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The Netherlands

Rethinking Adat strategies: the politics of state recognition of customary land rights in Indonesia

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Citation
Arizona, Y. (2022, June 14). *Rethinking Adat strategies: the politics of state recognition of customary land rights in Indonesia*. Retrieved from https://hdl.handle.net/1887/3309795

Version:	Publisher's Version
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Rethinking adat strategies:
The politics of state recognition of customary land rights in Indonesia

In memory of my father and mother
who passed away in 2019
whilst I was completing my study in Leiden.

Rethinking adat strategies:
The politics of state recognition of customary land rights in Indonesia

PROEFSCHRIFT

Ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof.dr.ir. H. Bijl,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 14 juni 2022
klokke 10.00 uur

door

Yance Arizona

geboren te Kerinci, Indonesië
in 1983

Promotor	prof. dr. A.W. Bedner
Co-promotor	dr. ir. J.A.C. Vel
Promotiecommissie	prof. dr. J.M. Ubink prof. dr. G.A. Persoon prof. N.L. Peluso (University of California Berkeley, USA) dr. M.A. Safitri (University of Pancasila, Indonesia)

Lay-out: Yance Arizona
Printwerk: Leiden University Print Shop & Komojoyo Press.

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Acknowledgements

It has been a great opportunity for me to write a dissertation concerning adat communities and customary land rights at the Van Vollenhoven Institute, Leiden University, especially because Cornelis van Vollenhoven (who the institute is named after) was a great scholar, who dedicated himself to develop adat law as a new discipline. While van Vollenhoven studied and developed adat law from his academic background, I encountered adat studies as a result of my activist activities. Before starting my PhD in 2017, I was involved in adat advocacy for ten years, which gave me opportunity to travel across regions in Indonesia. In that period I met a lot of people in Papua, Kalimantan, Sulawesi, and Sumatra who were suffering from injustices and deprivation. They taught me many things about misery, anxiety, uncertainty, hope, and wisdom. I hope this thesis, in its own way, gives a new meaning and appreciation for their enduring struggles.

I am very grateful to my supervisors Professor Adriaan Bedner and Dr. Jacqueline Vel. Their enormous support while I did my research and wrote my thesis made me feel at home at the Van Vollenhoven Institute (VVI), and helped me develop my socio-legal research skills. During my five years at the VVI I have learned a lot from colleagues about how to do socio-legal studies, and how to contribute to a constructive academic environment. I am indebted to Santy Kouwagam, Fachrizal Afandi, Hoko Horii, Bernardo Almeida, Feby Ivalerina Kartikasari, Mies Grijn, Bilal Dewansyah, Nanda Amalia, Annelien Bouland, Dorien Conway, Carolien Jacobs, Nadia Soneveld, Maryla Klajn, Janine Ubink, Maartje van der Woude, Bruno Braak, Hannah Delacey, Roxane Massol de Rebetz, Neske Baerwaldt, Nada Heddane, Judith van Uden, and Reeda al Sabri Halawi. And of course, I am grateful for the intensive support given by Kari van Weeren, Kora Bentvelsen, Dennis Janssen, and Pauline Vincenten.

Conducting field research in three locations, in which the local communities all had different social and cultural backgrounds, seems like a pretty ambitious research project. However, I could complete my research thanks to the support of my NGO colleagues who intensively

assisted local communities in North Sumatra, Banten, and Sumbawa. I thank my friends (*kawan-kawan*) who introduced me as researcher to the Toba Batak communities, in North Sumatra: Delima Silalahi, Saurlin Siagian, Suryati Simanjuntak, Dimpos Manalu, Lambok Lumban Gaol, and Yusrizal Adi Syaputra; the Kasepuhan communities, in South Banten: Jaro Wahid, Engkos Kosasih, Teh Een, Kang Asep, Nia Ramdhaniaty (deceased), and Mardhatila; and the Berco tribe members and Sultanate, in Sumbawa: Febriyan Anindita, Jasardi Gunawan, and Memet Syatria Wirawan. Special thanks go to my best friend, Veri Junaidi, who offered me his Jakarta office as guesthouse, before starting my fieldwork. Regretfully, he passed away due to Covid-19 in July 2021.

I am very grateful to the staff of many organisations who helped me during my research. Special thanks to Perkumpulan HuMa and the Epistema Institute, where I was involved in advocacy for local communities concerning their access to natural resources. Some of my 'gurus' and partners include: Myrna Safitri, Sandra Moniaga, Rikardo Simarmata, Noer Fauzi Rachman, Emil Kleden, Yando Zakaria, Abdon Nababan, Andiko, Bernadinus Steni, Upik Djalins, Darmanto and Nadia, Erasmus Cahyadi, Muhammad Arman, Nurul Firmansyah, Muki T Wicaksono, Asep Yunan Firdaus, Awaludin Marwan, Luluk Uliyah, Prof. Kurnia Warman, Prof. Saldi Isra, Prof. Jimly Asshiddiqie, Prof. Khudzaifah Dimyati, Herlambang Perdana Wiratraman, and Zainal Arifin Mochtar. Likewise, friends who shared their sorrows and joys during my stay in the Netherlands, in PPI Belanda, PPLN Den Haag, PCINU Belanda, KBRI Den Haag, and *Leidenaars*: Hadi, Andrea Arti, Pak Mul, Kak Uli, Pak Dubes Puja, Pak Hasyim, Pak Bambang Hari, Pak Din Wahid, Syahril, Aditya, Bang Ucok, Farid, Bana, Bara, Ganggas, Isma, Fauzi, Farabi, Julinta, Uni Lies, Ajo Suryadi, Erik, Dian and Dian, Renzi and Rio, Adrian, Taufik, Grace, and Santoso.

From the very beginning, I realised that doing a PhD could not be accomplished individually. I was lucky to have my wife and children accompanying me during my study in the Netherlands. Completing my PhD is the result of our cooperation. I am fortunate to have immense supports from my wife, Umi Illiyina, my eldest son, Alrazi Rafardhan Arizona, and from my two kids born at the end of two winters in the Netherlands, Madina Humaira Arizona (2017) and Kafka Pasha Arizona (2020). Finally, I express my eternal gratitude to my parents, Sailal Alimin and Nurhayati, for their devoted support to

me and my education since I was a child. I feel so sad that that they have passed away in 2019, while I was in Leiden, and did not live to see their son complete his doctoral degree. Therefore I dedicate this dissertation in memory of my beloved parents.

Yogyakarta, May 1, 2022

Table of Contents

ACKNOWLEDGEMENTS v
LIST OF FIGURES AND TABLES xv
GLOSSARY AND ACRONYMS xvii
1. INTRODUCTION 1
1.1. General themes: Indigenous identity and customary land rights in land conflicts 4
1.1.1. International advocacy for indigenous identity and land rights 4
1.1.2. Adat and indigeneity as an alternative narrative against land dispossession in Indonesia 7
1.1.3. The colonial concepts of adat community and customary land rights in Indonesia 9
1.1.4. Legal recognition of adat communities and customary land rights 12
1.2. Research questions 14
1.3. Research design: Procedures, processes, participants and politics of legal recognition 16
1.3.1. Procedures: The legal framework for customary land rights 16
1.3.2. Processes: An analytical framework for the legal recognition process 17
1.3.3. Participants: Actors and interests 20
1.3.4. Politics of legal recognition 29
1.4. Case study selection 30
1.5. Research method 35
1.5.1. Multi-sited fieldwork 35
1.5.2. Data collection method 36
1.5.3. Reflexivity 37
1.6. Overview of chapters 39
2. CHARACTERISTICS OF FOREST TENURE CONFLICTS AND EMERGING OPTIONS FOR RESOLUTION 43
2.1. Introduction 43
2.2. State territorialisation and political forest 45
2.2.1. The formation of state forest area in the colonial period 46

2.2.2. Underpinning of state control of forest area after Indonesian independence 51
2.3. Characteristics of forest tenure conflicts 57
2.3.1. Actors in forest tenure conflicts 57
2.3.2. Categories of forest use in conflicts 58
2.3.3. Variety of interests within local communities in forest tenure conflicts 60
2.4. Emerging options for solving forest tenure conflicts 62
2.4.1. Promotion of social forestry policies 62
2.4.2. Government schemes for resolving forest conflicts 66
2.4.3. Conflict solutions inspired by local community members 70
2.5. Conclusion 73
3. THE GENEALOGY OF STATE RECOGNITION CONCERNING CUSTOMARY LAND RIGHTS 77
3.1. Introduction 77
3.2. The root of the conditional recognition clause in the colonial period 79
3.2.1. The repugnancy clause: Hierarchy between colonial law and customary law 79
3.2.2. Public interests: State land domain versus the right of avail .. 83
3.3. The pursuit of national identity and the subjugation of customary land rights 88
3.3.1. Formation of the Basic Agrarian Law: Legal unification and the destabilisation of customary land rights 88
3.3.2. Customary land rights under Suharto's New Order regime: An obstacle for economic development 92
3.4. Adat in the reform era: Reshaping customary land rights 94
3.4.1. Adat community movements and a new interpretation of adat 94
3.4.2. The conditional recognition clause and the Constitutional Court 99
3.5. Implementing regulations for the legal recognition of customary land rights 103
3.5.1. Implementing regulations before the Constitutional Court ruling number 35/2012 103
3.5.2. Implementing regulations after the Constitutional Court ruling number 35/2012 105
3.6. Conclusion 109

4. CLAIMING ADAT COMMUNITY RIGHTS AGAINST A MINING COMPANY 113
4.1. Introduction 113
4.2. The Cek Bocek community case in context 115
4.2.1. The Cek Bocek community's relation to the Elang Dodo forest 115
4.2.2. The main parties in Sumbawa's political context 117
4.2.3. State forest area and mining concessions 120
4.3. Shifting strategy from individual to communal land claims 121
4.3.1. A variety of responses to mining expansion 121
4.3.2. Strengthening individual land claims 123
4.3.3. Switching to collective adat claims 125
4.4. Elevating the Cek Bocek community to a regional politics case 128
4.4.1. Competition over adat representation 128
4.4.2. Under the wings of AMAN 131
4.4.3. The mining company's response 133
4.5. Analysis and conclusion 135
4.5.1. An inadequate basis for customary land rights recognition 135
4.5.2. Conclusion 137
5. A LABYRINTH OF LEGAL RECOGNITION: COMPLEXITY IN OBTAINING CUSTOMARY FOREST RECOGNITION 139
5.1. Introduction 139
5.2. The setting and problems of forest tenure conflicts in North Sumatra 140
5.2.1. Large-scale forest concessions and land conflict in North Sumatra 141
5.2.2. Local communities versus PT. Inti Indorayon Utama (PT. IIU) 142
5.3. The Pandumaan-Sipituhuta case 145
5.3.1. The origin of land conflict 145
5.3.2. A twist in strategic framing: From benzoin farmers to an adat community 148
5.3.3. Organising district government support 153
5.3.4. Bureaucratic obstacles to the legal recognition of customary forest rights 154
5.4. The labyrinth of legal recognition and management of recognition 158
5.5. Customary forest recognition is not a perfect option 160

5.6. Political pressure and options for customary forest recognition 163
5.7. Conclusion 165
6. GETTING LEGAL RECOGNITION FOR CUSTOMARY FORESTS 167
6.1. Introduction 167
6.2. Land dispossession for forest conservation projects 169
6.3. Two successful cases: Kasepuhan Karang community and Marena community 170
6.3.1. Kasepuhan Karang community v. Mount Halimun-Salak National Park in Banten 171
6.3.2. Marena community v. Lore Lindu National Park in Central Sulawesi 172
6.3.3. Framing and claiming identity 173
6.3.4. Political opportunities and the legal recognition strategy 176
6.3.5. Outcomes of legal recognition 180
6.4. Enabling factors for legal recognition of customary forests 181
6.4.1. Internal factors supporting recognition 182
6.4.2. External factors supporting recognition 183
6.5. Conclusion 186
7. AFTER THE VICTORY:THE IMPLEMENTATION OF LEGAL RECOGNITION AND TENURE SECURITY 189
7.1. Introduction 189
7.2. Assumptions and expectations regarding the implementation of customary forest recognition 190
7.3. After the Kasepuhan Karang community victory 193
7.3.1. Exercising community control over customary forest areas 194
7.3.2. Securing income from customary forest 196
7.3.3. Capitalising on customary forest rights 198
7.3.4. Building an informal land registration system 199
7.4. Land market development and tenure security 202
7.5. Conclusion 204
8. CONCLUSION: RETHINKING LEGAL RECOGNITION OF ADAT COMMUNITIES AND CUSTOMARY FOREST RIGHTS 207
8.1. Introduction: The root cause of forest tenure conflicts 207
8.2. There are no simple land conflicts 209
8.3. A process approach for studying land conflicts 211
8.4. Adat community is a political concept 213
8.5. State recognition is conditional 215

8.6. Legal recognition is the result of negotiation 216
8.7. The chances of legal recognition are limited 217
8.8. Conclusion: Land conflicts require tailor-made solutions 218
SUMMARY 221
SAMENVATTING (SUMMARY IN DUTCH) 229
RINGKASAN (SUMMARY IN BAHASA INDONESIA) 237
BIBLIOGRAPHY 245
CURRICULUM VITAE 261

List of Figures and Tables

Figures

Figure 1. President Joko Widodo symbolically handed over the legal recognition decree for the Pandumaan-Sipituhuta customary forest
Figure 2. An analytical framework for legal recognition of customary land rights
Figure 3. Locations of fieldwork
Figure 4. Rp. 100 coins featuring the text 'Hutan untuk Kesejahteraan' (Forest for prosperity)
Figure 5. Options for solving forest tenure conflicts, based on the three categories of forest use.
Figure 6. Options for resolving forest tenure conflicts, based on the objectives of local community members
Figure 7. The procedure for legal recognition of adat communities and customary forests
Figure 8. Cek Bocek community putting up a signpost stating their customary forest is no state property, while armed police are watching
Figure 9. Left: a benzoin farmer extracts benzoin gum. Right: benzoin gum on a benzoin tree.
Figure 10. Pandumaan-Sipituhuta community members erect a signpost responding to the constitutional court ruling on customary forest.
Figure 11. The grand launch of the Cepak Situ Camping Ground by the Lebak District Head
Figure 12. Distribution of land-use certificates in the Kasepuhan Karang customary forest

Tables

Table 1. Characteristics of the four communities selected for the case studies
Table 2. Description of the Conditional Recognition Clause based on Article 18B (2) of the 1945 Constitution

Glossary and Acronyms

ADB	Asian Development Bank
AIPP	Asian Indigenous Peoples Pact
AMAN	*Aliansi Masyarakat Adat Nusantara* (the Indigenous Peoples Alliance of the Archipelago)
BAL	Basic Agrarian Law (Ind. *Undang-Undang Pokok Agraria*)
BFL	Basic Forestry Law (Ind. *Undang-Undang Pokok Kehutanan*)
BPS	*Badan Pusat Statistik* (the Central Statistic Bureau)
BRWA	*Badan Registrasi Wilayah Adat* (the board for registration of adat territories)
CBFM	Community-Based Forest Management
CLUA	Climate Land Use Alliance
CSR	Corporate Social Responsibility
DKN	*Dewan Kehutanan Nasional* (the National Forestry Council)
FAO	Food and Agricultural Organization
FKKM	*Forum Komunikasi Kehutanan Masyarakat* (Communication Forum on Community Forestry)
FSKN	*Forum Silaturahmi Keraton Nusantara* (the National Forum for Local Kings and Sultanates)
FPIC	Free, Prior and Informed Consent
FPP	Forest People Program
FWI	Forest Watch Indonesia
GBHN	*Garis-garis Besar Haluan Negara* (the State Policy Guidelines).
GDP	Gross Domestic Product
GPS	Global Positioning System
HD	*Hutan Desa* (Village Forest Programme)
HKm	*Hutan Kemasyarakatan* (Community Forestry Programme)
HPK	*Hutan Produksi yang dapat Dikonversi* (Convertible Production Forest)

