

Legal Pluralism in Malaysia, Indonesia and Thailand: Preserving Local Wisdom, Community Rights and the Eco-Cultural System

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Introduction

Legal pluralism in recognizing customary laws

Malaysia is a multicultural state. Many native communities in Malaysia continue to be closely associated with particular ancestral domains and have distinct cultures, languages, lifestyles and traditions. The Federal government has powers to pass laws on matters of national importance, but State governments retain powers to pass laws on local governance. The legal system is fundamentally based on English common law traditions, by which there is the law of general application; exceptions are allowed based on personal laws of certain groups according to race and religion. Today, Malaysia's national legal system integrates legislation, common law and customary laws. The system of courts is divided into civil courts, the *syariah* and native courts. These separate courts are a reflection of the multi-ethnic, multi-religious and multicultural nature of Malaysian society. Although the personal laws were initially related to religious and family laws, these exceptions have extended to proprietary right and have evolved as a basis for recognition of fundamental human rights and minority rights.

Following the history of colonial law in Indonesia, there were three dimensions to private law. Firstly, Dutch legal codes concerned with trade, private law, criminal code and commercial law were formally introduced for Europeans and extended to cover "Foreign Orientals," mainly ethnic Chinese. Secondly, different ethnic groups and communities were supposed to be governed according to their own diverse laws and customs. Thirdly, Islamic law was based on authoritative interpretations of the Qur'an and Hadith. Claims of State jurisdiction over community resources in Indonesia began during the colonial era, continued under Sukarno,

and were amplified under Suharto's centralized New Order Development State. Existing native community rights and organization were tolerated and even recognized, as long as they did not conflict with colonial trade. After independence in 1945, a national legal system was set up to replace the colonial one and the State law adopted both *adat* and Islamic law, but in practice has ignored or limited the recognition of *adat* laws. People continue to struggle to get their *adat* laws respected and recognized by the State.

Thailand is a single nation state based on a national code and constitutional law, with enforcement in compliance with the written laws and depending on the discretionary authority of State officials, provided by law. Legislation has been monopolized by an elite group, including lawyers. The creation of legal knowledge is still under the control of the bureaucratic state and law making is a "space" reserved only for the rulers. In the past, these rulers were kings and noblemen; in the dictatorial regime, the army made laws; in a democracy, it has been the House of Representatives in cooperation with the Senate, bureaucrat's lawyers and academics who pass laws. Moreover, in a democratic system, concerned parties from the private sector—if they can form themselves into influential groups—can also play a role in law-making. (Kaiyoorawongs 2005, 72-73).

The existence of customary laws of local communities, particularly customary rights on land and natural resources management, is trumped by State laws. The administration and management of land and natural resources (LNR) is carried out by the central government. Only the financial management of incomes from LNR use, including investment, is distributed to sub-districts in the form of low incomes and royalties. The 1911 Civil and Commercial Code Law, however, recognizes customary rights but in general, the court's decisions

are considered from the written code law rather than from explicit evidence relating to customary rights. People's organizations (PO) and nongovernmental organizations (NGO) started to participate in legislation after the pro-democracy protests of May 1992. The participatory role of PO and NGOs has increased since Article 76 and 170 of the 1997 Constitution recognized these rights. Also, the same principles were written into the 2007 Constitution.

Concept of customary law

Thailand, Indonesia and Malaysia are unique with their diverse eco-cultural systems of tropical rain forests which provide food, medicine and other products from plants and animals. Local peoples' livelihoods are dependent on nature, which creates a social and political structure that is the model for traditional laws designed to create a society that can live in harmony with nature. "Customary law" was created based on the social structures of past agriculture and hunting communities and later adjusted for modern capitalistic societies.

"*Adat*" has become the generic term for describing local customary practice and institutions throughout the Indonesian archipelago. In Malaysia, the word "*adat*" is used to describe the customary law of Orang Asal/indigenous peoples/native peoples. In its most profound meaning, *adat* incorporates the rendering of moral ideals, behavior imperative in relation to "property," and social-religious visions of a necessary correspondence between cosmic and human relationships.

Tenure rights are analyzed through a bundle of rights that comprise the right of access, withdrawal, management, exclusion, and alienation. The entire bundle of rights is always the optimal outcome for all communities' tenure regimes. Native peoples or local peoples generally regulate their internal customary legal and social matters, including any reforms to these, or are prevented from doing so. Many customary laws are not ancient, nor are all customary laws administered by chiefs. Customary law may be distinguished

from statutory law by being more closely attached to a people's culture.

Therefore customary laws are not necessarily of ancient origin, or from a totally oral tradition, and are generally adopted over time. The important thing is that these laws are accepted by the community, whatever their source. Customs, or customary rules of law, are not formally recognized until settled by a legal decision, and the burden of proving the existence and validity of the custom is put on the person invoking it.

The term "customary law" in Thailand was recognized in the Three Stars Law System—*Tra Sam Duang*—since the feudal era of King Rama I more than 200 years ago. Later it was adopted into Article 4 of the 1911 Civil and Commercial Code law. Its enforcement and implementation was frozen until the people's movement and the new Constitution of 1997, due to the limited knowledge of customary law among Thai lawyers and judges who had never studied the subject in law school.

The people's movement in 1997 campaigned for a "Green Constitution" that implemented human rights, community rights and transparent investigation of government and politicians through people's participation and independent organizations.

The grassroots movement for community forests, which had been campaigning for a Community Forestry Bill, proposed the concept of "community rights" to the Constitution Drafting Assembly (CDA). Finally, this was enacted in Articles 46 and 56 of the 1997 Constitution, and later, recognized in Articles 66 and 67 of the 2007 Constitution. These community rights, however, merely guarantee the right of a community to participate with the State in the management, preservation, and exploitation of natural resources and areas of biodiversity, including using local wisdom to ensure sustainable livelihoods. Community rights are implied to be the right of public participation, but not the right of territorial ownership in the principle of self-determination, such as are recognized in the United Nations Declaration on

the Rights of Indigenous People (UNDRIP).

This research focuses on the analysis of the concept and term “customary law” or *adat*, in relation to the aforementioned tenure rights, in the three countries. It also focuses on adduced community rights in the context of Thailand.

