

**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

The Status of Customary Land Areas in West Kutai

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Abstract. Customary land rights encompass two elements. The first element is a civil law element, namely as the joint ownership right of the members of the relevant customary law community over the customary land, which is believed to have originated from the legacy of their ancestors and is a gift from a supernatural power, as the main support for the life and livelihood and the environment of all members of the customary law community. The second element is a public law element, namely as the authority to manage and regulate the allocation, use, and control of customary land, both in internal relations with its own citizens and externally with non-citizens or "outsiders". In customary law communities, land has an important meaning, because by its nature land is the only asset that, even if it experiences any circumstances whatsoever, remains constant in its state, and sometimes even becomes more advantageous. This issue has become a recurring problem encountered in the field regarding land use. Data from the National Land Agency of Kutai Barat Regency shows that no customary land has been registered with the BPN. However, judging from the locations in Kutai Barat, areas that are productive areas that are often controlled by companies are not customary land. Based on the background described above, the problem identification is what are the issues faced in the Status and Territory of Customary Land in Kutai Barat Regency. The normative juridical method is carried out through a literature study that examines secondary data in the form of legislation, court decisions, agreements, contracts, or other legal documents, as well as research results, assessment results, and other references. The normative juridical method is research that begins with normative research or a study of legislation (normative). According to the data held by the BPN of Kutai Barat

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Regency, no customary land has been registered with the BPN. However, based on observations and monitoring carried out by the National Land Agency (BPN), the land that is currently considered customary land is located in West Kutai, which is a non-productive forest area. Based on the explanation from the BPN, a monitoring mechanism can be implemented to ensure that customary land is truly customary land. This mechanism is based on the provisions of the Minister of Agrarian Regulation Number 10 of 2016.

Keywords: Customary Land; Communal; Land Rights.

1. Introduction

Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia states that:

"The earth and water and the natural wealth contained therein are controlled by the state and used to the greatest prosperity of the people."

The 1945 Constitution of the Republic of Indonesia does not mention land but earth. Regarding the meaning of this earth, there is no further explanation. According to Article 1 paragraph (3) of the Basic Agrarian Law (UUPA), that:

"The relationship between the Indonesian people and the earth, water and airspace is an eternal relationship."

Regarding the earth, it is regulated in the UUPA, as stated in Article 1 paragraph (1) and (2), that the entire territory of Indonesia is the unity of the homeland of all Indonesian people, who are united as the Indonesian nation. All the earth, water and airspace, including the natural wealth contained therein within the territory of the Republic of Indonesia as the gift of God Almighty is the earth, water and airspace of the Indonesian people and is a national wealth.

This means that in Indonesia, the concept of land is used in the juridical sense as a concept that has been limited in Article 4 paragraph (1) of the UUPA, the basis of the state's control over only the surface of the earth, which is called land, which can be granted to and owned by individuals, both individually and jointly with other individuals and legal entities.

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After Indonesia's independence and before the enactment of Law Number 5 of 1960 concerning the Basic Agrarian Principles, recognizing the importance of land in life, long before the UUPA was enacted, a system of natural resource control was known in various regions in Indonesia known as hak ulayat. Although the concept of hak ulayat is not explicitly explained, from various opinions of experts; Hak Ulayat, a term known in the literature of Customary Law and among customary legal communities in various regions, is known by different names. Hak ulayat is the highest right of control over land in customary law, which includes all land within the territory of a particular customary legal community, which is the collective property of its citizens.¹

Hak ulayat encompasses two elements. The first element is a civil law element, namely as the joint ownership right of the members of the relevant customary law community over the ulayat land, which is believed to have originated from their ancestors and is a gift from a supernatural power, as the main supporter of the life and livelihood and the environment of all members of the customary law community. The second element is a public law element, namely as the authority to manage and regulate the allocation, use, and control of the ulayat land, both in internal relations with its own citizens and externally with non-citizens or "outsiders".²

The subject of this customary land right is the customary law community, which is a legal association based on common residence (territorial) or descent (genealogical), known by various names in the relevant area, for example, tribe, clan, dati, hamlet, nagari, and so on. If there is someone who appears to be the subject of customary land rights, then that person is the customary leader or elder who receives the delegation of authority from the customary law community concerned according to the provisions of their customary law. He is not the subject of customary land rights, but rather an official of the customary law community in carrying out the authority related to customary land rights.³

The subject of ulayat rights is the customary law community, which is a legal association based on common residence (territorial) or based on descent (genealogical), known by various names specific to the region in question, for example, tribe, clan, dati, hamlet, nagari.

