

This forest is ours:

the challenge of formal recognition of customary forests ('hutan adat') in Malinau, North Kalimantan, Indonesia

Photo: Ali Mustofa/GIZ FORCLIME

Background

The District of Malinau still has extensive forest resources and is home to numerous ethnic groups that rely on natural resources and forest products for their subsistence. Their livelihoods are based on swidden cultivation of upland rice and collection of non-timber forest products (NTFPs). These ethno-linguistic groups include swidden-farming Dayak groups, such as the Abai and Kenyah, and hunter-gatherer communities, known as the Punan. Villagers' rights to land in Malinau and natural resources are legally unclear: overlapping customary ('adat') claims to land have fuelled conflict over natural resources. These fluid boundary agreements have made it important to address the definition of clear rights. The lack of secure access to natural resources is not only a result of social conflict and ambiguous land tenure but also of the increasing presence of logging, mining and oil-palm concessions.

Realising the challenges posed by these contested claims, not only in Malinau but throughout the country, the Indonesian government is proposing a massive land reform that aims to allocate 12.7 million ha of state-owned forestland to local communities. Several community-based forestry management (CBFM) schemes are being promoted by the Ministry of Environment and Forestry (MoEF).

Key findings

- The operationalisation of the Constitutional Court ruling MK35/2012 lies at district level but requires criteria for designating customary lands, processes for doing so, and means for resolving conflicts.
- High ethnical diversity and strong historical mobility in Malinau is leading to debates on legitimacy over the place of origin of groups and the current land under control.
- Because of past migration patterns, using historical presence in an area as a criterion for land claims is problematic.
- Current mapping of customary territories does not take into account ethnic and sub-ethnic claims at village level but rather focuses on large-scale customary land areas.
- It is important to solve conflicts at village level and tackle the issue in contested areas. But village and customary boundaries are not a priority for local governments and much of the work comes from external NGO support.

But the most promising, and most challenging, change is the recent Constitutional Court decision (No. 35/PUU-X/2012), which in May 2013 modified a key clause in the Forestry Law, removing the State's claim of ownership of customary forests, hereinafter referred to as 'hutan adat'.

The ruling implies that customary adat communities will have the power to legally own the land they have been managing for generations. The Forestry Law has not yet been revised but one can safely say that the Constitutional Court's decision has excised hutan adat from claimed State forestland. However, three years after the ruling little progress has been made and implementation remains challenging, burdened by various implications, especially in places like Kalimantan where adat boundaries and agreements have historically been fluid and contested. The ruling offers no criteria for designating land as adat, no process for doing so, and no means for resolving conflicts. The focus of action for advocating this decision is at local level and will depend on commitments and regulation by local governments and involvement of NGOs.

This brief analyses the situation in the District of Malinau and reviews the processes, weaknesses and the way forward for the effective operationalisation of hutan adat and the recognition of adat communities rights to forest resources.

Findings

1. Local legislative and institutional framework

In 2012, the District of Malinau issued a local regulation to recognise, respect and protect the rights of customary communities: Peraturan Daerah Nomor 10 Tahun 2012 tentang Pengakuan dan Perlindungan Hak-Hak Masyarakat Adat di Kabupaten Malinau (PERDA 10/2012). The enactment of the regulation was supported by Aliansi Masyarakat Adat Nusantara (AMAN/ Indonesian Indigenous People's Alliance) and was a response from the local government, with involvement of the Dewan Perwakilan Rakyat Daerah (DPRD/District Assembly of Representatives), to rampant conflicts between villagers and oil-palm companies encroaching upon village boundaries^[1].

Following the enactment of this local regulation, the Bupati (Regent) of Malinau issued a regulation (Peraturan Bupati Malinau Nomor 201 Tahun 2014 tentang Badan Pengelola Urusan Masyarakat Adat Kabupaten Malinau) in 2014 that sets out the technicalities and the official body responsible for

verifying, recognising and registering customary territories. Badan Pengelola Urusan Masyarakat Adat Kabupaten Malinau (BPUMA) is responsible for verifying applications from adat communities before handing to the Regent for his final approval. BPUMA should verify an application within 90 days and has the right to accept or refuse it, based on its technical details and criteria. Once accepted, the application is registered as a claim at district level before submission to the Regent.

BPUMA is, however, not operational since its committee members and respective functions have not yet been approved and ratified by the Regent. With the enactment of the regulation and the establishment of the legal body, Malinau is among the most advanced districts in Indonesia in terms of legislative and institutional readiness to tackle the Constitutional Court's decision. The regulation is the umbrella at district level recognising and protecting the right of adat communities while BPUMA is the technical body responsible for implementing the regulation and recognising the land and territories of the communities. Since human and technical capacities at village level are restricted, the adat communities can seek for external support to map their areas.