The Context of native peoples and local peoples

“Indigenous peoples/IP” or “Native peoples/NP” is the generic term for the subjects of collective rights recognized by the UNDRIP, which was adopted by the UN General Assembly in 2007. The UNDRIP sets the minimum standard for the protection of collective rights for IP, and provides the necessary measures to address particular situations in rectifying historical injustices and discrimination committed against them. IP are defined as groups with their own distinct languages, cultures, customary laws, and social and political institutions that are very different from those of the dominant ethno-linguistic groups in their countries. (Asia Indigenous People’s Pact/AIPP et al. 2011, 2-3)

AIPP (AIPP et al. 2011, 4) recently reported the estimated IP populations in Indonesia, Malaysia and Thailand as follows:

- **Indonesia:** 50-70 million, or 20-29 percent of the total population. There are more than 700 indigenous groups but the government recognizes only 365 ethnics and sub-ethnics as “Isolated Adat Communities”;
- **Malaysia:** 3.4 million, or 12 percent of the total population with 97 indigenous groups;
- **Thailand:** 1.1 million, or 1.5 percent of the total population, with 34 indigenous groups.

In Malaysia, “Orang Asal” is used to describe IP in Sabah and Sarawak States, while “Orang Asli” or “Aboriginal” is used in Peninsular Malaysia. In Indonesia, the term “Adat people” or traditional

communities/TC is used. In Thailand, the term “Ethnic minorities” is used, which can be interpreted to designate them as apart from the majority, and to label them as second-class citizens in the eyes of the State. For the Thailand-based research in this paper, the terms “Local communities (LC)” or “Community rights” will be used for any Thai group with its own culture, language and customary laws. In many cases, the present generation does not know about customary laws. The term LC is a strategic term used to protect and recover customary laws and tenure rights, leading to the self-determination and collective rights recognized by the UNDRIP.

Objectives and method of research

The research adopts an interdisciplinary legal pluralism approach to the analyses of each country’s political, social and legal context and to compare them. It is presented in three dimensions:

- The concept and content of State laws related to land and forest conflicts that impact on NP, TC and LC, eco-cultural systems, and local wisdom,
- Legal cases involving NP rights protection and LC in relation to land and natural resources/LNR,
- Lawmaking in the three countries to preserve local wisdom, community rights and the eco-cultural system.

The first information-gathering method was collecting and analyzing research papers and books on the topics. The second was selecting example cases from research papers, including interviewing people who are familiar with the cases.

The context of Orang Asal in Malay Peninsula and in Sabah State is analyzed by interviewing NGOs, legal academics, lawyers and the Kadasan indigenous peoples in Sabah.

In Indonesia, the Dayak and Minangkabau peoples are studied in order to understand the relationship and conflicts between customary laws and state laws. Members of the Pelaik Keruap

community in Melawi District, West Kalimantan were interviewed. The Minangkabau case is analyzed through research papers and interviews with an academic and a lawyer who work closely with this tribe.

In the case of Thailand, all information is collected and analyzed from research papers and books.

Results and discussion

Malaysia

Native peoples in Malaysia are legally divided into two main groups: aborigines and natives. The Orang Asli's legal status and customary rights, including proprietary rights on LNR, are recognized in the Aboriginal People's Act (Act 134). NP in Sabah and Sarawak, on the other hand, are defined as "natives" by ancestry or "race"³. The term "customary law" is used interchangeably with *adat* or "native law and custom" under Article 160 (2) of the Federal Constitution. Not only are customary laws defined as part of the law under Art 160(2), Art 150 also provides constitutional protection for native law and customs as part of the basic structure of the Federal Constitution. Clause 6A of Art 150, however, states that this power does not extend to Malay *adat* or to any matter of native law and customs in the States of Sabah and Sarawak.

Through history until in the present day, native communities throughout Malaysia have faced enormous challenges to have their customary rights to land recognized. Although there are provisions in State and Federal laws that acknowledge the existence of *adat* and native land rights, these have not consistently translated into secure tenure.

1) Orang Asli in Peninsular Malaysia and land rights

The Aboriginal People Act 1954 (Act 134 and all amendments up to January 1, 2006) recognize Orang Asli and demarcates and classifies aboriginal areas and aboriginal reserves. These areas predominantly or exclusively inhabited by

aborigines are regulated and controlled by the Department of Orang Asli Affairs (the Jabatan Hal Ehwal Orang Asli/JHEOA) which is under the Malaysian Ministry of Rural Development.

The rights of occupancy may be granted to an individual aborigine, a family of aborigines, or any member of aboriginal community, but the rights are subject to such conditions as may be imposed by the grant of the Director General of JHEOA (Section 8).

The prohibited provisions in the law are that no individual can transfer, lease, charge, sell, convey, assign, mortgage or otherwise dispose of any land without the consent of the Director General, who may also revoke wholly or in part, or change, any declaration of an aboriginal area (Section 9). The usufruct right is prohibited in relation to planting of specified product, felling of jungle, and taking forest produce, wild birds and animals (Section 19). If land in an aboriginal reserve area is revoked, JHEOA may grant compensation payment to a person (Section 12). The Minister of Rural Development can make regulations for aboriginal settlements within aboriginal areas and reserves, including controlling entry into these areas.

The government established the JHEOA to be the mandated body according to the Federal Constitution and the Aboriginal Peoples Act for taking care of and promoting the rights and the welfare of the Orang Asli. The government and the JHEOA introduced an important policy document entitled *Statement of Policy Regarding the Administration of the Orang Asli of Peninsula Malaysia* (hereinafter called the "1961 Policy Statement") for promoting the rights of Orang Asli in "broad principles" such as protection of institutions, customs, mode of life, person, property and labor of the aborigine people. The social, economic, and cultural development of aborigines are promoted with the respecting of land usage and land rights, forest conversion, settling sufficient agriculture of food crops and a dependable cash crop, providing education and health service. Orang Asli will not be moved from their traditional areas without their full consent.

Nevertheless, Colin Nicholas (in a study commissioned by SUHAKAM 2010, 6) mentioned that the provisions of the Aboriginal Peoples Act have been narrowly interpreted and applied, invariably in favor of the authorities' interests. All this in spite of the preamble of the Aboriginal Peoples Act's specifically stating that this was to be, "an Act to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia".

In practice, the Federal Constitution and the Aboriginal Peoples Act have been interpreted and enforced by administrators and the authorities in ways that deny Orang Asli rights, in cases relating to land seizures and natural resources..

