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ABSTRACT

Indigenous People have a very strong and historical relationship with their land and nature. They continue to struggle to strengthen their position and to obtain their rights. Often the rights of customary communities are ignored by the state, coupled with the existence of Law No. 41 of 1999 concerning Forestry, which states that customary forests are state forests located in the territory of customary law communities. Whereas the 1945 Constitution in Article 18B states that the State recognises and respects customary law communities and their traditional rights. The purpose of the study is to identify and analyse the legal certainty of the position and rights of Indigenous Peoples in South Kalimantan Province and the policies implemented by the government in forest management by Indigenous Peoples in South Kalimantan Province. The results of this study are as follows. First, South Kalimantan Province has not provided optimal legal certainty for Indigenous Peoples and their rights. Out of thirteen districts/municipalities, only three districts have ratified regional regulations in the framework of protection, recognition and empowerment of indigenous peoples. This situation arises because the existence of Indigenous Peoples is determined by the regional government and the political process in the regional parliament., Second, there are no customary forests that have been ratified by the Minister of Environment and Forestry. This absence limits legal access to Indigenous Peoples to participate in forest management. To empower indigenous peoples, the government grants permit to manage forest areas in the Social Forestry scheme such as Village Forests, Community Forests, People's Plantation Forests, Forestry Partnerships. These schemes involve Indigenous Peoples in Forest Farmer Groups. However, the social forestry scheme is not in line with Constitutional Court Decision No. 35/2012 because the concept of social forestry has the status of a state forest that involves the community in its management.

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A. INTRODUCTION

The state's recognition of the unity of customary law communities and recognition of their customary law has been affirmed in the Indonesian Constitution in Article 18B. This article provides that the state recognises and respects the unity of customary law communities and their traditional rights, as long as these communities continue to exist and follow the principles of the Unitary State of the Republic of Indonesia.¹ Thus, the application of customary law is already part of the will of the constitution, not determined by the ruler or the political will of the state administrators. Therefore, customary law communities have the right to maintain and strengthen their distinctive characteristics in the fields of politics, law, economy, social and cultural institutions.²

Long before the Indonesian Nation's Independence, the Customary Law Community already had customary land rights. The position and function of land for the customary community is very important as a place to live and a source of livelihood for them. However, since the New Order era, the position of customary land has been shrinking because most of it was claimed unilaterally by investors for business in the forestry sector.³

Recognition and respect for the unity of customary law communities and their

rights is recognised provided that they meet the requirements stipulated by law.⁴ However, the Basic Agrarian Law does not provide specific regulations regarding customary law community rights. This is due to the fact that this may hinder the natural development of customary law which is dynamic.⁵ In reality, the position of customary rights tends to be increasingly weakened by the strengthening of individual rights, the existence of written laws and regulations, and the implementation of registration which produces evidence of rights, while the customary rights of customary law communities are not registered.⁶

They have long maintained a very strong emotional and historical relationship with the land and natural environment where they live. However, the position of Indigenous Peoples in Indonesia remains weak when it comes to obtaining land rights and access to Natural Resources. Although they continue to fight to strengthen their position and rights in land governance and ownership in Indonesia, the efforts made have not yielded results. On the contrary, their customary rights continue to be violated in the name of development or national interests which are defined in flexible and ambiguous terms.⁷

¹ Constitution of the Republic of Indonesia 1945, Article 18 B.

² Yusuf Salamat, 'Pengaturan Mengenai Hak Atas Tanah Masyarakat Hukum Adat' (Studi Kasus Pengakuan terhadap Hak Atas Tanah Masyarakat Hukum Adat Dayak Di Kalimantan Tengah) (Regulatory of Rights of Adat Law Community Land (Case Study of Recognition of the Dayak Adat Law Community Land in Central Kalimantan) (2016) 13(4) Jurnal Legislasi Indonesia 412.

³ *ibid* 554.

⁴ Second Amendment to the 1945 Constitution, art 18B (2); Law Number 5 of 1960 concerning Basic Agrarian Law, art 3.

⁵ Basic Agrarian Law, 2nd B Amendment, Article 3, and General Elucidation number II number 3 of Basic Agrarian Law.

⁶ Fani Suma Pratama, 'Eksistensi Hak Ulayat dalam Era Investasi' (6 Januari 2000), PA Probolinggo, <<https://pa-probolinggo.go.id/article/Eksistensi-Hak-Ulayat-dalam-Era-Investasi>>.