HPT	*Hutan Produksi Tetap* (Permanent Production Forest)
HTR	*Hutan Tanaman Rakyat* (People's Plantation Forest)
HuMa	*Perkumpulan untuk Pembaruan Hukum Berbasis Masyarakat dan Ekologis* (Association for Ecology and Community Based Law Reform)
IPRA	Indigenous Peoples Rights Act of the Phillipines
IS	*Indische Staatsregeling*
Panitia IP4T	*Panitia for Inventarisasi Penguasaan, Pemilikan, Pengelolaan, dan Pemanfaatan Tanah* (the Committee for Inventarisation of Land tenure, ownership, management, and utilisation)
KdTI	*Kawasan dengan Tujuan Istimewa* (Area with Exceptional Purpose)
KPA	*Konsorsium Pembaruan Agraria* (the Agrarian Reform Consortium)
KHDTK	*Kawasan Hutan dengan Tujuan Khusus* (Forest Area with Special Purpose)
KSPPM	*Kelompok Studi dan Pengembangan Prakarsa Masyarakat* (The Study Group for Developing Peoples Innitiatives)
LATS	*Lembaga Adat Tana Samawa* (Tana Samawa Adat Council)
LPAAG	Lembaga Pencinta Alam Awam Green (Awam Green Nature Lover institution)
MAASP	Ministry of Agrarian Affairs and Spatial Planning
Manipol USDEK	*Manifesto politik Undang-Undang Dasar 1945*, *Sosialisme Indonesia*, *Demokrasi terpimpin*, *Ekonomi terpimpin,* and *Kepribadian Indonesia* (the political manisfot of the 1945 Constitution, Indonesian socialism, the guided democracy, the guided economy, and Indonesian identity).
MEMR	Ministry of Energy and Mineral Resources (Ind. *Kementerian Energi dan Sumber Daya Mineral*)
MoEF	Ministry of Environment and Forestry (Ind. *Kementerian Lingkungan Hidup dan Kehutanan*), I used it interchangeably with MoEF (Ministry of Forestry)
MPR	*Majelis Permusyawaratan Rakyat* (People's Consultative Assembly)

NCHR	National Commission on Human Rights (Ind. *Komisi Nasional Hak Asasi Manusia*)
NGO	Non-Governmental Organisation
NLA	National Land Agency (Ind. *Badan Pertanahan Nasional*)
NTFPs	Non-Timber Forest Products
PDIP	*Partai Demokrasi Indonesia Perjuangan* (Indonesian Democratic Party of Struggle)
Perda	*Peraturan Daerah* (Regional Regulation)
pilkada	*pemilu kepala daerah* (regional elections)
Prorep-USAID	Program-Representasi United States Agency for International Development
PT. AMNT	*Perseroan Terbatas Amman Mineral Nusa Tenggara* (Amman Mineral Nusa Tenggara)
PT. IIU	*Perseroan Terbatas Inti Indorayon Utama* (Inti Indorayon Utama Corporation)
PT. NNT	*Perseroan Terbatas Newmont Nusa Tenggara* (Newmont Nusa Tenggara Corporation)
PT. TPL	*Perseroan Terbatas Toba Pulp Lestari* (Toba Pulp Lestari Corporation)
RFN	Raintforest Foundation Norway
RMI	*Rimbawan Muda Indonesia*
RR	*Regeringsreglement*
SABAKI	*Satuan Adat Banten Kidul* (Association of Adat communities in southern Banten)
SIDA	the Swedish International Development Cooperation Agency
SKPT	*Surat Keterangan Pemilikan Tanah* (Letter of Land Possession)
SOIFO	State of Indonesia's Forests
TAP MPR	*Ketetapan Majelis Permusyawaratan Rakyat* (Decree of People's Consultative Assembly)
TGHK	*Tata Guna Hutan Kesepakatan* (Forest Allocation Consensus)
TNGHS	*Taman Nasional Gunung Halimun Salak* (Mount Halimun and Salak National Park)
TNLL	*Taman Nasional Lore Lindu* (Lore Lindu National Park)
UNDRIP	United Nations Declaration on the Right of Indigenous Peoples

VOC	Dutch East India Company ((*Vereenigde Oostindische Compagnie*)
WALHI	*Wahana Lingkungan Hidup Indonesia* (Indonesian Forum for Environment)
YBH Bantaya	*Yayasan Bantuan Hukum Bantaya* (Bantaya Legal Aid Foundation)
YEP	*Yayasan Elang Penaru* (Elang Penaru Foundation)
YLBHI	*Yayasan Lembaga Bantuan Hukum Indonesia* (Indonesian Legal Aid Foundation)
YTM	*Yayasan Tanah Merdeka* (Tanah Merdeka Foundation).

1 Introduction

Figure 1. President Joko Widodo symbolically handed over the legal recognition decree of the Pandumaan-Sipituhuta community customary forest © The president office, the president palace, December 30, 2016

On December 30th 2016, representatives of the Pandumaan-Sipituhuta community, from North Sumatra, came to the President's Palace to meet with President Joko Widodo (See Figure 1). Together with eight other adat communities from different regions, the Pandumaan-Sipituhuta representatives received a Ministry of Environment and Forestry decree from the President, recognising their benzoin customary forest. For the Pandumaan-Sipituhuta community members, this event was a milestone in solving a decade of land conflict with a pulpwood company. For President Joko Widodo, it was the fulfilment of his political campaign to recognise adat communities' rights. In a similar vein, this event was a historical moment for NGOs, as well as adat community organisations and supporters, providing new hope that pervasive forest tenure conflicts across Indonesia might be resolved. However, my field research in the Pandumaan-Sipituhuta community, in 2019, indicated that the story did not actually end there, and that the recognition celebrated in the palace had not yet helped resolve the land

conflict with the company.[1] My research findings question the strategy of countering land dispossession by seeking legal recognition of an adat community with customary land rights as solution to land conflicts.[2]

Before starting my PhD studies, I had been active in NGOs promoting customary land rights as a solution for solving land conflicts. In Indonesia, land conflicts are omnipresent, and no effective mechanism has been created to eliminate such conflicts. The NGO Agrarian Reform Consortium (*Konsorsium Pembaruan Agraria*/*KPA*) recorded 2,047 cases of land conflict occurring from 2015 to 2019. In 2019 alone, 279 land conflicts appear to be located within 734,239 hectares. Around 109,042 of the households involved resided in 420 villages across Indonesia (Diantoro 2020:245-6). In 2021, the Ministry of Environment and Forestry (MoEF)[3] has already received 500 reports on land conflicts in the forestry sector, and only 54 of these have reached a solution between the parties in conflict.[4] Land conflict in the forestry sector has detrimental effects on environmental sustainability and on the prosperity of the local community. As an NGO activist, I was interested in promoting a proper mechanism for solving land conflict. One possible solution was the legal recognition of customary land rights.

I contributed to expanding the legal framework at the national and regional levels, to accommodate the legal recognition of customary land rights. In the past decade, some positive outcomes have been institutionalised as pre-conditions for the legal recognition of adat communities' rights. For instance, parliament discussed the need for a special law concerning adat communities' rights, the Constitutional Court upheld the legal position of adat communities' customary forests, and many provincial and district governments enacted regulations and decisions recognising the legal personality of adat communities as a right-bearing subject. However, there have so far only been a few successful recognitions of adat communities' rights appearing as

1 This case is described and analyzed in Chapter 4.

2 In Indonesia, an 'adat community' is a group with specific rights, based on their ties to customary rules and living within a specific territory. NGOs and adat community organisations use the term 'adat communities' (*masyarakat adat*) as a translation of 'indigenous peoples', in the Indonesian context. Meanwhile, Indonesian legislation uses the term 'adat law communities' (*masyarakat hukum adat*). I will explain the variety of terms and their respective definitions in Chapter 3.

3 In this thesis, I use the terms 'the Ministry of Forestry' (MoF) and 'the Ministry of Environment and Forestry' (MoEF) interchangeably.

4 http://pskl.menlhk.go.id/pktha/pengaduan/frontend/web/index.php?r=site%2Fjumlah-penanganan-pengaduan (accessed on 30 November 2021)

solutions for actual land conflict between communities and state agencies or corporations. Even the cases considered to be successes are more complex than how they are presented in the reports and news of advocacy organisations. Up until April 2021, the MoEF has recognized 75 customary forests, covering 56,903 hectares. This number is far from the estimation of customary land rights promoters, who claim that the rough size of customary forest covers 40 million hectares, or 33% of the total forest area in Indonesia (120 million hectares). Wondering about the reasons for such limited success, my PhD research has gradually turned into a critical reflection on this question: Why has there been such limited legal recognition of adat communities and their customary land rights in Indonesia, despite all the enabling factors present, particularly the legislation enacted since 1998?

In the course of my research, I found that this question cannot be answered by only legal research focussing on the legal arrangements for state recognition of customary land rights, nor by only social science research on the actual struggles of specific adat communities. All the cases I studied during my field research, which will be presented in this thesis, turned out to be very complicated. There are many more stakeholders involved in land conflicts than just the adat communities and the natural resource companies. There are historical arguments for land rights, and competing arguments based on present-day law. There are competing authorities among state agencies, and complex procedures for the legal recognition of customary land rights. There are culturally homogeneous adat communities, but more often communities consist of mixed populations including migrants. The struggle for the recognition of customary land rights is part of competing local and national political agendas. Throughout, and in every case, the government - consisting of many different (and often competing) institutions - is a very dominant actor.

To deal with this complexity, I have used four foci to look at specific case studies: procedures, processes, participants, and politics (P4). The first focus is 'procedures', referring to my analysis of the historical development of regulations on adat communities and customary land rights, but also to the currently valid legal procedures for recognition. The second focus is the principle of analysing the legal recognition of customary land rights as a 'process', instead of an outcome or status (static). This implies that the analysis of every case of legal recognition struggle starts with figuring out the land tenure conflict problems that local communities have initially experienced, continues with

investigating several distinct phases of the process leading to formal recognition, and ends with the phase after recognition. The third focus, on 'participants', means that I examine the interests and strategies of various stakeholders in the land conflict, not just the community members. I also distinguish between different dispossessing actors, depending on whether land dispossession has been caused by conservation projects, or by mining and logging companies. Finally, the 'politics' focus highlights how local communities navigate the pursuit of legal recognition under their own complex circumstances. Politics also includes an analysis of how local, national, and global actors use narratives on the legal recognition of indigeneity for their own agendas, as well as to resolve actual land conflicts.

1.1. General themes: Indigenous identity and customary land rights in land conflicts

The general theme of this thesis is indigenous identity as an argument for claiming land rights in situations of land conflict, particularly in forest areas. This theme is widely discussed in international academic literature. In this section, I will explore the main background for the emergence of a movement for the recognition of adat communities and their land rights in Indonesia. It covers both the influence of international indigenous peoples' movements and the reinterpretation of adat from historical origins specific to Indonesia. The two conditions - the global indigenous peoples' agenda, and historical ties to adat - provide an essential foundation for the revival of an adat community movement in contemporary Indonesia.

1.1.1. International advocacy for indigenous identity and land rights

In the past few decades, a global movement of NGOs has promoted indigeneity as a countervailing argument against the land dispossession of local communities worldwide (Moniaga 2007; Merlan 2009; Li 2010; Postero and Fabricant 2019). NGOs, together with anthropologists and international law scholars, have mobilised the international discourse about indigeneity and have sought to transform it into a new global political identity (Niezen 2003:3; Birrell 2016). International institutions, such as the International Labor Organization, the United Nations, the World Bank, and the Asian Development Bank have established conventions, declarations, standards, and safeguarding policies to accommodate indigenous peoples' rights (Gover and Kingsbury 2004; Anaya 2004; Thornberry 2013). At the national level, local communities

and NGOs have used indigenous identity and customary land rights discourses to frame land conflicts with state agencies and corporations (Vel and Makambombu 2019). The main assumption of indigenous rights supporters is that state legal recognition of customary land could prevent and resolve the land conflicts experienced by local community members against the state agencies and corporations that have caused land dispossession. Studies in several countries show that indigeneity was a dominant narrative for local land users encountering land conflicts, including in Indonesia (Persoon 1998; Simarmata 2006; Tsing 2010), Taiwan (Sung 2004), Japan (Kawasima 2004), Bolivia (Postero 2006), Nicaragua (Halle 2005), Canada (Niezen 2010), Malaysia (Idrus 2010), Bangladesh (Udin 2019), Botswana, Mozambique, and Tanzania (Knight 2010).

Although the indigeneity discourse has been prevalent in framing many land conflicts across the world, the effectiveness of this strategy is questionable. The main problem is that many countries have rejected the applicability of indigeneity in their respective countries. The international legal framework, notably the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, has not provided a precise definition of indigenous peoples and customary land rights. Most studies on indigenous peoples refer to Jose Martinez Cobo's (1982) working definition in his report about the situation concerning the indigenous population:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural, social institutions, and legal systems."

The main element of Cobo's definition is historical continuity with pre-invasion and pre-colonial societies. This definition of indigenous peoples or communities might well apply in countries in Latin America, the USA, Canada, and Australia, all of which have a clear pre-invasion past, but it is less appropriate in the context of most countries in Asia and Africa, where native leaders have established post-colonial nation

states (Kingsbury 1998; Niezen 2010). Many national governments in Asian countries refuse to accept the concept of indigenous peoples in their respective countries, stating that all citizens are indigenous (Persoon 1998; Gover and Kingsbury 2004:1; Bedner and van Huis 2008; Erni 2008). This is called 'the salt-water theory', where the government argues that if all citizens in respective countries are indigenous, then it is superfluous to designate a particular group in a country as an indigenous group (Erni 2008; Baird 2016). The Government of Indonesia's denial of the applicability of the concept 'indigenous peoples' appeared in its ambiguous response to the United Nations in 2012, stating that:

> "The Government of Indonesia supports the promotion and protection of indigenous people worldwide. Given its demographic composition, Indonesia, however, does not recognise the application of the indigenous people concept as defined in the UN Declaration on the Rights of Indigenous Peoples in the country."[5]

The main reason for the Indonesian government's rejection of the definition of indigenous peoples is that the term can be used by separatist movements to call for independence through self-determination, which would undermine national integrity. That reference to international support for indigenous peoples was indeed a realistic option for separatists became clear to me in 2014, when I attended the United Nations Permanent Forum on Indigenous Issues (UNPFII), at the UN headquarters in New York. At that time, representatives of Papuan independence organizations delivered a statement urging the Indonesian government to hold a referendum as a way of exercising self-determination for Papuan independence.

Moreover, I found that the representative of indigenous communities and NGOs present at the UNPFII meeting all raised different objectives, related to their own specific interpretation of indigenous peoples' rights. The representative of the Chittagong Hill Tracts of Bangladesh used the international forum to urge the Bangladesh government to implement the 1997 Peace Accord between the Bangladeshi Government and the Parbatya Chattagram Jana Sanghati Samiti (PCJSS), a political party formed to represent the people and indigenous tribes of the Chittagong Hill Tracts in Bangladesh. In

5 Source: http://redd-monitor.org/wp-content/uploads/2012/10/indonesias-response-to-unpr.pdf (Accessed on March 7, 2021).

Taiwan, indigenous peoples' representatives have been concerned with press and media freedom to enable the expression of indigenous culture in public spheres. The different levels of interest in using the international forum on indigenous peoples has made the concept of indigeneity multi-interpretative. The meaning attributed to indigeneity depends on the contentious situation in which it is used.

My research has concentrated on the contentious situation in which Indonesian NGOs and indigenous peoples' organisations have been using indigeneity claims as legitimate bases for local communities against land dispossession by state agencies and corporations. In the Indonesian situation, the reference to international indigeneity discourses is used as a source of mobilisation to resolve land conflicts.

1.1.2. Adat and indigeneity as an alternative narrative against land dispossession in Indonesia

In the 1990s, the Government of Indonesia actively participated in international meetings concerning sustainable development and environmental protection. The government's involvement in this issue opened up an opportunity for NGOs in Indonesia to develop programmes concerning environmental protection and empowering forest dwellers. In 1992, the Rio Declaration on Environment and Development (the result of a multilateral summit) emphasised the importance of local and indigenous communities' contribution to sustainable development and environmental protection (Principle 22). During the 1990s, local communities in some countries – such as Brazil, Canada, Mexico, the Philippines, and Malaysia – referred to international legal instruments on the environment and indigenous peoples as arguments against large scale government-sponsored programmes, such as dam projects and forestry logging activities (Tsing 2007). In Indonesia, environmental activists and legal aid workers found that using the term *masyarakat adat* ('adat communities') as a translation of 'indigenous peoples' provided new arguments for reclaiming land against dispossessions sponsored by Suharto's New Order regime (Moniaga 2007:281-3). At the same time, the adat movement became a safe alternative for the earlier peasant movement, with its class-based land claim that collapsed after the dissolution of the Communist Party in the 1960s (Bedner and Arizona 2019:420). Consequently, since the 1990s, some peasant organisations have transformed their strategy, and have articulated adat claims to deal with land conflicts (Afiff & Lowe 2007:87-9).