Nevertheless, the precedent-setting judgments of the courts have far been proactive and clear as far as the recognition of Orang Asli rights. The rights being imposed in the Aboriginal Peoples Act have been interpreted in compliance with the Federal Constitution. (Colin Nicholas, et al 8 - 9)

In 1997, in the case of *Adong bin Kuwau & Ors v State Government of Johor*, the Johor High Court decided that compensation be paid for the loss of 53,273 acres of ancestral lands to 52 Jakuns after the State government constructed a dam to supply water to both Johor and Singapore and took forested land and leased it to the Public Utilities Board of Singapore. The justice concluded that the Jakuns had proprietary rights over their lands, even without holding title for the lands. They had the right to use it for their subsistence and other needs.

The Court of Appeal in the case of *Sagong Tasi & 6 Ors v Kerajaan Negeri Selangor & 3 Ors* in 2005 acknowledged Orang Asli's proprietary interest in lands that should be treated as titled lands and they therefore acquired compensation under the Land Acquisition Act 1960. The Sagong Tasi case involved 23 family heads from Bukit Tampoi in Dengkil, Selangor who had 38 acres of their lands seized for the construction of the Nilai-Banting highway linking with the new Kuala Lumpur International Airport in 1995. Some of their crops

and dwellings were destroyed, and while they were paid a nominal amount for these, there was no compensation for the land. The authorities maintained that the Orang Asli were mere tenants on State land and as such were not entitled to compensation under the Land Acquisition Act 1960.

2) Native customary land rights in Sabah

Native people, (Orang Asal) in Sabah are recognized as citizens if they were born while their father was domiciled in Sabah and their parents are or were members of a people indigenous to Sabah. Native land rights are dependent on whether a person or his/her forefathers fulfilled certain requirements under the laws prevailing at the time, which rights to the land were said to have been created. However, there is no document of title to show ownership, but rather the proprietary interest in the land is protected by Article 13 of the Federal Constitution.

The definition of NCR in the Land Ordinance 1968 covers land possessed by customary tenure, land planted with fruit trees, isolated fruit trees, or other plants of economic value, and grazing land stocked with a sufficient number of cattle. Land use has been cultivated or built on within three years, burial grounds or shrines, and the usual rights of way for men or animals from rivers, roads, or houses are included. Such rights imply rights of financial compensation for acquisition or in the case of claims of land grants.

The meaning of "customary tenure" is the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years. The holder then retains a permanent heritable and transferable right of use and occupancy. Land holders must be responsible for planting, working and cultivating on lands as well as the liability to give his labor when required by the Collector or Native Chief or Headman for the common benefit of his neighbors. Native customary rights to land provided in the Land Ordinance are classified as land utilization for agriculture and common land use for the purpose of community such as dams, water courses,

streams, burial ground, religious place etc. The condition is that occupation and upkeep of the land or crops are consecutive. Land under shifting cultivation is not included here.

The process of land title application for Native Title involves a requirement to submit the application to the Assistant Collection of Land Revenue (ACLR) through the District Land and Survey Office. In practice, prior to issuing titles, the State must first survey and map those lands. Sabah has identified lack of funding as the primary reason it has failed to survey native customary land and issue titles. When an applicant for State land has been approved, cultivation must be commenced within six months and the whole area shall be brought into cultivation within three years. In the event of failure to comply with the terms of this subsection there shall be reserved to the Government the right to re-enter the land in question and to resume such portions thereof as are not then under cultivation. (Land Ordinance 1968.)

In practical terms, NCR in Sabah have conflicted with the coexisting open system of land ownership, according to which any individual, whether a Sabah resident or foreigner, is able to apply for land titles. Although the Sabah Land Ordinance 1968 gives priority to applicants claiming customary rights, their applications are often ignored and the same land is applied for by government authorities, cooperatives, international companies and individual entrepreneurs. Furthermore, native customary rights do not establish collective ownership and ignore the fallow period of five to ten years, which is intrinsic to the shifting cultivation system.

Therefore, NP have often been arrested and charged in the courts. At this point they try to protect their NCR in legal cases, both as the accused and as prosecutors. Nevertheless, the precedents and interpretations of court decisions have often been positive for NP rights. The example of the case of *Andawan Bin Ansapi & 5 or vs PP* in 2010 indicated that the judge listened to the evidence that explicitly proved that burial grounds found in the vicinity of the land belonged to their ancestors and that cropcultivation had continued

by ancestors sincebefore the Forest Reserve was introduced in 1984. *Andawan & 5* or were arrested and charged in court because of encroaching on land they had cultivated within the Kuala Tomani Forest Reserve, without the authority to occupy the land under the Forest Enactment.

3) Protecting native customary rights in Malaysia is based on the Judge's decision.

Native peoples in Malaysia have long lived on the peninsula and in the States in Borneo. They are subject to the differing laws of each State and also experience varying living conditions. In Peninsular Malaysia, the Aboriginal Peoples Act 1954 establishes the rights of the Orang Asli on the lands and reserves that they have traditionally occupied. In Sabah, the law recognizes that native peoples have native customary rights over the lands they have been occupying and cultivating. Such rights do not amount to ownership, and are considered to be inferior to the rights of the State, hence the State can restrict or extinguish them.

The NCR in Malaysia have been acknowledged by judge's decisions rather than law enforcement, interpreting native peoples' rights according to the Federal Constitution and Acts. The cases of *Adong and Andawan* are precedents, as the common law recognizes a form of native title which reflects the entitlement of the aboriginal people and naïve people, in accordance with their laws and customs, to their traditional lands.

The decision in the *Adong* case was influenced by the persuasive authority of the Canadian case of *Calder v. A-G of British Columbia* [1973] 34 DLR (3d) 145 and the Australian cases of *Mabo & Ors v. State of Queensland & Anor* [1986] 64 ALR 1, *Mabo v. Queensland* [1991-1992] 175 CLR 1 and *Pareroultja & Ors v. Tickner & Ors* [1993] 117 ALR 206. (*Sagong Tasi* case, High Court Malaya, Civil Suit No: MTI-21-314-1996, 12 APRIL 2002, 23).