⁷ Andri Ratih, 'Problematika Keberadaan dan Perlindungan Hak Masyarakat Hukum Adat' (Komnas Ham, 5 July 2021) <<https://www.komnasham.go.id/problematika-keberadaan-dan-perlindungan-hak-masyarakat-hukum-adat>>.

Law No. 41/1999 on Forestry provides that 'customary forests are state forests located in the territory of Masyarakat Hukum Adat'.⁸ This provision indicates a limited recognition of the rights of legal communities by the state. There are several provisions in this law that regulate customary law communities, stating that customary forests are to be treated as state forests located in their territory.⁹ Based on this, it is an interesting problem to examine the Legal Protection of the Rights of Indigenous Peoples in Forest Management in South Kalimantan Province. So far, it seems that the rights of Indigenous Peoples remain weak when dealing with certain powerful interests, especially business entities that receive legal authorisation from the state to use land for their activities. The purpose of this study is to determine the legal certainty regarding the position and rights of indigenous peoples as well as government's legal policies on forest management by indigenous peoples in South Kalimantan Province.

1. The Urgency of Having Regional Regulations to Ensure Legal Certainty for the Status of Indigenous Communities

Formally, in the applicable law in Indonesia, the position of customary rights of Indigenous Peoples is recognised but

can still be eliminated or receive limited recognition in several regulations such as the Forestry Law and the Basic Agrarian Law. But in reality, the legal protection for customary rights of Indigenous Peoples is often marginalised when faced with public interest because it has not been implemented in the field. This shows that legal protection for the rights of Indigenous Peoples remains largely at the conceptual stage existing only at the of 'law in the books' and not at the level of 'law in action'. This is the case despite the fact that the state constitution formally guarantees and provides legal protection for the rights of Indigenous Peoples.¹⁰

Recognition and respect for the rights of indigenous legal communities have not been fully implemented by the mandate of the Constitution. This is due to the lack of synchronisation between laws and regulations relating to customary rights, overlapping authority and sectoral egos between state institutions or departments. In addition, in the management of forest areas, the government tends to prioritise implementing laws and regulations that are identical to state law, and in the process of forming and implementing laws and regulations, customary law is often ignored.¹¹

In various laws and regulations, the recognition and protection of the rights of Indigenous Peoples' including their customary rights, have been formally regulated.¹² However, at the regional

⁸ General Provisions point 6 of Law No. 41/1999.

⁹ Myrna A. Safitri (ed), *Untuk Apa Pluralisme Hukum? Konsep, regulasi, negosiasi dalam Konflik Agraria di Indonesia, dalam Upaya Tiada Henti Mempromosikan Pluralisme dalam Hukum Agraria di Indonesia* (Epistema Institute-HuMa-Forest Peoples Programme 2011) 80.

¹⁰ Andi Bustamin and daeng kunu, 'Kedudukan Hak Ulayat Masyarakat Adat Dalam Hukum Tanah Nasional' (2010) 1(10) *Jurnal Inspirasi* 40-41.

¹¹ Stefanus Laksanto Utomo, *Budaya Hukum Masyarakat Samin* (PT Alumni 2013) 7.

¹² 1945 Constitution, second amendment, art 18B(s); Law No. 5 of 1960 concerning the Basic Agrarian Law, art 3; Law No. 41 of 1999 concerning Forestry, Art 4(3); Law No. 32 of 2004 concerning Regional Government.

level, the formulation and enactment of regulations recognising customary law have not been considered important. As a result, only a few regions have adopted Regional Regulations concerning the recognition and protection of Indigenous Peoples' Rights. Land holds profound cultural and livelihood significance for Indigenous Peoples, so conflicts often arise when other parties seek to exploit the land for their interests. Since the New Order era, the extent of customary land ownership has steadily diminished. Most of the customary land areas have been unilaterally taken over by investors in the forestry (HPH), plantation (HTI), and mining sectors, who obtained official permits and legal backing from the Central or Regional Government.¹³