2. Mapping adat territories

Badan Registrasi Wilayah Adat (BRWA/Customary Territory Registration Agency) is an independent national body initiated by civil society organisations that assists the government in compiling spatial and social data of adat communities and their territories. The aim is to make an inventory of adat territories throughout the country, registered in a national system. BWRA has developed guidelines for registration, verification and validation. In Malinau, BRWA has assisted Forum Musyawarah Masyarakat Adat (FoMMA), a local consultative forum for indigenous peoples, to map the territories of 10 ethnic groups in and around the Kayan Mentarang National Park (KMNP) and upload the data to its web-based system. These territories were more or less clear and conflict-free owing to past participative mapping exercises conducted by the World Wildlife Fund during the establishment of the KMNP collaborative management plan^[2]. However, the mapping and registration work of BRWA is a large-scale mapping process at the level of homogenous ethnic groups ('adat besar') and does not reflect the claims and complexities of sub-groups.

Ethnic groups in Malinau are represented by the heads of the adat council ('kepala adat besar') who are members of AMAN and FoMMA. These ethnic groups do have historical attachments to territories but are

[1] The most prominent example is the case that took place in 2010–2011 between the villages of Setulang and Setarap and PT Bina Sawit Alam Makmur, which was finally resolved by giving rights to the respective communities. More details on section 3 of this brief.

[2] Led by the Regent of Malinau, the Dewan Pembina dan Pengelolaan Kolaboratif (DPPPK/Collaborative Management Advisory Council) plays a crucial role in the implementation of the collaborative management plan.



Tane' olen forest in Setulang is protected by the community and regulated by adat rules. Photo: Ali Mustofa/CH2 FORCLIME

often divided into sub-groups (with distinct languages and customs) who have strong histories of migration and resettlement. These migrations came to an end during the 1960s and 1970s when the local government insisted that remote upstream villages had to be resettled closer to the town of Malinau, with the aim of enforcing its control over isolated populations and also moving them closer to government services. In many locations close to the town of Malinau, the resettlement program resulted in clusters of several different ethnic groups or sub-groups living together, leading to a large amount of horizontal conflicts and claims over adat territories and the legitimacy of land rights. Some sub-ethnic groups do not respect the broader ethnic group representatives and clash among themselves, forming new clans. Mapping at the broad ethnic group level is a rather clear and coherent task but when it comes to village and sub-ethnic groups, there is rich complexity.

3. Cases from the field: Setulang and Setarap villages

A. Setulang

Setulang covers 11 530 ha. The ethnic majority in the village is Dayak Kenyah Uma' Lung, a sub-group of the broader Dayak Kenyah ethnic group. Originally, villagers from Setulang come from the upstream area of Pujungan sub-district (Long Sa'an). They settled in the area throughout the 1960s and 1970s during three main migration waves so as to be closer to government services provided in nearby Malinau. During the first wave in 1963, tenurial pressure was not yet a constraining factor and land was plentiful. The first settlers were offered three locations by the adat head of the Malinau River (Ketua Adat Besar Malinau) but only Setulang was still not inhabited by other groups; the migrants preferred to remain together and not mix with other ethnic groups. The area was granted through a verbal agreement in 1963. Setulang has a relatively advantageous geographic location, close to both the forest and the town of Malinau. It has strong social capital, with unity and cohesion, relatively non-degraded forest resources, expertise and knowledge in forest management, robust village institutions and

regulations, including adat rules (Pramova et al 2013). Setulang is recognised as a tourist village by decree of the local government.

Tane' olen

In their place of origin, the people of Setulang had a traditional system of managing forestland called tane' olen^[3]. Some forest patches designated as such were protected by the community and attached to specific functions, such as, for game reserves, non-timber forest products and protection of water supply. The responsibility for the management of such areas fell under the authority of members of 'noble' families. When the community moved to Setulang, they imported this adat system and established a tane' olen over the remaining forest, aiming to conserve and protect it for the same functions mentioned above. However, the management responsibilities no longer resided with the noble families but fell to the entire community through adat laws administered through a committee.

In 2003, the Centre for International Forestry Research (CIFOR) supported the establishment of the management institutions and the participative mapping of the 5314 ha of protected forest. This happened in the context of villages in the area entering into deals with timber businesses through decentralised, small-scale, forest concessions. While most neighbouring villages entered into such deals, Setulang preserved its forest and protected it from encroachment. In 2009-2010 a joint district and provincial-level team continued to map the area aiming at developing ecotourism activities. Only sustainable extraction of non-timber forest products is allowed in the tane' olen, regulated by adat rules that are monitored by the management committee. Outsiders are not allowed to enter the area and the village has started to develop ecotourism activities.

