency in the constitution has negated former (lower) regulations, such as Law No. 5 of 1960 concerning Basic Agrarian Law, for examples, in which outlined a set of criteria that rendered customary law hard to be exercised. This regulation recognized the land right of indigenous communities with some strings attached to it: the communities are still present, it may not conflict with the national interest and the state interest, and it shall not conflict with the laws and regulations of a higher level.

In the post decentralization of 1999, a range of provisions have been enacted in order to implement the principal law that recognizes the indigenous peoples and their prevailing law, the

[1] Second amendment of the Indonesian 1945 Constitution (18 August 2000), Article 18B(2).
[2] John Griffiths, 'What Is Legal Pluralism' (1986) 24 Journal of Legal Pluralism 38 <commission-on-legal-pluralism.com/volumes/24/griffiths-art.pdf> accessed 25 July 2018.
[3] M.B. Hooker, *Legal Pluralism — An Introduction to Colonial and Neo-Colonial Laws* (Oxford University Press, 1975) 2.

chief of which concern forestry,[4] plantation,[5] coast and marine management,[6] and fishery[7]. The recognition toward indigenous peoples is also apparent in the regional level as shown in the Regulation No. 23 of 2014 regarding Regional Government and Regulation No. 6 of 2014 regarding Village. As decentralization is getting stronger, new responses arise as a way for the State to recognize indigenous peoples along with the implications that may come up in the implementation level. As Bakker put it, 'the spatialization of law in Indonesia has emerged as a potent tool for acquiring and maintaining power at the regional level of government'.[8]

In the legal point of view, the recognition of the indigenous peoples makes up a condition to obtain legal protection in natural resource utilization that extends to land, forest, coastal area and the sea.

Despite the fact that indigenous peoples have been recognized and protected in the constitution, what happens in the real world is still a far cry as shown by the cases in Paser Regency and Kutai Kartanegara Regency.[9] In fact, the confusion has primarily originated from the contestation of the two legal sources: State Law and Customary Law. In the words of Mirza, 'the reconciliation of customary law and the state legal system which is characterized by the strong legal positivist (formalist) under the spirit of unification'[10] is still going on. In other words, state protection toward indigenous peoples in the present, after the clause regarding the recognition of indigenous peoples is incorporated in the constitution, has not changed much, especially with respect to legal certainty. Simarmata mentions that 'it is normal to endeavor toward legal unification and diversity with a condition that both should guarantee legal certainty'.[11]

The study found that customary law comes second to the unification process of state law that is prevalent in almost all aspects of social life of the indigenous peoples in the research areas, especially in the management of natural resources and environmental risks that tag along.[12] Article 28H (1) of the Indonesian 1945 Constitution states that: 'Everyone shall have the right to live in physical and spiritual prosperity, to have a home, and to enjoy a good a healthy environment, and shall have the right to obtain medical care'. This formulation guarantees that citizens including the indigenous peoples are entitled to environmental safety. According to Heyward, one characteristic of modern constitution is that it considers environmental

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[4] Law No. 41 of 1999 concerning Forestry including Constitutional Court Ruling No. 35/PUU-X/2012. This decision affirms indigenous peoples having the right to manage forest zone. Constitutional Court Ruling No. 95/PUU-XII/2014 concerning the examination of Law No. 18 of 2013 that deals with Prevention and Eradication of Forest Destruction and Law No. 41 of 1999 concerning Forestry against 1945 Constitution, on 8 December 2014.

[5] Law No. 18 of 2008 concerning Plantation mentions that in case the lands to be used belong to indigenous peoples, it is necessary to consult them in the first place.

[6] Law No. 27 of 2007 about Management of Coastal Area and Isles jo. Law No. 1 of 2014 concerning amendment of Law No. 27 of 2007 concerning Management of Coastal Area and Isles.

[7] Law No. 31 of 2004 concerning Fishery. See also, Law No. 45 of 2009 and Amendment of Law No. 31 of 2004 concerning Fishery and Law No. 32 of 2014 on Maritime Transport.

[8] Laurens Bakker, 'The Sultan's Map: Arguing One's Land in Paser' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law, An Anthropological Geography of Law in Society* (Ashgate, 2009) 110.

[9] Both regencies opt to prepare Regent's Act on Mechanism of Recognition of the Indigenous Peoples, which is in progress at the time of this writing.

[10] Mirza Satria Buana, 'Living Adat Law, Indigenous Peoples and the State Law: A Complex Map of Legal Pluralism in Indonesia' (2016) 1 International Journal of Indonesian Studies 104 <https://view.joomag.com/international-journal-of-indonesian-studies-volume-1-issue-3/0157693001479197148?page=104> accessed 27 July 2018.

[11] Rikardo Simarmata, 'Legal pluralism and accompanying issues, a discourse development series' (*Pluralisme hukum dan isu-isu yang menyertainya, seri pengembangan wacana*) 24 <https://books.google.com/books/.../Pluralisme_hukum_dan_isu_isu_yang_menyer.html?.> accessed 25 July 2018.

[12] The research was conducted from September 2017 to April 2018 in Paser Mayang Village dealing with coastal area management issues (Paser Regency), Desa Lamin Telihan, Lamin Puluh, dan Desa Teluk Bingkai (Kutai Kertanegara Regency) dealing with land and forest control issues.

sustainability.[13] This concept of environmental sustainability is totally in contradiction to natural resources exploitation practices (that have shut the indigenous peoples out), which ignores their very basic rights.[14]

The long history of natural resources management in East Kalimantan sheds some light on how capable the State is in its protection of indigenous peoples, especially in mining industry and forestry. Coal mining started in this area in 1861. In 1927, the production output already reached its highest peak of 808.078 tons, which was the biggest one during the Dutch colonial era.[15] A package of policies carried out by President Soekarno in the early 1960s gave birth to a series of regulation packages in mining and forestry that would shape the course of natural resource exploitation in East Kalimantan. Massive exploitation of forest that took place between 1970s and 1980s became a touchstone in the depletion of forest in East Kalimantan and degrading territories of the indigenous peoples in the surrounding areas.[16]