When political reforms occurred in 1998, accompanied by the amendment of the 1945 Constitution, greater space was created for the recognition of indigenous peoples' rights. Article 18 B paragraph 2 provides that the state recognises the existence of indigenous legal communities and their traditional rights, as long as they continue to exist and are consistent with societal development and the principles of the Republic of Indonesia. Article 28I Paragraph (3) also emphasises the obligation to respect the cultural identity and rights of Indigenous Peoples in line with societal progress. However, these Constitutional provisions remain ambiguous, offering only conditional recognition of Indigenous Peoples' existence, which has been an ongoing challenge for Indigenous Peoples in asserting their rights. Nonetheless, these provisions may serve as a constitutional foundation for Indigenous Peoples to

advocate for the protection of their rights.¹⁴ In addition, the government and the Regional Representatives Council (DPR) have not yet succeeded in passing the Indigenous Peoples Bill. This shows that customary law is often only a symbol of diversity in the social, political and legal fields, not to achieve justice.¹⁵

The relationship between Indigenous Peoples and land is profoundly intertwined, not only as a place to live but also as a source of livelihood and a place where ancestral spirits are believed to protect them. This close relationship gave birth to customary rights, namely the communal control of land by Indigenous Peoples, both genealogically and territorially, which existed long before the enactment of the Basic Agrarian Law No. 1 of 1974. According to Cornelius van Vollenhoven, the rights of Indigenous Peoples over their land are referred to as *beschikingsrecht* (mastership rights or customary rights). In his book *De Indonesië en zijn Grond* (1919), he stated that such customary rights constitute an ancient body of law, that apply throughout Indonesia in the form of land rights for Indonesian legal communities. These customary rights represent a form of immovable property that can only be owned by social units, not by individual persons, and cannot be permanently transferred or released.¹⁶

South Kalimantan Province is one of the provinces in Indonesia comprised of

¹³ S Sukirno, 'Sistematisasi Peraturan Perundang-Undangan Yang Berkaitan Dengan Tanah Hak Ulayat Sebagai Upaya Mencegah Konflik' (2012) 41(4) *Journal Masalah-Masalah Hukum* 558.

¹⁴ Yance Arizona, 'Adat Sebagai Strategi Perjuangan dan Mobilisasi Hukum Adat as Strategy for Legal Struggle and Legal Mobilization' (2003) 2(2) *The Indonesian Journal of Socio-Legal Studies* 12.

¹⁵ *ibid* 3.

¹⁶ Sofyan Pulungan, 'Menelaah Masa Lalu, Menata Masa Depan: Sejarah Hukum Tanah Ulayat dan Model Penanganan Konflik Sosialnya' (2023) 6(1) *Undang: Journal Hukum* 237-40.

thirteen autonomous regions inhabited by several tribes as indigenous peoples, namely the Banjar Tribe and also the Dayak Meratus Tribe, locally referred to as 'Urang Bukit Meratus'. This means those who live in the forest and mountain areas of Meratus, which span across Banjar Regency, Tanah Laut, Tanah Bumbu, Kotabaru, Tapin, Hulu Sungai Selatan, Hulu Sungai Tengah, and Balangan. They live in groups in traditional settlements centred around the 'Balai Adat'.¹⁷ In this Province, full protection and legal certainty for indigenous legal communities and their rights has not yet been achieved. Out of eleven Regencies and two Municipalities, only three Regencies have adopted Regional Regulations on Indigenous Legal Communities. At the Provincial level however, the Regional Regulation of South Kalimantan Province Number 2 of 2023, concerning Recognition and Protection and Recognition of Indigenous Legal Communities has been ratified in early 2023. This provincial regulation came after two districts had already enacted Regional Regulations related to the Protection of Indigenous Communities, namely, the Kotabaru Regional Regulation No. 19 of 2017 concerning Recognition and Protection of Indigenous Communities and the Hulu Sungai Selatan Regional Regulation No. 1 of 2022 concerning Recognition, Protection and Empowerment of Indigenous Legal Communities. Most recently, the Tanah Bumbu Regency Regional Regulation Number 2 of 2024 was ratified concerning the Recognition, Protection and Empowerment of Indigenous Legal Communities.

Keeping in mind the importance of adopting Regional Regulations related to the position of Indigenous Peoples in the region, such regulations are essential as a required

under Article 67 paragraph 2 of the Forestry Law, which states that the confirmation or elimination of Indigenous Legal Communities must be stipulated through Regional Regulations. Therefore, Regional Regulations on Indigenous Communities serve as a very necessary first step to provide legal certainty and protection in their respective areas. This is particularly important because to obtain ratification of customary community forests from the Minister of Environment and Forestry, there must first be a Regional Regulation that legitimises the Legal Community.