For the purpose of using indigeneity as an argument against land dispossession, the English word 'indigeneity' is often translated into Indonesian as the concept of *adat*. However, these terms are not completely similar. In Indonesia, *adat* is translated as 'custom' or 'tradition'. In contrast, 'indigenous' emerged from old Latin words, consisting of *indu* (meaning 'in' or 'within') and the verb, *gignere* (meaning 'to beget') (Manser and Turton 1998:356). Sixteenth-century Spanish conquests in the Americas offered Europeans the term 'indigena' as a template with which to classify natives of the places they hoped to settle and civilise (Tsing 2009). Although the concepts 'adat' and 'indigeneity' have different roots, they tend to coalesce in the Indonesian context as bases for claiming rights. Adat communities in Indonesia often claim their rights by asserting prior occupation of the land – via their own histories/myths of how they settled in an area first. More prominently, they claim indigeneity because they still preserve customary traditions (Muur, Vel, Fisher and Robinson 2019:384; Hauser-Schaublin 2013).

Although the adat strategy began as an argument during the Suharto's New Order regime (1965-1998), local communities have continued to employ this strategy, because land conflicts persist. The number of conflicts has even been increasing, because of large-scale land acquisition by corporations for oil palm plantations, forestry concessions, protected areas, tourism, and infrastructure projects (Komnas HAM and KPA 2014). Worldwide, natural resource-based conflicts activate the articulation of indigenous identity, because a uniting identity as 'stakeholder' becomes relevant in resource competition with other stakeholders, such as government agencies or corporations (Kardashevskaya 2020:106). The presence of 'high-value resources' within the territory of a local community therefore contributes to the strategic mobilisation of ethnic identity (Mahler and Pierskalla 2015). In Indonesia, the adat movement found support for their arguments against land dispossession by referring to the internationally recognised indigenous peoples' rights (Davidson and Henley 2007:5-9). Linking the Indonesian discussion to the international debate stimulated the call for formal state recognition of adat communities. National NGOs promoted legal recognition by advocating for legal reform and by creating legal awareness among adat communities about the options that this legal strategy could bring for ending their land conflicts. Support from educated activists in urban

areas was also a significant factor in the emerging articulation of adat identity by local communities living in remote areas (Li 2000:174).

After the initial enthusiasm around adat movements as a political phenomenon in the 1990s, criticism gradually followed. Several studies have shown the dilemmas and limitations of prioritising adat rights, especially for the part of the population that does not fit within the category of an 'adat community' (Acciaioli 2007:301-2). Some argued that adat rules could also be a source of exclusion for powerless groups within adat communities (Sangadji, 2007:321; Hall, Hirsch, and Li 2011). Other anthropological studies focused on the role of adat, regarding rural justice for migrants (Acciaioli 2007), tourism projects (Warren 2007), and support for local elites (Klinken 2007; Bakker 2009). Adat became a source of mobilisation for adat elites running as candidates in district and parliamentary elections (Fisher and Muur 2020; Arizona, Wicaksono and Vel 2019). The studies called for a critical approach, questioning the deployment of adat in Indonesia (Li 2007).

Despite its importance as a source of present-day contentious politics at global, national and local levels, indigeneity is not a recent concept in anthropology. Adam Kuper (2013) identified the notion of indigeneity as a euphemism for race in the anthropology discipline. Shah (2007:1806) warns a 'dark side of indigeneity' which might maintain a class system that further marginalises the poorest. While Tania Li (2010) argued that the current revival of indigeneity should be regarded as a recall of the politics of difference by colonial rulers, as reflected in most post-colonial states in Asia and Africa. In Indonesia, contemporary discussion about adat communities and customary land rights have their historical roots in the colonial setting. I will briefly explain the colonial legacies of adat in the next section. Detailed analyses can be found in Chapters 2 and 3 of this thesis.

1.1.3. The colonial concepts of adat community and customary land rights in Indonesia

The term adat has been used in the Malay archipelago since the Dutch colonial period. Originally, adat emerged from the Arabic term *ada*, which refers to ordinary practices or habits, and was commonly translated as 'custom' or 'tradition' (Tsing 2009). This term had been used by many local populations in Indonesia, for many purposes, including customary rules for: arranged marriages, traditional festivities, traditional arts and architecture, the lineage system and inheritance, and informal dispute settlement. The term adat appeared in

some writings in the early 19th century by Muntinghe, Raffles, and Marsden (Ball 1986; Benda-Beckmann 2019). Furthermore, Snouck Hurgronje (1893), a Dutch scholar and advisor on Dutch colonial native affairs, discussed the concept of adat in his book, *De Atjehers*, distinguishing it from Islamic norms (Snouck Hurgronje 1893 cited in Holleman 1981:5). Subsequently, his colleague at Leiden University, Cornelis van Vollenhoven, expanded the use of the adat concept in his work regarding the 'law of the native' in the Dutch East Indies. Van Vollenhoven elaborated on the general term of adat, describing it using more specific concepts: *adatrecht* ('customary law'), *adatrechtsgemeenschap* ('adat law community/jural community'), *adatrechtskringen* ('adat law areas'), and *adat* delicts. This elaboration of legal concepts was initially relevant to situations in which the colonial government governed by indirect rule, leaving internal affairs to the adat communities. In this sense, the colonial government respected native communities, in practice allowing them to exercise their customary law. Defining and describing adat communities and their rights was also a way to protect those rights from dispossession by the colonial government.

Two central adat concepts are dominant in contemporary debate amongst scholars, activists and policymakers: adat law community, and rights of avail (Benda-Beckmann 2019:401-5). The debate on these concepts and their adoption in Indonesian legislation in the post-colonial period occasionally refers to Van Vollenhoven's writings. The first debate is concerned with the importance of autonomous communities within native society, because of their potential as self-governing communities. Van Vollenhoven called them 'indigenous jural communities' (*inheemsche rechtsgemeenschappen*) or 'autonomous indigenous jural communities' (*zelfstandige inlandsche rechtsgemeenschappen*). Later, these would be known as *masyarakat hukum adat* ('adat law communities') in the post-colonial Indonesian legislation (Benda-Beckmann 2019). Adat law communities are the smaller constituent corporate units of an organised indigenous society. They derive their distinct legal autonomy in domestic affairs from the fact that each has: a) its own discrete representative authority; and, b) its own discrete communal property, especially land, over which it exercises control (Van Vollenhoven 1901 cited in Holleman 1981:43). Van Vollenhoven described four broad types of adat law communities: genealogical groupings, territorial and genealogical groupings, territorial groupings without genealogical communities, and voluntary

organisations (Holleman 1981:41-53). Van Vollenhoven warns that these groups cannot always be distinguished, as there is much local variation. He states that it is important to be aware that such communities are neither static nor exclusive, but dynamic and inclusive (Van Vollenhoven 1901 cited in Holleman 1981:53).

The second concept pertains to customary land rights. In adat law studies, land property and land tenure are conceptualised as a native right to possession (*inlands bezitrecht*) and the right of avail *(beschikkingsrecht*). Van Vollenhoven underscored that most adat systems distinguished neither possession from ownership, nor absolute rights from the relative rights characteristic of Western legal systems (Benda-Beckmann 2019:402). The introduction of a western type of land property through the *Agrarische Wet* 1870, following application of the principle of Domain Declaration, would disrupt the autonomy of local native populations in terms of land tenure arrangements (see Chapter 3). During the colonial period, the sharp separation between private and public property increasingly led to the colonial government's interpretation of 'wasteland' dominating the control of forested village areas (see Chapter 2).

Two key concepts inherited from the colonial period, adat law communities and the rights of avail, have been adopted in post-colonial legislation (See Chapter 3). NGOs and adat community organisations use these concepts as the legal bases for their land claims. Whilst continuing the argument that the rights of the local population should be protected against the expansion of modern capitalism in rural areas, the contemporary Indonesian adat movement uses a different vocabulary, reframing adat rights to fit with the global discourse on indigenous peoples' movements. For example, AMAN,[6] the biggest adat community organisation in Indonesia, uses the term 'adat communities' (*masyarakat adat*), instead of 'adat law communities' (*masyarakat hukum adat*) - the translation of *adat rechtgemeenschappen* from the colonial studies and legislation. The term 'adat communities' is considered to be broader and more flexible, because it not only accommodates the legal dimension, but also the spiritual, social, economic, and political dimensions of a group. In addition, AMAN also promotes recognition of 'customary territory' (*wilayah adat*), rather than the rights of avail

6 AMAN (Aliansi Masyarakat Adat Nusantara) is the biggest adat community organisation in Indonesia. National NGOs and adat community representatives formed AMAN in 1999 as an umbrella organisation for local communities struggling against land dispossession and cultural misapprehension.

(*beschikkingsrecht/hak ulayat*), as a general term to describe the relationship between adat communities and their natural resources. Despite NGOs and adat community organisations trying to provide new vocabularies for and interpretations of adat, official adat law tuition at universities continues to refer to the original concepts produced by adat law studies during the colonial period. This conservatism in teaching adat at universities not only 'freezes' the concept, it also becomes a burden when making creative interpretations of adat in the context of contemporary contentions with respect to land conflicts (Simarmata 2018). Policy makers at national and district levels often invite adat law scholars with conservative views of adat to supply information for the process of lawmaking.

1.1.4. Legal recognition of adat communities and customary land rights

The central issue for indigenous peoples' movements is the struggle for recognition, including political, social, and legal recognition. In this thesis, I focus on the legal recognition process for obtaining customary land rights. The legal recognition process is defined here as a process by which the state grants formal legal status to a specific community as an adat community, along with its customary land rights. A main driving factor in this process is that communities expect that state recognition will lead to autonomy and self-determination.

In recent decades, recognition has become a main focus in debate about identity and subject formation for different groups in society - for example, debate about women, transgender people, gay people, refugees, and indigenous peoples. Generally, there are two types of legal recognition: notably constitutive recognition, and declaratory recognition. In the first case, recognition is *status-creating*; in the latter, it is merely *status-confirming* (Talmon 2004:101). In the constitutive theory, an adat community exists exclusively via recognition by another group within society and state agencies. In contrast, in the declaratory theory, an adat community becomes a legal entity when it meets the minimum criteria for recognition of an adat community.

However, the process of legal recognition is in practice more complex than this dichotomy suggests. In the process of legal recognition, both the fulfilment of criteria and the recognition of the other parties are essential components. This is because legal recognition is a relational process, involving negotiations on terms and interests amongst the actors involved. The politics of recognition refers to the interaction between claims made by adat communities, and the response

to those claims by formal authorities (Gover and Kingsbury 2004:2). In short, recognition is the interface between rights and authority (Lund 2016). In pursuing legal recognition, an adat community becomes involved in double moves. Firstly, to discipline itself to meet the criteria for adat communities set up by the state (Ivison 2002), and secondly to convince the state to grant its recognition. If granted, legal recognition situates an adat community as a legal person within the state legal framework.

In Indonesia, obtaining recognition is the prominent objective of the adat community movement (Li 2001:645-6). At AMAN's inaugural congress in 1999, the motto was: *If the state does not recognise us (the adat communities), then we will not recognise the state.* At that time, the preliminary purpose of recognition was to be freed from the labels of 'isolated community' (*masyarakat terasing*), 'shifting cultivator', and 'forest encroachers' (Li 2001:655). Gradually, the purpose of recognition has shifted to gaining autonomy as well as self-determination, especially in relation to land rights and the management of natural resources (ICRAF, AMAN, and FPP 2003).

Legal recognition implies the formalisation of customary land rights. The demand to formalise customary land rights is not unique to the Indonesian context; it has become a global trend. Reviewing land legislation in 100 countries, Wily (2018) found that 73 out of 100 states had formulated legislation concerning customary land rights. Nevertheless, most of the legal recognition of communal property has taken place since 1990. Nearly 50% of first-time provision has occurred since 2000, and 25% has occurred over the past decade. Most of this legislation distinguishes communal land from state and individual land property. Communal land tenure refers to situations where groups, communities, or one or more villages have well defined, exclusive rights to jointly own and/or manage particular areas with natural resources, such as land and forest (Colchester 2006; Andersen 2011).

The main characteristics associated with the term customary land rights are that: the land belongs to all community members; informal public authorities regulate land use and ownership within the community; all community members utilize the land and nature in sustainable ways; and the land plots are not a reason for alienation (Hall, Hirsch and Li 2011). Based on these assumptions, adat community members and their supporters perceive the formalisation of customary land rights by government agencies as a confirmation of local and indigenous community authority to exercise customary land tenure

arrangements (Li 2000). Pressure from outsiders, such as the government's interest in using the land for infrastructure projects and business interests for large-scale land acquisition, is considered a disruption to indigenous communities' autonomy to manage their communal land (Colchester 2006). In this sense, adat communities expect that legal recognition can be used to prevent and resolve actual land conflicts.

Legal recognition is not only accomplished by passing new legislation; it can also be accomplished as a result of a court decision. From the Mabo case in the Australian High Court (1992), the Awas Tigni case in the Inter-American Court of Human Rights (2001), and the Sagong Tasi case in the Malaysian High Court (2002), to the recent Ogiek Case in the African Court of Human and Peoples' Rights (2017), the courts have played an important role in advancing legal recognition of indigenous communities and their land rights. In Indonesia, the Constitutional Court ruling Number 35/PUU-X/2012 was a milestone for realising legal recognition of the customary land rights of adat communities. The Constitutional Court Ruling granted adat community land the status of 'customary forest' (see Chapters 2 and 3). National and district government institutions responded to this ruling by creating regulations for realising customary forests. The Epistema Institute (Arizona et al 2017) indicated that there had been 69 district regulations established on adat-related issues over the three years of implementing the court ruling. However, the following questions remain: Has this legal success changed the situation in the field? In Indonesia, what has been the role of the legal recognition of customary land rights in solving land conflicts?

1.2. Research questions

The central question of this dissertation is the following: Has state legal recognition of adat communities and customary land rights in Indonesia brought solutions for land dispossession in land conflict situations? How can we explain the role of legal recognition in addressing the initial demands of local communities in land conflicts? To answer the central questions, this research examines the development of a legal framework regarding the recognition of customary land rights, and how different actors at local and national levels are dealing with different sets of rules in land conflict situations. In this thesis, I discuss several case studies in which local communities have engaged in the struggle to obtain state legal recognition of adat communities and customary land rights in the

forestry sector, as a way to end land dispossession, with differing results. But before analysing case studies, Chapters 2 and 3 will provide a background for land conflict in the forestry sector and discuss the legal framework available for solving land conflicts by answering:

- What are the main causes and characteristics of land conflict in the forestry sector? What procedure is available for local communities to resolve forest tenure conflicts, and is the legal recognition of customary land rights an alternative solution for solving forest tenure conflicts? (*Chapter 2, on characteristics of forest tenure conflicts and emerging options for resolution*).
- Has the Indonesian national legislation provided an accessible procedure for the legal recognition of customary land rights? How have different narratives about customary land rights from colonial legacy, the pursuit of national identity, and the global discourse on indigenous peoples shaped the construction of customary land rights in Indonesian legislation over time? (*Chapter 3, on the genealogy of state recognition concerning customary land rights*).

Chapters 4 to 7 are case study chapters, organised by following the stages in the legal recognition process for customary land rights. Each chapter addresses the following questions:

- Why have some local communities been unsuccessful in obtaining customary land rights recognition to end their land conflict? What are the necessary requirements for legal recognition of customary land rights? What are the constraining factors and main obstacles for beginning the process of state legal recognition of customary land rights? (*Chapter 4, on claiming adat community rights against a mining company*).
- Why is the procedure for obtaining state/legal recognition of customary land rights as a solution to resolve land conflict with corporations so long and complicated? How do power imbalances between local communities and opposing parties in land conflicts influence the outcome of the procedure for legal recognition? (*Chapter 5, on the labyrinth of legal recognition: complexity in obtaining customary forest recognition*)
- Why have some local communities succeeded in obtaining state recognition of customary land rights? What are the enabling factors, and who are the most determinant actors in obtaining state legal recognition of customary land rights? (*Chapter 6, on getting legal recognition for customary forests*).

- What is the impact of state recognition of customary land rights for local community members? Who is benefitting the most? Has customary land rights recognition provided tenure security for land users? (*Chapter 7, on the implementation of legal recognition and land tenure security*).