Indigenous peoples' controlled areas diminished in size as a result of plantation and coal mining activities supported by the government. The new paper-based allocation of lands overlapped with indigenous peoples' tradition of land control based on customary tradition, which triggered the conflict within the indigenous peoples' community itself or between the indigenous peoples and the investors.[17] Benda-Beckman noted that 'with the use of maps the specific ways in which competing legal categories and related legal claims are made in relation to the same land'.[18] For example in West Sumatera, land can be classified competitively as village commons (*ulayat nagari*) or as state land.[19] Furthermore, Benda-Beckmann added that 'multiple legal construction of place not only open up a range of arenas for the exercise of political authority but also provide differing approaches to the localization of right and obligations'.[20] As this research shows, all four villages experienced territory losses in term of regency spatial planning (both regencies of Paser and Kutai Kertanegara) and special planning in provincial level,[21] not to mention a myriad of conflicts that arise with regard to the utilization of areas claimed by indigenous peoples as their own.[22]

This encroachment on indigenous peoples' lands spreads to coastal and sea areas where coal transportation, to mention an example, using sea carriers become common. As the result, the indigenous peoples' access of the coastal or sea areas become harder and harder. In most cases, traditional fishermen and indigenous peoples previously dwelling in the coastal area have to leave their own homes as it occurred in Paser Mayang Village of Paser Regency.[23]

The fight over controlled lands claimed by the indigenous peoples on the one hand and the corporations supported by licensing system introduced by the state on the other hand has created

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[13] Tim Heyward, *Constitutional Environmental Right* (Oxford University Press, 2005) 5.

[14] Mirza Satria Buana, 'Can Human Right and Indigenous Peoples Spirituality Prevail over State-Corporatism? A Narrative of Ecological and Cultural Right Violation from East Kalimantan, Indonesia: An Activist Perspective' (2017) 1 Journal of Southeast Asian Human Rights 1–15.

[15] RW Van Bemmelen, *The Geology of Indonesia, Vol. II Economic Geology*, (Government Printing Office, The Hague 1949) 4.

[16] Indonesia Ministry of Environment and Forestry mentions that forest coverage in East Kalimantan in the years 2006–2015 has 6.568.308,56 ha left.

[17] M. Muhdar and Nasir, 'Conflict Resolution over Natural Resource Management Dispute in West Kutai Regency and Kutai Kertanegara Regency' (*Resolusi Konflik terhadap Sengketa Penguasaan Sumber Daya Alam di Kabupaten Kutai Barat dan Kutai Kartanegara*) (Epistema Institute and Prakarsa Borneo Research Paper 2012) 38 <http://epistema.or.id/wp-content/uploads/2015/07/Working_Paper_Epistema_Institute_03-2012.pdf > accessed 27 July 2018.

[18] Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Space and Legal Pluralism: An Introduction' in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths (eds), *Spatializing Law, An Anthropological Geography of Law in Society* (Ashgate, 2009) 21.

[19] Ibid, 21.

[20] Ibid, 22–23.

[21] See East Kalimantan Regulation No. 1 of 2016 regarding Regional Spatial Planning.

[22] Interview with Basri, the customary member of Lamin Telihan Village, 17 January 2018.

[23] Direct investigation in the settlement of the indigenous peoples of Paser Mayang Village, 17 September 2017.

uncertainty, especially for the indigenous peoples. In addition, the way the central government manages the disputed lands does not represent the indigenous peoples and at the same time creates a legal vacuum. Management initiation at sub-district and regency levels is as well susceptible in terms of authority as natural resource management policy becomes the jurisdiction of either central or provincial government. In general, the loss of access that indigenous peoples experience of natural resources in their controlled territory as a result of the licensing system guaranteed to a third party, primarily corporations, has repeatedly triggered conflicts among the stakeholders. Above all, it shows the weakness of the state legal system in the protection of individual as well as communal rights of the indigenous peoples.[24]

Based on the facts found in the research area, this article is trying to review the state legal system and its ability in recognition and legal protection context before the claim of indigenous peoples over natural resource access. Two main questions will be investigated: First, is the weak recognition and protection toward the indigenous peoples over natural resource utilization a result of legal system or rather due to internal friction prevalent in the indigenous peoples themselves? Secondly, how is the performance of the legal protection over controlled area of the indigenous peoples at the present time?

II. Recognition and protection of the indigenous peoples

A. Customary law community's concept

The 1945 Constitution of the Republic of Indonesia introduced several terms to identify indigenous peoples, such as indigenous peoples association, customary law community (CLC), as well as traditional or '*adat*' community,[25] of which the terms can be used interchangeably.[26] Meanwhile, the term '*masyarakat hukum adat*' (adat law community) is adopted in the Decree of Minister of Home Affairs No. 52 of 2014 regarding Guideline in Recognition of Adat Law Community, hence making it an accepted term in the Indonesian context. Safitri argued that the term of 'customary law communities' or 'indigenous peoples' which was based on *rechtsgemeenschappen*, has a wider scope.[27] In this regard, it is an extension emerging from an understanding of a community which has been known long before the national independence. In the colonial era, for instance, the indigenous peoples gained some sort of recognition from the colonial power that any attempt to exploit what belonged to this community, which is often referred to as '*hak ulayat*' (customary rights), was done through direct leasing or rent, not release of rights (*onteigening*).[28]

A series of regulations and provisions in natural resource management has forced people to comply with criteria outlined by the state in the framework of legal unification perspective. In other words, State becomes more authoritative in interpreting what is considered as indigenous peoples beyond what is mandated by the constitution. Regulation of the Minister of Agrarian

[24] See David N. Cassuto, 'The Law of Words: Standing, Environment, and Other Contested Terms' (2004) 28 The Harvad Environmental Law Review 79–128.

[25] Yance Arizona (ed), *Between Text and Context: The Dynamic of Legal Recognition over Rights and Natural Resources (Antara Teks dan Konteks: Dinamika Pengakuan Hukum terhadap Hak atas Sumber Daya Alam)* (HuMa, 2010) 44.

[26] Synonymous terms can be found in a wide array of references, e.g., Tribal and Indigenous peoples (International Labour Organisation (ILO) Convention 1969), Indigenous peoples (World Bank OD 2.20), Indigenous and Local Communities (Convention on Biological Diversity), Indigenous Peoples (UN Declaration on Indigenous Peoples), Indigenous Peoples (Asian Development Bank Policy on Indigenous Peoples

[27] Myrna A. Safitri and Luluk Uliyah, *Custom in the Hands of Regional Government, Guideline of Legal Product Drafting for the Recognition and Protection of the Indigenous Peoples (Adat di Tangan Pemerintah Daerah, Panduan Penyusunan Produk Hukum Daerah untuk Pengakuan dan Perlindungan Masyarakat Hukum Adat)* (Epistema, 2014) 30.