This shows that the struggle faced by customary law communities remains a long and complex process to obtain the ratification of their customary forests from the Ministry of Environment and Forestry, so that these forests can be owned and managed by the Customary Law Community. Under existing Laws and Regulations, the determination of customary forest recognition must first begin with the recognition of the customary community and its customary territory. Only after this step can the Customary Stakeholder submit an application to the Minister of Environment and Forestry for the issuance of recognition. The Determination of Customary Forest Recognition will be issued once the validation and verification process confirms that the application is complete and meets the requirements and criteria stipulated by the law. Thus, recognition of the Customary Law Community is an essential precondition that must be met before the Application for Recognition of Customary Forests.¹⁸

¹⁷ Irene Mariane, *Kearifan Lokal Pengelolaan Hutan Adat* (PT Raja Grafindo Persada 2014) 188.

¹⁸ Avaya Ruzha Avicenna, 'Pengakuan Hutan Adat: Komitmen Negara terhadap Perlindungan Hak-Hak Masyarakat Hukum Adat di Indonesia' (*Leks & Co*, 27 Jun 2023) <<https://blog.lekslawyer.com/pengakuan-hutan-adat-komitmen-negara-terhadap-perlindungan-hak-hak-masyarakat-hukum-adat-di-indonesia/>>.

Since the Constitutional Court Decision Number 35/PUU-X/2012¹⁹, only three districts in the South Kalimantan Province have enacted Regional Regulations as an initial step to provide legal protection for Customary Law Communities within their jurisdictions. This is important because, to obtain recognition of Customary Forests, a community must first have a Regional Regulation that legitimises the existence of the Customary Law Community. Despite this, there are still many areas in South Kalimantan that have not yet made Regional Regulations providing for the protection and recognition of customary law communities, especially in districts that have significant potential for customary forests and that have historically been part of the customary communities in South Kalimantan.

Taking into account that South Kalimantan Province consists of the thirteen districts/cities, several areas still lack Regional Regulations safeguarding the rights of customary law communities, an initial legal step indispensable for securing recognition of customary forests. Customary law communities in South Kalimantan, have long struggled for the acknowledgement of their forest areas, even though the area has quite strong customary forest potential. For instance, in the Hulu Sungai Tengah (HST) Regency, a Regional Regulation has not yet been adopted even though the Indigenous Peoples Alliance of the Archipelago and the customary law communities have fought for such legal instruments. Considering the vital importance of establishing a clear legal foundation as evidence of state recognition for Indigenous Law Communities and their accompanying rights, especially

in the relation to customary forests, the formulation of a Regional Regulation is an essential prerequisite for recognition. In fact, following the Constitutional Court Decision, many things can be implemented by the Regional Governments have been empowered to take various steps to provide protection and legal certainty for the rights of Indigenous Law Communities, especially regarding the management of their Customary Forests, a right that has yet to be fully realised.²⁰

Although the Constitutional Court has decided that Customary Forests are not part of State Forests, three challenges remain in obtaining recognition of the rights of Indigenous Peoples. First, the formulation in the existing Laws and Regulations reflects a romantic nationalist perspective of Indonesia as a newly formed country, which tends to consider customs as outdated or irrelevant. Second, the existence of certain legal requirements is the result of a compromise between pro-modernist and pro-traditional views, which illustrates the conflict between views that worry about the dominance of feudalism in the customary law system and views that support the existence of customs. This has resulted in ambiguous and sometimes contradictory legal norms, in the Basic Agrarian Law No. 5/1960, making recognition of Indigenous Peoples rights difficult to implement in practice. Third, the provisions of Law No. 41 of 1999 concerning Forestry further complicate matters by placing the process of determining the existence of Indigenous Peoples in the hands of the Provincial Legislative Council's political mechanism. This process is often inaccessible to

¹⁹ Constitutional Court Decision Number 35/PUU-X/2012 was issued on May 16, 2012. This decision relates to the recognition of customary rights of indigenous peoples over customary land and forests, and revokes the provision that equates customary forests with state forests.