The courts in Malaysia have allowed oral evidence as hearsay evidence to be adduced to prove customary practices in many landmark cases. In the case of *Sagong Tasi*, the judge ruled that the oral

histories of the Orang Asli relating to aboriginal societies and the pre-contact practices, customs and traditions on their relationship with the land be admitted as evidence, subject to the terms of the *Evidence Act* 1950, s 32 (d) and (e).

NGOs and the Orang Asal movement use the strategy of filing cases to the court to protect customary land and laws, based on oral and written evidences and customary territories recognized by precedent cases of common law in Australia and Canada. They are also drafting a new law to recognize self-determination rights, which would be consistent with international agreement human rights conventions including UNDRIP and the International Labor Organization (ILO) Convention 169 on Indigenous and Tribal Peoples. The Orang Asal link the principle of self-determination with the right to the land ownership, as land provides the basis for the existence of their populations.

Indonesia

1) *Adat* laws recognized by the Indonesian Constitution

Self-governing territories have been recognized since the era of Dutch sovereignty, and allowed to maintain their systems of customary government and rights. “Autonomous communities” were local traditional political entities with the so-called “right of origin” (*bak asal-usul*) in directly governed territories. Although deeply flawed by colonial manipulation of local leadership and decision-making, the theory behind the native courts was to practice legal pluralism and to respect the differences in local customary law (Hooker 1975, 251–255).

The diversity of *adat* cultures was understood by nationalist leaders to be an integral part of the new unique and legitimating nation of Indonesia. Support for this diversity was believed to strengthen national unity. During the constitutional debates of the 1940s and 1950s, the *adat* law scholar Soepomo argued that sovereignty should be in the hands of the Indonesian people (see Article 1, Section 2 of the Constitution). Soepomo

believed in the unity of individuals and society under *adat* (Nasution 1992). The 1945 Constitution of the Republic of Indonesia, fourth amendment of 2002, Article 18B⁴ recognizes and respects traditional communities along with their traditional customary rights, but there are two conditions - they still remain in existence as long as in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and they shall be regulated by law.

2) *Adat* land is regulated by provisions

The 1945 Constitution of Indonesia aimed to create a unified nation and used the law as an instrument to control land and natural resources in the single State. “National interest” was of a higher value than *adat*. Although Article 18 in the 1945 Constitution of the Republic of Indonesia implicitly guarantees legal entitlement by local people to participate meaningfully in managing natural resources that they directly rely on for their lives and livelihoods, the ongoing unconstitutional failure to recognize community-based *adat* property rights is a result of past crimes in which community resources were seized without due process. This must be rectified.

This State-based paradigm reached its pinnacle in the early 1980s when the New Order State classified over 75 percent of the total land area as State Forest, including over 90 percent of the Outer Islands. The approach ignored pre-existing local rights to millions of hectares of land, forests, coastlines and other natural resources. (Fay and Sirait 2001). The largest land seizure in history, the State-regulated village governance structure claimed authority as the only legitimate manager of all resources in these areas of local communities and has used this authority to prioritize economic development.

The establishment of agrarian law reaffirmed (No.5/1960) the instrument of controlling land and natural resources. It stated that the earth, water and airspace, including natural resources contained therein are controlled by the State. The law was designed to centralizing authority to the

State to regulate and administer the allocation, use, supply, and maintenance of the earth, water, and airspace, including regulating legal relationships between people as well as legal acts concerning such lands and natural resources.

Article 5 of the new Forestry Law (No.41/1999) states that the Indonesian State will only recognize community rights to forest land if it can be proven that the *adat* community relies on the forest for subsistence, religion and social activities based on *adat* rule and also that the *adat* community forest area has clear boundaries, approved and acknowledged by their neighbors. The *adat* community can only obtain rights to use and manage *adat* land or forest if the State acknowledges their existence and they are not able to own land. The State had the authority to divide forest areas into several land use categories with different policy objectives, such as timber production and conversion of the forest area into agricultural land.

From field work in West Sumatra, I learned that knowledge of the boundaries of customary (*adat*) land are transferred through oral tradition from generation to generation. Villagers did not know the exact boundary of State land until a coal mining company claimed that land to be mined was State land because of the absence of maps or land titles. Legally the *adat* land had become forest land, according to the Forestry Law (No.41/1999). In addition, conflicts among villages over where boundaries lie resulted in land automatically classified as forest area while the map of State land is still ambiguous.

Another case, that of the Minangkabau tribe who live in Malalo village, Tanah Datar District, West Sumatra, showed the unity of villagers insisting on the right of *adat* law and rejection of State law and land certifications. They were struggling with mapping the boundary of a protected area.

In the case of another village in Minangkabau, the Simpang Tanjung Nam Ampek village, Solok District, West Sumatra, the government claimed that disputed land was State land because there was neither land certification nor explicit boundaries

for the *ulayat* (communal land rights). In this case, the police, *nagari* (local village governance institutions) leader and some *adat* leaders agreed with an iron mining project. Here, 1,000 hectares of *ulayat* land is now being mined, but villages are still against the mining exploration of further lands of the *suku* (members of the tribe).

These example cases show that local people are assumed to be absent from valuable natural resource landscapes. When landscapes are mapped, they are interpreted to be State land. Local people are assumed to be undifferentiated destroyers of nature who are illegal occupants and are labeled “squatters” or “poachers”. Further, local people do not participate in natural resources management for generations because they must be removed to “protect” natural resources.

2) The overcoming of traditional peoples' land rights by the Constitutional Court

In March 2012, *Aliansi Masyarakat Adat Nusantara/AMAN* plus representatives of two native communities—the Kuntu and the Kasepuhan Cisu communities—applied for a judicial review of Forestry Law No 41/1999, parts of which, they argued, were unconstitutional. They asked for several changes to the law, some of which were granted by the Constitutional Court, in its decision No.35/PUU-X/2012, issued on May 16th. The Constitutional Court (according to the Constitutional Court Ruling 35/PUU-X/2012, 16th May 2013 (Judicial Review of articles in Forestry Law 41/1999)) agreed that Article 1 Paragraph six of the Forestry law 41/1999 was inconsistent with the Constitution and the word “State” in the same article did not have binding legal force. Therefore Article 1, point 6, of Law No 41 of 1999 on Forestry was to read as follows “*customary forest is a forest located in indigenous people area*”.