¹ Dasar Hukum Hak Ulayat, Makalah, <http://hambalaehglegapui.blogspot.com/2016/01/dasar-hukum-hak-ulayat.html>, Diakses pada Tanggal 3 Mei 2024 Pukul 15.00 WITA.

² Ibid

³ Ibid

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Within the customary law community, land holds significant importance because, by its nature, land is the only asset that, despite experiencing any circumstances whatsoever, remains constant in its state, sometimes even becoming more advantageous. In fact, land is the dwelling place of the community, providing its lifeblood, a place where deceased members are buried, and where the protective spirits of the community and the spirits of its ancestors reside, and so on.

If there is a person who appears to be the subject of ulayat rights, then that person is the customary leader or elder who receives the delegation of authority from the customary law community in question according to their customary law provisions. He/she is not the subject of ulayat rights, but rather the customary law community's official in exercising the authority related to ulayat rights.⁴

The state, through the legal instrument of the Basic Agrarian Law (UUPA), strives to provide protection for citizens who have genuine rights to customary land (ulayat). Therefore, Article 26 paragraph (1) of the UUPA states that:

"Sale, exchange, gifting, granting of wills, granting according to custom, and other acts intended to transfer ownership and supervision are regulated by Government Regulation."

However, the reality is that land conflicts often occur related to land use. Even many lands controlled by indigenous peoples (ulayat rights) are taken over by the government through violence.

For the West Kutai region itself, which has an area of approximately 31,628.70 km², there is no legal or formal record of customary forests or customary land in West Kutai, even though there have been many claims stating ownership of land in the name of customary law. Conflicts and disputes often occur between the community and companies regarding land use. From the company's perspective, they argue that land acquisition has already taken place, so the company has a legal basis for the area for which ownership rights have been released. Meanwhile, the indigenous community believes that for land acquisition to occur, there needs to be consent or agreement with the local indigenous community. Therefore, if land acquisition occurs without the knowledge of the indigenous community, then the land acquisition is not

⁴ Badan Pertanahan Nasional Kanwil Provinsi Kalteng, *Seminar Langkah-Langkah Admininstrasi Perlindungan Tanah Adat*, Palangkaraya, 2007.

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valid according to the indigenous community. On the other hand, the company turns a blind eye to the background or how the land acquisition could have happened, knowing that the land has been released, making it legal for the company to manage the land.

This situation becomes a frequent problem encountered in the field regarding land use. Data from the National Land Agency of Kutai Barat Regency shows that there is no customary land registered with the BPN. However, based on the locations in Kutai Barat, the productive areas that are often controlled by companies are not customarily owned.

Therefore, through this academic manuscript study, it is hoped that it will be a solution in the form of generally binding regulations regarding the Status and Territory of Customary Land. This solution is in the form of drafting regional regulations regarding the Status and Territory of Customary Land in Kutai Barat Regency.

PROBLEM IDENTIFICATION

Based on the background described above, the problem identification is what are the issues faced in the Status and Territory of Customary Land in West Kutai Regency

WRITING OBJECTIVES

In accordance with the scope of the problem identification stated above, the objectives are to formulate the problems of the Status and Territory of Customary Land in West Kutai Regency as the reason and legal basis for the Status and Territory of Customary Land in West Kutai Regency.

2. Research Methods

The normative juridical method is carried out through a literature study that examines secondary data in the form of laws and regulations, court decisions, agreements, contracts, or other legal documents, as well as research results, assessment results, and other references. The normative juridical method is research that begins with normative research or a study of laws and regulations (normative).

Therefore, the legal principles, both in the form of legislation and in the form of customary law in the Status and Territory of Customary Land in West Kutai Regency, become the reference in determining the Status and Territory of Customary Land in West Kutai Regency. This method is

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based on the theory that good law is law that is based on existing reality, not merely the will of the ruler.