²⁰ Raden Ariyo Wicaksono, 'Liputan Khusus: Masyarakat Adat Belum Rasakan Implementasi Putusan MK 35' *Betahita.id* (22 Mei 2022) <<https://betahita.id/news/lipsus/7561/masyarakat-adat-belum-rasakan-implementasi-putusan-mk-35.html?v=1653098759>>.

indigenous peoples in general. The regional political process is characterised by competing interests, which involve the interests of local governments, indigenous communities, and investors.²¹

This shows that, for customary law communities to obtain recognition of customary forests from customary law communities, there needs to be political will from the Regional Government in South Kalimantan. Particularly in areas that do not yet have a Regional Regulation on the Recognition and Protection of Customary Law Communities and their rights. Such a regulation is essential as a legal foundation for securing the ratification of Customary Forests of Customary Law Communities in South Kalimantan.

2. Implementation of Legal Policy on Forest Management by Indigenous Peoples in South Kalimantan Province

2.1. Obstacles to the ratification of customary forests in South Kalimantan Province

As stated by the Ministry of Environment and Forestry, Regulation No. P.21/Menlhk/Setjen/KUM.1/4/2019 concerning Indigenous Forests and Customary Rights Forests, Article 5, Paragraph (2), Letter (b),

explicitly stipulates that 'To apply for the designation of an Indigenous Forest, one of the requirements that must be met is to attach a legal product that recognises the existence of Indigenous Peoples in the area'. The required legal product is either a Regional Regulation for Indigenous Forests located within State Forest Areas, or a Decree from the Regional Head for Indigenous Forests located outside State Forest Areas. However, in practice, the enactment of this regulation has not yet resolved the long standing issues concerning the recognition of Indigenous Peoples' rights to their Indigenous forests.²²

According to I Gede Arya Subhakti, the Head of Extension and Community Empowerment Division of the South Kalimantan Provincial Forestry Service, of all the forests in South Kalimantan, not a single customary forest has been legalised by the Ministry of Environment and Forestry. The Indigenous Peoples Alliance of the Archipelago has produced a map of the distribution of customary forests in the province, but recognition remains pending. This problem arises due to several factors:

- a. From a regulatory perspective: many districts and cities have not yet established Regional Regulations on Indigenous Peoples (MHA), which poses a major obstacle to proposals for Indigenous Forests. This is because Law No. 41 of 1999 requires the existence of a Regional Regulation on Indigenous Peoples in the proposal for Indigenous Forests within State Forest Areas.
- b. From a field conditions perspective: Boundaries of Indigenous Forest areas remain unclear, and often

²¹ Yando Zakaria, 'Orang Indonesia dan Tanahnya Seratus Tahun Kemudian' (*Kompas*, 23 Januari 2020) <<https://www.kompas.id/artikel/orang-indonesia-dan-tanahnya-seratus-tahun-kemudian>>.

²² Heru Saputra Lumban Gaol and Rizky Novian Hartono, 'Political Will Pemerintah Terhadap Pengelolaan Hutan Adat Sebagai Upaya Penyelesaian Konflik Agraria' (2021) 7(1) *Journal Agraria dan Pertanahan* 47-48.

overlap with existing permits, settlements, and agreements among Indigenous communities themselves regarding the proposed Indigenous Forests areas.²³

The obstacles mentioned above shows that the struggle of Indigenous Peoples in South Kalimantan to obtain the ratification of their customary forests is still far from over, thereby increasing the risk of conflict in forest management. The ongoing occurrence of customary land conflicts, both vertical and horizontal within communities, stems partly from lack of legal clarity regarding the very definition and entity of the customary land itself. This shows that in its implementation, the Government is still not serious in resolving the customary land issue completely and is yet to show genuine commitment.²⁴ The shifting role of customary law communities in managing their customary forest areas, either directly or indirectly, can lead to extensive control of forests by the state, justified in the name of increasing state or regional income, through the granting of permits. In addition, in its implementation, the government often issues forest area designations without first examining and verifying the claims of customary law communities or acknowledging settlements that have historically existed in the area.²⁵