In addition, Article 4 paragraph (3) and Article 5 paragraph (1) of the above mentioned law concerning forestry were inconsistent with the 1945 Constitution in so far as they were not construed as follows; “*forest concession by the State shall keep taking into account the rights*

of indigenous peoples, in so far as they are still in existence and in accordance with societal development and principles of the Unitary State of the Republic of Indonesia, and shall be regulate by law” and “State forest as referred to in paragraph (1) point a, does not include customary forest”.

It is difficult for local people to map the boundary of *adat* land by themselves. The State must nominate a working group and an agency to implement and make a consensus of *adat* land boundaries, and also provide a budget and the technology needed for mapping.

The State should enact a law to recognize *adat* laws of TC, such as in the case of *Minangabau*. NGOs, researchers and academics should propose tenure policies and laws based on the principles of human rights, forest sustainability, plurality of just laws and cultures, transparency, accountability and cooperation among parties. The measurable elements comprise improvement in policies and the increased participative implementation of forest zones gazettement acceptable to all parties, and the ability to establish strong legitimacy to the government, community and business groups... (Epistema Institute et al. 2011, 4-5).

Thailand

1. Community Rights under the Thai Constitution

The Thai government’s goals and direction for forest protection and conservation were made clearer with the enactment of the Wildlife Protection and Preservation Act of 1960 and the National Park Act of 1961. These regulations state that no persons will be allowed to reside, farm, or gather forest products in declared State Protected Forest zones. During the time these policies were first implemented (1985 A.D.), Thailand had 40 percent forest cover. In 2009, Thailand had 418 Protected Forest Zones representing a total area of 102,636 km² (about 20 percent of total land area in Thailand), which are subdivided into 6 categories (Thailand Development Research Institute (TDRI), 2012):

1. National Parks
2. Forest Parks
3. Wildlife Sanctuaries
4. Non-hunting Zones
5. Botanical Gardens
6. Arboretums

The establishment of these Protected Forest Zones overlapped with communities who had been previously living and utilizing these lands. Furthermore, as populations increased, new land was sought out and villagers began to encroach on official Protected Forest Zones more and more often, until the Forestry Department said that they could not prevent this from happening. According to the Forestry Land Management Office (2008), 33.44 percent of all the land in Thailand (513,115 km²) is classified as “Forests” and under their jurisdiction — an area much too large for their department to effectively administer and protect.

A legal land title for individuals was first implemented during the reign of King Rama V. Prior to this, there were no formal systems for land tenure. However, as communities and populations grew, there were increasing disputes over lands. To solve this problem, Thailand began to issue land registration documents under the “Torrens system” named after the Australian Sir Robert Torrens. After this time, land could be formally registered as “*chanote*” and other forms of land titles emerged as outlined previously.

The effect of this system of formal land titling was that persons who had such documents would not be forced to move off their land, or at least would receive fair compensation if evicted, whereas those without land titles would be subject to eviction without compensation at any time. The reason this could occur was that any land that was not titled belonged to the Thai State, as per the definition of “Forest Land” previously explained in this chapter. Furthermore, in Section 2 of the Land Act of 1954, it is declared that “land that is not claimed by anyone belongs to the State”.

During the time when the Thai government began to develop the country from an agricultural-based

economic system to one with more emphasis on industry and tourism, many ethnic people began to be forced off their forest lands and/or forced to change their traditional ways of life. There was no legal recourse for these vulnerable groups, since the State did not recognize any community land and natural resource management systems that these communities may have utilized.

The 1997 Constitution was the first constitution that recognized community rights under Sections 46 and 56, due to the advocacy efforts of the Community Forest Networks with the Constitutional Drafting Assembly/CDA. The definitions for these Sections were based on the Community Forest models developed by ethnic Karen communities living in mountain areas in traditional ways. "Community" was classified into three types: 1) communities, 2) local communities, and 3) traditional local communities. The 1997 Constitution goes on to state that a legislative act must be enacted to ensure community rights are recognized by the State.

Ten years later, Sections 66 and 67 of the 2007 Constitution took out the wording about "requiring a legislative act" to ensure community rights, but all the other wording remained unchanged from the 1997 Constitution. The reason for the omission was that the courts ruled that they would uphold community rights even without a direct legislative act to guide them.

However, despite some legal protections from the court system, community and natural resource management rights were not recognized by law enforcement agencies and government authorities. Many court decisions have been in favor of state officials and against local community members in both civil and criminal cases, resulting in fines for villagers of over one million baht.

In summary, the 2007 Thai Constitution guarantees community rights for any community in Thailand, regardless of their ethnic identity or citizenship status. It also provides this right for communities living in Protected Forest Zones, regardless of whether they residing before or

after the area had been proclaimed a Protected Forest Zone. However, they are still many legal technicalities and limitations that have limited the use of the 2007 Constitution to defend community rights, and each case must be considered and debated individually until more clear legislation has been enacted.

2. Legal Problems in the attainment of land and forest tenure rights

Thailand has a large number of land management rules and regulations. The Land Code of 1954 provides land ownership rights for individuals and public lands. There are five Acts which relate to forested lands: the Forest Act of 1941, the National Park Act of 1961, the Wildlife Protection Act of 1992, the Forest Reserve Act of 1964, and the Forest Plantation Act of 1992.

The process for declaring and establishing a new Protected Forest Zone appears to provide affected communities with an appeal and objection process according to the written regulations, but in practice these options are not allowed for. The final deliberation process for establishment of Protected Forest Zones is the duty of a committee consisting of state officials. If the committee has agreed that a new zone should be established, they will contact the local administrative officials (village headman, district chief, etc.) who then will declare that the new zone will officially exist in two to three months. During that interval, the communities have no opportunity to express their opinions to the state officials in an official hearing. The community members' only option is to file an appeal. The most problematic part of this establishment process is that they are no detailed ground surveys done when establishing zone boundaries; instead the state officials use satellite images, which often do not accurately identify community lands and farming areas. This process often leads to disputes between the public and state officials.

In order to solve these disputes, a Cabinet Decree was issued to address the grievances of forest community members, in accordance with existing

laws. Since this decree was issued by the Prime Minister's Cabinet, it can be changed or disregarded with each new cabinet that is appointed by a newly elected government. Currently, the government uses the Cabinet Decree of June 30, 1998, which states that investigations into land disputes must rely primarily on State records to determine rightful ownership, of which local testimonies are one component. Therefore, local communities are not allowed to directly participate in these investigations, but are only viewed as obstacles or problems for the investigation process.