THEORETICAL STUDY

1. Customary Law Theory

The theory of land ownership based on customary law is that land is communally owned or a legal association (*beschikkingsrecht*). In this case, each member of the association can work the land by first clearing it, and if they work the land continuously, it can become their individual property.⁵

Regarding customary land ownership, Ter Haar, as quoted by Kalo, explains the following:⁶ Customary law grants precedence to the person who first placed a prohibition sign or first cleared the land; if he does not carry out the clearing and burning work according to the season, another person can urge him to choose: to continue working or to surrender the land to him. So, this claim to ownership disappears altogether if another person, a fellow member, wants it and urges him to choose between the two options.

According to Wignjodipoero, this communal right to land is also called the right of domain or *ulayat* right, while Van Vollenhoven calls it *bescikkingsrecht*. Wignjodipoero further states that "this *ulayat* right in its basic form is a right of the community to the land it inhabits, while its implementation is carried out either by the community itself or by the head of the community on behalf of the community."⁷

In this context, the meaning of customary land rights is stated as follows:

Customary land rights are the rights of a customary law community to control land that is still a forest within its territory for the benefit of the customary law community itself with its members

⁵ Kalo, *Op.cit.*, hlm. 9

⁶ Ibid, hlm.1-9

⁷ Wignjodipoero, *Op.Cit.*, halaman 198-199

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or for the benefit of outsiders to the customary law community by paying a recognition fee known as or can be equated with recognitie.⁸

As customary law communal land, in principle, only members of the customary law community (communion) themselves may cultivate the communal land. In this regard, Wignjodiopero explains as follows:

*The right of disposal or customary right applies both externally and internally. It applies externally because non-citizens of the communion are in principle not allowed to participate in the cultivation of land that is the territory of the communion in question; only with the permission of the communion and after paying a pancang (entrance fee) and then providing compensation, can outsiders who are not members of the communion obtain the opportunity to participate in the use of the land of the communion territory.*⁹

Applicable to the community as a whole, meaning all members of the community jointly as a unit, exercising customary rights by picking the products of the land and all wild plants and animals living on it. Regarding the area of this customary land, Erman Rajagukguk, as quoted by Kalo, states the following:

"All land, forests, if necessary up to the mountain peaks, if the residents have rights, both real and tacitly recognized, the land is not state land. According to customary law, the village has the right to control land outside the village boundaries, and villagers have the right to cultivate or seek sustenance from the forest with the permission of the village head. According to Trenite's interpretation, the land belongs to the state, but according to Van Vollenhoven, Logeman, and Ter Haar, the land is not under the state's authority."

Siregar further elaborates on the characteristics of customary rights as follows:

- 1) The legal community and its members have the right to freely use the forest land within their territory, including clearing land, collecting products, hunting, fishing, grazing livestock, and so on.

⁸ Tampil Anshari Siregar, *Undang Undang Pokok Agraria dalam Bagan*, Kelompok Studi Hukum dan Masyarakat Fakultas Hukum USU, Medan, 2011. Halaman 20

⁹ Ibid, hlm.98

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2) Non-members of the legal community may also exercise these rights, but only with prior permission from the head of the legal community and payment of a recognition fee (acknowledged after fulfilling their obligations).

3) The legal community is responsible for crimes committed within its territory if the perpetrator cannot be identified.

4) The legal community cannot sell or permanently transfer customary rights to anyone.

5) The legal community has the right to intervene in the land cultivated and owned by its members, such as in the case of land sales and so on.

As quoted by Siregar, Van Vollenhoven stated that the customary land rights of indigenous people (Inlands bezitrecht) are divided into two types:

1) Communaal bezitrecht (communal ownership) when the right belongs to a legal community.

2) Erveeljk individueel bezitrecht (individual ownership) when the right belongs to individual members of the legal community.

Based on this theory, individual and communal rights to land are recognized and inherited by members of the customary community who bind themselves to the adat (customary law) association.

2. National Legal Theory

The national legal theory referred to here is the right to control land based on the Basic Agrarian Law (UUPA) Number 5 of 1960. In this case, the right to control land that is legally valid in Indonesia is stated in Article 2 of the UUPA:

1) Based on the provisions of Article 33 paragraph 3 of the Constitution and the matters referred to in Article 1, the earth, water, and airspace, including the natural resources contained therein, are at the highest level controlled by the state, as an organization of all people.