Hutan Desa

Although supported by the local government, recognition of the tane' olen remained informal and even with the enactment of the local regulation, no

[3] Olen or molen in the local language means protected, to be guarded.

further work had been done. The rights over the area remain uncertain and conflicts over boundaries with neighbouring villagers arise frequently. The district Forestry Agency therefore requested the assistance of the German-funded Forest and Climate Change Programme (FORCLIME) implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit and MoEF to apply for Village Forest ('Hutan Desa') recognition over the tane' olen forest, which gives the village a right-of-use licence for 35 years. The use licence was granted in August 2016 by the governor of the province (SK Gubernur No. 188.44/K.470/2016). The Village Forest scheme is seen by the community as the best option for securing their right to the tane' olen.

B. Setarap

The village of Setarap is home to a mix of several ethnic groups, mainly Dayak Lundayeh, Dayak Kenyah, and Punan, who settled in the area over time but especially since the 1960s. We found it challenging to understand their migration patterns and to identify which ethnic group had been established in Setarap for the longest period. However, it seems that the Lundayeh (originally from Mentarang) have been practising swidden agriculture in the area for generations. Owing to internal conflict over land and difficulties of cohabiting, the smaller Punan community of Setarap moved in 2002 to the other side of the Malinau River, established its own village now called Punan Setarap, and has become reluctant to claim land together with their neighbours. People in Setarap are mainly swidden farmers practising rotational agriculture for the production of paddy rice.

Local perceptions of adat forest

According to villagers of Setarap, their adat forest covers 20 000 ha, extending far beyond village administrative boundaries, owing to their long historical claim of the area. According to them, adat boundaries were agreed on by elders but are now contested by younger generations, especially from the villages of Batu Kajang and Setulang. This claimed adat area has never been entirely mapped; just a small proportion of 2300 ha, with the support of AMAN and a local NGO (Lembaga Pemerhati dan Pemberdayaan Punan Malinau) in 2010, during conflict with PT Sawit Bina Makmur, which had started to log the area for conversion to oil palm. Based on discussions, the people of Setarap also have a forest area composed of 5600 ha which is being protected by the community. However, its location far away upstream makes it difficult to secure any benefit from it. Rather, they felt that it was benefiting outsiders who were encroaching on the forest, stealing valuable resources, including game and agar wood. Their forestland also includes a sacred forest ('hutan keramat') that was degraded by the oil-palm company in 2010.

4. Contested boundaries

Overlapping adat-based claims to land have fuelled conflict between both villages. The boundary agreement based on adat rules, which restricts Setulang from crossing the Malinau River to farm is no longer strong enough to deal with the pressure for land and has been violated many times in recent history. Meanwhile, rights over the tane' olen are uncertain and neighbouring villages, including Setarap, are making claims to that land. Adat practices are often used to justify encroachment on each others' land. Some villagers in Setulang use previous adat rules about ownership being conferred on those who fell the forest ('merimba') and on those who plant trees to make claims to land outside their village boundaries. Setulang and Setarap have different ways of claiming land. Conflicts between the two villages are also attached to all sorts of claims over historical occupation of the area. The extent of the boundaries of Setulang and the tane' olen are not widely accepted, as Setulang villagers are viewed as new settlers in the area and neighbouring villagers believe that they were not adequately considered or consulted, claiming that NGOs and local political elites favoured Setulang during past attempts at conflict resolution. Adat and verbal agreements between local leaders about boundaries between village territories are difficult to verify since the original parties are now dead and the agreements were oral not written (Barr et al 2001). In 2010–2011, when both villages were engaged in conflict with the oil-palm company, they successfully joined forces. However, as soon as it was solved, horizontal conflict started again.

According to local histories related by people in Setarap, the tane' olen used to be the adat territory of a Punan group who abandoned it after being hit by a deadly epidemic and, accordingly, the people of Setulang do not have the right to designate the tane' olen as adat forest since they have only recently moved to the area.

5. Conflict resolution

According to district informants, there is a large challenge to be overcome to settle administrative boundaries in those villages where everyone is claiming indigeneity and reinventing migration and resettlement histories in order to claim legitimacy over land.