The frequent occurrence of land conflicts that are detrimental to Indigenous Peoples reflects the failure of the current legal framework in protecting their rights. For a century, injustice has continued, and land control (including forests) is often based on kinship or clan relationships. While larger indigenous community units such as Nagari (Minangkabau) or the state (Maluku), have been weakened since the New Order era by the enactment of the Village Government Law 5/1979.²⁶ In addition, what is regulated in Law No. 41 of 1999 concerning forestry rights and individual rights to land and natural resources does not fully align with the provisions in the previous Basic Agrarian Law No. 5 of 1960. According to the Basic Agrarian Law, *ulayat* land is considered property that is not within State Forest Areas. This ownership has long been recognised as traditional rights with government acknowledgment. This contrasts with the concept of Indigenous Forests/*ulayat* land in Law No. 41 of 1999, which still shows a sharp divergence between the government and Indigenous Peoples. Indigenous communities view their customary land as private territory that cannot be unilaterally claimed by the state as State Forest Areas. This position is reinforced by the Ministry of Agrarian Affairs/Head of National Land Agency Regulation No. 5 of 1999, which recognises Customary Land as private territory, while Law No. 41/1999 recognises it as public territory.²⁷

According to Zakaria, this situation persists because of the weak transformative

²³ Interview with I Gede Arya Subhakti. Head of Extension and Community Empowerment Division, South Kalimantan Forestry Service (south Kalimantan, Banjarbaru, Indonesia, 16 August 2023).

²⁴ Julius Sembiring, *Dinamika Pengaturan Dan Permasalahan Tanah Ulayat* (STPN Press 2018) 176-177.

²⁵ Wahyu Nugroho, 'Konstitusionalitas Hak Masyarakat Hukum Adat dalam Mengelola Hutan Adat: Fakta Empiris Legalisasi Perizinan' (2014) 11(1) *Journal Konstitusi* 111.

²⁶ Zakaria (n 21).

²⁷ Martua Sirait and Chip Fay dan A Kusworo, 'Bagaimana Hak-Hak Masyarakat Hukum Adat Dalam Mengelola Sumber Daya Alam Diatur' (2000) Southeast Asia Policy Research Working Paper, No. 24 ICRAF SE-Asia Southeast Asian Regional Research Programme 11.

power of policies caused by the failure of policy makers to understand the empirical facts in the field about what is meant by Indigenous Peoples themselves. Policy makers, experts and even civil society activists who fight for Indigenous Peoples are often trapped in prolonged debates about the definition and requirements for the recognition of indigenous legal communities and/or communities that continue. In addition, many continue to view Indigenous Peoples merely as political entities, a mindset inherited from the colonial era. As a result, it gives birth to a form of legal logic disconnected from the actual socio-anthropological reality, which is called custom.²⁸

2.2 Application of the Social Forestry Concept in Forest Management Involving Indigenous Communities

In order to implement the new paradigm of forestry development, which emphasises that forests should be viewed as a comprehensive resource with a focus on community-based forestry development, one key approach is active community participation.²⁹ So, to provide legal access to indigenous peoples or other communities living within or outside forest areas to engage in forest management, the Government issued a policy through the Regulation of the Minister of Environment and Forestry No. 9 of 2021

on Social Forestry Management. Article 1 number 1 of this regulation states that 'a sustainable forest management system implemented in state forest areas or Forest Rights/Customary Forests implemented by Local Communities or Customary Law Communities as the main actors to improve their welfare, environmental balance and socio-cultural dynamics in the form of Village Forests, Community Forests, Community Plantation Forests, Customary Forests, and Forestry Partnerships'.³⁰

The social forestry management system places local communities at the centre of implemented. Applications for social forestry management can be submitted by the community to the Minister of Environment and Forestry through the Directorate General of Social Forestry or Environmental Partnerships. For village forests and community forests under certain conditions, the Minister of Environment and Forestry can delegate the process of approving social forestry management to the Governor. Of the five types of social forestry, customary forests differ most significantly. Customary forests do not have a fixed management period after receiving management approval from the Minister, while other types of social forestry such as village forests, community forests, community plantation forests are granted 35 year rights, and Forestry partnerships follow the validity period of the Forest Utilisation business permit and forest area use approval.³¹

Given the ongoing struggle for Indigenous Peoples in South Kalimantan to obtain recognition for their Indigenous Forests

²⁸ Noer Fauzi Rachman, 'Masalah Hak Ulayat dalam Kajian dan Kebijakan Pertanahan Nasional' <<https://www.noerfauzirachman.id/2023/05/masalah-hak-ulayat-dalam-kajian-dan.html>>.