[28] cf Court Testimony of Nurul Rahman in Constitutional Court Proceeding Case No. 35/PUU-X/2012.

Affairs/Head of National Land Affairs Bureau No. 5 of 1999 regarding the Guideline for the Settlement of Problems Related to the Communal Reserved Land of the Customary Law Community, which was enacted after the Indonesian Reformation in 1998, stipulates that regional government has the authority to determine and acknowledge the recognition of customary rights; a type of degradation of the constitution's message, incorporated into Article 18B of the amendment of 1945 Constitution.

The historical and constitutional degradations allow the discussion on social and legal discourse dispute, especially in the theoretical basis reflected in Ter Haar Bzn adopted by the Constitutional Court as its jurisprudence in Ruling No. 31/PUU-C/2007. In its decision, the Constitutional Court stipulates criteria of indigenous peoples unit which include: organized group; the presence of a specific territory, the existence of traditional governance, and the assets and/or custom objects. These legal criteria has obviously benchmarked a customary law community in line with what is understood by the government,[29] but viewed differently by the indigenous peoples.

The conditions stipulated in the verdict of the Constitutional Court in addition to several Acts issued by the government as represented in the Regulation of Minister of Home Affairs No. 52 of 2014 regarding Guideline for Recognition of Adat Community, however, seem to be vague as there is no best explanation whether they are cumulative, which means all the conditions need to be there, or one condition is sufficient to be legally considered 'adat' community, or indigenous peoples.

Article 97(2) of Law No. 6 of 2014 regarding Village considers it satisfactory when the main condition, which is territory, is present, in addition to one of the other requirements. This great advancement in technicality of the recognition has been devised by the Muluy community whose conditions of territoriality and communality are easily recognized, to achieve their recent status as recognized indigenous community of Muluy.

B. National level regulation

Indonesia does not ratify the International Labour Organisation (ILO) Convention No. 169 (Indigenous and Tribal People Convention) despite its relevance to factual circumstances of the indigenous peoples who have anticipated such recognition long before the Independence.[30] The same case holds true for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which has no legal binding effect on Indonesia.[31] The government's decision to neglect the Convention is strongly supported by a need of self-identification. The pre-independence condition is assumed to potentially disrupt the order of the newly independent state. Any change in the condition of indigenous peoples, therefore, is directed toward the integration of indigenous peoples into the government structure in the entire aspects and levels. In addition, the government is supposed to treat all citizens equally despite their ethnic differences.[32] The ratification of Article 1 of the International Covenant on Economic, Social and Cultural Rights associated with the protection of basic rights is to be understood as a post-independence fact, instead of pre-independence one.[33]

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[29] Tolib Setiady, *The Summary of Indonesian Customary Law, A Literature Study (Inti Sari Hukum Adat Indonesia, Dalam Kajian Kepustakaan*) (Alfabeta, 2008) 76.

[30] ILO Convention C169 on Tribal and Indigenous Peoples.

[31] United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR,61 sess, 107 plen mtg. Supp No.49, UN Document A/RES/61/295 (13 September 2007).

[32] cf Gerard A. Persoon, Tessa Minter and Barbara Slee, Clara van der Hammen, 'The Position of Indigenous Peoples in The Management of Tropical Forests' (Tropenbos Series 23, Tropenbos International, The Netherlands 2004) 30.

[33] Law No. 11 of 2005 about The Ratification of The International Convenant on Economic, Social and Cultural Rights.

The recognition of indigenous peoples according to the 1945 Constitution is stipulated in Chapter 28B(2), however is yet to be implemented in practical level. The phrase 'regulated by law' asstated in this subsection implies that customary rights are bound by numerous provisions further outlined in Indonesia's legal system, while 'as long as they are still present' refers to verification to be conducted by the state.[34] Further, Article 28I(3) of the 1945 Constitution states that, '[t]he cultural identities and rights of traditional communities shall be respected in concordance with the development of times and civilizations.' This vague provision is like other abstract ones argues for a need of verification of Article 28B(2) to measure whether the culture associated with the indigenous peoples has been accorded to the development of time and civilization.

It is suggested that there is a wide gap in the constitutional text considering the difficulty in realizing below constitutional level. It is the State's obligation as mandated by the constitution to 'protect all people and whole homeland of Indonesia and advance general welfare, educate the life of the people and participate toward the establishment of a world order based on freedom, perpetual peace, and social justice'.[35]

However, these '*adat*' communities face criminal charges if they tried to collect forest products or timber which grow in their own forest. This accusation may happen regardless of the purposes and their intended use. Literally, it neglects the tradition they have practiced for generations.

C. Regional level regulation

The layers of provisions in Indonesia legal system started from the national level, provincial level, and regency/municipality level. Provisions regarding natural resource management belong to national government. Oil and gas, for instance, are within the jurisdiction of central government while forestry is regulated in concert by the central and provincial government, which left other sectors such as plantation to regency jurisdiction.[36]

From state law perspective, natural resource users are obliged to follow the clear-cut procedure, while from users' point of view, it is necessary that the procedure gives certainty with regard to indigenous peoples' land tenure as well as clear norms as a guideline to determine what is legal or illegal.[37] In such mutual hostility, compromising what is considered legal and something illegal feels uncomfortable because[38] the state will always turn to positivism over compromising path in their handling of tenurial conflicts that involve indigenous peoples.

It is, therefore, necessary that the provincial and regency/municipality governments draft regulations to recognize and protect indigenous peoples. A range of regulations in the Province of East Kalimantan, Paser Regency and Kutai Kertanegra Regency, however, show otherwise:

a) Regional Regulation No. 15 of 2008 regarding Long-term Development Planning of East Kalimantan 2005–2025: This regulation denies development planning for indigenous peoples in East Kalimantan.
b) Regional Regulation No. 7 of 2014 regarding Mid-Term Development Planning of East Kalimantan 2013–2018: Even in this short duration, the formulation of regional

