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

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ABSTRACT

This article investigates the facts and performance of the Indonesia legal system in providing recognition and protection to indigenous peoples in the management of natural resources. This includes the patterns of legal relationships regarding land ownership in the indigenous peoples' controlled areas. This study draws on information collected from selected areas in East Kalimantan, namely: Paser Mayang Village of Paser Regency (for coastal issues), in addition to Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village of Kutai Kertanegara Regency (for land and forest issues). The ever-growing strength of legal unification carries the spirit of legal certainty. This has reduced the use of customary law in maintaining access to and legal guarantee over the management of natural resources. Companies that have the support of the state through the licencing systems to control natural resources also have used the superiority of state law. Indigenous peoples have limited resources to satisfy their requirements to acquire licences. As such, indigenous peoples are surely losing their control of their own lands to these companies or corporations. This is slowly and inevitably degrading the identity and integrity of the indigenous peoples and the traditional culture. The weakness of the legal protection over the areas utilized by the indigenous peoples evidently confirms the failure of the state in recognizing and protecting indigenous peoples and their rights.

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I. Introduction

Article 18B(2) of the second amendment of the 1945 Constitution of the Republic of Indonesia recognized the presence of customary community or indigenous community, also known as indigenous peoples. The law declared 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

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¹ Second amendment of the Indonesian 1945 Constitution (18 August 2000), Article 18B(2).

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This is the principal legal system instrument in the State of Indonesia that recognizes and protects indigenous peoples and the rights they have long aspired for. The constitutional formulation proves that the state recognizes them and the prevailing customary law that has governed the natural resources activities of indigenous peoples. A community that uses another legal order, or source of law, other than the state law is 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 has now gained currency in the constitution has negated former (lower) regulations, such as Law No. 5 of 1960 concerning Basic Agrarian Law, for example which outlined criteria that rendered customary law difficult to be exercised. This regulation recognized the land rights of indigenous communities but with some strings attached to it: for example the communities must be 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 Indonesia's post-1999 decentralization era, many provisions were enacted to implement the principal law that recognizes the indigenous peoples and their prevailing law. The primary one concerned forestry,⁴ plantation,⁵ coast and marine management,⁶ and fishery.⁷ The recognition of indigenous peoples is also apparent in the regional level, as shown in Regulation No. 23 of 2014 regarding Regional Government, and Regulation No. 6 of 2014 regarding Village. As decentralization has got stronger, new responses have arisen to create ways for the state to recognize indigenous peoples and the implications for their implementation. 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

From the legal viewpoint, the recognition of the indigenous peoples create 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 away, as shown by the cases in Paser Regency and Kutai Kertanegara Regency.⁹ The confusion has originated primarily 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

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.

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.

characterized by the strong legal positivist (formalist) under the spirit of unification¹⁰ is still going on. In other words, state protection of indigenous peoples' rights 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, 'it is normal to endeavour toward legal unification and diversity with a condition that both should guarantee legal certainty.'¹¹

This study has found that customary law comes second to the unification process of state law that pervades 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 1945 Constitution of the Republic of Indonesia states: 'Everyone shall have the right to live in physical and spiritual prosperity, to have a home, and to enjoy a good and healthy environment, and shall have the right to obtain medical care.' This formulation guarantees that citizens, including indigenous peoples, are entitled to environmental safety. According to Heyward, one characteristic of a modern constitution is that it considers environmental sustainability.¹³ Although the Indonesian constitution have considered environmental sustainability, it is still difficult to be implemented to indigenous peoples.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; the largest 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 took place between 1970s and 1980s that became a touchstone in the depletion of forest in East Kalimantan and led to the degrading of territories used by indigenous peoples in the surrounding areas.¹⁶

Indigenous peoples controlled areas have diminished in size as a result of plantation and coal mining activities supported by the government. The new paper-based allocation of lands has overlapped with indigenous peoples' tradition of land control based on customary tradition. This has triggered conflicts amongst indigenous peoples' communities themselves, or between indigenous peoples and the investors.¹⁷ Benda-Beckman noted that 'with the

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.