The final question is concerned with the future of adat strategies in land conflicts: What can we learn about use of the legal recognition strategy by local communities against land dispossession by state agencies and corporations, from experience? (*Chapter 8, on rethinking legal recognition of adat communities and customary land rights*).

1.3. Research design: Procedures, processes, participants and politics of legal recognition

As explained in the introduction of this chapter, I have chosen four foci for analysing my research findings: procedures, processes, participants, and politics (P4). In this section, I will elaborate on these elements and explain their applicability to my research. The main object of my research is the legal recognition process. Legal recognition is defined here as the government act of granting formal legal status in the case of adat communities and customary land rights. Legal recognition is a political process that involves interaction with and interpretation of rules and practices by local community leaders and members, private corporations, academic researchers, and government officials. The difference between the interests of all the stakeholders is central to the politics of recognition which this research aims to explain.

1.3.1. Procedures: The legal framework for customary land rights

Institutionalisation of customary land rights into the state legal framework requires a solid procedure to secure collective identity-based land rights in land laws. The first part of my research therefore concerns the question of how the national legal framework in Indonesia accommodates legal recognition of adat communities and their land and forest rights. My analysis concentrates first on the legislation, from the constitution up to specific legislation on land, forestry and mining. Furthermore, the legal framework is elaborated on, moving along the administrative scale from the national to the district level. Therefore, the second part of my legal analysis explains which state institutions play a role in legal recognition, and what their authorities are. The third part elaborates on which legal procedures need to be successfully passed, and

which resulting documents need to be available, before legal recognition can be granted.

The legal arrangements for adat communities and customary land rights in Indonesia have historical roots in the Dutch colonial period. In the colonial context, the Dutch colonial government recognised the customary land rights of native communities as part of the indirect rules strategy, to support the effectiveness of the colonial government administration. Although the colonial rulers recognised customary land rights at the time, no land registration procedure was created to formalise customary land rights. The post-colonial government no longer relied on the politics of legal dualism inherited from colonial rulers, so the dichotomy between adat and the state was considered irrelevant. Nevertheless, post-colonial land law does recognise customary land rights, with some conditions. Conditional recognition is the element used in the current legal framework for customary land rights in Indonesia. This is discussed further in Chapter 3.

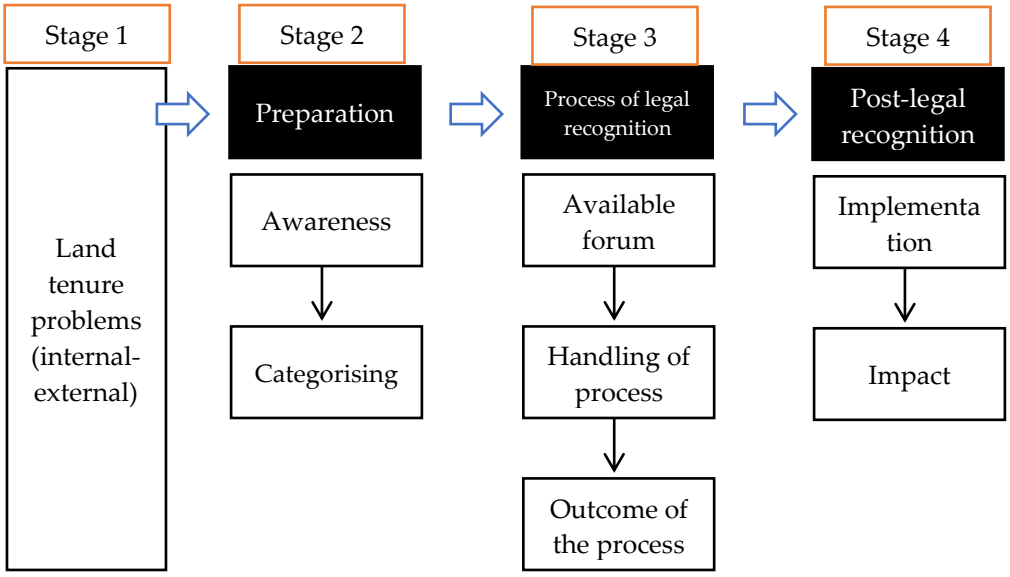
The legal framework for the recognition of customary land rights is evolving. In the past decade, the government of Indonesia made several implementing regulations to realise adat communities' rights. The current legal framework regulates the rights of adat communities in various sectors, arranging these rights across various sets of rules and various state agencies. The implication of this is that adat communities have to deal with different government agencies when negotiating their customary land rights. Therefore, the implementing regulations remain a complex procedure for adat communities to gain full recognition of their customary land rights. In this study, I will use the case study chapters (Chapters 4 to 7) to explain the complex procedure, and how local communities try to navigate it at district and national levels. Local communities have to deal with a complex procedure and they cannot fully control the outcome. As a result, instead of gaining autonomy, local communities can get caught up in an imbalanced relationship with the state, and (following legal recognition procedures) with the NGOs supporting them.

1.3.2. Processes: An analytical framework for the legal recognition process

I have developed a specific analytical framework for understanding the legal recognition of customary land rights as a process from the perspective of communities seeking legal recognition. This framework builds on methods for empirically analysing the process of seeking

access to justice (Bedner and Vel 2010). It has developed further into an *Analytical framework for legal recognition of customary land rights* (Arizona, Wicaksono, and Vel 2019).[7] The analytical framework consists of four stages, beginning with the identification of land tenure problems, then moving on to preparation, the process of creating legal recognition documents, and (finally) post-legal recognition.

Figure 2. An analytical framework for legal recognition of customary land rights



The first step in this analysis explores the land tenure problems of a local community, the internal land tenure arrangements, and the social formation on which land access and ownership are based. The perception of problems may differ between elites, common members, and vulnerable groups within a local community. Furthermore, I analyse land tenure conflicts between local communities and outsiders, especially with state government agencies and corporations.

7 This analytical framework was first used in my article, published in the Asia Pacific Journal of Anthropology: Yance Arizona, Muki Trenggono Wicaksono & Jacqueline Vel (2019) 'The Role of Indigeneity NGOs in the Legal Recognition of Adat Communities and Customary Forests in Indonesia', *The Asia Pacific Journal of Anthropology*, 20:5, 487-506 DOI: 10.1080/14442213.2019.1670241. In this thesis, I use the analytical framework to analyse case studies in Chapters 4 to 7.

Understanding the characteristics of the land problem generating injustice, as perceived by local communities, is essential to explaining the success and impact of specific legal strategies. In this first stage, I do not categorise local communities as adat communities. Whether they can be categorised as adat communities or not is a question that can be answered by navigating the legal recognition process. Local communities who experience land conflicts have a variety of objectives and strategies for resolving the conflict. One option for solving land conflicts is to engage with adat identity claims and to seek the legal recognition of customary land rights.

The second step in the analysis concentrates on preparations for entering the legal process. For land conflicts with forestry agencies, problems occur because the government restricts local communities' access to land and resources in forest areas. Moreover, most of the land has already been designated by the Ministry of Forestry as state land, free of private rights. Meanwhile, communities may have developed land tenure arrangements in the forest dating back to periods before state enclosure (see Chapter 2). NGOs enter the scene as these opposing viewpoints come to a head, often providing local communities with a new perspective on legal interpretations of land control. They translate community problems into grievances concerning the violation of laws and rights. NGOs typically assist local communities in strengthening their adat claims, by revitalising adat institutions, rules and ceremonies, and via participatory mapping. These activities adjust adat for the purpose of categorising and defining land problems, as required for legal recognition.

The third step of the analysis concentrates on the actual legal process for obtaining a government decree on the recognition of customary land rights. Here, local communities need specialist legal assistance to find the most promising strategy in each case. After choosing a strategy, the next activity involves drafting a proposal for state-legal recognition. Recognition at the district level requires scientific research, conducted by academic researchers. Local parliaments hire academic researchers (in some cases, NGO staff) to produce the required academic review (*naskah akademik*). Local parliament considers the report's findings and decides whether the proposal for legal recognition of adat communities and customary land rights will be admitted for further legal processing. Next, there are political negotiations between parliament members and the local government, to ascertain the content of the draft district regulation. Either full parliament finally decides on enacting the district

regulation, or the district head issues a decree. At least one of these district recognitions is required to apply for national-level recognition via a decree from the Ministry of Environment and Forestry (see Chapter 3 for a detailed description of the procedure for the legal recognition of customary forests).

The fourth step in my analysis concentrates on the post-legal recognition phase. The process does not end when the government has granted legally recognised status to the adat community, as well as their land or forest rights. Instead, the process will only end when the initial problems the community members experienced (as in step 1) are solved. This final step is rarely included in research about the recognition of adat communities. If it is omitted, cases easily provide success stories (like the short story at the start of this chapter), but there is actually a much more complex impact of recognition. Therefore, I will pay attention to questions about what happens afterwards: Who is taking care of the implementation of legal recognition? How has legal recognition affected life in the adat communities, and which members have benefitted the most? Assessing whether or not recognition has solved the initial problems of the communities is the final part of my analysis. In this thesis, the four chapters containing case studies (Chapters 4 to 7) will each highlight one step in this process.

1.3.3. Participants: Actors and interests

Researching the legal recognition of customary land rights in land conflict situations does not only involve investigating the roles and interests of one local community and one natural resource company as two adversarial parties, because a wide array of actors is involved in the legal recognition process. The additional actors include government agencies, NGOs, donor agencies, and academic researchers. I analyse the objectives and strategies of these categories of actors, in order to understand the contestations that occur. Moreover, I also pay attention to internal differences within the categories of actors.

a. Local communities and adat communities

When doing research about the legal recognition of adat communities and their customary forest rights, it is clear that adat communities are the main actors in the process that I have been studying. Commonly, legal recognition cases are indicated by the name of a specific adat community, like the Kasepuhan Karang community. But how is the adat community defined in these cases, and which categories of people also

living within the land conflict area are excluded? Zooming in on the actors in land conflicts, it is clear that 'a local community' is not a homogeneous entity (White 2017). Therefore, when speaking about the people who live in the land conflict area, I use the term 'local community' as a geographic distinction, instead of 'adat community' as an ethnic distinction with reference to historical ties to the land (Davidson and Henley 2007). A local community can be an adat community with specific characteristics. Local community members include customary leaders, the village heads, original inhabitants, clans, migrants, women, elders, and youth. Interests and strategies in land conflicts often differ between these categories of community members, as will become clear from the case studies discussed in the chapters of this thesis.

As a further differentiation, local community members can be distinguished based on their position inside or outside of the community, which is highly relevant for understanding issues concerning land tenure and property relationships. In local communities with strict customary rules, internal land tenure arrangements are more complex, because their position within the kinship system of the adat community defines people's access and rights to land. For example, the difference between patriarchal and matriarchal lineages determines gender differences in terms of rights to land and inheritance. There is also differentiation in rights to access land based on criteria of inclusion in the adat community, which implies that immigrants have only temporary use rights, or no rights at all, according to the adat rules. As a consequence, these community-internal distinctions have repercussions on the strategy of each category within the local community, when encountering land conflicts with government agencies and corporations.

The next categorisation of local community members that is relevant to understanding their position as stakeholders in land conflicts is based on their economic activities. The majority of the local community members discussed in this thesis are farmers who cultivate rice, collect benzoin from the forest, or grow coffee and fruit trees. Amongst the farmers, there are differences between small and large farms, based on the amount of land they cultivate. There are also local community members who earn their living working as traders, company staff, laborers, and government employees. Those occupied in non-farming types of work are less dependent on access to land and natural resources, and this difference determines their respective strategies regarding land

conflict. They often welcome the opportunity to get benefit from company operations by obtaining jobs, compensation payments for the use of their land, and business contracts provided by the company (see Chapter 2). For my research, I have selected well-known legal recognition cases, but I did not determine beforehand who the members of the local communities would be, or what the most relevant distinctions between them would be, in terms of understanding their positions as stakeholders in land conflicts.

Another central category in this thesis is adat communities. Some local communities identify themselves as adat communities. The main characteristics they convey usually relate to their collective relationship to a particular place and their adherence to customary rules and practices.[8] The category of adat community determines membership, distinguishing between insiders and outsiders with different rights and responsibilities. In many ways, local community members use the identity of an adat community strategically, depending on the interests they can obtain with such a category. In this study, I did not always rely on the self-identification of local communities to define adat communities. Since this study scrutinises the legal recognition of adat communities, I perceive the status of adat communities to be a result of the negotiation process. Consequently, I will observe legal recognition of adat communities as a relational concept, relying on power relations amongst many different actors. I employ the non-essentialist approach to analyse legal recognition of adat communities and customary land rights. This approach helps me understand adat communities as a socio-political construction through legal processes. In addition, this approach helps me understand how the strategies of various groups in the community have shifted over time, and at particular moments, how local communities have engaged with the strategy of pursuing legal recognition of customary land rights.

b. Natural resource companies involved in land conflicts

Natural resource companies are frequently the opponents of local communities in land conflicts. The companies obtain a land use concession from the government for their large-scale operations.

[8] According to Law Number 32/2009 on Environmental Protection and Management, an 'adat law community' is defined as a group of people who have been living in certain geographic areas for generations, due to their ties to ancestral origins, and who have a strong relationship with the local environment and the existence of a system of norms which determines their economic, political, social and legal institutions.

Companies that extract natural resources can be divided into large-scale companies and small-scale local companies, depending on the size of their yearly turnover and the size of their operational areas. In Indonesia, the common situation in the natural resource exploitation industry is that large companies or business conglomerates operate through many smaller subsidiary companies. The subsidiaries operate locally on just some of the activities in the value chain covered by the business conglomerate. For example, Chapter 5 of this thesis discusses PT. Toba Pulp Lestari (PT. TPL) in North Sumatra. PT. TPL is part of Royal Golden Eagle/Asia Pacific Resources International (RGE/APRIL), which manages over 1.2 million hectares of land, accounting for 26% of all pulpwood concessions in Sumatra. The TPL's concession itself covers 185,016 hectares, dispersed throughout certain districts in North Sumatra.

After obtaining business permits from the government, the conglomerate's subsidiary companies hire small-scale local contractors to conduct specific tasks - for example, logging trees, planting seeds, maintaining plantations, harvesting, and transporting timber. With this mutual cooperation scheme, the subsidiary companies are connected with local companies that are usually founded by local businessmen and politicians. In addition, the subsidiary companies also recruit employees, prioritising local community members. The preferential policy stimulates social legitimacy, because it shows that the company creates employment for local community members. In Indonesia, based on the Company Law (Number 40 of 2007), every company engaged in the natural resources industry is obliged to conduct Corporate Social Responsibility (CSR) programmes. The companies allocate CSR funds to support community empowerment activities, such as providing seeds and other agricultural inputs for local farmers, donations for church construction, and other activities, to create an impression that the company is realising its social and environmental responsibilities. Often, local community members seek opportunities to benefit from the CSR programmes. The company uses CSR programmes to obtain social acceptance from local communities. However, the company can also use CSR programmes to divide local communities, by accommodating the interests of a particular group within the community, whilst excluding other groups who oppose the company's operations. Usually, the CSR programmes are carried out directly by the company, but in other cases the company staff cooperate with local NGOs and youth organisations, as well as with district and provincial governments. The CSR

programmes create economic opportunities for local community members, thereby increasing acceptance of company operations within the community area.

c. The multitude of government institutions

The government is not a single entity; it consists of many institutions with their own roles, duties, and authorities, which often compete with each other. In land conflicts, the government plays multiple roles. In some cases, the government plays the role of opponent of the conflicted communities - for instance, in a conflict between local communities and national park agencies (Chapters 6 and 7). In another type of land conflict between local communities and companies, the government's position became increasingly complicated. On the one hand, the government contributed to causing the land conflict, because the Minister of Forestry gave concessions to companies without the consent of the affected communities. On the other hand, the community asked government institutions, either national or district government, to play an active role as mediator, in order to facilitate land conflict resolution with the company (Chapters 4 and 5).

The government institutions that play a role in land conflict situations can be distinguished as vertical and horizontal. Vertical differences concern the administrative scale that distinguishes the national from the provincial, district and village government institutions. Each level has a specific authority with regard to land conflict and the legal recognition of customary land rights. Horizontal differentiation implies authorities competing across different parts of the government institutions at the same level. For example, there is contestation of the authority over certain land between the Ministry of Environment and Forestry (MoEF) and the Ministry of Agrarian Affairs and Spatial Planning (MAASP). The two ministries have a different legal basis, in Forestry Law and in Basic Agrarian Law, respectively. MoEF and MAASP control different type of land, which creates dual land administration in Indonesia (Safitri 2015). In terms of areas, the MoEF controls 64% of the Indonesian land surface, which is state forest area, whilst the MAASP controls the remaining 36%. The two ministries cover separate territories. For instance, if land has been determined as state forest area, the MAASP cannot issue individual and communal land certificates.