According to FoMMA, villages close to the town of Malinau will not be included in their mapping since they are heterogeneous and engaged in multiple horizontal disputes. Instead, it will focus on mapping upstream homogenous adat territories. According to its representative, FoMMA is an alliance of ethnic groups and will not support villages who are engaged in conflict since its mandate is not conflict resolution; villages should first resolve their own internal conflicts.

The situation in the district is also a challenge for the Governance Agency ('Tata Pemerintahan'), which is responsible for determining administrative boundaries between villages, especially given all the resettlements of the past. It requires a long-term involvement and the agency is lacking capacity for the technical work on the ground. For administrative boundaries, they usually ask villages to solve it internally with the support of the sub-district head ('Camat'); the agency only collects the GPS coordinates once villages agree upon their boundaries.

Adat boundaries are even more challenging owing to multiple claims. The responsibility for determining adat boundaries lies with the district Forest Agency but requires substantial budget and long-term involvement.

According to an informant from a local NGOs, solving conflicts in Malinau should be easy since it is known who occupied the land first. The problem relates primarily to a lack of political will. The current Regent prefers to maintain a neutral position.

Villagers feel that their negotiations with neighbours to solve the issue require a more substantial involvement of local government and third-party mediators to be fair and just.

6. Local perceptions over adat territories

Beside the adat claims over the tane' olen, villagers in Setulang also claim ownership over the land from where they originated in Pujungan, which is home to the remains of their ancestors' longhouses and cemeteries. Although they do not visit the place often owing to the distance, the sense of belonging to the place of origin and the territorial claims attached to it remain strong. Villagers therefore interpret adat land as both the traditional land where a group originated from and the land where they currently live and manage using adat rules. 'Adat forest' can refer to an entire village area, a forest within claimed territory or a protected forest such as the tane' olen.

Overall challenges

Despite the confusion about adat territories, it might be easier to treat registered villages as the most common unit for claims over adat forest, especially if funding (village fund and Gerdema^[4]) is meant to be attached for the development of activities in the area. However, in order to achieve this conflicts over village boundaries need to be solved. Boundary agreements in Malinau have been fluid, unstable and conflicts have increased without the necessary institutional capacity for resolving them being developed at the appropriate levels of government. According to the Village Law (UU No. 6/2014), every village should have clear boundaries

so that they can receive village funds from the central government. However, since Malinau has its own additional Gerdema fund, the boundary issue is not seen as a priority.

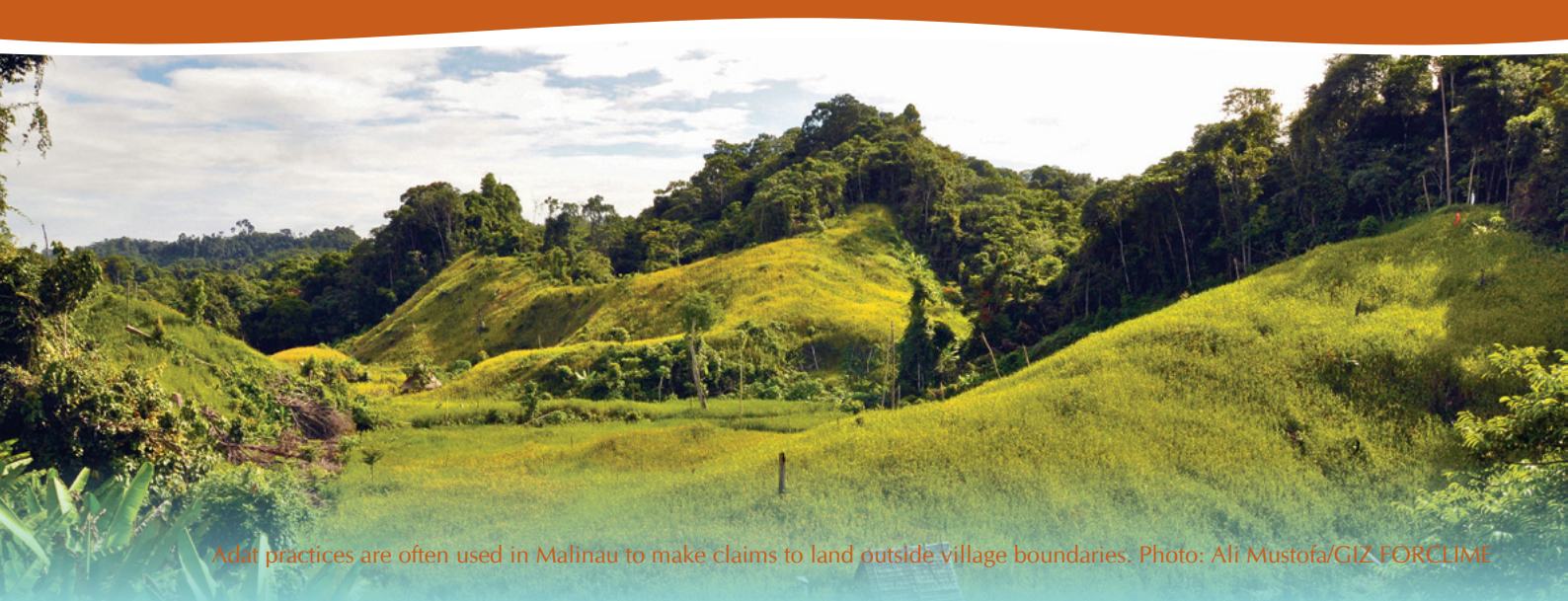
The real challenge remains in the historical mobility of ethnic groups, with each of them holding a different basis for their land claims. The high ethnic diversity in the district, combined with strong historical mobility, is fuelling debate about the legitimacy of any group's claims over a place of origin and the land it inhabits. A single location can attract multiple claims as shown by the example of Setulang and Setarap. Informal debate has concentrated on the length of time a group needs to have been in an area to be able to claim adat right (Levang and Buyse 2006). Because of past migration patterns, using historical presence in an area as a criterion for making land claims is problematic. Groups that migrated during the resettlement era feel especially vulnerable to definitions based on historical presence, since many have given up their original land, such as the people of Setulang. Historical claims would be difficult to accommodate without alienating large groups in the district. The resettlement program also resulted in clusters of different ethnic groups (Setarap) having separate village designations. This raises questions about whether such groups should claim adat rights together or separately in their current territory. Punan groups face the additional difficulty that they have historically not defined their space in terms of territories; they do not hold formal village status and therefore are categorized as inhabiting the villages of other groups. How are the adat areas of these groups to be defined?