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 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 6,568,309 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 Kertanegara*) (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.

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 terms of regency spatial planning (both regencies of Paser and Kutai Kertanegara) and special planning at 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 onto indigenous peoples' lands extends to coastal and sea areas where coal transportation, for example, using sea carriers has become common. As a result, indigenous peoples' access to coastal or sea areas has become harder and harder. In most cases, traditional fishermen and indigenous peoples, previously dwelling in the coastal areas, have to leave their own homes as 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 licencing system introduced by the state on the other hand, has created uncertainty, especially for the indigenous peoples. In addition, the way central government has managed disputed lands does not represent the interests of indigenous peoples and, at the same time, creates a legal vacuum. Management initiation at sub-district and regency levels is susceptible as well in terms of authority, as natural resource management policy becomes increasingly the jurisdiction of either central or provincial government. As a result, indigenous peoples gradually lose their access to the natural resources on which their lives depend. This triggers conflicts among the issuer of the permit, the permit holder, and the indigenous peoples. Above all, it shows the weakness of the state legal system in the protection of individuals, as well as the communal rights of indigenous peoples.²⁴

Using the facts found in the research area, this article seeks to answer two questions: Firstly, is the weak recognition and protection for the indigenous peoples over natural resource utilization a result of the legal system, or is it rather due to internal friction prevalent amongst indigenous peoples themselves? Secondly, how is the legal protection over controlled area of the indigenous peoples performing at the present time?

II. Recognition and protection of the indigenous peoples

A. Customary law community's concept

The 1945 Constitution introduced several terms to identify indigenous peoples, such as indigenous peoples association, customary law community (CLC), as well as traditional or

¹⁸ Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths, 'Space and Legal Pluralism: An Introduction' in von Benda-Beckmann, von Benda-Beckmann and Griffiths (eds) (n 8) 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 community 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.

²⁴ See David N Cassuto, 'The Law of Words: Standing, Environment, and Other Contested Terms' (2004) 28 *The Harvard Environmental Law Review* 79.

'adat' community²⁵; terms that can be used interchangeably.²⁶ Meanwhile, the term '*masyarakat hukum adat*' (adat law community) was adopted in the Decree of Minister of Home Affairs No. 52 of 2014 regarding Guideline in Recognition of Adat Law Community. This made it an accepted term in the Indonesian context. Safitri argued that the term '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 that has been known long before the national independence. In the colonial era, 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 since has forced people to comply with criteria outlined by the state in the framework and perspective of legal unification. In other words, the state has become more authoritative in interpreting what is considered as indigenous peoples beyond that which is mandated by the constitution. Regulation of Minister of Agrarian 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 the 1945 Constitution.

The gradually degrading position of indigenous peoples in Indonesia is also evident in the Constitutional Court Ruling No. 31/PUU-C/2007, which represents Ter Haar Bzn' influence. In its decision, the Constitutional Court stipulated criteria regarding units of indigenous peoples that included: organized group; the presence of a specific territory, the existence of traditional governance, and the assets and/or custom objects. These legal criteria have obviously benchmarked a customary law community in line with what is understood by the government,²⁹ but was viewed very differently by the indigenous peoples.

However, 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, seem to be vague, as there is no clear explanation as to whether they are cumulative — meaning that all the conditions need to be there — or one condition would be 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.

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 The term indigenous peoples can be found in: International Labour Organization Convention 1969 (Tribal and Indigenous Peoples); World Bank OD 2.20 (Indigenous Peoples); Convention on Biological Diversity (Indigenous and Local Communities); UN Declaration on Indigenous Peoples (Indigenous Peoples); Asian Development Bank Policy on Indigenous Peoples (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.