Furthermore, within a single ministry there may be fragmentation and contestation between different directorates. One concrete example,

that will be discussed in more detail in Chapters 5 and 6, can be drawn from MoEF. The MoEF consists of several directorates, with specific authorities. For example, the Directorate of Forestry Business Development aims to increase state revenue from forestry by issuing concessions to companies for natural resource exploitation. Meanwhile, the Directorate of Social Forestry and Environmental Partnership has the task of expanding local community access to forest areas, through social forestry schemes and customary forest recognition. In addition to the above two agencies, there is the Directorate of Conservation of Nature and Ecosystems, which includes national park agencies in charge of biodiversity conservation in forest areas. The three directorates reflect the competition within forest resource management between economy, ecology, and society. The complexity of relations between government agencies is a prominent issue in the analysis of land conflicts and legal recognition in this thesis. The implication of this multitude of government institutions is that local communities have to deal with the complexity of the government structure, at both district and national levels. With limited capacity for dealing with bureaucracy, local communities need support from experts or mediators when communicating with the government, in particular when it comes to complicated matters such as trying to obtain legal recognition. In situations of land conflict, NGOs usually adopt the role of intermediary between local communities and the government.

d. NGOs involved in the legal recognition process

NGOs have been growing in Indonesia since the 1980s, with various agendas to address problems faced by communities at the local level, including land conflicts (Antlov 2006). Adat advocacy strategy is one of the options for NGOs to support local communities suffering from land dispossession. Local NGOs translate and sort the problems into grievances that fit with legal procedure, which is a common role for legal aid workers in providing access to justice (Bedner and Vel 2010:15-6). Currently, with the emerging option to resolve land conflict through legal recognition of customary land rights, NGOs assist local communities in navigating this procedure.

Analysis of the steps in the legal recognition process involves various types of NGO activities. In the case studies discussed in this thesis, there are four categories of active NGOs. The first category of organisations involved in the legal recognition process consists of local or regional NGOs, with programmes to empower local people, capacity

building, and material projects like building village facilities. In general, these NGOs aim to increase local prosperity. Since the 1980s, NGOs have expanded and increased, receiving financial support from private organisations, foreign development funding organisations, and churches (Antlov et al. 2006). Due to long-term relations with local communities, local NGOs have acted as natural advocates of common interests amongst villagers. However, in general, this category of development NGOs has also been criticised, because of its apolitical attitude that ignores the root causes of poverty and land dispossession (Ferguson 1994; Hickey 2009; Li 2007:238). When freedom of speech and political liberty increased, after the Suharto regime ended in 1998, many local NGOs gradually changed their focus towards advocacy as well.[9] Local NGOs typically discuss villagers' problems and translate them into grievances that could be addressed through NGO development intervention, government programmes, or access to justice.

The second category of NGO that is important to the legal recognition process consists of national advocacy NGOs, which emerged in the early 1990s. They started using the term 'adat communities' as an alternative to the class-based concept of 'peasants', in their advocacy campaigns against land dispossession (Moniaga 2007; Afiff and Lowe, 2007; Bedner and Arizona 2019). A prominent example of this kind of NGO is AMAN, an umbrella organisation for adat communities across Indonesia. AMAN's main objective is to put an end to the state territorialisation inherited from the colonial and New Order periods, especially in the forestry sector.[10] As a way of reaching that objective, and as an end in itself, AMAN promotes the legal recognition of adat community rights (Li 2001, Moniaga 2007, Rachman and Masalam 2017). AMAN challenged state legislation that hinders the recognition of adat communities' rights, and encouraged the government to enact a special law on adat communities (see Chapter 3 of this thesis). Since the third congress, in 2007, AMAN has opened up a path to collaboration with the government. AMAN encouraged its community members to put themselves forward as candidates for local and national elections. AMAN also created political agreements with the president and district head candidates, by providing political support for them. In return, the candidates ensured that legal recognition of adat communities and

[9] Interview with RMI staff (Nia Ramdhaniaty and Mardatilla) in December 2018, and a senior NGO activist, Jhonny Nelson Sumanjuntak, in January 2019.
[10] http://www.aman.or.id/ (accessed on March 3, 2019)

customary land rights was stated as their top priority for law-making at the national, provincial, and district levels.

A third category of NGO involved in the legal recognition process has emerged, between the large national NGOs and the smaller local development NGOs. These organisations consist of professionals and specialist volunteers responding to the increasingly complex requirements of donor-funded development work (Banks et al. 2015) and the need to speak the same 'language' as government policymakers (Peluso 2005). For example, the specialist organisations, HuMa and the Epistema Institute both engaged with legal empowerment for adat communities and legal advice to district government agencies (see Chapter 6).[11] Other organisations in this category specialise in technical activities that provide important input into the recognition process, such as participatory mapping of community territories and informal land administration (see Chapter 4 to 7).

The fourth category is international NGOs and donor agencies. International NGOs provide financial support to local and national NGOs to implement programmes related to indigenous peoples and environmental protection. Additionally, this kind of international NGO also engages national NGOs and local community members representing indigenous peoples from different countries in international meetings. International NGOs and donor agencies utilise various international forums to encourage governments and companies to create a responsible sustainable development agenda. In doing so, this organisation lobbies and supports the establishment of international instruments and certification mechanisms, promoting indigenous peoples' rights and environmental protection. Generally, this type of NGO provides financial support to local and national NGOs, as well as running international campaigns to raise international funds to implement their programmes.

Together, the four types of NGO compose a network for cooperation and representation, as well as for the distribution of donor funds. In Indonesia, national NGOs have successfully influenced policy reform in the forestry sector, resulting in several schemes to improve land access for local and adat communities in forestry areas, such as customary forests and other social forestry schemes (Safitri 2010a) (see Chapter 2).

[11] I am grateful to have extensive experience in providing legal assistance to local communities, district government and parliament members, as well as to ministry officials when I worked at HuMa (2007-2010) and the Epistema Institute (2010-2016).

However, in order to implement national policies and create a constituency for national advocacy, these achievements require links with grassroots organisations. Increasingly, the four categories of NGO described above have developed cooperation in promoting the legal recognition of adat communities and their land rights as a model for securing land tenure and access for community members. For local NGOs, stopping land dispossession remains a prime objective, which often converges with the national NGO struggle against longstanding state territorialisation in the forestry sector, favouring community-based forest management.

e. Academic researchers

Academic researchers play an important role in the legal recognition process of customary land rights. In general, academic researchers are lecturers in universities, but sometimes they are researchers based in NGOs. Academic researchers, in this case, are experts in legal requirements for the recognition of adat law communities, and anthropologists who are able to observe and describe the living customs of the communities concerned.

In the process of legal recognition, the role of academic researchers is twofold. Firstly, the lawmaking process in Indonesia – whether for an act of parliament or for a district regulation - formally requires an 'academic review' (*naskah akademik*), with scientific argumentation on whether a certain community fulfils all the requirements of the law to be able to apply for legal recognition. District government and parliament hire academic researchers, because the recognition of adat communities must be done via a district regulation, created jointly by the district parliament and the district head.

The second role of academic researchers relates to fulfilling the requirement for a local community to be recognised as an adat community. An adat community has to demonstrate that adat rules exist, and that community members still have a traditional relationship to the land and other resources. To perform this role, NGOs and the adat community hire or request academic researchers to support them in making customary practices visible before government agencies and members of district parliaments. On the other hand, district government, parliament, and ministry staff also hire other academic researchers to verify claims submitted by adat communities. In this situation, academic researchers become intermediary actors in the legal recognition process.

In addition to their role in the legal recognition process, academic researchers also play a role in the direction of land conflicts between adat communities, companies and government agencies. Many researchers also conduct 'project research', which is commissioned by research institutions, universities, government agencies, international funding agencies, national NGOs, and corporations. For instance, research about actor mapping in a land conflict, the legality of a company's operations, or research to provide policy recommendations. Local community members undergoing land conflicts often perceive academic researchers as their helpers, while companies expect research results to show them in a good light whilst they are dealing with a land conflict against a community. The various agendas and interests of the actors involved in land conflicts make it challenging for academic researchers to produce objective research which does not favour their research sponsors.

1.3.4. Politics of legal recognition

The politics of legal recognition refers here to various actors' negotiation of their own interests within the process of obtaining legal recognition. A classic definition of politics is: Who gets what, in what way? (Lasswell 1936). Bernstein (2017:8) elaborated on this definition for agrarian change studies by posing four questions: Who owns what? Who does what? Who gets what? What do they do with it? These simple questions draw attention to the variety of actors, interests, goals, and strategies. In the politics of legal recognition, local community members, state agencies, and business corporations compete with each other over the ownership and use rights of land and forest.

The attention given to the politics of recognition inspired me to regard legal recognition as a relational concept, involving an interface and mutual relationship between the rights of citizens and state authorities (Lund 2016). In other words, the politics of recognition concerns the interaction between a claim and self-identification by adat communities on the one hand, and responses to the claim by state agencies on the other. In claiming land rights, adat communities have to make their claim visible within the legal framework. In the process of presenting their land claim, adat communities are occasionally supported by intermediary actors, such as NGOs and academic researchers. To obtain legal recognition, adat communities should organise themselves to fit into certain regulative norms enforceable by the state (Ivison 2002), but they should also learn to persuade the state to expand the regulatory framework to accommodate customary land

recognition. Customary land claims require the repositioning of adat communities within the state legal framework. Hence, the struggle for legal recognition of customary land rights can be considered a mutual interaction, reformulating the relationship between state and citizen (Idrus 2010).

In some specific cases, the politics of recognition is also practical and visible in election politics. As district parliament and the district head both have the authority to decide on the status of adat communities, these communities are eager to create alliances with local politicians, in order to gain support for the recognition of customary land rights (Muur 2018). Adat communities either delegate one of their members as a candidate for local election, or they support a candidate outside their own community who has a clear agenda to push the legal recognition of customary land rights. All the case studies in this thesis show how local communities negotiate with local politicians in this way. Similarly, adat community organisations at the national level have been using presidential and parliamentary elections as an arena to create political awareness, and to lobby for a bill on adat communities' rights (Chapter 3).

1.4. Case study selection

Selecting proper case studies for this research was a challenging task. My past work experience in promoting customary land rights for ten years in Indonesia had provided me with a substantial amount of information about cases regarding adat communities who struggle to obtain state recognition of customary land rights. As a PhD student, I realised that the information collected by the adat movement was meant for advocacy purposes and might not be sufficient for rigorous academic research. However, the information I had was very suitable for making a list of cases in which communities tried to obtain legal recognition from the government. My subsequent research of the selected cases would then provide more objective information and correct the advocacy movement's bias.

Therefore, I used a set of explicit criteria to help me select case studies that provide data on the whole process of legal recognition. This means that I have used purposive case selection, relying on my own assessment capacity as an expert in the field of adat studies. Purposive (or deliberate) sampling is disadvantageous compared to random sampling, in that it introduces a bias that hinders generalisation of the research findings (Palinkas et al. 2015). However, this method does

allow patterns, and particular mechanisms that occur in the situation as defined by the selection criteria, to be identified. In this thesis, I use the case studies to illustrate factors at play in the legal recognition process, and to generate knowledge about these processes in more abstract terms (Lund 2014).

First, I made an inventory of customary land recognition initiatives in several locations, for which information was available from academic articles or books, NGO reports, and studies by government institutions. In 2017, during the preparation of my research proposal, the Van Vollenhoven Institute organised the conference, *Adat law 100 years on: Toward a new interpretation*. To find suitable cases for my research, I read the 90 abstracts that participants had submitted to the organising committee. I also gathered data from the Epistema Institute, AMAN, and the National Commission on Human Rights of the Republic of Indonesia, for inclusion in the inventory. On December 30th 2016 the government of Indonesia recognised the customary forests of nine adat communities, for the first time. This successful recognition also provided me with new options for case studies for this research. Based on various sources above, I collected 34 cases where local communities have been using the legal recognition strategy of customary land rights as an argument against land dispossession.

Next, I used the following criteria to select case studies for my research from the 34 legal recognition struggle cases. The first criterion was that land conflict between local communities occurred within state forest areas, so that all the cases would legally concern forest areas, rather than agricultural land or urban areas. In Indonesia, the (legal category of) state forest areas covers 120 million hectares, around 64% of the Indonesian land surface (SOIFO 2020). A detailed discussion of the background for forest tenure conflicts is given in Chapter 2. Many local communities have employed customary land claims against land dispossession in forest areas, confronting state agencies and corporations in the forestry sector. In addition, the Constitutional Court ruling number 35/PUU-X/2012 in 2013, concerning customary forests, provided a new opportunity to institutionalise the legal recognition procedure for customary forest (see Chapter 3).

The second criterion was that my research should cover the main types of forest land tenure conflicts in which adat communities are involved. I have distinguished the conflicts, based on the main reasons for land dispossession in forest areas: conservation projects, forestry

concessions, and mining operations. Therefore, I have selected case studies that together cover these three situations.

The third criterion relates to the stages in the legal recognition process, as explained above in section 1.2.2. Through purposive selecting, I intended to present a series of cases that differ in how far they have come in the legal recognition process. In the first case, the struggles for recognition had already got stuck in the preparation phase. The second is about two communities that reached partial recognition. In the third case, the community obtained full recognition, which allowed me to investigate the impact of this achievement. This selection procedure led to study of the following cases:

a. Local communities versus a mining corporation in Sumbawa

The first case study is a land conflict between local communities and the mining corporation, Newmont Nusa Tenggara (PT. NNT), in Sumbawa District, West Nusa Tenggara Province. I focus on the Cek Bocek community, who demanded compensation from the mining company that operates in their customary land. The colonial government displaced the Cek Bocek communities in the 1930s. Subsequently, the post-colonial government designated their former villages as 'state forest area'. The Cek Bocek community, with the support of AMAN Sumbawa, has been trying to pursue legal recognition of adat communities by the district government. However, the district government refused to recognise the Cek Bocek community as an adat community with customary land rights. This case study represents a situation where local communities fail to even enter the process of legal recognition, which in the process approach means that they do not get further than stage 1. This case is elaborated on in Chapter 4 of this thesis.

b. Local communities versus a forestry corporation in North Sumatra

The second case study was already mentioned in the opening story of this chapter. It concerns the land conflict between local communities and a forestry corporation in North Sumatra Province, PT. Toba Pulp Lestari (PT. TPL), which has been operating since the 1980s. Under its previous name, PT. Inti Indorayon Utama, the company obtained concessions of hundreds of thousands of hectares of forest land, to operate in several districts in the North Sumatra Province. The conflict between this company and local communities has continued since the 1980s, because the company's concession areas have always overlapped with farmland and forest area belonging to local communities. In the Humbang and

Hasundutan districts in particular, the Batak ethnic groups have been cultivating benzoin forests for hundreds of years. This case specifically focusses on one of these communities: the Pandumaan-Sipituhuta community. In 2016 the Ministry of Environment and Forestry allocated 5,172 hectares of the company's concession area to be designated as Pandumaan-Sipituhuta customary forest. The President of the Republic of Indonesia symbolically gave the Minister decree to representatives of the Pandumaan-Sipituhuta community at the Presidential Palace. However, legal recognition of customary forests as the final process of conflict resolution can only be accomplished if, first, the Pandumaan-Sipituhuta community has been recognised as an adat community by the district government. In the end, the Pandumaan-Sipituhuta only obtained partial recognition of their customary land rights. This case study shows how complex the legal procedures are, which must be followed by the community when pursuing legal recognition of customary forest as a solution to land conflicts with business enterprises – stage 3 of the analytical framework. This case is explained in Chapter 5 of this thesis.

c. Local communities versus national park agencies in Banten and Central Sulawesi

The third case study is a land conflict around two forest conservation projects. I compare the land conflict between Kasepuhan communities versus the Mount Halimun Salak National Park (TNGHS), in Banten, with the case of Marena communities versus Lore Lindu National Park (TNLL), in Central Sulawesi. Land conflicts between local communities and national park agencies have some similar characteristics, especially since national park officers restrict local communities' access to forest products, for commercial purposes. The community tried to confront the claims of conservation forest areas, arguing that the forest areas were their customary land, because they had lived in the forest area before the government designated it as a forest conservation area and established the national parks. Both the Kasepuhan Karang and Marena communities obtained customary forest recognition by the Ministry of Environment and Forestry, in 2016 and 2017 respectively. Although both communities gained legal recognition, the process for obtaining customary forest status was not simple. The legal recognition process involved many actors and political decision-making moments, at both the local and national levels – stage 3 of the analytical framework. The two successful cases provide an illustrative example, which can be used

to learn how the implementation and impact of the legal recognition of customary forests affects local community members, and tenure security for land users – stage 4 of the analytical framework (Chapters 6 and 7 of this thesis).