The investigative process for land disputes in forest areas, therefore, is not transparent and does not reflect the reality on the ground. Currently, there are a huge number of cases of communities residing in Protected Forest Zones, who are using these lands to live on and grow crops. There is no doubt that the State's act of establishing Protected Forest Zones in areas where communities have already existed has led to great conflict between community members and state officials. Furthermore, if the State attempts to solve this issue by forcing communities to be evicted from these lands, conflicts will only escalate and intensify.

In conclusion, the existing land laws and regulations in Thailand only recognize individual land ownership, as well as provide full authority for Forestry officials to evict communities living in their zones. Meanwhile, there are no opportunities for communal land ownership models, even though these models have been implemented successfully to preserve local culture, traditions, and ecosystems in forest and agricultural communities. Government policies have only served to punish persons for living and using forest areas, without addressing the actual roots of this problem. A review of legal cases related to land rights further demonstrates the growing discord between government officials and villagers, as well as between private and communal values.

3. Peoples' Movements

In 2013, The People's Movement for a Just Society (P-Move), which is a network of small-scale peasants and poor people affected by state policies and

development projects drafted the following four laws related to land and natural resource management that are aimed at improving current policies and regulations:

- The Community Land and Natural Resource Management Act has been drafted in order to provide communal land rights for communities that have been located in State-owned areas prior to June 11, 2007. Communities would be able to apply for this right and then have a governmental committee survey their case for consideration for approval.
- The Progressive Land Tax Act has been drafted in order to discourage land speculation and encourage land owners to make use of their resources. The revenue collected from such a tax would be split 50-50 between a National Land Bank and local government administrative agencies.
- The Land Bank Act has been drafted to provide financial assistance to landless or indebted farmers, as well as to provide assistance for agricultural infrastructure development to improve farming efficiency. The Land Bank would receive funds from the Progressive Land Tax to finance its activities.
- The Justice Fund Act has been drafted to offer financial assistance for poor persons who are involved with legal cases. It would be used to assist with payment of fines and legal costs in criminal and civil court cases when the defendant does not have enough money to pay for these costs. This Act would be in line with the Victims Compensation Act of 2001.

The Community Land and Natural Resource Management Act is designed to solve the problems that face communities living on disputed State lands. Under this proposal, communities would be responsible for maintaining their land and natural resources and ensuring that no laws are broken. Furthermore, community members would not be able to sell individual land plots to outsiders without community approval. Communities would only be able to utilize this arrangement after a formal survey process was completed by government officials, complete with detailed maps that clearly designate land boundaries and regulations.

This proposed law does not recognize the rights of indigenous inhabitants nor change the current procedure for communities residing in and utilizing State lands. Instead it still shows mistrust of the persons residing in these lands. Therefore, these proposed laws do not measure up to the Malaysian and Indonesian laws with regard to acceptance of native person's cultural rights.

Conclusions and Recommendations

The tenure regimes, local wisdom and eco-cultural systems of Orang Asal in Malaysia, traditional communities in Indonesia and local communities in Thailand have been affected by economic development policies which lead to transnational mega projects, including hydro-power dams, gas and oil drilling, mining, logging, transportation, rubber and oil palm plantation and large-scale agri-business schemes over the past decades. During the 21st century, the ASEAN Economic Community (AEC) aims for economic integration envisioned by ASEAN leaders for the year 2015: an "open, outward-looking, inclusive, and market-driven economy". The promotion of a single market fully integrated into the global economy means promoting a market-driven economy based on free trade. However, the free flow of goods, services and capital (investment) will be detrimental to poorer, smaller economies. The AEC Blueprint only provides protection for end-users, i.e. consumers, but not producers.

In fact, free trade is leading to increasing gaps between rich and poor, and further marginalization of IP and local peoples. This type of trade also gives no recognition to practices of self-sufficiency and sustainable resource management systems of local communities.

The tension between state laws and customary laws are obvious and increasingly taking place. LNR laws are especially causing problems when land is privatized, leading to high values of real estate, infrastructure and high carbon credit costs.

The government policies of the three countries promote natural resource exploitation, via complicated

processes of State laws and overlapping of several laws that have not led to recognition of customary laws for LNR.

LNR are a fundamental historic theme in law and philosophy. Under some legal systems, property models are purported to be universal and this has led to struggles over property rights. Early on in this region, LNR and PR were exported to colonial countries. With social evolution, they have become property of the State. Under the influence of modernization and globalization, the State recognizes property rights of individual ownership, including intellectual property rights that are based on Western legal categories.

Western concepts are based largely on State-created and protected private individual rights, or on ambiguous socialist concepts that theoretically vest the State with ownership of all natural resources, ostensibly to best promote the public interest. On the other hand, contemporary States have a plurality of property ideologies and legal institutions, often rooted in different sources of legitimacy, including local or traditional law, the official legal system of the State, international and transnational law, and religious legal orders.

The report of the Rights and Resources Initiative (2012, 10-11) demonstrates that the laws of most developing countries do not recognize traditional ownership or reflect the mechanisms and institutions that rural populations use on a day-to-day basis to manage natural resources. In many cases, local tenure systems, broadly labeled in the literature as "customary" or "traditional," were created over long periods (often generations) by local users of rural and forest resources. Local practices and institutions, which can be influenced by State policies, are often distinct from State policies and allocate resources and rights very differently than do statutory systems.

In many countries, customary tenure systems remain the most relevant and the most legitimate tenure systems for rural and forest communities. Statutory tenure systems, even those that recognize local rights to land, are often inaccessible to groups

due to high access costs, elite capture, extensive bureaucratic barriers, and even the mere fact that statutory tenure arrangements do not reflect local social values or land use practices.

People's movements within these countries have engaged in a long historical struggle, which eventually led to the development of State laws establishing environmental management standards, human rights protection in line with international laws and recognition of community rights and native peoples' rights to the use and management of natural resources and the environment.

The formal legal status of customary laws in Malaysia, Indonesia and Thailand are acknowledged by the written Constitution, but have failed to be enforced by State officials. Within the federal system of Malaysia, autonomous provinces or States contain the highest degree of accommodation and protection of indigenous peoples' customary laws. The Orang Asli in peninsular Malaysia are examples of native peoples within formally unitary states with a reasonably high level of State recognition and protection of their custom-oriented legal systems, at least with regard to their rights over lands and other natural resources. For Thailand and Indonesia, the tenure rights are recognized by the Constitution but in national laws, they are not protected.