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

This great advancement in the technicality of the recognition was devised by the Muluy community, as their conditions of territoriality and communality were 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 Independence.³⁰ The same case holds true for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) that 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. Therefore, any change in the condition of indigenous peoples is directed to the integration of indigenous peoples into the government structure in their 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 a pre-independence one.³³

The recognition of indigenous peoples according to the 1945 Constitution is stipulated in Article 18B(2). However, this is yet to be implemented in any practical way at any level. The phrase 'regulated by law' stated in this section 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.' Both articles are in need of more technical guidelines in order to be operational.

It is clearly a wide gap in the constitutional text if the current situation is taken into consideration. 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 have ever tried to collect forest products or timber growing in their own forest. This accusation may happen regardless of the purposes and their intended use. Literally, this neglects and obscures the tradition and a livelihood strategy they have practiced for generations.

³⁰ ILO Convention No. C169 on Indigenous and Tribal Peoples in Independent Countries <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 27 March 2018.

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, Barbara Slee and 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 Covenant on Economic, Social and Cultural Rights.

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.

C. Regional level regulation

The layers of provisions in Indonesia's legal system start at the national level, then the provincial level, and finally at the 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 governments. This leaves other sectors, such as plantations, to regency jurisdiction.³⁶

From a state law perspective, natural resource users are obliged to follow a clear-cut procedure. While, from the 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 because³⁸ the state will always turn to positivism over a compromising path in their handling of tenurial conflicts that involve indigenous peoples.

Therefore, it falls to the provincial and regency/municipality governments to draft regulations to recognize and protect indigenous peoples. However, a range of regulations in the Province of East Kalimantan, Paser Regency and Kutai Kertanegara Regency 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 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 to benefit 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.
- (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 Kertanegara Regency No. 13 of 2006 regarding Social and Customary Institutions.

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.

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

The most crucial issues affecting indigenous peoples through the political and legal narratives are driven primarily by unjust treatment of indigenous peoples by the state regarding their role in and access to natural resource management. The lack of fairness is evident when the law requires the written permit in the access of natural resources, which applies also to indigenous peoples whose customary law uses and puts more emphasis on oral agreement. The state does not provide sufficient legal support underpinning and encompassing the unwritten norms known to indigenous peoples.³⁹ Therefore, as Mermin states, '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 has always been a perpetual violation against customary rights of the indigenous peoples *de facto*⁴¹ as shown in the cases of Paser Mayang Village (Paser Regency), Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village (Kutai Kertanegara Regency). Custom-based movements have emerged to fight for indigenous peoples' rights. On some occasions, these movements have evolved into political strategies acting across spectra, legally or illegally, creating conflicts between indigenous peoples and the government agency, as well as land or forest users.⁴²

In addition, although the constitution gives the recognition to indigenous peoples, the practices in the field are not necessarily in conformity with the law. Even regions with such regulations experience serious conflict around natural resource management issues that involve indigenous peoples' reserved areas.⁴³

Law No. 5 of 1960 acts as a basis of regulation that effectively 'kills' indigenous peoples' power to express themselves with regard to natural resource management. Thus, document-based legal requirements override the unwritten norms of indigenous peoples, deeming them null and void. The regulation-reality gap that is taking place in Paser Regency, and Kutai Kertanegara Regency, confirms the weakness of indigenous peoples in their efforts to access natural resources given the pervading legal restrictions. In a much worse scenario, the Forest of Lamin Telihan Village, designated as a forest area by the Ministry of Forestry, subsequently developed over time to become a non-forestry area to be planted by a certain company.⁴⁴ Similar cases also have occurred in Muara Lambakan Village, where indigenous peoples' controlled areas were turned into a reservation area by the decision of the state.

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 Bakker, '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.

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 Masyarakat 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.