Table 1. Characteristics of the four communities selected for the case studies

	Cek Bocek	**Pandumaan-Sipituhuta**	**Marena**	**Kasepuhan Karang**
Location	Sumbawa District, West Nusa Tenggara Province	Humbang Hasundutan District, North Sumatra Province	Sigi District, Central Sulawesi Province	Lebak District, Banten Province
Land conflict area	Forest area and mining concession area	Forest production area	Forest conservation area (Lore Lindu National Park)	Forest conservation area (Mount Halimun Salak National Park)
Community's main opponent in land conflict	Mining company, PT. Newmont Nusa Tenggara (PT. NNT)/(PT. AMNT)	Forestry company (wood pulp production), PT. Toba Pulp Lestari	Authorities of the Lore Lindu National Park	Authorities of the Mount Halimun-Salak National Park
Stage in the legal recognition process	Stages 1 and 2, concerning the identification of a land tenure problem, and preparation (awareness and categorising)	Stage 3, concerning the process and outcome of legal recognition	Stage 3, concerning the process and outcome of legal recognition	Stage 4. Post-legal recognition, concerning implementation and impact
Form of legal recognition	The local parliament refused the community's proposal to obtain legal recognition	Partial legal recognition of customary forest by the MoEF	The MoEF diverted customary forest recognition to the preserved forest area, whilst the community demanded a forest conservation area.	The MoEF decree on customary forest recognition

1.5. Research method

1.5.1. Multi-sited fieldwork

Legal recognition of adat communities and customary land rights is not something that just takes place in areas where the communities live. Instead, as explained above, it involves a chain of activities conducted by a range of actors who work in other areas, such as in the district capital town or neighbouring villages, in the national capital, Jakarta, and in the offices of government institutions and NGOs involved in the process. Therefore, I have conducted my fieldwork for this research at all these various administrative levels, as well as within the wider geographical area around the community territory.

In my field research at the community level, undertaken from 2017 to 2019, I spent six months in three locations: Pandumaan-Sipituhuta community (North Sumatra), Kasepuhan Karang community (Banten), and Cek Bocek community (Sumbawa). In each of these community areas, I conducted interviews with the neighbours of the communities, in order to capture the broader picture of land conflicts and to observe their (often competing) interests. In addition to the three selected communities, I also included a community from Central Sulawesi, which is involved in the case of the Marena community versus the Lore Lindu National Park. I use the Marena community case in Chapter 5, together with the Kasepuhan Karang community case, because both cases have similar conflict patterns. During my fieldwork from 2017 to 2019, I did not visit the Marena community. This is because before I started my PhD research in January 2017, I had already visited the community (in November 2016) to gather updated information about legal recognition, as preparation for my PhD research. Additionally, I used the information I had obtained from previous research amongst the Marena in 2010 and 2013.

Figure 3. Locations of fieldwork

1.5.2. Data collection method

To help me enter the sites for my field research, I used my previous engagement with national and local NGOs to contact relevant informants. Aware of the bias that this would potentially create, I maintained distance from the NGO workers and explained clearly to all my informants that I was not there as an NGO activist, but as a researcher writing a university thesis. By conducting interviews with all the different actors engaged in land conflicts, I was able to gather information about the activities, narratives, interests and strategies of the various parties in each land conflict that I studied. This method was crucial to avoiding bias, when gathering and analysing data for this research.

From 2017 to 2019, I interviewed more than 200 informants, consisting of adat community members and leaders, village government officials, NGO activists at the local and national levels, members of national and district parliaments, forestry officials, and company managers. As an observer during my fieldwork, I attended more than ten meetings and events at government offices, where district government officials discussed the legal recognition of adat community rights with community members. I collected NGO reports on the selected case studies, as well as local newspaper reports documented by the local NGOs. These documents are crucial for tracing land conflicts between local communities and state agencies or corporations, and for understanding how the frames for and narratives of land conflict have changed over time.

Doing research on land conflicts engaged me in an adversarial relationship between the conflicted parties. Every party, whether a local community, or a corporation or government agency, had their own story about the land claims, and they tried to reject their opponent's claims. Moreover, the parties also tended to hinder researchers when they wanted to meet with their opponents. If I met with the opposing party, in particular with the company staff, I was considered to be disloyal, and it would affect my relationship with local community members. I encountered this dilemma when doing fieldwork in three different locations. I entered the community via local NGO workers, who had assisted the community in dealing with land conflict. This strategy had advantages and disadvantages. The NGO provided me with a large amount of data concerning their activities with the local communities. However, I was also looking for an opportunity to meet with officials of the companies involved and national park managers. In North Sumatra, I had the opportunity to stay one night in the guesthouse of the PT TPL, where I interviewed the company's commissioner. On another occasion, I also interviewed the director of PT. TPL, and several top managers of the company. The company director also invited me to attend a meeting between the company and a local community whose members had agreed to sign a cooperation agreement with the company. The company's top managers attempted to show a positive image of the company when I conducted the interview. Through the company staff, I was also able to enter the location of the disputed land, and to get in touch with other communities who had set up collaborative forest management with the company.

In Sumbawa, I interviewed the public relations department staff of PT. AMNT. In a group interview, the head of the public relations department was very reserved and provided just a glimpse of the information regarding the ongoing land conflict. I also conducted a group interview with the field officers of the company, in order to collect more information and hear their perspectives on the land conflicts with the community. In Banten, I interviewed national park officials in their offices.

1.5.3. Reflexivity

Before I started my PhD research in 2017, I had been working for ten years for NGOs promoting adat community rights in Indonesia. Bias therefore seemed inevitable in this study. However, since beginning this research I have stepped back from policy advocacy and have used PhD

research as a means for reflexivity. Reflexivity is a researcher's ongoing critique and critical reflection on his or her own biases and assumptions, and how these have influenced all stages of the research process (Begoray and Banister 2010). To employ reflexivity, I have changed my initial intention - to conduct research from an advocacy perspective – to an intention to place the experiences of the local community at the centre of my research. When I started writing my research proposal, I was most interested in studying the subject formation of indigenous identity, and in linking it to the discussion on cultural and collective citizenship. This topic arose from my experience as an NGO activist and my master thesis at the Onati International Institute for the Sociology of Law, in Spain (2016). However, my interest gradually changed after my literature review on access to justice. The literature review led me to focus more on the actual problems encountered by local communities in land conflict situations. With this new perspective, I positioned indigeneity mobilisation and customary land recognition as options for local communities, amongst the various other advocacy strategies available. By doing so, I started to see adat or indigeneity as a source of local struggles, instead of as an imperative concept to be applied in reality (Groose 1995, Mende 2015). My field research changed my initial view on the adat community as a stable entity into a perspective that acknowledges the members of local communities as individuals without specific attributions. In diverting my perspective away from an essentialist view of adat communities, I could understand how identities, interests and power differences play a role within the community, and how indigeneity is being translated, articulated and constructed within the community.

However, this transformation did not turn me into an outsider smoothly, because the local community members and NGO activists in places where I did my previous research still remembered my former role as an NGO activist. They observed me with mixed feelings. During my field research, I always introduced myself as a PhD candidate from Leiden University, who was doing research on the legal recognition of adat communities. However, some of the local community members and local NGO activists still expected that my visit would help them strengthen their position in solving their land conflicts. Once, when I was doing fieldwork in North Sumatra, a local NGO organised a press conference to put pressure on the district government to enact the district regulation on legal recognition of adat communities. I was not planning to give a talk at the press conference. However, after an

introductory speech by one of the local NGO leaders, she suddenly invited me on stage as a speaker. I accepted, because I thought that refusing her request would spoil our good relationship. But, instead of lobbying for the district regulation, I presented information on the process of legal recognition of adat communities in more general terms, without touching upon specific details regarding the local communities, which were the main subject of my research.

One critical question was repeatedly addressed to me, regarding my engagement with adat advocacy in the past and in future. When I attended a conference in Canberra (Australia) in 2019, to present one of my articles that is quite critical of the role of NGOs in the legal recognition of adat community rights in Indonesia, a participant asked me: "What will you tell your fellow NGO activists about your critical examination of adat mobilisation, after you complete your PhD?" I responded by positioning my research as a critical reflection on the strategy of adat mobilisation for land claims in contemporary Indonesia. This thesis intends, theoretically, to generate a new understanding of the use and limitation of adat in contemporary resource politics. At a more practical level, the thesis intends to provide lessons-learned in order to support (but also to warn) local communities, when they try to obtain access to justice in land conflict situations.

1.6. Overview of chapters

This thesis is divided into eight chapters. After the introduction in Chapter 1, Chapter 2 explains the main causes and characteristics of forest tenure conflict, compared to other types of land conflict. Chapter 2 also serves as background for the case study chapters (Chapters 4 to 7). I found that land conflict in the forestry sector has its historical roots in colonial policy, which controls forest areas and restricts local communities' access to forest land and resources. Since the 1990s, several initiatives have been constructed to provide legal procedure to mitigate forest tenure conflict, such as social forestry and agrarian reform programmes. I discovered that these programmes have structural limitations when addressing a variety of forest tenure conflicts, and it is crucial that another mechanism is explored. As an emerging option, the legal recognition of customary land in forest tenure conflicts provides a new mechanism for resolving land conflicts.

Chapter 3 explains the legal framework for customary land rights in Indonesia. I analyse the construction of customary land rights by lawmakers in parliament, judicial authorities, and government offices

throughout Indonesian history. By analysing the lawmaking process, constitutional court rulings, and the implementation of regulations over time, this chapter discusses the genealogy of legal recognition of customary land rights in the Indonesian legal system. The main finding is that legal recognition of customary land rights is conditional. This model of conditional recognition has resulted in complicated circumstances for the realisation of customary land rights.

The following chapters discuss the interpretation of customary land rights in practice, by zooming in on three selected case studies that differ in the extent of their success in obtaining state-legal recognition of customary land rights. I have sorted Chapters 4 to 7 based on two criteria, which are: the type of land conflict, and the stage the land conflict has reached in the legal recognition process.

Chapter 4 discusses a land conflict between local communities and a mining corporation in Sumbawa (West Nusa Tenggara). I focus on the case of the Cek Bocek community. This chapter analyses the prerequisites for starting the process of legal recognition of customary land rights (Stages 1 and 2 of the analytical framework). The most crucial aspect is the consensus amongst community members about the actual problems, strategies and goals in the land conflict situation.

Chapter 5 shows how complicated it is to obtain legal recognition from the district government and the MoEF. This chapter analyses an ongoing case of a local community pursuing legal recognition of customary land rights as a solution to end their land conflict with a forestry company. The central case study in this chapter is a land conflict between the Pandumaan-Sipituhuta community and a logging company, PT. Toba Pulp Lestari, in North Sumatra. In analysing the complicated procedures for recognition, this chapter zooms in on stage 3 of the analytical framework.

Chapter 6 discusses the more successful recognition cases of the Kasepuhan Karang community (Banten) and the Marena community (Central Sulawesi). With the support of NGOs, the two communities have completed the full procedure and have obtained their legal recognition. The cases put emphasis on the capacity of local communities, and the important role of NGOs in assisting them in finding the right political and legal opportunities. This chapter identifies crucial success factors in obtaining legal recognition.

Chapter 7 analyses what happens after adat communities have obtained customary land rights (stage 4 of the analytical framework). Again, I discuss the Kasepuhan Karang community case, in which newly

obtained communal land rights were divided between individual land users via an informal land registration system providing land-use certificates for every land user. Moreover, the registration administration showed that around 40% of land users in the Kasepuhan Karang customary forest are not members of the Kasepuhan Karang community. This case study illustrates the significant role of community leaders in the implementation of legal recognition. This case also shows that state-recognised customary land rights do not always provide tenure security for all land users.

Chapter 8 is the concluding chapter, where I reflect on the main lessons learned from previous chapters. Chapter 8 returns to the broader discussion on indigeneity, land dispossession, customary land rights, and the politics of recognition, in order to reframe the state and society relationship. This study warns local communities, NGO activists, and policymakers that legal recognition is not the end result in securing customary land rights. At both national and local levels in Indonesia, the politics of recognition in the global discourse of indigenous peoples has been translated in a problematic way. Advocacy to secure customary land rights has shifted to a complicated process of defining the legal personality of indigenous communities. The current parliamentary bill on adat communities' rights also contains a serious problem, in that it cites legal recognition as the key concept for the realisation of customary land rights. This thesis concludes that institutionalising legal recognition of customary land rights risks trapping local communities in complicated procedures to define indigenous identity, instead of directly securing their land rights. Therefore, instead of focusing on legal recognition, customary land rights supporters would do better to concentrate on protecting the land rights of the people who depend on the land or forest for their livelihoods.

2 Characteristics of forest tenure conflicts and emerging options for resolution

2.1. Introduction

Forest is a very contested natural resource in Indonesia. For centuries, colonial rulers, post-colonial governments, corporations, local traditional kingdoms, and local land users have competed over forest rights and access. The contestation of actors, claims, strategies and goals have made forest areas an important arena for natural resource conflicts. Forest conflicts are pervasive in Indonesia, because forests contain extensive natural resources, including timber, mining deposits, carbon, animals, fruits, and other natural products.

The government of Indonesia claims control over 120 million hectares of forest, which is around 64% of the national land surface. The government has divided the forest into areas for extractive activities, such as logging, plantations and mining, and areas for the conservation of biodiversity. Meanwhile, local communities who live in the areas surrounding such forest are not allowed to access it, even though they have been living and utilising forest resources for generations. The Indonesian Central Bureau of Statistics *(Badan Pusat Statistik/BPS)* released a census, stating that 31,957 (or 71.06% of) villages in Indonesia are located in the surrounds of forest areas (Safitri et al. 2011:6-7). In 2014, the MoEF conducted a forestry survey and found that 32,447,851 people depend on forest resources for their livelihoods. Most of them are living in poverty. They have been cultivating land and gathering products from the forest, according to their local customs. The local communities continued living there, but after the government changed the status of their forest to 'state forest', they became illegal squatters, according to state law. This imbalance of power and access leads to forest tenure conflicts between local communities, state agencies and forest corporations, centering on the question of who has legitimate rights and access to forest resources. This chapter elaborates on the main forest tenure problems, with a historical explanation of why forest tenure conflicts have been occurring, and an analysis of why (in general) solving forest tenure conflicts is so difficult.

The first part of the chapter concentrates on how the state developed its control over forest areas throughout history in Indonesia, and how

this led to pervasive land conflicts with local communities. This part will explain how the legal construct of 'state forest' was invented by the colonial government of the Dutch East Indies, and how it was continued by successive post-colonial governments in Indonesia. The idea of designating state forests was not only based on politico-administrative decisions, it was also justified by the argument that the state is the most capable actor in scientific forest management - able to best balance environmental protection with economic exploitation. In practice, creating state forest areas implies that the government determines boundaries, and divides the functions and allocation of forests according to conservation, protection, or production forest areas. Accordingly, the government restricts access to the forest for anyone without a government license or entry permit; this shows the practical meaning of the legal concept of state forest, when defined as an area. The legal concept defines state forest as an area that is cleared of any other individual or collective private rights. Consequently, government agencies perceive members of local forest communities who enter the forest in the way they have been doing for generations as trespassers, who are intruding on the state's exclusive control over forest areas.[12]

The second part of the chapter addresses the question of how forest conflicts can be characterised. Denial of local communities' customary rights to forest resources has been the leading cause of forest tenure conflicts (Peluso 1992:44). However, a more sophisticated analytical framework is needed in order to understand how conflicts arise, who the main actors and interests are, and what the legal underpinnings of their positions and the possible solutions are. My analytical framework distinguishes types of forest conflicts based on: (a) the (well-differentiated) main actors involved; (b) legal classification of the state forest concerned; and, (c) the interests and objectives of local community members regarding the contested forest rights. In other words, conflicts occur between local communities and forestry agencies, such as national parks, as well as with companies operating within forest areas. Companies operating in forest areas are also various, from merely logging trees, to building timber plantations, conducting conservation activities, or mining gold and silver. Meanwhile, local community members have various objectives; for example, maintaining access to their forest gardens as a source of livelihood, or obtaining compensation

[12] For instance, Article 24 of *Boschordonantie voor Java en Madura 1927* for the colonial period, and Article 50 (3) of the Forestry Law Number 41/1999.

and other benefits from companies operating in their customary forest areas. This variety of interests makes not only the analysis, but also the solution of forest conflicts complex.