Although Thailand has never been colonized - in contrast to Malaysia and Indonesia - the State laws of Thailand were enacted and adapted to be consistent with colonial laws from France, Japan and Germany to protect Thailand's sovereignty. The concept of the Western code of law has dominated regarding LNR and the environment.

Under this model of legal pluralism, the State defines the parameters that mark the territories of legal systems within its domain, such as customary and Islamic law. Community-based property rights are often included but are not limited to common property. They can also encompass various kinds of individual rights and kinship rights, such as inherited rights, rights to land, natural resources, intellectual property, and so forth.

In Asian countries, particularly Malaysia and Indonesia, customary law is recognized as a source of rights in the national constitutions. In Sabah and Sarawak, the Bornean States of Malaysia, there are legal and administrative provisions for the exercise of customary law through native courts. The federal state administration recognizes the independence of the State to own executive and legislative powers since the history of British colonization. The States' majority populations are NP.

In Indonesia, customary laws of TC and Islamic laws have been in existence since Dutch colonization until now. The Constitution and State laws recognize traditional law and Islamic law just as in Malaysia, which opens space for NP to apply customary laws for protecting their territories. Customary law enforcement depends on a strong organization and movement to negotiate and balance executive and legislation powers.

The code law system in Thailand since the first law reform in the regime of King Rama V has long trumped customary laws of local peoples. The 1997 and 2007 Constitution initiated the concept of legal pluralism in the symbolic use of "community rights" as the root for creating customary laws in Thai society.

Despite the fact that customary law exists in Malaysia and Indonesia, implementation on the ground has remained poor. The problem points partly to weak actualization or enforcement and lack of respect for customary laws. As long as customary law is made subservient to positive law and is dependent on it or its enforcement, it is unlikely that a harmonious coexistence of both legal systems can be achieved.

In Sabah, Sarawak and Indonesia, customary practices are also recognized as a basis for land rights (though these provisions are not implemented effectively or widely). Moreover where common law traditions are observed such as in Malaysia, the courts have recognized the existence of native title and aboriginal rights. In various ways throughout

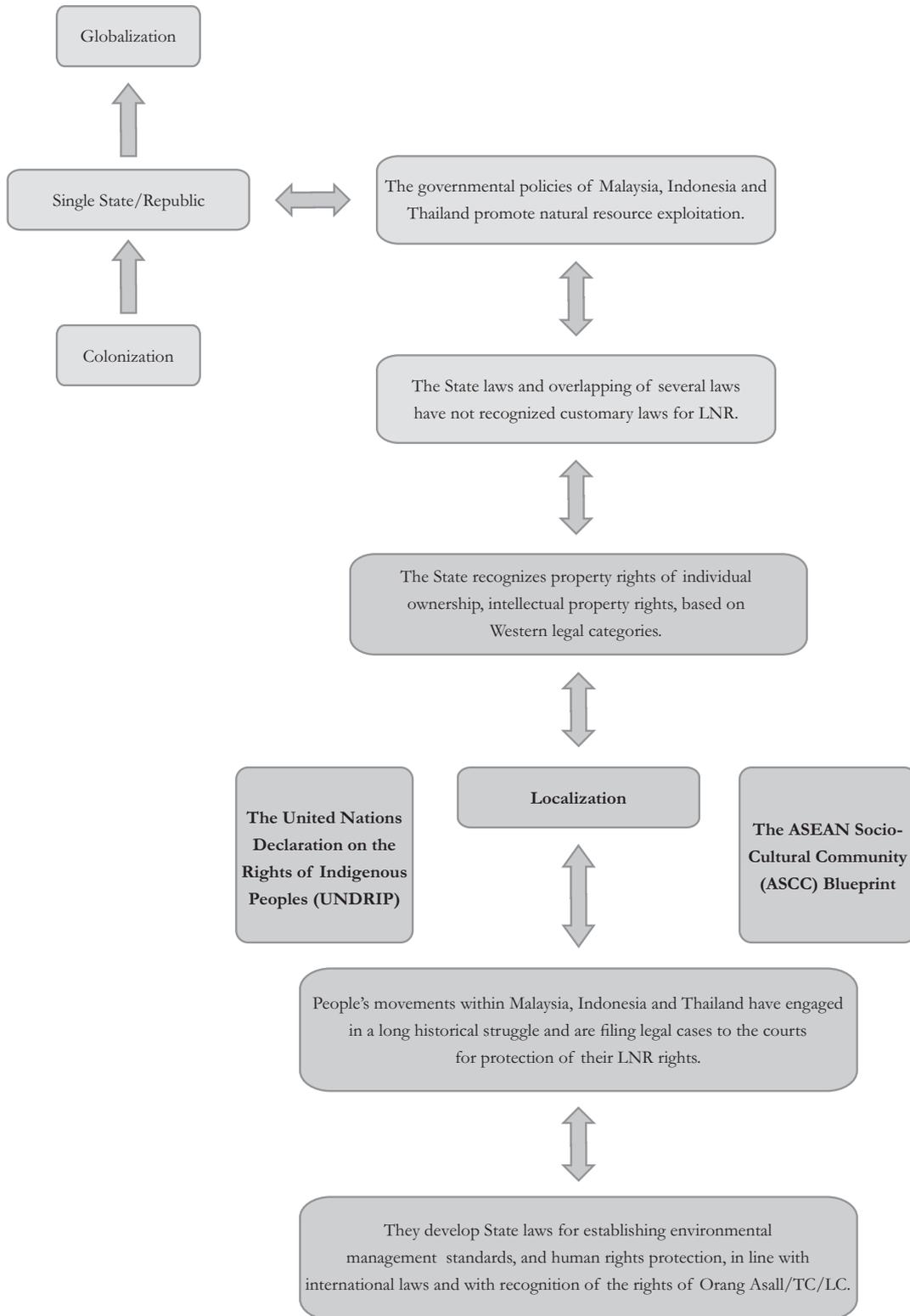
the region therefore, customary practices are a living and active source of rights, not just in practice but also in law.

Reforming laws to protect local wisdom, customary laws and the eco-system can bring about unity in free market economic zones in these three Asian countries. Balancing economic development with customary law based on local wisdom will protect the eco-system and ensure social justice in Malaysia, Indonesia and Thailand in the future.