Recommendations

The local regulation (PERDA 10/2012) is a good entry point for protecting the rights and land of adat communities in Malinau and a big step toward the implementation of the constitutional ruling. However, it remains weak since it is only based on the ruling and does not have a supportive umbrella law at national level. The protection of adat communities is referred to in several national laws but there exists no framework that could give sufficient power for local regulations to gain full legitimacy. The Bill, RUU Pengakuan dan Perlindungan Hak Masyarakat Hukum Adat (RUU PPHMHA/Recognition and Protection of the Rights of Indigenous Peoples), could serve as the missing framework but has not yet been passed by parliament; it experiences constant delays. The national government needs to affirm the functions and roles involved in the recognition of adat forests and develop rules and regulations that support them.

The work of mapping local adat territories focuses on larger ethnic groupings without embracing the complexities of sub-groups at village level. Having a

[4] Gerdema (Gerakan Desa Membangun) is a special program under the Regent. The fund comes from the district development budget and is usually higher than the village fund (±1,2 billion/year).



Adat practices are often used in Malinau to make claims to land outside village boundaries. Photo: Ali Mustofa/GIZ FORCLIME

good overview of historical ethnic group territories is important, especially for the inventory at national level. However, if adat forests are likely to be recognised, this would be at community and village level and, hence, it is crucial to solve conflicts at those levels. Furthermore, BRWA has been mapping in Malinau without coordinating with BPUMA, which should be the legally-responsible body in the district but is not yet operational. The local regulation should also set criteria for designating adat territories and the means for resolving conflicts.

The local government should, in the implementation of the local regulation, not undermine certain groups based on their historical and territorial claims, since some communities might be excluded, resulting in conflicts continuing. Besides defining clear criteria to identify adat groups, it will be crucial to settle administrative boundaries and to define forest patches which could then be defined as adat forest. Adat rules and agreements need to be written and agreed on by all parties.

The boundary issue should be integrated in the Rencana Pembangunan Jangka Menengah Desa (RPJMDes/Mid-term Village Development Plan) using village or Gerdema funds.

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Authors

Sébastien de Royer, Reny Juita, Ali Mustofa

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For further information please contact:
Sébastien de Royer (s.royer@giz.org)



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PROGRAM ON
Forests, Trees and
Agroforestry



**World Agroforestry Centre (ICRAF)
Southeast Asia Regional Program**
Jl. CIFOR, Situ Gede, Sindang Barang, Bogor 16115
[PO Box 161, Bogor 16001] Indonesia
Tel: + (62) 251 8625415 | Fax: + (62) 251 8625416
Email: icraf-indonesia@cgiar.org
www.worldagroforestry.org/region/southeast-asia
blog.worldagroforestry.org

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