The third part of the chapter discusses the solutions for forest conflicts that government agencies, companies, NGOs, academics, and local land users have been seeking. Since the 1980s, international and national NGOs, as well as academic scholars, have promoted community-based forest management as an alternative to state-centred forest management. The main argument for this approach is that local communities can better manage forests in a sustainable way, which will reduce environmental degradation due to deforestation. In addition, community-based forest management supports poverty alleviation in rural areas. Therefore, NGOs and local communities have been encouraging the government and parliament to create legislation and programmes which recognise community-based forest management practices. This kind of advocacy by NGOs and forestry academic scholars has gradually convinced government institutions to create policies and programmes to enhance public access to forest resource management. In this section, I will analyse some legal options for resolving forest tenure conflicts, such as social forestry and land reform programmes. However, these schemes never provide a structural solution for local communities' lack of formal rights to the forest. This is precisely what points towards an advantage to be gained by an alternative solution for forest conflicts: state recognition of customary forest. It is also why my research has been devoted to this – in theory - more promising and structural solution for ending forest conflicts.

Together, the three parts of this chapter provide general background for the case study chapters (4 to 7) on forest tenure conflicts, and how legal recognition of customary forest is used by local communities as a strategy to resolve forest tenure conflicts.

2.2. State territorialisation and political forest

> *The ideology of "scientific" forestry was embraced by the colonial state and its foresters, while local institutions of forest access and property were gradually phased out of the legal discourse. The impacts of these policies on the lives of forest-dwelling people remain significant today.*
>
> Nancy Lee Peluso (1992:44)

To understand the background to the current proliferation of forest tenure conflicts, we need to return to colonial times, when the policies that still constitute the backbone of present-day government forest policy were developed. Two concepts are central to the policies: state territorialisation, and political forests. State territorialisation refers to the measures by which the government declared forest areas to be state property. This legal construct is a legacy of the Dutch colonial regime, as will be explained below. 'Political forest' constructed 'forest areas' which are areas determined by the government, by administrative decision, and such areas are distinguished from other types of land. Within the concept of political forest, forest area is not defined by its biological characteristics; for example, by measuring tree density. Instead, what constitutes a forest area is determined by the government's political decision (Peluso 1992:131; Peluso and Vandergeest 2001).

2.2.1. The formation of state forest area in the colonial period

The territorialisation process began in the colonial period, when the VOC declared that forest areas belonged to the colonial authority and prohibited the local population from entering the forest to log trees. Even during the period before actual colonisation, the founder of Batavia (which later became Jakarta), Jan Pieterzoon Coen, prohibited logging around Batavia in 1620. Subsequent rulers continued with similar policies. In 1811, Governor-General Daendels declared that teak forests would have the legal status of 'state domain' (*staat landsdomein*) from then on, and that they should be managed for the benefit of the state (Peluso 1992:45). At that time, the Dutch colonial government focused on creating regulations to control teak forest on Java Island. As soon as forests were designated state property, the colonial government started granting concessions to private companies. In 1831, King Willem I decided that the government could grant short- and long-term lease rights to European plantation owners, for uncultivated land in the colony (especially forest areas), adding the restriction, "as long as such land lease permit did not harm the rights of native communities" (Termorshuizen-Arts 2010:42).

In 1865, the Dutch colonial government strengthened forestry control via a regulation applying specifically to Java and Madura.[13] The

[13] Ordonnantie van 10 September 1865, Staats- blad no. 96: Reglement voor het beheer en de exploitatie der houtbosschen van de Lande op Java en Madura (See Peluso 1991:68 and 74).

1865 forest regulation defined forests as state-owned forests by removing a provision on the recognition of native communities managing their village forests (Hardjodarsono et al 1986:76). At that time, the general policies of European expansion and imperialism supported the creation of regulations to protect and control colonies against other colonial powers, whilst increasing profits from colonial exploitation. The 1865 forestry regulation was revised several times, including in 1874, 1875, 1897, 1913, 1927, 1932, 1937, and 1939. Such revision was conducted to expand government control over forest areas, including by implementing the 'domain declaration' principle, according to the *Agrarische Besluit* of 1870 (Rachman 2012:33-4). For example, in 1874 the colonial government enacted a regulation on forest management and exploitation in Java and Madura, which divided forest management by teak and non-teak forest areas (Hardjodarsono et al 1986:80; Mary, Armanto and Lukito 2007:10). This regulation strengthened the colonial government's control, and provided a legal basis for issuing concessions to private corporations to exploit teak forests. In the beginning, the colonial government was only interested in controlling teak forest in Java, because of its commercial value. However, under the Domain Declaration, state control extended to non-commercial forest and 'wilderness' forest (Termorshuizen-Arts 2010:63-4). The colonial government expanded its control over non-teak forests by prohibiting logging activities. At the time, the ban on logging was intended to ensure the availability of timber stocks, but the ban has persisted on the grounds of maintaining flood prevention and protecting biodiversity.

Colonial government control of forest areas was not only based on policy, but also on the application of specific academic knowledge, known as 'scientific forestry' (Peluso 1992:44; Siscawati 2012:1-2). Scientific forestry employed a quantitative approach to forest management. One of the first scholarly works on scientific forestry was produced by Georg Grünberger (1749-1820), professor of mathematics and co-director of the Bavarian Royal School of Forestry, in Munich. Grünberger introduced the fundamental principle of scientific forestry by producing a map that showed an imaginary forest patch, structured within a mathematical grid. Grünberger's academic textbooks on scientific forestry were used by the first generation of scientifically trained foresters in Germany (Siscawati 2012:53). There are three key concepts in scientific forestry (Rajan 1999; 324-333, cited in Sirait

2015:41). The first is that forest has to be maintained at minimum diversity, in order to obtain as much of the same timber product as possible from a limited land area. A consequence of this is the clearing of other trees, with less commercial value. The second is that balance sheets should be created, which aim to convert the standing timber stock into a numerical value and calculate the optimum harvesting age of the trees. The third is that employing sustained yields aims to maintain a logging cycle rotation over several decades, which requires a system of forest cut blocks and an annual allowable cut (AAC).

As scientific forestry was developed in Germany, sometimes this approach is called the German School of Forestry. This scientific forestry paradigm spread to Germany's neighbouring countries, including France, England, and the Netherlands, as well as to the colonies of European countries, including India, Burma, and the Dutch East Indies (Siscawati 2012:55). In 1849, the first professional foresters with a German forestry education were appointed under the Dutch colonial administration, with a mandate to develop improved cultivation practices for the teak forest estates in Java (Hardjodarsono et al 1986:80; Boomgaard 1992). The principle that forest management was best assured by state stewardship over forest lands led to the establishment of a professional government forestry service. Its responsibilities included controlling forest lands, replanting degraded forests, the development of tree species, and following and improving forest management practices (Peluso 1991; Siscawati 2012:65). To implement scientific forestry, forest areas must be under the direct control of the state, and be free of any individual or collective claims (Article 2 of *Boschordonantie* 1927). To ensure exclusive control by the government, forest areas must also be designated and separated from non-forest areas. In other words, to ensure that forest management can provide maximum benefits for the state, the state authority needs the support of scientific forestry.

The colonial government also created a forestry service, *Het Boschwezen van Nederlandsch Indië*, on July 1st 1897 (Siscawati 2012:66). The *Boschwezen* was a colonial government enterprise under the Ministry of Agriculture (Termorshuizen-Arts 2010:62-3). *Boschwezen* developed 'political forests' by drawing boundaries between agricultural and forested land on their maps, seizing all the land unclaimed by native communities to be designated as state forest domain (Peluso 1992; Peluso and Vandergeest 2001). The authority of the *Boschwezen* working area became a debate in the colonial period.

When the Dutch parliament ratified the Agrarische Wet 1870 and the domain declaration, the colonial government's control over the forest area became explicit. This happened because of the broad interpretation of the scope of 'domain declaration' principle, which will be discussed in the next chapter. The domain declaration is a decree by the colonial government which states that land for which no one could prove ownership would be classified as state land. In general, colonial government officials considered forest area to be abandoned land *(woeste gronden)* without an owner; it was therefore state property. At the time, most abandoned land was forest. One of the proponents of a broad interpretation of the domain declaration was Nolst Trenite, senior adviser to the Dutch government on agricultural policy (Burns 2004:21). Trenite wrote in his *Domeinnota* that state land in the colony was divided into two categories: free state land domain, and unfree state land domain. Furthermore, he argued that the state could perform any activity it chose in free state land domain, including on uncultivated land, and especially in forest areas (Termorshuizen-Arts 2010:47).

The proponents of a broad interpretation of the domain declaration argued that the forest's government authority was crucial to overcoming the scarcity of wood, because of massive exploitation of the teak forest to supply shipbuilding and other types of construction. Another argument was that the government should limit deforestation and begin reforestation. According to forestry officials, the leading cause of deforestation at that time was the shifting cultivation practised by native communities (Siscawati 2012:66). Accordingly, the *Boschwezen* restricted local community members in accessing and utilising forest resources. Logging wood from the forest was only allowed with the permission of the forestry service. The colonial government also created a map of forest areas, and resettled local communities to ensure that forest areas were free from land claims by local community members. A similar practice occurred outside Java (see also Chapter 4). The impact of this policy was that local communities had limited access to forest land and resources. The colonial government policy on forest restriction, including against levying taxes from farmers, led to widespread social protests in many places (Peluso 1992:67-72; Kartodirdjo 1987:375-85).

In 1928, the Governor-General of Dutch East Indies established an agrarian commission to conduct a study on implementation of the domain declaration doctrine, and on legal certainty about native communities' land rights (see Chapter 3). One of the critical topics in the

commission was whether or not forest areas should be included in the commission's inquiry. This topic was raised by Koesoemo Oetoyo, a Javanese member of Volksraad and a member of the Agrarian Commission, who stated that he was not arguing against proclaiming teak forests in Java as government property, but that he objected to the denial of all forms of native rights to the forest, including native rights to use its resources. Especially in Java, local residents had practised foraging, gleaning, and grazing livestock in the jungle for many years (Burns 2004:107). Foresters worried that if the domain declaration was abolished, forestry agencies would have to cooperate with native communities. Forestry officials assumed that local communities were unwilling to cooperate, given the many riots and conflicts between the forestry service agencies and local communities in various places (Peluso 1992: 68-70; Termorshuizen-Arts 2010:65). The attitude of foresters at the time was anxious, in the sense that "the foresters did not, could not, would not, trust native communities" (Burns 2004:108). However, the Agrarian Commission did not mention the status of forest areas in its recommendation.[14]

Before the commission conducted its investigation (1928-1930), the colonial government revised its forestry regulations by issuing the *Boschordonantie voor Java en Madura* 1927, which was later revised in 1932. Article 2 of this forestry regulation stated that forests are state-owned and free from indigenous rights. According to this regulation, state forests consisted of uncultivated trees and bamboo plants, timber gardens planted by the Forestry Service or other government agencies, and gardens containing plants that do not produce trees but are planted by the Forestry Service. The colonial government only made regulations on forest control for Java and Madura (Termorshuizen-Arts 2010:65). The lack of forestry regulations enacted for regions outside Java and Madura was due to a shortage of personnel and budget for carrying out effective government control of forest areas. The post-colonial

[14] Forestry bureaucrats at the time worried about the investigation being conducted by the commission, in particular regarding the status of forest area and the impact of the commission's recommendation for government control over forest areas. This concern was clarified a few years later by Logeman, a member of the commission and a professor at Batavia law school. In 1932, at a conference held by de *Vereeniging van Hoogere Ambtenaren bij het Boschwezen in Nederlandsch-Oost-Indie* (the Association of Senior Officials of the Dutch East Indies Forestry Service), Logemann stated that forestry was not included in the scope discussed within the Agrarian Commission. Logeman's statement eased foresters' concerns at the time, by saying that the forest areas would have nothing to do with the policy recommended by the Agrarian Commission (Burns 2004:107).

government used the colonial forest policies on Java and Madura as the bases for developing new forest policy and management. In particular, forestry policies have their own legal development route, different from agrarian policy (governing agricultural land) and other land policy. The following sections discuss forestry policy in the post-colonial period.

2.2.2. Underpinning of state control of forest area after Indonesian independence

In the early period of Indonesian independence, Indonesia's post-colonial government replaced Dutch colonial land laws with national laws that were compatible with Indonesian peoples' interests. During preparation of the Basic Agrarian Law (BAL) 1960, forestry issues were not much debated. Although the BAL intended to reform forest regulation by replacing the concepts of state domain and domain declaration in the *Agrarische Wet 1870*, it did not impact the core forestry regulations. The BAL removed several agrarian regulations from the colonial period, but it did not revoke the *Boschordonantie 1932*. The BAL regulated the limited right to open collection of forest products, but the Ministry of Agrarian Affairs never created implementing regulations to make such rights operational. From 1960 to 1963 the government launched a land reform programme, distributing land to farmers in order to implement the BAL. The majority of officials within the Forestry Service wanted the forest to be excluded from land reform programmes. They considered land reform a threat to forest sustainability (Rachman 2012:38). Anti-land reform Forestry Service officials urged President Sukarno to set up forestry companies, and promised to increase state revenues from the forestry sector.

Forestry became a policy domain for a separate institution in Indonesian land law, under the Ministry of Agriculture, while non-forested land under direct control of Ministry of Agrarian Affairs. The first forestry law in the post-colonial period was created in 1967. President Suharto enacted Basic Forestry Law Number 5 of 1967 (BFL) to increase economic activity in forest areas that would create state income. In contrast to the BAL, which specifically revoked agrarian regulations in the colonial period, BFL did not revoke the *Boschordonantie*. Forestry Service officials translated the *Boschordonantie* into Bahasa Indonesia, and used it as the main source for the BFL (Peluso 1992:131). By not removing the *Boschordonantie*, the government can preserve implementing regulations in the forestry sector, including

maps of forest areas based on the *Boschordonantie*. The BFL continued the forestry management policy of the *Boschordonantie* by stating that the state is the forest landowner. The Minister of Forestry has the authority to determine which areas are designated as 'forest area' (Article 1, point 4 of the BFL), and to grant logging concessions to foreign and domestic companies (Article 14 of the BFL, and Government Regulation No. 21/1970). The BFL does not recognise customary territories at all, and thus no customary forests (Rachman and Siscawati 2016). President Suharto established a state-owned enterprise, Perhutani, to extract forest resources in support of national economic development. Perhutani's working area covered all the productive forest areas which were under control of the *Boschwezen* during the colonial period in Java (Rachman 2012:44). Similar to the colonial setting, the expansion of Perhutani's working area in the post-colonial period was also determined without the consent of the local communities affected (see Chapter 6). Subsequently, President Suharto upgraded the directorate-general of forestry within the Ministry of Agriculture to a new, full Ministry of Forestry, in order to strengthen state-controlled forestry management.

Suharto's New Order government sustained the colonial policy of exclusive state control over forest areas. The government even expanded the state forest area. Nancy Peluso pointed out that the exclusive state control of forest area has become the foresters' ideology in Indonesia, including the three characteristics of forest management from the colonial period. The first is that state forestry is carried out based on utilitarian rhetoric: everything is for the greatest good of the most significant number of people. The second is that scientific forestry is the most efficient and rational use of resources. The third is that promoting economic growth through forestry production efforts is the primary orientation (Peluso 1992:125). In this sense, forestry policies during Suharto's authoritarian regime were not new (Peluso 1992:124).

During Suharto's New Order period, the government began a real exploitation of forest resources on the outer islands. During the colonial period, forest exploitation was restricted to Java and Madura. In the 1980s, the Ministry of Forestry enacted a series of regulations on the Forest Land Agreement (*Tata Guna Hutan Kesepakan/TGHK*). This policy expanded state control over forest areas. The TGHK map was the result of this activity. The main problem with the TGHK map was that it was different from the actual condition of forest or land use according to provincial spatial planning documents. Many forest areas on the TGHK map overlapped with villages, plantations, or people's agricultural land.