[34] For verification purpose, the Government through the Minister of Home Affairs issued Regulation No. 52 of 2014 concerning Guideline on Recognition and Protection of Customary Law Communities.
[35] Paragraph 4 of the Preamble of 1945 Constitution of the Republic of Indonesia.
[36] The appendix of Law No. 23 of 2014 Regarding Local Government.
[37] cf Laurens Gerrit Hendrik Bakker, 'Who Own the Land'? Looking for Law and Power in Reformasi East Kalimantan' (Dissertation, Radboud University-Nijmegen 2009) 79.
[38] Rikardo Simarmata, *Indonesian Law and Reality in the Delta, A Socio-Legal Inquiry into Laws, Local Bureaucrats and Natural Resources Management in the Mahakam Delta, East Kalimantan*, (Leiden University Press, 2012) 9.

policy to realize the customary rights of the indigenous peoples is almost absent except in a policy discourse without any promising future that it would lend natural resources accessible to the indigenous peoples in a fair manner.

c) Regional Regulation No. 1 of 2015 regarding Guideline of Recognition and Protection of indigenous Peoples in East Kalimantan: The provisions are substantially replicating Ministry of Home Affairs Regulation No. 52 of 2016 which ended in almost nothing for the benefits of indigenous peoples in East Kalimantan.
d) Regional Regulation No. 1 of 2016 regarding Spatial Planning of East Kalimantan Region (SPEKR): This regulation was enacted during the realization of Medium-Term Regional Development Plan 2014–2018. During this period, East Kalimantan introduced SPEKR which evidently did not properly address the existence of indigenous peoples. In fact, the bill is potentially in conflict with the regulation concerning customary space administered by indigenous peoples. The problem will get out of hand soon an economic activity licensed by the regional government sitting on lands claimed by indigenous peoples to be of their possession.
e) Regency Regulation No. 3 of 2000 regarding the Empowerment, Reservation and Protection as well as Development of Traditions and Customary Institutions, and Regulation of Kutai Kartanegara Regency No. 13 of 2006 regarding Social and Customary Institutions.

III. The existing regulation gap on the recognition and protection at practical level

The crucial issues concerning indigenous peoples in political and legal narratives are primarily driven by unjust treatment of the indigenous peoples by the state over the natural resource management. The lack of fairness is evident when the law requires the written permit in the access of natural resources, which applies as well to the indigenous peoples whose customary law puts more emphasis on oral agreement.

The discourses on the role of the state in providing protection have been extended to issues of the indigenous peoples' existence and their right to natural resources which ultimately encounter the impasse at the practical level. The state does not sufficiently provide legal support toward the unwritten norms known to indigenous peoples. Sumantri mentions that the state should give legal protection to its citizens in either written or unwritten law.[39] Therefore, 'state protection becomes vulnerable, whereas the state should guarantee the protection of the citizen against excessive or unfair government treatment, including to protecting people against excessive or unfair private power'.[40]

Until recently, there have been several provisions that formally or legally respect, protect, advance, and satisfy the antecedent rights of the indigenous peoples *de iure*; however, there was also a perpetual violation against customary rights of the indigenous peoples *de facto*[41] as it is shown in the cases of Paser Mayang Village (Paser Regency), Lamin Telihan, Lamin Puluh, and Teluk Bingkai Villages (Kutai Kertanegara Regency). Custom-based movements have arisen to fight for indigenous peoples' rights. In some occasions, these movements turn into political strategy across spectra, legally or illegally, creating conflicts between indigenous peoples and the government agency as well as land or forest users.[42]

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[39] Sri Sumantri M, *An A-Z of Constitutional Law (Bunga Rampai Hukum Tata Negara)* (Alumni, 1992) 47.
[40] Samuel Mermin, *Law and the Legal System: An Introduction* (2nd edn, Little Brown and Company, 1982) 7.
[41] The condition can be found anywhere in the villages as an important picture of such violation discovered during the research.
[42] Laurens Bekker, 'Introduction: Access to Justice of the Land' ('*Pengantar: Akses terhadap Keadilan atas Tanah*') in Ward Berenschot and others (eds), *Access to Justice, the Struggle of the Poor and the Disadvantaged for Rights Claiming in Indonesia (Akses Terhadap Keadilan, Perjuangan Masyarakat Miskin dan Kurang Beruntung untuk Menuntut Hak di Indonesia)* (1st edn HuMa, 2011) 49.

In addition, although the constitution gives the recognition to indigenous peoples, the practices in the field do not necessarily in conformity with the law and even regions with such regulations experience serious conflict with regard to the natural resource management that involves indigenous peoples' reserved areas,[43] as evident in the areas of this research.

Law No. 5 of 1960 as a revolutionary basis of regulation 'kills' indigenous peoples's power to express themselves with regard to natural resource management. Document-based legal requirements lend the unwritten norms of indigenous peoples null and void. The regulation-reality gap which is taking place in Paser Regency, and Kutai Kartanegara regency, confirms the weaknesses of indigenous peoples in their effort to access natural resources on behalf of the law. In much worse scenario, the Forest of Lamin Telihan Village designed as forest area by the Ministry of Forestry subsequently developed over time to become non-forestry area to be planted by a certain company.[44] Similar case also took place in Muara Lambakan village where indigenous peoples' controlled area was turned into a reservation area by the decision of the state.

The difficulty in accessing natural resources has been going on for a long time, particularly since the regional autonomous practices started, on which certain land use was restricted through a licensing system. In practices, regional government takes heed to regulations (such as the ones in agriculture, mining, forestry, and coastal management), and therefore it will be very hard for indigenous peoples to obtain recognition unless the area is not wanted by a third party, namely the company, and free from dispute. Constitutional promise as well as Constitutional Court's promise on customary forest once considered as a relief now proves to be a long way ahead as Constitutional Court Decision No. 35/PUU-X/2012 Affirms Indigenous Peoples having the Right to Manage Forest Zone lacks clarity in terms of how to obtain the right over forest. Besides, the decision is contingent upon regional regulation to bestow such recognition.