The difficulty in accessing natural resources has persisted for a long time, particularly since the regional autonomous practices started and where certain land uses were restricted through a licencing system. In practice, regional government takes heed of regulations (such as the ones in agriculture, mining, forestry, and coastal management). Therefore, it would be very hard for indigenous peoples to obtain recognition unless the area was not wanted by a third party, namely the company, and was free from dispute. Constitutional promises, as well as Constitutional Court's promise, on a customary forest once considered as a relief now proves to be a distant reality as Constitutional Court Decision No. 35/PUU-X/2012, which affirms indigenous peoples having the right to manage forest zone, lacks clarity in terms of how to obtain the right over such forests. Besides and in any case, the decision remains contingent upon regional regulation to bestow such recognition.

On the other hand, large-scale land clearance and the exploitation of forest area have been 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 a big timber company invaded the nearby areas adjacent to the Muluy cultivation fields. Jidan, customary head of Muluy, reported that the operation near Gunung Lumut forest conservation area was 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 these people felt because of the invaders was not mutually shared by the government, which had licenced the operation of the timber company. Despite the Decree of the Head of Paser District No. 413.3/8/2018 regarding Recognition and Protection of Muluy Adat Community, the Muluy community is still not allowed to utilize the forest area.⁴⁶

Moreover, the access to natural resources also becomes a problem in many places, that is in the sub-district of Kahonan, Kutai Kertanegara Regency. Plantation companies, through the licencing system, have now acquired the rights over the land that the community once owned. Again, the state sided with the businesses and neglected the *adat* community. 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 such that some might deliberately claim what belongs to the community is now his own, triggering unrelenting internal conflict.⁴⁷

The economic reason forced the community members to join the land identification team set up by the oil palm companies. One of the participants was Martinus, who is a member of the Lamin Telihan indigenous community, as well as a secretary in the Village.⁴⁸ The individuals are tempted to opt into 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.⁴⁹ In other words, partnership schemes allow a company to access indigenous peoples' lands, plant and harvest them.

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.

⁴⁷ Interview with Barnabas (Lamin Telihan Village, 16 January 2018) and Saidun (Samarinda, 5 April 2018).

⁴⁸ Interview with Martinus (Lamin Telihan Village, 16 January 2018).

⁴⁹ Interview with Lukman Budiono, head of sub-district of Kanohan (Kahala Village, 18 January 2018).

At the same time, it also allows the farmer to access a certain piece of land planted by the company and own 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 this case, the situation benefits the company, as it has a guarantee to administer the farmer's certified land without having to pay a penny. Soon, the company gets the land certificate and the company will use it to apply for the bank loan. This incident has happened in three different villages in the sub-district of Kanohan, that is Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village.

One problem arising from plasma/partnership scheme in these three villages involves the ownership of land, which is not clearly defined. The exact location as well as the boundaries of the lands owned by a farmer are often unclear as no cadastre survey and plan has been completed. The farmers, in fact, have no idea about their process of land titling. All five farmers who flew to Jakarta to represent their community to sign the agreement with the corporation have never seen any legal evidence whatsoever.⁵⁰ In the future, this issue is very likely to ignite dispute or conflicts among the heirs of those farmers.

Inevitably, the natural resource regulations are unavoidably pushing the farmers into market mechanism scheme. The individual ownership system 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 in the face of the law. The licencing 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 injustices experienced by indigenous peoples in accessing natural resources results in one of three situations: Firstly, the individuals in the indigenous peoples opt-in to partner with the company, and even work for it, as occurred in the three villages of Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village. Secondly, they continue to work as usual with all the limitations they have while waiting for government's facilities without ever complaining about the policy that suppresses them. Muluy belongs to this category, as the villagers never voiced their objection to the government. Thirdly, these individuals work hand-in-hand with the corporation while at the same time are critical of their occupied rights, which they fight for with acceptable channels, such as protest or else, opens conflict as happened in Muara Tae (West Kutai Regency).⁵¹ Conflict also arose in Muara Lambakan Village, where the people fought against *Perseroan Terbatas* (Indonesian legal entity, hereafter 'PT'). Fajar Surya Swadaya who took over peoples' forest as the company extended their Industrial Forest Area (acacia plantation) to reach 5,300 ha.⁵² People in the third category might also fight for customary rights in forums, but either option reveals how the government has failed to protect the indigenous peoples.