2) The right to control the State referred to in paragraph 1 of this article gives the authority to:

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- a. Regulate and organize the allocation, use, supply, and maintenance of the earth, water, and airspace.
- b. Determine and regulate legal relationships between people and the earth, water, and airspace.

3) The authority derived from the state's right to control as referred to in paragraph 2 of this article is used to achieve the greatest prosperity of the people, in the sense of nationality, welfare, and independence in society and the independent, sovereign, just, and prosperous Indonesian Legal State.

4) The implementation of the State's right to control as mentioned above can be delegated to Autonomous Regions and Adat Law Communities, as far as necessary and not contrary to national interests, demanding the provisions of Government Regulations

3. Results and Discussion

Kutai Barat Regency is one of the 10 regencies/cities in the East Kalimantan Province. Kutai Barat Regency, with Sendawar as its capital, is a result of the expansion of the Kutai Regency area, which was established based on Law Number 47 of 1999 concerning the formation of Nunukan Regency, Malinau Regency, Kutai Barat Regency, Kutai Timur Regency, and Bontang City dated October 4, 1999. It was symbolically inaugurated by the Minister of Home Affairs of the Republic of Indonesia on October 12, 2009, in Jakarta, and operationally inaugurated by the Governor of East Kalimantan on November 5, 1999, in Sendawar.¹⁰

Geographically, Kutai Barat Regency is located between 114°44'59.05" - 116°07'15.23" East Longitude, 00°07'54.50" North Latitude and 01°08'58.18" South Latitude. The area of Kutai Barat Regency reaches 20,381.59 km² or approximately 15.79% of the total area of East Kalimantan Province. Administratively, the boundaries of Kutai Barat Regency are Mahakam Hulu Regency to the north, Kutai Kartanegara Regency to the east, Penajam Paser Utara Regency to the south, and Central Kalimantan Province to the west.¹¹

¹⁰ Sumber <http://kutaibaratkab.go.id/geografi/>, diakses pada Tanggal 04 Mei 2024 Pukul 11.20

WITA

¹¹ Ibid

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Prior to the district expansion, Kutai Barat Regency consisted of 21 districts comprising 236 villages and 4 urban villages. However, following the enactment of Law No. 2 of 2013 concerning the Formation of Mahakam Ulu Regency in East Kalimantan Province, 5 districts namely Long Apari, Long Pahangai, Long Bagun, Laham and Long Hubung officially became part of Mahakam Ulu Regency, reducing the number of districts in Kutai Barat Regency to 16.¹²

With an area of approximately 31,628.70 square kilometers, it turns out that there is no record of customary land in West Kutai at the National Land Agency (BPN). While we all know that land and land disputes between indigenous communities and companies often occur in West Kutai. For example, in 2016, a land dispute between the Dayak indigenous community and a palm oil company ended unfavorably for the indigenous community. To the point where the indigenous communities in West Kutai involved in the dispute have resigned themselves and no longer know how to save their land from the invasion of companies that deliberately evict them for oil palm planting. In fact, they feel that what the company is doing does not benefit the community in the least.

The unclear ownership of land is still the main problem for indigenous communities. The erosion of customary forest areas poses a real threat to the survival of indigenous communities in various regions of Indonesia, as well as the conditions in West Kutai. The problem of land ownership status continues to occur with the entry of corporations. Oil palm plantations and the opening of areas as mining areas are the biggest causes of the conflict. Syahril, a resident of West Kutai, said that there are many cases of land sales to heir citizens that end up unclear. This has caused many residents to lose their land as a source of livelihood. Many of our customary forest areas continue to be victims of illegal logging. Limited access also often causes obstacles for residents. The urgency of needs due to the increasingly narrow land and customary forests has forced many residents to carry out various other activities to meet their livelihoods. However, this still cannot run optimally due to limited access to their areas.

According to data from the West Kutai BPN, there is no customary land registered with the BPN. However, based on observations and monitoring carried out by the BPN, the land that is currently considered customary land is located in locations in West Kutai which are non-productive forest areas.