On the other hand, large-scale land clearance and the exploitation of forest area are taking place through the permits granted by the state, right in front of indigenous peoples, neglecting the fact that they have occupied the forest for generations. Muluy people could only look on when big timber company invaded the nearby areas adjacent to Muluy cultivation fields. Jidan, customary head of Muluy stated that the operation near Gunung Lumut forest conservation area is threatening as the forest has been the source of life for 58 households, especially with regard to clean water, hunting and other forest resources such as honey collecting.[45] The feeling of insecurity that this people might feel because of the invaders is not mutually shared by the government which had licensed the operation of the timber company. Fortunately, after the long struggle, this community gains the recognition and access that come along to the forest resources as mandated in the Head of Paser Regency Decree No. 413.3/KEP-268/2018 regarding Recognition and Protection of Muluy Adat Community. [46]

Moreover, the access to natural resources also becomes a problem in many places, i.e., in the sub-district of Kahonan, Kutai Kartanegara Regency. Appropriate of Indigenous peoples' land by oil palm plantations is ascertained on behalf of the state as the license agent. The land control based on the mapping conducted by the National Land Authority, which is the basis of the permit issued by the Head of Regency, indicates the appropriation of indigenous peoples' rights as the party to administer the lands. The individuals living in the area were marginalized and unable to defend their communal rights. Even worse, some of them have even become more individualistic that one would deliberately claim what belongs to the community as his own,

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[43] Yance Arizona and others, 'Power and Law: The Reality of Legal Recognition of the Indigenous Peoples' Rights over Natural Resources in Indonesia' (*Kuasa dan Hukum: Realitas Pengakuan Hukum terhadap Hak Masyrakat Adat atas Sumber Daya Alam di Indonesia*) (Epistema Working Paper No. 05/2010, Epistema Institute) 2 <http://epistema.or.id/publikasi/working-paper/148-kuasa-dan-hukum.html> accessed 24 March 2018

[44] The same view is also expressed by customary chief of Lemin Telihan Village named Barnabas.

[45] Interview with Jidan spread in two different periods (Muluy Village, 14 July 2016) and (Muluy Village, 8 February 2018).

[46] The decision was handed down in Muara Komam on 2 August 2018.

triggering unrelenting internal conflict as admitted by head of Lamin Telihan Community named Barnabas [47] in addition to Saiduan, who is also a member of AMAN Kaltim (a non-governmental organization (NGO)) and a native of Kampung Malong, Lamin Telihan Village. [48]

The economic reason and compliance with the state law force the community members to join the land identification team set up by the oil palm companies. One of the participants is Martinus who is a member of Lamin Telihan indigenous community as well as a secretary in the village. [49] Further, the individuals are tempted to opt in the plasma/core-partnership scheme where land owners shift the control of their lands to the company for its use and pay the land owners a sum of money from the oil palm production share. [50] In other words, partnership scheme allows a company to access indigenous peoples' lands, plant and harvest them. In the meantime, it also allows the farmer as a person to access a certain piece of land planted by the company and owns it after the payment to the company has been settled, the money of which comes from the same piece of land previously controlled by the customary law.

In that case, the situation benefits the company as it has a guarantee to administer the farmer's certified land without having to pay a penny. As a matter of fact, the company makes use the certificate at disposal to apply for the bank loan. The incident as such has happened in three different villages in the sub-district of Kanohan, i.e., Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village. One problem arising from plasma/partnership scheme in these three villages has something to do with the ownership of the land which is not clearly defined. The exact location and the boundaries of the lands which are owned by a farmer is unclear. The farmers, as a matter of fact, have no idea about their land titling. All five farmers that flew to Jakarta to represent their community to sign the agreement with the corporation have never seen any legal evidence whatsoever.[51] In the future, this issue is very likely to ignite the dispute or conflicts among the heirs of those farmers.

To this end, the natural resource regulations unavoidably push the farmers to market mechanism scheme. The individual ownership seems easier to be recognized by the state while customary ownership that relies on group identity becomes less certain such as in the case of Dayak Tanjung. In terms of natural resource allocation, this group identity is not effective. The licensing law regime in the process of natural resource management which covers forestry, coal mining, and land and forest control for plantation has evidently downsized the land controls of the indigenous peoples and possibly transferred their rights to another party.

All in all, the injustice experienced by indigenous peoples in accessing natural resources results in one of three situations: First, the individuals in the indigenous peoples opt-in to partner with the company and even work for it as it occurred in three villages of Lamin Telihan Village, Lamin Pulut Village, and Teluk Bingkai Village. Secondly, they continue to work as usual in all limitation they have while waiting for government's facilities without complaining about the policy that suppresses them. Muluy belongs to this category as the villagers never voiced their objection to the government. Third, these individuals work hand in hand with the corporation but at the same time critical of their occupied rights which they fight for with acceptable channels such as protest or else, open conflict as it happened in Muara Tae (West Kutai Regency).[52] Conflict also arose in Muara Lambakan Village where the people fought against PT. Fajar Surya

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[47] Interview with Barnabas (Lamin Telihan Village, 16 January 2018).
[48] Interview with Saiduan (Samarinda, 5 April 2018).
[49] Interview with Martinus (Lamin Telihan Village, 16 January 2018).
[50] Interview with Lukman Budiono, head of sub-district of Kanohan (Kahala Village, 18 January 2018).
[51] Testimony from three village heads and customary heads of Teluk Bingkai, Telihan and Lamin Telihan during the Focus Group Discussion regarding the delivery of research report before *adat* community, NGOs, village administration, Kanohan sub-district administration and Kutai Kertanegara Regency government in Tenggarong, 4 April 2018.
[52] Komnas Ham, *The Inquiry of the National Human Rights Commission, Agrarian Conflict of the Customary Law Communities in Their Territory in the Forest' (Inkuiri Nasional KOMNAS HAM, Konflik Agraria MHA atas Wilayahnya di Kawasan Hutan)* (1st edn Komnas HAM, 2016) 190 (citations omitted)

Swadaya that came to take over peoples' forest as an effort of the company to extend Industrial Forest Area (acacia plantation) reaching 5.300 ha.[53] People in the third category might also fight for customary rights in forums, but either option reveals how the government fails to protect the indigenous peoples.

IV. Natural resource management and indigenous peoples' access

A. Indigenous peoples' controlled zone in the natural resource utilization

The indigenous peoples are associated with natural resource utilization due to their dependence on and easy access to it since pre-independence days.[54] The state is therefore obliged to guarantee their antecedent rights of access toward natural resources and to protect them from another party that might disturb their livelihood, especially about environmental hazards produced by modern industry.[55] Forest, plantation, and coastal area management activities by companies in the research areas posed environmental risk, not to mention the harm they have done on economic activity which is dependent upon good environmental condition.

Economic distribution of natural resource is not supposed to neglect marginalized communities based on the principle of 'distribute fair benefit and burden fairly or equal' (distributive justice and ethics).[56]

However, the discriminatory pattern and restriction in the distribution of natural resource utilization continue to happen as found in the coastal and sea area, forest and plantation sites in the Paser and Kutai Kartanegara regency. The fact provides the evidence of legal contestation that takes place between indigenous peoples' claim and the licensing system of the natural resource management in East Kalimantan.