⁵⁰ 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.

⁵¹ Komnas Ham, *The Inquiry of the National Human Rights Commission, Agrarian Conflict of the Customary Law Communities in Their Territory in the Forest' (Inkuiiri Nasional KOMNAS HAM, Konflik Agraria MHA atas Wilayahnya di Kawasan Hutan)* (1st edn Komnas HAM, 2016) 190.

⁵² Interview with Jamhari, (Muara Lambakan Village, 19 September 2017).

IV. Natural resource management and indigenous peoples' access

A. Indigenous peoples' controlled zone in natural resource utilization

Indigenous people are associated closely with natural resource utilization given their dependence on and easy access to these resources since long before independence days.⁵³ Therefore, the state is obliged to guarantee their antecedent rights of access to natural resources and to protect them from any other party that might disturb their livelihoods, especially when it comes to the environmental hazards produced by modern industry.⁵⁴ Forest, plantation and coastal area management activities by companies within the research areas clearly posed environmental risks, not to mention the harm they have done impacting local economic activity which depends upon the maintenance of good environmental conditions.

The 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).⁵⁵

However, the discriminatory pattern and restrictions in the distribution of natural resource utilization has continued to happen as has been witnessed in the coastal and sea areas, as well as the forest and plantation sites in the Paser Regency and Kutai Kertanegara Regency. These facts provide clear evidence of legal contestation that takes place between indigenous peoples' claims and the state subscribed licencing system of the natural resource management in East Kalimantan.

Paser Mayang Village, Pondong Village and Muara Lambakan Village, as well as Dusun Muluy, are examples of areas that have a natural resource economy in all the coast, plantation and forest sectors. Meanwhile, Lamin Telihan Village, Lamin Pulut Village and Teluk Bingkai Village that constitute the Dayak Tanjung territory in Kutai Kertanegara Regency have control over their own lands, but oil palm plantations and industrial forestry's corporations have denied this. The presence of palm plantations in the area has disrupted the quality of Pemaluan River as the source of fish for local people. During the rainy season, water has flooded the area and damaged the roads connecting the village and people's plantation.⁵⁶ Worse still, areas nearby these three villages also have been provided for 'transmigration' — an Indonesianization effort crafted by Soeharto regime in the past⁵⁷ where outsiders from Java, Sulawesi and East Nusa Tenggara were resettled and then chose to work as labourers in natural resource exploitation.⁵⁸ The presence of these transmigration communities is a tragic event for indigenous peoples who struggled to maintain their access to and existence of their land.⁵⁹

⁵³ 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. (See *The World Bank Operation Manual Statement of 1982*).

⁵⁴ 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.

⁵⁵ Kathryn M Mutz, Gary C Bryner and Douglas S Kenney (eds), *Justice and Natural Resources: Concepts, Strategies, and Applications* (Island Press, 2002) 36–37.

⁵⁶ The presence of oil palm plantation in the area, for instance, has influenced the quality of water in Pemaluan River.

⁵⁷ Persoon (n 32) 36.

⁵⁸ Bakker (n 42) 49.

⁵⁹ 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, failed to gain state recognition, except for an ineffective customary institution. Unfortunately, these customary institutions are government-made response to the strong demand of the indigenous peoples for state recognition. It might be surprising to think of how such customary institutions were and can be incorporated into village administration, which is at odds with the Indonesian civic system. The government had the authority to appoint chieftains, or heads of customary society, but left no space for such chieftains to participate in natural resource management. The government has failed in all means to properly recognize and protect the indigenous peoples.