¹² Ibid

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Based on the explanation from the BPN, in principle, a monitoring mechanism can be used to ensure that customary land is truly customary land. This mechanism is based on the provisions of the Minister of Agrarian Regulation Number 10 of 2016:

- a. The customary law remains the primary rule in the region.
- b. Customary legal systems are still used in decision-making to resolve customary law issues.
- c. The land has been controlled in a hereditary manner.

Stages or process of registering customary land can be done as follows:

- Application
- Formation of the IP4T team
- Identification, verification
- Report examination
- Analysis of physical and legal data
- Submitting reports and determination of rights and subsequent registration of rights

Currently, the existence of regulations related to the recognition of customary forests is still very minimal, even for East Kalimantan, the number is not yet significant. Currently, there are three areas that are being championed by the Indigenous Peoples Alliance (AMAN) to become customary forests. The three areas are; Jumetn and Tuwaytn forests [West Kutai], and Umaq Wak Mahakam Ulu forests.¹³ NGOs/CSOs in East Kalimantan are also promoting customary forests, and almost all of them are now in the process of promoting regional regulations recognizing Indigenous Legal Communities. One of the requirements to obtain the legality of

¹³ Fariz Fadillah, Pengakuan Hutan Adat Kaltim Masih Minim, Perlu Penguatan Regulasi Daerah, 20 Maret 2018, <http://kalimantan.bisnis.com/read/20180320/411/752090/pengakuan-hutan-adat-kaltim-masih-minim-perlu-penguatan-regulasi-daerah>, Diakses Pada Tanggal 5 Mei 2024, Pukul 08.00 WITA

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customary forests is the recognition of the indigenous community that owns the forest as an Indigenous Legal Community.¹⁴

AMAN states that so far there are only two customary forests, both located in Kutai Barat Regency. The area is also not very large, with the Hemaq Beniungyakni customary forest covering 48.85 hectares and the Kekau Customary Forest covering 4,026 hectares. This area is still far from expectations and does not yet meet the needs of indigenous peoples. The total forest area in East Kalimantan is 12,638,936 hectares. Based on data held by AMAN, each proposal for a customary forest generally faces obstacles in the form of indigenous communities that have not yet received recognition as customary law communities (MHA). AMAN encourages that forests that have been protected and managed for generations can be ensured to be promoted to obtain legal status from the government.

Customary law communities, often known as traditional communities, are communities that arise spontaneously in a particular territory. Their establishment is not determined or ordered by a higher authority, and they are characterized by a strong sense of solidarity among their members. They utilize their territory as a source of wealth that can only be fully exploited by their members. Genealogically, customary law communities still need to fulfill certain requirements to be considered as customary law. This is particularly interesting in the context of East Kalimantan (Kaltim), which has a high abundance of natural resources. Kaltim has a population of 40% indigenous Dayak people and 60% Kutai, Paser, and others (ISHA: 2006).

The excessive exploitation of natural resources such as forests, mines, and plantations leads to social and cultural shifts. It also impacts the rights of indigenous communities and customary law in Kaltim. In many cases in Kaltim, when the state requires forest land, it is granted to logging companies. In the mining and plantation sectors, the state can take over or seize forests under the pretext of "state forests" and for the sake of "public interest." This is the implication of designating customary forests controlled and managed by indigenous communities as state forests. The existence of indigenous communities should be recognized in accordance with the ratification of the ILO Convention 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries. This convention defines indigenous communities as "tribal people in independent countries whose social, cultural and economic conditions distinguish them from

¹⁴ Ibid

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other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

In many cases in East Kalimantan, when the state requires forest land, it is granted to HPH entrepreneurs. In the mining and plantation sectors, the state can take over or seize the forest under the pretext of "state forest" and implement it "for the public interest." This is an implication of the designation of customary forests, which are controlled and managed by indigenous communities, as state forests. Indigenous communities should be recognized in accordance with the ratification of ILO Convention 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries, which defines indigenous peoples as "tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."

In practice, the state's control of forests gives authority to the central government, which often ignores the rights of indigenous communities, including in East Kalimantan since 1970. As a result, the rights of indigenous communities around forests have been widely displaced, leading to social conflict among the Dayak tribe.