²⁹ Azwar Budi and others, 'Strategi Keberlanjutan Pengelolaan Hutan Larangan Adat Kenegerian Rumbio Kabupaten Kampar Propinsi Riau' (2021) 8(1) Jurnal Dinamika Lingkungan Indonesia 57.

³⁰ Anonymous, 'Memahami Perhutanan Sosial dan Cara Membedakannya' (*Sustain*, 20 Mei 2022) <<https://sustain.id/2022/05/20/memahami-perhutanan-sosial-dan-cara-membedakannya/>>.

³¹ *ibid.*

and to manage them independently, the current policy that can be implemented is the Social Forestry Management concept as outlined in the Ministry of Environment and Forestry Regulation No. 9 of 2021. This regulation includes the following schemes: Village Forests, Community Forests, People's Plantation Forests, Forest Partnerships, and Indigenous Forests. Although no Customary Forests from customary law communities have been approved by the Minister of Environment and Forestry, the government's approach to empowering indigenous communities in the context of forest management includes:

- i. Granting permits to manage forest areas in the Social Forestry schemes such as Village Forests, Community Forests, People's Plantation Forests, Forestry Partnerships
- ii. Involving Indigenous Communities in Forest Farmers Groups to facilitate capacity building, institutional development, forestry business development, nature tourism, and other activities located within Indigenous community areas
- iii. Conducting socialisation in collaboration with relevant parties such as the Social Forestry and Environmental Partnership Centre Kalimantan and the Indigenous Peoples Alliance of the Archipelago of South Kalimantan
- iv. Assisting in forest area management to Indigenous Communities³²

The implementation of the social forestry concept is further strengthened by the stipulation of Presidential Regulation Number 28 of 2023, concerning Integrated Planning for the Acceleration of Social Forestry Management, which aims to accelerate the management of Social Forestry, improve community welfare, and conserve forests. The South Kalimantan Provincial Government followed up with the issuing the South Kalimantan Provincial Governor Regulation Number 2 of 2024, concerning Facilities for the Acceleration of Social Forestry Management, which includes regulating facilitation and funding support to implement the acceleration of Social Forestry.

In South Kalimantan, the implementation of social forestry primarily involves the Village Forest scheme. This scheme is favoured as the most feasible means of empowering Indigenous Communities to participate in forest management and utilisation. Under Regulation No. 9 of 2021 on Social Forestry Management, the Village Forest scheme allows access to communities without the need for a Regional Regulation, unlike Indigenous Forests, which require formal legal recognition. Instead, it only requires approval.³³

³² Interview with I Gede Arya Subhakti (n 23).

³³ *ibid.*

Social Forestry in South Kalimantan

**Table 1 Social Forestry Permit
Based on Scheme**

No.	Scheme	Amount	Area (Ha)
1.	Village Forest	63	64.348,00
2.	Community Forestry	51	12.997,00
3.	Community Forest	18	8.299,52
4.	Forestry Partnership	39	6.331.50
Amount		171	91.976,02

There have been no proposals or designations of customary forests in South Kalimantan

**Table 2 Operational Social Forestry
Permit**

No.	Forest Management Unit	Number of Permits	Operational Amount
1.	Tabalong	23	19
2.	Balangan	26	19
3.	Hulu Sungai	26	20
4.	Kayutangi	11	6
5.	Tanah Laut	33	27
6.	Kusan	13	7
7.	Cantung	14	11
8.	PLS	21	11
9.	Sengayam	4	4
Amount		171	124

Source: I Gede Arya Subhakti, Policy and Regulation on Recognition and Protection South Kalimantan Provincial Forestry Office, 2023

The existence of government policies under the Regulation of the Minister of Environment and Forestry Number 9 of 2021 concerning Social Forestry Management, if examined further, reveals that customary forests are still positioned as part of state forests. Customary forests represent substantively rights inherent to Customary Law Communities that are granted and recognised by the state. In the social forestry scheme, the applications for management approval must be submitted to the Ministry of Environment and Forestry. After verification, the management of customary forests can be given to the local customary law community. Furthermore, recognition of customary forests must be supported by Regional Regulations. The inclusion of Customary Forests in the Social Forestry scheme is considered inappropriate because it risks substantially threatening the rights of Customary Law Communities and also has the potential to eliminate the

existence of the customary forests itself as has been decided by the Constitutional Court.³⁴

Regarding the concept of social forestry within the Indigenous Forest scheme, Arizona argues that the government's policy of including customary forests in the social forestry scheme is contrary to the Constitutional Court Decision No. 35/2012. This is because the social forestry scheme defines forests as state forest that are managed with community participation.³⁵ While the Constitutional Court Decision

³⁴ Jasardi Gunawan and S Supriyadi, 'Problematisa Pengelolaan Hutan Adat Melalui Perhutanan Sosial Berdasarkan Peraturan Menteri Lhk No. 9 Tahun 2021' (2023) 9(2) Jurnal Ilmiah Mandala Education (JIME) 1387-1388.