B. Coastal and marine resources

Local people in Pondong Village no longer have direct access to the sea as migrants, either for dwellings, or for businesses, now occupy the coastal areas. Their access to the sea is blocked as the coastal areas are now under the control of the Bugese people. Indigenous peoples' fishing boats are no longer allowed to moor in the coastal area and this has resulted in a loss of their livelihoods.⁶⁰

On the other hand, Bajo People of Paser Mayang Village, although they have had access to the sea, their controlled zone has lessened, as the mining companies have taken over the access to the sea for transporting their coals in the traditional fishing areas of the Bajo People. Hence, this has pushed the indigenous peoples aside.⁶¹ No prior notice has ever 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 has decreased slowly and some of them have become more individualistic and pragmatic. For example, some have indicated their willingness to work for the same coal mining company that confiscated their livelihoods.

In response to this type of marginalization to their access to their sea resources, Bajo People have opted to move to another location and this has allowed them to coexist with nature. These local people now have to find a new path by becoming swallow nest farmers or searching for other temporary works to facilitate 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 that area.⁶² Bajo and Paser people's livelihood have been destroyed. Meanwhile the authorities cannot come up with a fair solution and have chosen 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

⁶⁰ Interview with Yakob, also known as Guru Yakob (Paser Mayang Village, 16 September 2017).

⁶¹ The sea as the fishing area of Paser Mayang constitutes the mining delivery route owned by PT Kideco Jaya Agung, a South Korean company.

⁶² East Kalimantan Governor Decree No. 46/1982 regarding Designation of Forest Area in Teluk Andang and Teluk Apar as Conservation Area.

Forestry did not change much with regard to deforestation rates considering that forest now is also open for plantation and coal mining. The affected indigenous peoples expressed a strong need to revise the law that labelled all forest as state forest. This was fulfilled by the introduction of Constitutional Court Decision No. 35/PUU-X/2012 that affirmed indigenous peoples' rights to manage such forest zones.

The forest exploitation rate is the main factor involved in 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, the East Kalimantan forest had an area of 14,651,553 ha. This consisted 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.⁶³ 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 has become non-forest zone, while 276,290 ha of forest zone has further altered in function.⁶⁴

The pace of deforestation 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 emissions reaching 56 per cent (approximately 20,355,102 tons CO₂/year), followed by mangrove soil at 21 per cent (7,644,708 tons CO₂/year). In the meantime, the logging activities releases about 17 per cent or 6,053,610 tons CO₂/year,⁶⁵ followed by forest degradation at four per cent (1,480,356 tons CO₂/year), and peat soil decomposition at two per cent (608,057 tons CO₂/year). In addition, greenhouse gas emissions resulting from various land uses totalled 36,143,844 tons CO₂ per year.⁶⁶

This massive deforestation eventually will affect the indigenous peoples' controlled areas, given that forest concessions have the advantage of the licencing system. The position of indigenous peoples is significantly weakened by their 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 have threatened and even neglected the presence of the indigenous peoples. This has isolated indigenous peoples 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). In Muara Lambakan, for example, the villagers took the street and blocked the road to prevent the company equipment from entering their land.⁶⁷

The government proposed a solution of social forestry. However, this did not fulfil the indigenous peoples' wishes and hopes to enable them to manage their own forest

⁶³ East Kalimantan Office of Forestry Report 2017.

⁶⁴ Ibid.

⁶⁵ East Kalimantan Regional Board of Climate Change, *Forest Degradation and Carbon Emission in East Kalimantan Report* (April 2018).

⁶⁶ Ibid.

⁶⁷ 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.

based on local wisdom.⁶⁸ Though social forestry might allow them 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 proximity to 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. It has yet to be tested in terms of benefit that this social forestry might bring them.

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

D. Plantation resources

Article 12 of Law No. 39 of 2014 regarding Plantation requires that, with regard to plantation land that belongs to indigenous peoples, the businesses sector consults with 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 occurs at the same time and requires some 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 had already come out prior to this.