Such law reform should follow the principles of the ASEAN Socio-Cultural Community (ASCC) Blueprint, which includes respect for rights and fundamental freedoms and promotion and protection of human rights and social justice, with specific mention of disadvantaged, vulnerable and marginalized groups. Therefore, legislation in these three countries must be consistent with conventions related to indigenous peoples, the United Nation General Assembly's adoption of the UNDRIP, common law judgments, and international laws which firmly uphold the principle that indigenous peoples and local peoples derive their land rights from customary practices.

The Republic Act No. 8371 of the Republic of the Philippines is an example customary law of Asian countries that Indonesia, Malaysia and Thailand should adopt and apply. The Act is issued to recognize, protect and promote the rights of indigenous cultural communities (ICC) /indigenous peoples (IP), creating a national commission on indigenous peoples, establishing implementing mechanisms, appropriating funds therefore, and for other purposes. The concept of Ancestral Lands/Domains includes such concepts as territories which cover both the physical environment and also the spiritual and cultural bonds to the areas which the ICC/IP possess, occupy and use and to which they have claims of ownership. The right to self-governance and empowerment, social justice and human rights are also recognized by law.

In addition, Indonesia and Thailand should adopt the practices of Malaysian courts in accepting oral and hearsay evidence under the principle of traditional law. This would allow traditional communities and local peoples to have the court protect their rights in the case of land disputes, and the courts would also learn about how to use customary laws in relation to social justice.



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3. Sagong Tasi & Ors V. Kerajaan Negeri Selangor & Ors. High Court Malaya, Shah Alam Mohd Noor Ahmad J. (Civil suit No: MTI-21-314-1996). April 12, 2002.

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1. The plaintiffs were 43 members of the Association to Prevent Global Warming against 8 State Officials in the case 908/2552 which was ruled on in the Central Administrative Court on September 29, 1999.

2. The plaintiff was the district attorney of Mae Sot and the defendant was Mrs. Haymui Wiangwicha, who was accused of violating the Forest Act and National Forest Protected Zones Act in the Criminal Case 4026/2553 filed in the Region 6 Court of Appeals on December 30th, 2011.

Interviewees: Malaysia

1. Colin Nicholas - Center of Orang Asli Concerns, Kuala Lumpur
2. Dolley Lasimbang - PACOS Trust, Kota Kinabalu, Sabah
3. Jannie Lasimbang - Jaringan Orang Asal SeMalaysia (JOAS)
4. Nasiri Sabiah - PACOS Trust, Kota Kinabalu, Sabah
5. Neville Taylor - LEAP (Land Empowerment Animals People)

Interviewees: Indonesia

1. Abdias - Lembaga Bela Banna – Tolino (LBBT), Pontianak, West Kalimantan
2. Adrigo - HuMa, Jakarta
3. Affonsius Iyon - Deputy head of Peliak Keruap, Melawi District, West Kalimantan
4. Agapitus - AMAN, Pontianak, West Kalimantan
5. Bumbang - Head of Peliak Keruap, Melawi District, West Kalimantan
6. Lonti - Adat leader of Peliak Keruap, Melawi District, West Kalimantan
7. Mingi - Adat leader of Peliak Keruap, Melawi District, West Kalimantan
8. Ramah Mary - HuMa, Jakarta
9. Prof. Sainuddin Dt.R.Lenggang - Ketua Umum Cembaga Kuapatan Adat Klam Minangkabau (LKAAM)
10. Dvs.M.Saynti Dt. Rajo Paugulu, M.Pd - Ketua Umum Cembaga Kuapatan Adat Klam Minangkabau (LKAAM)
11. Yance Arizona - Epistema Institute, Jakarta
12. Yaya Hidayati - WALHI, Jakarta
13. Dr.Yonariza Guchiano - Forest Resource Management, Andalas University, Padang, West Sumatra

APPENDICES**Abbreviations**

ACLA	Assistant Collection of Land Revenue
AEC	ASEAN Economic Community
AIPP	Asia Indigenous People's Pact
AMAN	Aliansi Masyarakat Adat Nusantara – Alliance of Nusantara Adat (Traditional) Society
ASCC	ASEAN Socio-Cultural Community
CDA	Constitution Draft's Assembly
COAC	Centre for Orang Asli Concerns
HuMa	Perkumpulan untuk Pembaruan Hukum berbasis Masyarakat dan Ekologis – Association for Community – and Ecology – based Law Renewal
ICCS	Indigenous cultural communities
ICCAs	Indigenous Territorian and Community – Conserved Areas
ICEL	International Center Environmental Law
ILO	International Labour Organization
IPs	Indigenous Peoples
JHEOA	Jabatan Hal Ehwal Orang Asli/ The Department of Orang Asli Affairs
LCs	Local communities
LNRs	Land and natural resources
LBBT	Lembaga Bela Banna Tolino
LKAAM	Ketua Umum Cembaga Kuapatan Adat Klam Minangkabau
MPR	Peoples' Representative Assembly
NCR	Native customary right
NGOs	Non Government Organizations
OEG	The Office of the Committee to Settle Encroachments on Government Land
POs	People Organizations
PRs	Property rights
RFD	Royal Forestry Department
SEG	The Committee to Settle Encroachments on Government Land
Suhakam	Human Rights Commission of Malaysia
TCs	Traditional communities
UNDRIP	United Nations Declaration on the Rights of Indigenous People
WALHI	Wahana Lingkungan Hidup Indonesia

¹ Article 76 provided: The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of state power at all levels.

² Article 170 provided: The persons having the right to vote of not less than fifty thousand in number shall have a right to submit a petition to the President of the National Assembly to consider such law as prescribed in Chapters 3 and 5 of the Constitution.

³ The Federal Constitution 2006, Art 161 A (6) and (7),

(6) In this Article “native” means –

(a) In relation to Sarawak, a person who is a citizen and either belongs to one of the races specified in Clause (7) as indigenous to the State or is of mixed blood deriving exclusively from those races, and

b) In relation to Sabah, a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in Sabah or to a father domiciled in Sabah at the time of the birth.

(7) The races to be treated for the purposes of the definition of “native” in Clause (6) as indigenous to Sarawak are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

⁴ Article 18B (2) “The State recognizes and respects traditional 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.”