Pasir Mayang Village, Pondong Village and Muara Lambakan Village, as well as Dusun Muluy, are examples of areas that have natural resource economy in the coast, plantation and forest sectors. Meanwhile, Lamin Telihan, Lamin Pulut, and Teluk Bingkai Villages constitute Dayak Tanjung territory in Kutai Kartanegara Regency control over their own lands has been denied by oil palm plantations and industrial forestry's corporations. Palm plantation presence in the area disrupted the quality of Pemaluan River which is the source of fish of the people. During rainy season, the water flooded the area and thereby damaged the roads connecting the village and people's plantation.[57] Worse still, areas nearby these three villages have been as well provided for 'transmigration' — an Indonesianization effort crafted by Soeharto regime in the past[58] where outsiders from Java, Sulawesi, and East Nusa Tenggara settled down, and then chose to work as laborers in natural resource exploitation.[59] The presence of transmigration communities is a tragic event for indigenous peoples who struggle to maintain the existence of their land.[60]

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[53] Interview with Jamhari, (Muara Lambakan Village, 19 September 2017).

[54] The World Bank recognizes indigenous peoples, especially in Operational Directive 4.20 outlining two conditions, which specifically related to issues of land rights and natural resource management. (The World Bank Operation Manual Statement of 1982).

[55] Such patterns also take place in Africa. See, Kenneth I. Ajibo, 'Transboundary Hazardous Waste and Environmental Justice: Implications for Economically Developing Countries' (2016) 18 Environmental Law Review 269.

[56] Kathryn M. Mutz, Gary C. Bryner, and Douglas S. Kenney (eds), *Justice and Natural Resources: Concepts, Strategies, and Applications (*Island Press, 2002) 36–7.

[57] The presence of oil palm plantation in the area, for instance, has influenced the quality of water in Pemaluan River.

[58] Persoon (n 32) 36.

[59] Bakker (n 41) 49

[60] See, Lallie Szczepanski, 'Land Policy & Adat Law in Indonesia' (2002) 11(1) Pacific Rim & Policy Journal 246 <https://digital.lib.washington.edu/dspace-law/handle/.1773.1/752> accessed 21 April 2018.

Areas administered by indigenous peoples, and even the indigenous peoples themselves, fail to gain state recognition, except for an ineffective customary institution. These customary institutions, unfortunately, are government-made as a response to the strong demand of the indigenous peoples for state recognition. It might be surprising to think of how such customary institution is incorporated into village administration, which is at odd with Indonesian civics system. Also, the customary chieftain appointed by the government has no voice in determining the indigenous peoples' status or controlled areas and functions and therefore makes the chieftain a mere accessory to the immediate social structure. The government by any means fails to properly recognize and protect the indigenous peoples.

B. Coastal and marine resources

The local people in Pondong Village no longer have direct access to the sea as the coastal areas are now occupied by migrants either for dwelling or for businesses. Their access of the sea is blocked as the coastal area is now under the control of the Bugese people. Indigenous peoples' fishing boats are not allowed to moore in the coastal area resulting in their loss of livelihood.[61] On the other hand, Bajo people of Pasir Mayang Village, although they have had access to the sea, their controlled zone is lessened, as the mining companies take over the access to the sea for transporting their coals in the fishing areas of Bajo People, and hence pushing the indigenous peoples aside.[62] No prior notice has been provided by the company to utilize these people's controlled areas. In reality, their economic and cultural zones have been confiscated arbitrarily. The community pride and solidarity decrease slowly as part of them becoming more individualistic and pragmatic, for example, by indicating their willingness to work for the same coal mining company that has confiscated their livelihood.

In response to marginalization to the access of the sea resources, Bajo People have opted to move to another location which allows them to coexist with nature. As such example of the victim of distribution risk of natural resource management by a third party, the local people now have to find a new path by becoming swallow nest farmers or searching for other temporary works that allow their survival. In this regard, the case also shows whimsical arbitrariness of legislation. This arbitrariness also appears in Paser Mayang Village where indigenous peoples lost their lands due to the establishment of the conservation area, and so put an end to people's access to natural resources in the area.[63] Bajo and Paser people's livelihood have been destroyed on behalf of natural conservation, while the authority cannot come up with a fair solution and chooses instead to neglect the rights of the indigenous peoples.

C. Forest resources

Large scale logging activity in East Kalimantan has been under the influence of Law No. 5 of 1967 about Forestry. This law is exploitative in nature since there is no protective sustainable formulation contained therein. A more current Law No. 41 of 1999 about Forestry did not change much with regard to deforestation speed considering that forest now is also open for plantation and coal mining. The indigenous peoples considered a strong need to revise the law that labeled all forest as state forest, which was fulfilled by the introduction of Constitutional

[61] Interview with Yakob, also known as Guru Yakob (Paser Mayang Village, 16 September 2017).
[62] The sea as the fishing area of Paser Mayang constitutes the mining delivery route owned by PT Kideco Jaya Agung, a South Korean company.
[63] Legal consequence of natural conservation establishment is no more access other than conservation purposes. See also, East Kalimantan Governor Decree No. 46/1982 regarding Designation of Forest Area in Teluk Andang and Teluk Apar as Conservation Area.

Court Decision No. 35/PUU-X/2012 affirming indigenous peoples having the right to manage forest zone.

The forest exploitation is the main factor of the depleted forest area in East Kalimantan. In accordance with the Minister of Forestry Decree No. 79/Kpts-II/2001 concerning Designation of Forest Zone and Waterways, East Kalimantan forest has the areas of 14.651.553 ha. It consists of 2.165.198 ha for the conservation area, 2.751.702 ha of protected forest, fixed production forest at 4.612.965 ha and production forest zone at 5.121.688 ha.[64] However, the Minister of Forestry Decree No. 554/Menhut-II/2013 concerning Agreement on the Revision of Spatial Planning of East Kalimantan Region confirmed that the forest area size has decreased as 395.621 ha of forest zone became non-forest zone while 276.290 ha of forest zone has further altered in function.[65]