A negotiation offer from PT Agro Bumi Kaltim (PT 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.⁶⁹ A dispute over the result of negotiation took place, as well in Lamin Telihan and Teluk Bingkai, where peoples expressed much disappointment regarding the process.⁷⁰ In short, the licencing of the three disputed areas very well illustrates the legal uncertainty that is very likely to trigger a tenurial conflict, sooner or later.⁷¹

Oil palm plantations came later in natural resource management developments of East Kalimantan. This 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 state-owned enterprises and 858,624 ha of private-owned companies.⁷²

There are three oil palm plantations in the neighbourhood of Lamin Telihan Village; namely, PT Manunggal Adi Jaya (PT MAJ), PT Damar and PT ABK. The people in the area first opposed their presence because these companies operated within the indigenous peoples' lands. Nevertheless, as time passed, and due to the weak bargaining position of indigenous peoples, the resistance lessened. These marginalized people had no power to deal with private companies, which already had been issued with the permits from the state. As a consequence, there was a shift in land ownership; from indigenous peoples to private companies. Indigenous peoples were enticed and fell into the trap of market economy. They

⁶⁸ Minister of Environment and Forestry Regulation No.P.83/MENLHK/STJEN/KUM.1/10/2016 regarding Social Forestry.

⁶⁹ Interview with Japardi as village head of Lamin Pulut Village (Teluk Bingkai Village, 17 January 2018).

⁷⁰ The statement of Pordi, the Head of Teluk Bingkai Community (Tenggarong, 4 April 2018).

⁷¹ The statement of Lamsi as the administration staff of Teluk Bingkai Village (Tenggarong, 4 April 2018).

⁷² *East Kalimantan Office of Plantation Report 2017.*

gained no compensation whatsoever, except in those circumstances where otherwise they would join plasma scheme programme initiated by the government.

Furthermore, the companies never involved local people in the first place; either at the beginning of the project or during the negotiations with regard to the community controlled areas. As the corporations always use the permit from the government as an excuse, it is of no surprise that their presence caused and continues to cause conflict in the community. PT ABK (oil palm plantation), for instance, clashed with local people because their plantation dislodged an existing burial ground. Another corporation, named PT MAJ (oil palm), also clashed frequently with the people over land tenure. In contrast, PT Akasia Andalan Utama (industrial forest plantation) did not experience such resistance, as its controlled zone was located in a remote forest area. They had to forego their own forest as a result of the negotiation with the forestry office of East Kalimantan.⁷³ However, such conflicts usually reduce over time, especially given the fact that a corporation's presence may create jobs and give an opportunity for individuals to maintain their own plants through the plasma scheme.

Lamin Pulut's villagers now have oil palm plantations in PT MAJ encompassing 1,260 ha which involves 113 households with two ha per family totalling 226 ha.⁷⁴ However, the partnership evidently has not stopped the conflict between farmers and corporation. A range of factors that triggered disputes between the farmers and PT MAJ include tenure rights, security over tenure, administered land location, individual shares in the plasma scheme and the sharing system.⁷⁵ In addition to Lamin Pulut Village, the same company also operates in Lamin Telihan Village with an administered area of 1,629 ha involving 182 households or average area size of 1.8 ha. The conflict here has arisen due to land tenure distribution and recruitment in plasma scheme managed by PT MAJ.

In another village, called Teluk Bingkai, the dispute arose because the company had neglected customary figures in the area. Pordi, Head of the Adat Community of Teluk Bingkai mentioned that PT MAJ took over indigenous peoples' lands as large as 3,000 ha without even consulting indigenous peoples' chieftain in the vicinity in the first place. They did consult with him later when the clashes took place.⁷⁶ The illustration from the three villages shows how weak the indigenous peoples' access to natural resource management is in face of the licencing regime.

The condition in five villages in Paser Regency and Kutai Kertanegara Regency shows that indigenous peoples have difficulty to access natural resources and have even lost their territory to third parties. Sundi, as the Head of Lamin Pulut Adat Community, pointed out that the Dayak Tunjang case shows how their customary rights have been gradually lessened or obscured because of the permit issued by the state.⁷⁷

Another example is what happened with Bajo and Paser community. The same case was inflicted upon Bajo (Bajau) and Paser, who depended on marine resources for their livelihood. They were evicted from their own sea area in face of a powerful licenced industry, but the state did nothing to secure the very survival of these peoples.