³⁵ Yance Arizona is a lecturer at the Department of Customary Law, Faculty of Law, Gadjah Mada University.

No. 35/2012 explicitly distinguishes customary forests from state forests. The Forestry Law makes government regulations regarding the management of customary forests through Ministerial Regulation Number 32 of 2015, which includes customary forests in the category of rights forests. If the government is truly committed to protecting customary forests, it should make regulations using the omnibus law method, this method is expected to improve the regulations that are spread across several sectoral regulations, not merely making new regulations but improving the existing ones concerning rights to forests.³⁶

Thus, although the government's policy with the social forestry scheme, as regulated in the Regulation of the Minister of Environment and Forestry No. 9 of 2021, provides access for Indigenous Peoples in forest management, it still places customary forests as part of state forests. As such, the Social Forestry scheme falls short of fully implementing the constitutional mandate contained in Article 18B of the 1945 Constitution, a which guarantees recognition and respect for the existence of customary law communities and their traditional rights. This constitutional protection is reaffirmed by Constitutional Court Decision number 35/2012, which states that customary forests are forests located in customary areas, not state forests, and recognises Indigenous Peoples as legal subjects who have rights to forests in their customary areas. Nevertheless, policies related to social forestry can be regarded as a transitional mechanism, to provide opportunities for communities, including Indigenous Law Communities,

to obtain legal access from the state and to participate in the use and management forests. However, this framework falls short of embodying the full concept of customary forests as mandated by the Constitutional Court Decision.

CONCLUSION

The legal protection of Indigenous communities and their rights, as well as for community empowerment in forest management in South Kalimantan Province, has been a challenge since the Constitutional Court Decision No. 35/2012. Many districts still lack Regional Regulations that formally recognise the existence of Indigenous Communities within their areas. To date, only three districts, Hulu Sungai Selatan, Kota Baru, and Tanah Bumbu, have enacted Regional Regulations on the Recognition and Protection of Indigenous Communities. This reflects the local governments' commitment to protecting Indigenous communities and their rights, including their Indigenous Forests. Such regulations can provide an essential legal framework for empowering Indigenous communities in South Kalimantan and serve as a preliminary step toward recognising Indigenous Forests, which requires the prior establishment of a Regional Regulation acknowledging Indigenous Communities.

In South Kalimantan Province, no Indigenous Forests have yet received formal recognition or approval from the Minister of Environment and Forestry. Therefore, to facilitate Indigenous Communities' participation in forest management and empowerment, the government has implemented policies granting forest management permits under the Social Forestry scheme, including Village Forests, Community Forests, People's Plantation Forests, and Forest Partnerships, while

³⁶ Perkumpulan Huma, 'Salah kaprah Hutan Adat' (*Huma*, 31 May 2023) <<https://www.huma.or.id/opini-kami/salah-kaprah-hutan-adat>>.

also involving Indigenous Communities in Forest Farmers' Groups. However, the status of Indigenous Forests within the Social Forestry scheme still lacks approval, as such approval requires the prior establishment of Regional Regulations. This has been a significant obstacle in formalising or recognising Indigenous Forests in South Kalimantan Province. This situation indicates that the government's policies in South Kalimantan have not yet fully realised the spirit of the Constitutional Court Decision No. 35/2012, clearly distinguishes Indigenous Forests from

State Forests. The current social forestry scheme, which includes elements State Forests management, does not reflect this distinction. Therefore, the urgent legal step for local governments across South Kalimantan is to draft and enact Regional Regulations that recognise Indigenous Communities across all districts possessing potential Indigenous Forests areas. Such legal action would lay the groundwork for authentic recognition of Indigenous Forests and bring provincial policy closer to the constitutional mandate affirming the rights and existence of Indigenous People.

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