The deforestation pace in East Kalimantan, in particular during 2005–2015 had reached 57.954 ha per annum, whereas the forest degradation pace in the same period stood at 12.890 ha per annum. The deforestation in East Kalimantan, contributes to the carbon emission, reaching 56 per cent (approximately 20.355.102,20 tons CO_2/year), and followed by mangrove soil at 21 per cent (7.644.707,64 tons CO_2/year). In the meantime, the logging activities releases about 17 per cent or 6.053.610,20 tons CO_2/year,[66] followed by forest degradation at four per cent (1.480.355,99 tons) CO_2/year), and peat soil decomposition at two per cent (608.057,33 tons) CO_2/year. In addition, GRK emission resulting from various land uses totaled 36.143.844 tons CO_2 per year.[67]

The massive deforestation will eventually affect the indigenous peoples' controlled areas as forest concessions have the advantage of the licensing system. The position of indigenous peoples is weak due to the lack of legal recognition. It is evident that the timber and lumber companies, as well as the oil palm plantation, have deprived the rights of indigenous peoples in the customary controlled zone and their territory. Large-scale timber and lumber companies which have operated since the 1970s obviously threaten and even neglect the presence of the indigenous peoples. It makes the indigenous peoples isolated and is very likely to trigger tenurial conflicts in the future. To this end, the indigenous peoples' resistance to concessionaire corporations is prevalent in all sectors of land and forest-based natural resource management, (i.e., oil palm plantation and industrial plantation forest). Similar case also occurred to Muara Lambakan community as told by Jamhari, the form of which can take the form of road block against the company. [68]

The solution of social forestry that was proposed by the government does not fulfill the indigenous peoples' wish and hope to enable them to manage their own forest based on local wisdom.[69] Though the social forestry allows the legal access to some extent, it does not benefit people financially. Besides, the allocation pattern of social forestry is susceptible to the difference in forest distance in cases of Java and Kalimantan. In Java Island, it is good to optimize controlled forest zone even in a limited area in social forestry scheme due to its close distance from trading markets. The inhabitants who live in or nearby the forest area in East Kalimantan have a larger administered zone, but they stumble upon the market access, and yet to be tested in terms of benefit that this social forestry might bring them.

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[64] East Kalimantan Office of Forestry Report 2017.
[65] Ibid.
[66] East Kalimantan Regional Board of Climate Change, *Forest Degradation and Carbon Emission in East Kalimantan Report* (April 2018).
[67] Ibid.
[68] Interview with Jamhari (Muara Lambakan Village, 17 September 2017). See also Syukran Amin, 'Customary Community of Muara Lambakan Rejects PT. Fajar Surya Swadaya to Enter Its Territory' (*Masyarakat Adat Muara Lambakan Tolak PT. Fajar Surya Swadaya Masuk Wilayahnya*) *Gaung Online* (Paser, 20 January 2016) <http://gaung.aman.or.id/2016/01/20/masyarakat-adat-muara-lambakan-tolak-pt-fajar-surya-swadaya-masuk-wilayahnya/> accessed 2 February 2018.
[69] Minister of Environment and Forestry Regulation No.P.83/MENLHK/STJEN/KUM.1/10/2016 regarding Social Forestry.

The failure of the government to understand this issue shows little consideration that the government has toward the indigenous peoples living in the outer island of Java which unconsciously has brought harm to the indigenous peoples.

D. Plantation resources

Chapter 12 Article (2) Law No 39 of 2014 regarding Plantation mentions that with regard to plantation land that belongs to indigenous peoples, it is required that the businesses sector consults them in matters that concern the takeover of the land and its use. The consultation is in accordance with the existing regulation. However, the construction of this law does not mean that it empowers the indigenous peoples as it is at the same time requires a kind of recognition prior to the negotiation. As a consequence, the indigenous peoples of Lamin Telihan, Lamin Pulut, and Teluk Bingkai eventually had to cooperate with the company as the company permit came out in the first place.

Negotiation offer from PT Agro Bumi Kaltim (ABK) could not be avoided as the permit to administer the land had been issued by the government, as stated by Japardi, village head of Lamin Pulut. [70] A dispute over the result of negotiation took place as well in Lamin Telihan and Teluk Bingkai where peoples were at much disappointment regarding the process.[71] In short, the licensing of the three disputed areas shows the legal uncertainty that is very likely to trigger a tenurial conflict, sooner or later.[72]

Oil palm plantation comes later in natural resource management of East Kalimantan. It started in the late 1980s and expanded very quickly reaching 1.150.078 ha, which consisted of 277.034 ha of plasma plants, 14.402 ha of BUMN/state-owned enterprises and 858.624 ha of private-owned companies.[73]

There are three oil palm plantations in the neighborhood of Laim Telihan Village, namely PT Manunggal Adi Jaya (MAJ), PT Damar and PT ABK. Their presence was first opposed by the people in the area because these companies operated in the indigenous peoples' lands. Nevertheless, as time passed, and due to the weak bargaining position of indigenous peoples, the resistance lessened. People had no power in dealing with private companies which had the permits from the state. As a consequence, there is a shift in land ownership; from people's lands to private companies. Indigenous peoples fell into the trap of market economy, and they gained no compensation whatsoever unless they would join plasma scheme program initiated by the government.

Further, the companies never involved the local people in the first place; either in the beginning of the project or in negotiation in regard to the community controlled areas. As the corporations always use the permit from the government as an excuse, it is not surprising that their presence causes conflict in the community. PT ABK (oil palm plantation), for instance, clashed with local people because their plantation dislodged the existing burial ground. Another corporation named MAJ (oil palm) also clashes frequently with the people over land tenure. In contrary, MAU (industrial forest plantation) did not experience such resistance as its controlled zone which is located in a remote forest area. They had to let go their own forest as the result of the negotiation with the forestry office of East Kalimantan.[74] However, such conflicts usually

[70] Interview with Japardi as village head of Lamin Pulut Village (Teluk Bingkai, 17 January 2018).
[71] The statement of Pordi, the Head of Teluk Bingkai Community at FGD regarding the result of this research (Tenggarong, 4 April 2018).
[72] The statement of Lamsi as the administration staff of Teluk Bingkai Village at FGD regarding the result of this research (Tenggarong, 4 April 2018).
[73] Plantation Office of East Kalimantan 2017.
[74] Interview with Pordi as Chief of Teluk Bingkai Community (Teluk Bingkai Village, 18 January 2018).

lessen over time, especially addressing the fact that corporation' presence may create the jobs and give an opportunity for individuals to have their own plants through plasma scheme.