⁷³ Interview with Pordi as Chief of Teluk Bingkai Community (Teluk Bingkai Village, 18 January 2018).

⁷⁴ Interview with Syahrini as the secretary of Lamin Pulut Village (17 January 2018).

⁷⁵ Interview with Ilmansyah as village representative of Lamin Pulut (Lamin Pulut, 17 January 2018).

⁷⁶ Interview with Pordi (Teluk Bingkai Village, 18 January 2018).

⁷⁷ Interview with Sundi (Lamin Pulut Village, 17 January 2018).

Sometimes the tension arises within the community itself, especially when some people have to give in to the pressure. This may occur when they suffer severe economic hardship. In some cases, the villagers have made economic progress after the plantation started its operation. People now have permanent homes and decent vehicles. They have opened 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.⁷⁸

Unfortunately, the economic development does not necessarily improve people's access to natural resource management from either a legal or an indigenous peoples' perspective.⁷⁹ The peoples' cooperation with the company under the state law has yet to guarantee their rights, especially with regard to land titling. Meanwhile, from another point of view, it confirms how *adat* law, or customary law, has been 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,⁸⁰ a dream surprisingly shared by the local governments in Paser Regency and Kutai Kertanegara Regency.⁸¹ The challenge is that any historical claim has now also significantly lost its appeal in the face of growing emergence of individual self-recognition.⁸² As previously argued, the customary institution is getting drained in its effort to sustain collective ties, as the existing licencing law regime stands aloof from any customary claim. In the meantime, the state shows an 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 (the recognition of others).

Economic marginalization, which practically makes indigenous peoples legally unprotected and practically weak, is clearly correlated with customary identification policy and the criteria set by the licencing regime. Because of the permits, the indigenous peoples start losing their lands to the many major companies that thrive in both Paser and Kutai Kertanegara regencies. Despite the hardship that the indigenous people endure, the state tends to ignore the peoples' side and interests and rather look to where the money is. The state has evidently failed in recognizing and protecting the indigenous peoples particularly in the plantation sector.

V. Conclusion

The lack of recognition and protection of indigenous peoples over natural resource management has been brought about by the legal system that places its emphasis on legal unification and denies efforts to place legal pluralism in. The recognition of the

⁷⁸ Interview with Japardi (Lamin Pulut Village, 17 January 2018).

⁷⁹ Current condition confirms that legal rights of the indigenous have yet to be realized measured both in state legal system and customary law.

⁸⁰ 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.

⁸¹ The need for technical regulations to identify indigenous peoples as a preliminary step for recognition and protection of customary rights was also addressed by the Head of Kutai Kertanegara Regency Edi Darmansyah and Assistant 1 of the Head of Kutai Kertanegara Regency, Chairil Anwar, who affirmed that customary claim had long been ignored and should be legislated for legal certainty.

⁸² From historical aspect, the presence of villages shows that the areas have been occupied for long time. Customary leader of Teluk Bingkai Village was evidently elected as the 6th leader when he was chosen for the office in 2013.

indigenous peoples, seen from legal perspective, moves at a very slow pace, despite the fact that eventually it has 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 indigenous people to be recognized and legally protected. This is very much dependent upon the ability of the state to identify indigenous peoples in accordance with the criteria laid out by the state itself. Weakness within the indigenous peoples own affairs also contributes to such low recognition and protection as the communal bond falls apart and more indigenous peoples respond to the call of the state legal system in precedence over their own customary tradition in the administration of their own lands.

Poor legal performance with regard to the protection of the indigenous peoples' administered land is evident in the lack of proper tenurial proof for both individual and communal properties. This sits opposed to the characteristic of legal system that puts strong emphasis on legal certainty. The weakness of the state to legally recognize and protect indigenous peoples' rights to manage or utilize natural resources causes indigenous peoples to lose the access they used to have — and obviously need — for the sake of their survival.

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