To protect the existence of community rights over forests, there have been efforts by local governments in East Kalimantan to create Regional Regulations (Perda). For example, Nunukan District has Perda No. 03 of 2004 concerning the Customary Rights of Indigenous Communities. Followed by Perda No. 04 of 2004 concerning the Customary Rights of the Lundayeh Indigenous Community in Nunukan District. Paser District is currently preparing a draft Perda on the Customary Rights of Indigenous Communities. Malinau District regulates customary institutions with Perda No. 04 of 2001 concerning the Empowerment, Preservation, Protection and Development of Customs and Traditions and Customary Institutions, and a draft Perda on Customary Rights and Law.¹⁵

In fact, there is an understanding between the central government, the regional government, and the indigenous people in East Kalimantan regarding the respect for their respective rights to the forest. In other words, the management rights held by each party have not yet been fully

¹⁵ Ibid

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established. There is an aspect of injustice towards the rights of indigenous people in East Kalimantan.¹⁶

A study of the implications of implementing a new system, which will be regulated in the Regional Regulation, will have implications for both aspects of people's lives and aspects of the state's financial burden. The community with the regulation regarding the Status and Territory of Customary Land will definitely be benefited in the long term. Because it becomes a legal guarantee for the utilization, ownership and management of customary land in a legitimate and legal manner. The potential for land conflicts and disputes, especially the control of customary land, can be minimized with the presence of this Regional Regulation.

The regulation in the Regional Regulation on the Status and Territory of Customary Land will have a positive impact on the management of natural resources in West Kutai. The management of natural resources in the form of forests, mines and plantations that are exploited excessively, which initially always caused social and cultural shifts, can be minimized or even prevented due to the clear regulations in the Regional Regulation. In addition, the Regional Regulation concerning the Status and Territory of Customary Land also provides a solution to fulfilling the problems of indigenous peoples' rights and customary law in West Kutai.

The Regional Government will also benefit from this Regional Regulation because it will clarify the regulations on land and forestry, especially those related to the rights of customary law communities in the field of land tenure in West Kutai.

The unclear ownership of land is still a major problem for indigenous peoples. The erosion of customary forest areas is a real threat to the survival of indigenous peoples in various regions of Indonesia, as well as the conditions in West Kutai. Problems regarding the status of land ownership continue to occur along with the entry of corporations. Oil palm plantations and the opening of areas as mining areas are the biggest causes of this conflict. There are many cases of land sales to heir citizens that end up unclear. This has caused many people to lose land as a source of livelihood. Many customary forest areas continue to be victims of illegal logging. Limited access also often causes obstacles for residents. The urgent need due to the increasingly narrow land and customary forests has forced many people to carry out various other activities

¹⁶ Ibid

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**PROCEEDING OF INTERNATIONAL CONFERENCE ON
THE LAW DEVELOPMENT FOR PUBLIC WELFARE**

ISSN: 2798-9313

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to meet their livelihoods. However, this still cannot run optimally due to limited access to their territory.

Therefore, through the regulation in the Regional Regulation concerning the Status and Territory of Customary Land, it is hoped that it will become a strong legal basis. The existence of a legal basis as a solution to the problem of ownership and use of land, especially forests, which often become conflicts between indigenous peoples and companies.

4. Conclusion

Based on the description and research results, both normatively, empirically, and in the literature, it can be concluded that:

The main problem faced in the Status and Territory of Customary Land in West Kutai Regency is the lack of regulation and clarity regarding the existence of customary land in West Kutai. The registration and recording of customary land has not been found and has not occurred. This is due to the factors of lack of knowledge from the community and sectoral regulations that are not well socialized to the community. Therefore, a mechanism for determining the status and territory of customary land in West Kutai is needed so that there is legal clarity regarding which areas are customary land. This will minimize friction of interests in land use, especially those that often occur with companies. Therefore, based on the research findings presented earlier, the recommendation that can be given regarding the Status and Territory of Customary Land is that the need for the Formation of the Kutai Barat Regency Regulation concerning the Status and Territory of Customary Land should be realized immediately in order to concretize legal certainty for the Kutai Barat community. Therefore, the Academic Paper should be followed up by drafting the Draft Regional Regulation on the Status and Territory of Customary Land, which will later be stipulated as a Regional Regulation.

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