Lamin Putut's villagers now have oil palm plantations in MAJ encompassing 1.260 ha which involves 113 households with two ha per family totaling 226 ha.[75] However, the partnership evidently does not stop the conflict between farmers and corporation. The case between the farmers and MAJ, for instance, has been triggered by a range of factors such as tenure right security, administered land location, individual share in the plasma scheme, and the sharing system.[76] In addition to Lamin Putut, the same company also operates in Lamin Telihan Village with an administered area of 1.628,5 ha involving 182 households or average area size of 1.8 ha. The conflict arises due to land tenure distribution and recruitment in plasma scheme managed by MAJ.

In another village called Teluk Bingkai, the dispute arose because the company had neglected customary figure in the area. Pordi, Head of the Adat Community of Teluk Bingkai mentioned that PT TBS and MAJ, oil palms companies, took over indigenous peoples' lands as large as 3.000 ha without even consulting indigenous peoples' chieftain in the vicinity in the first place, but consulted him later when the clash took place.[77] The illustration from the three villages shows how weak the indigenous peoples' access toward natural resource management is in face of the licensing regime.

The condition in five villages in Paser Regency and Kutai Kartanegara Regency shows that indigenous peoples have difficulty to access natural resources and even lost their territory to the third party. Sundi as the Head of Lamin Pulut Adat Community points out that the Dayak Tunjang case shows how their customary rights have been gradually lessened or obscured on behalf of the state permit.[78] Another example is what happened with Bajo and Paser community. The same case has inflicted Bajo (Bajau) and Paser who depend on marine resources for their livelihood. They were evicted from their own sea in face of powerful licensed industry, and the failure of the state to protect the sustainable economy in fair natural resource distribution.

The weak bonds of the communal entities were also evident when the indigenous peoples in Lamin Pulut Village succeeded in attracting investment through their written proposal and attended local legislative assemblies to establish their controlled zone as an oil palm industrial area because of the economic issue. In fact, the village made economic progress as a result. People now have permanent homes and decent vehicles, opening up new economic activities (especially services), access to marketing commodities from the city and vice versa, with only minor issues related to public roads that remain unsolved.[79]

Unfortunately, the economic development does not necessarily improve people's access to natural resource management from both legal and indigenous peoples' perspectives.[80] The peoples' cooperation with the company under the state law has yet guaranteed their rights, especially with regard to land titling. Meanwhile, from another point of view, it confirms how *adat* law, or customary law, is being denied for the sake of state law. Tenurial conflict will linger on so long as the indigenous peoples are deprived of their legal rights. Identification and verification of customary groups are a must to delineate controlled areas and reduce tenurial conflicts,[81] a dream surprisingly is shared by the local governments in Paser Regency and Kutai

[75] Interview with Syahruni as the secretary of Lamin Pulut Village, 17 January 2018.
[76] Interview with Ilmansyah as village representative of Lamin Pulut (Lamin Pulut, 17 January 2018).
[77] Interview with Pordi (Teluk Bingkai Village, 18 January 2018).
[78] Interview with Sundi (Lamin Pulut Village, 17 January 2018).
[79] Interview with Japardi (Lamin Pulut Village, 17 January 2018).
[80] Current condition confirms that legal rights of the indigenous have yet to be realized measured both in state legal system and customary law.
[81] Identification and verification become legal terminology in the regulation issued by the Minister of Home Affairs No. 52 of 2014 regarding the Guideline on Recognition and Protection of Indigenous Peoples.

Kertanegara Regency.[82] The challenge is that historical claim has now as well lost its appeal in face of growing individual self-recognition.[83] As previously argued, the customary institution is getting exhausted in its effort to sustain collective tie as the existing licensing law regime stands aloof from any customary claim. In the meantime, the state shows ambivalent attitude as it will only turn to customary institutions whenever indigenous peoples-based tenurial conflicts arise. A practice which supposedly recognizes the existence of indigenous peoples externally (others recognition).

Economic marginalization which practically makes indigenous peoples legally unprotected and practically weak is correlated with customary identification policy and the criteria set by the licensing regime. State intervention is, therefore, necessary to preserve and enable indigenous peoples in their undertaking to access and take advantage of natural resources in their previously controlled area. So far, the state has evidently failed in recognition and protection of the indigenous peoples particularly in plantation sector.

V. Conclusion

The lack of recognition and protection of indigenous peoples over natural resource management is brought about by the legal system which puts its emphasis on legal unification which, as a result, weakens the legal pluralism fact. The recognition of the indigenous peoples, seen from legal perspective, moves at a very slow pace despite the fact that it has eventually found its way into the constitution and a series of regulations that were subordinate to the constitution.

At the operational stage, certain conditions apply in order for the indigenous peoples to be recognized and legally protected, which will be very much dependent upon the ability of the state in the identification of the indigenous peoples in accordance with the criteria laid out by the state itself. The weakness within the indigenous peoples also contributes to such low recognition and protection as the communal bond falls apart and more and more indigenous peoples respond to the call of the state legal system over their own customary tradition in the administration of their own lands.

The poor legal performance with regard to the protection of the indigenous peoples' administered land is evident in the lack of proper proof for both individual and communal properties, opposing to the characteristic of legal system that puts strong emphasis on legal certainty. The weakness of the state to legally recognize and protect the indigenous peoples in connection to the management or utilization of natural resources causes the indigenous peoples to lose the access they used to have and obviously need for the sake of survival.

Funding

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[82] The need for technical regulations to identify indigenous peoples as a preliminary step toward recognition and protection of customary rights was also addressed by the Head of Kutai Kartanegara Regency Edi Darmansyah and Assistant 1 of the Head of Kutai Kartanegara Regency, Chairil Anwar, who affirmed that customary claim had long been ignored and should be legislated for legal certainty.

[83] From historical aspect, the presence of villages shows that the areas have been occupied for long time. Customary leader of Teluk Bingkai was evidently elected as the 6th leader when he was chosen for the office in 2013.

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D

Dr. Muhammad Muhdar Sh, M.Hum <muhamadmuhdar@fh.unmul.ac.id> Aug 24, 2019, 11:50 AM

to Miss

Dear Ms Pinky Choy
Asia Pacific Law Review (APLR)
School of Law
City University of Hong Kong

I have received your email and am aware the substantial improvement that needs to be done to my article. I will accept all your suggestions and return the revised draft as soon as possible.

Finally, i'd like to thank you once again for your acceptance of the article and mayor revisions that you have suggested.

Best Regards,

M. Muhdar
Faculty of Law Mulawarman University, Indonesia