Although this policy was called 'forest land agreement', local communities were not involved in establishing forest areas. In TGHK policy, 'the agreement' constituted an agreement between the Ministry of Forestry and other national and regional government agencies. Consequently, TGHK policy led to land dispossession, and to land conflict between the Ministry of Forestry and local communities. However, at that time the Ministry of Forestry had little difficulty in handling such conflicts. During the 1980s, the Ministry of Forestry was a strong department, backed up by military and forest rangers, because it was believed to be a major contributor to Indonesian GDP (Safitri 2010b:96).

Based on the TGHK system in the 1980s, the Ministry of Forestry claimed 147.02 million hectares (67%) of the land surface as forest area. State forests were divided into several categories: 1) production forest, aimed at producing timber for export, and later on for timber-based industries (64.3 million hectares); 2) protection forests (30.7 million hectares); 3) natural conservation areas and nature preserve forests (18.8 million hectares); and 4) convertible forests (26.6 million hectares). With support from World Bank-sponsored projects, the Ministry of Forestry aimed to demarcate forest lands according to TGHK policy, with 1985 as the deadline (Siscawati 2012:96). However, the demarcation process did not go as expected, partly because of the government's lack of capacity to conduct the demarcation, and partly because local communities who had overlapping land claims with state forest rejected the demarcation. Once the Ministry of Forestry was in control of a large area, based on TGHK policy, it granted large-scale logging concessions to private companies. By 1990, the Ministry of Forestry had granted forest concessions to more than 500 companies throughout Indonesia (Yasmi et al. 2009). The concessions covered around 60 million hectares for logging, and 4 million hectares for industrial timber plantations (Barr et al. 2006; Siscawati et al., 2017:6). One of these cases will be discussed extensively in Chapter 5. Forestry concessions provided the second-largest income for the state, after oil and gas, and continuously contributed 12-13% to the national foreign exchange earnings in the 1980s (Tarrant et al. 1987:120; Peluso 1992:143).

The New Order government considered local communities living in forest areas to be disruptive of forest conservation and exploitation by forestry corporations holding legal permits. In a modernistic development paradigm, the New Order regime depicted the forest-

based agriculture performed by local communities as backward (Peluso 1992, Simon 2001, Vandergeest and Peluso 2006). The communities practised a variety of forest-based agriculture known as 'swidden agriculture'. Swidden agriculture is a style of agriculture that is very well adapted to the local (often harsh) natural circumstances. However, the government agencies (and many foresters) of the New Order era simply defined it as 'slash and burn' agriculture, or 'shifting cultivation'. The shifting cultivation label was used by government institutions and development agencies, because they assumed that people who practised this form of agriculture were themselves 'shifting' or semi-nomadic (Peluso 1992:125; Dove 1993:19; Li 2000; Tsing 2007; Siscawati 2012:5-6).

After President Suharto stepped down in 1998, the newly elected government and parliament enacted a new Forestry Law (Number 41/1999) to replace BFL (Law No. 5 of 1967). The new Forestry Law regulated a new procedure for the forest establishment (*pengukuhan*) process – split in four stages: designation (*penunjukan*), boundary demarcation (*penatabatasan*), mapping (*pemetaan*), and official enactment (*penetapan*) of forest areas (Article 15). Accordingly, the government's claim over forest areas, based on TGHK policy, was regarded as merely the first step in the forest establishment process. Subsequently, the Ministry of Forestry had to conduct a mapping and delineation process before officially enacting any state forest area. However, in reality, the Ministry of Forestry argued that state forest areas based on TGHK policy already had a definitive legal status, and that the Ministry could continue granting forest concessions and penalising intruders (Safitri 2010b:98).[15] In practice, state control over forest areas, as well as the denial of local community access, did not change with the adoption of the 1999 Forestry Law. Therefore, forest tenure conflicts have persisted, and have even become more widespread throughout Indonesia.

During the formulation of the new Forestry Law, environmental NGOs and forestry scholars from several universities pushed the Ministry of Forestry and parliament members to accommodate

[15] "Such loose interpretation of forest areas occurred because the Forestry Law provisions did not explicitly distinguish between the designation (*penunjukkan*) and enactment (*penetapan*) of forest areas." Article 1 point 3 of the 1999 Forestry Law states that: "forest areas are specific areas that had been appointed and/or determined by the Government to be maintained as a permanent forest". In an extensive interpretation, the Ministry of Forestry considers that the forest area newly appointed by the government is legal forest area, without having to go through the mapping and delineation process to solve overlapping claims with local communities.

community-based forest management schemes within the new law. They created a Community Forestry Communication Forum (*Forum Komunikasi Kehutanan Masyarakat*/*FKKM*) and proposed an alternative draft for revision of the Forestry Law (Siscawati 2012:251-2). They hoped that recognition of local communities' rights of access to forest areas would resolve forest tenure conflicts. Indeed, the Forestry Law (Number 41/1999) accommodated a selection of points proposed by NGOs and academics, for example regarding ways in which communities could share in the benefits of forest management. The 1999 Forestry Law also opened up an option for the recognition of customary forests, but it was unclear how that could be achieved in practice. The main problem was that the law defined "customary forests as state forests located within the territory of adat communities" (Article 1 point 6), which made it unclear whether customary forests are under jurisdiction of the state or adat communities. In 2012, AMAN challenged this vague provision in the Forestry Law to the Constitutional Court (Case Number 35/PUU-X/2012). In 2013, the Constitutional Court ruling changed the definition of customary forests, stating that customary forests should be regarded as part of adat community territories, instead of being under state forest jurisdiction. Further explanation of this court ruling will be discussed in Chapter 3.

District governments also perceived some problems contained in the 1999 Forestry Law, because it did not provide sufficient authority for district governments to control forest areas in their districts. In 1999, the Ministry of Forestry delegated authority to the district governments to grant small-scale concessions, with a maximum of 100 hectares per concession. This decentralisation policy led to a massive number of permits being issued by the district governments to forestry companies, causing both corruption and environmental degradation. For instance, the head of the district government in West Kalimantan Province released 994 concessions from 2000 to 2003 (Anshari et al. 2005:1). The ministry therefore revoked the authority in 2003, recentralising the forest concession process.

Provincial and district governments contested the exclusive control of forest areas by the Ministry of Forestry. In 2011, five district heads in Central Kalimantan challenged the Forestry Law in the Constitutional Court (Case Number 45/PUU-IX/2011). Their main points of concern were the provisions defining forest areas (*kawasan hutan*). Article 1, point 3 of the Forestry Law states that: "forest areas are specific areas that had

been designated and/or enacted by the Government to be maintained as a permanent forest". This provision is vague, because it implies that the legal basis for state forest area can be relied on as a designation and/or enactment. Article 15 of the Forestry Law states that the establishment of forest areas should follow four stages: designation, boundary mapping, delineation, and enactment. The Ministry of Forestry designated forest based on the forest inventory. Then, Ministry of Forestry officials conducted delineation and mapping, involving district governments and local communities. The final part of the forest establishment process is enactment by the Ministry of Forestry. Therefore, Article 1 of the Forestry Law, which states that forest area can be established by Ministry of Forestry designation, without completing other stages, excludes provincial and district government interests in the forest establishment process. Consequently, district governments could not build public facilities and release permits for companies which were interested in natural resource extraction in forest areas. The Constitutional Court removed the phrase 'designated and/or' in the provision. The new provision is: "forest areas are specific areas that had been enacted by the Government to be maintained as a permanent forest". This meant that any forest area must be established by following the four stages of the forest establishment process (Article 15 of the Forestry Law) (Arizona et al., 2012).

Based on the Constitutional Court ruling, forest area is an area where the government has conducted the four stages of the forest establishment process. The ruling provides a fundamental correction at policy level, regarding the process of establishing forest areas. In 2011, the Ministry of Forestry had formally enacted 15.2 hectares (11.1%) of 136 million hectares of forest areas (Arizona et al., 2012). The court's decision urged the Ministry of Forestry to speed up the process of establishing forest areas. Although the government sped up the forest establishment process, this did not resolve long-standing land conflicts in the forestry sector, which were due to a lack of local community participation in the delineation process. By 2020, Indonesia's state forest had been reduced to 120 million hectares. As already mentioned, this area is equal to 64% of Indonesia's land surface (SOIFO 2020). The size of the area reduced because the government allocated forest areas for non-forestry activities, primarily palm oil plantations and infrastructure development. The Ministry of Forestry maintained control over forest areas by sustaining permits to timber companies, and by creating conservation areas managed by national park agencies. Meanwhile,

many local communities have been living within (and on the borders of) forest areas for decades, sometimes centuries, even before the government designated such areas as state forests.

2.3. Characteristics of forest tenure conflicts

The denial of local communities' customary rights and access to forest resources has been the leading cause of forest tenure conflicts (Peluso 1992:44). A more sophisticated analytical framework is needed for understanding how conflicts arise, who the main actors and interests are, and what constitutes the legal underpinnings of their positions and possible solutions. Therefore, my analytical framework distinguishes types of forest conflicts based on: (a) the (well-differentiated) main actors involved; (b) the legal classification of the state forest concerned; and, (c) the objectives or interests of local community members, regarding the contested forest rights.

2.3.1. Actors in forest tenure conflicts

The main actors in forest tenure conflicts are government agencies, local communities, and companies. The contentions between the three categories of actors can be classified into several types of forest-related conflicts: (a) land conflict between local communities and government agencies; (b) land conflicts between local communities and companies; (c) land conflicts between government agencies and companies; and, (d) land conflicts within one category of actors, notably between members of different factions within communities, or between various government agencies, or between divisions or departments within corporations (Welker 2014:1). For instance, within the government there is a difference of interests between the district government, which prioritises local economic development, and the Directorate-General of Forestry Business Development at the Ministry of Forestry, which secures the interest of companies in keeping their concessions. Likewise, local community members are often divided between those who want to work for the company or share in the benefits of its exploitation, and those who are struggling to reclaim their land from the company's concession area. In many cases, conflicts occur which feature a combination of the four typologies above. For example, in land conflict between local communities and companies, the government is also involved in the conflict, because the government gives forest concessions to companies to conduct activities in forest areas.

2.3.2. Categories of forest use in conflicts

The second way to categorise forest conflicts refers to the purpose for which a forest area is used: nature conservation, commercial forestry, tourism, mining, or local community subsistence activities. I will explain forest use, based on Forestry Law and how different actors use forest resources in practice. Forestry Law divides forest areas into three functional categories, including production forests, protection forests, and conservation forests. When the forest's main function is to generate forest products, it will be considered production forest. Protection forest is intended to protect life-supporting systems, prevent floods, control erosion, prevent seawater intrusion, and maintain soil fertility. Conservation forest means forest that is used primarily to preserve plant and animal diversity, and the ecosystem (Article 1 of the Forestry Law). A specific ministry department is in charge of each of these categories, and there is a set of regulations that determines legal room for activities in the forest. In reality, the three functions of forest areas established by the government often do not fit with how different actors use the forest areas. For instance, the government designates a particular area as conservation forest, but in reality the area is a rural settlement including local community farm gardens. Therefore, the Ministry of Forestry officials consider that the local community is conducting illegal activities in the conservation forest. Likewise, the government designates production forest, but the local community protects the area as sacred forest, maintained for environmental sustainability. Different interests, perceptions, and uses of forest land and resources by different actors all contribute to land conflict.

Moving from categories of forest in the legislation to the use of forest by different stakeholders, I found that actors use forest land and resources for three purposes. The first purpose is conserving forest areas and resources. The Ministry of Forestry designates certain forest as conservation areas, especially upland and areas with a high inclination level. The Ministry of Forestry created national parks, nature tourism parks, game parks, and other kinds of conservation activities, in order to maintain biodiversity-rich areas, and endemic plants and animals, for environmental sustainability. Furthermore, the Ministry of Forestry employs forest ranger for ensuring that conservation areas are kept free of human activities. Corporations are not allowed to do extractive activities, such as creating timber plantations or establishing mining sites, in conservation forests. In addition to the government, companies

and local communities also carry out conservation activities. The Ministry of Forestry obliges companies operating in forest areas to maintain areas that have high conservation value (HCV) within their concession areas. Similarly, the community protects certain areas in their location in order to prevent disaster and environmental degradation, to maintain water supply, and to protect sacred sites within forest areas.

The second purpose of the forest areas is economic production through natural resource extraction. The Ministry of Forestry gives forest concessions to companies to perform forestry and non-forestry activities in forest areas. Forestry activities include logging of natural forest and establishing timber plantations to produce pulp and paper. Non-forestry activities refer to mining operations, construction of public roads, and telecommunication installations in forest areas. In addition to activities that are formally allowed by the Ministry, there are many illegal activities happening in forests where companies and local communities have established cash crop forest gardens or palm oil plantations and are conducting illegal mining without the permission of the Ministry of Forestry.

When mining is the purpose for which part of the forest is used, not only the Ministry of Forestry is involved on behalf of the government, but also the Ministry of Energy and Mineral Resources (MEMR). The company first has to obtain a permit from the MEMR, then apply to the Ministry of Forestry to obtain a lease to use the forest area. A mining company can operate in both protection and production forests.[16] Often, various ministries enact different permits for the same areas, creating overlapping authority between government agencies. In 2011, the Commission for the Eradication of Corruption (*Komisi Pemberantasan Korupsi*/*KPK*) found that 1,052 mining permits, covering 15 million hectares, overlapped with forest areas. In 2017, another study by the Forestry Department of the Bogor Agricultural Institute uncovered 17,4 million hectares of mining and palm oil plantation that were located in forest areas; most of this activity lacked a permit from the Ministry of Forestry (Diantoro 2020:246).

The third use of forest resources is for the subsistence of local community members. The population around forest areas is growing, so local communities need more land for cultivation, and for other resources to increase their income. This category is different from the second category above, in terms of scale. Local communities extract

[16] For more detail about mining operations in forest areas, see Chapter 4.

forest resources on a small scale, to fulfil their daily needs. Local communities perceive forests as agricultural reserve areas for future generations, and as a way to escape poverty. A World Bank report concluded that in 2000, of the 50 to 60 million Indonesian people who lived in rural areas, particularly in and surrounding the Forest Areas, 20% could be categorised as poor (World Bank 2006: 99-100 cited in Safitri 2010b:44). Therefore, the main local community interests in controlling forest land are subsistence, and ensuring that future generations still have assets and land that they can cultivate and manage. In addition to opening up cultivation land (especially rice fields), local communities also need the forest to cultivate non-timber products such as benzoin sap, fruits, leaves and seeds.

2.3.3. Variety of interests within local communities in forest tenure conflicts

Local community members have various responses to land conflicts in the forestry sector. Their strategy depends on their interests and goals. The interests of local communities depend heavily on their needs and the basis of their land claims, as well as their values, capacity, and opportunities. In one situation, local community members might protest against land appropriation by the state and corporations, whereas in another situation, local community members might give up because they either think they cannot stop land dispossession, or they lose interest in preserving their land. The community members who want to fight back against land dispossession are looking for support and alliances that will strengthen their position against external forces. Sometimes, local community members fight against a company's operation in their area, simply to increase their bargaining position and build a joint agreement with the company. Forest company operation benefits local community members by offering employment, business contracts or compensation payments. In such diverse conditions, local community members do not always see the negative aspect of land conflict. Land conflicts also provide opportunities for some community members to engage in natural resource management, fair distribution, and collaboration to promote environmental preservation (Yasmi et al. 2009:107). In this sense, some local community members perceive land conflicts as having a positive dimension, allowing for negotiation and stimulating learning for some actors (Yasmi et al. 2009:98).

For the case studies that will be analysed in the following chapters, I describe four categories of local community interests and objectives

when dealing with forest tenure conflicts. The first is reclaiming the land to sustain local community livelihood. Restrictions are imposed on local community members because the government has allocated forest areas for conservation and natural resources extraction, which has caused local communities to lose potential income from forests. Therefore, securing sources of income from forests has become a dominant argument for local communities fighting against land dispossession.

The second concerns environmental protection. This objective is connected to the first, because a healthy environment supports secure and sustainable livelihood. For instance, environmental protection ensures a good water supply for daily consumption and for agricultural activities. Local communities also protect forest in order to preserve arable land for further generations. Local community roles in protecting the environment link to the global environmental movement. Indonesia is the second biodiverse-rich country in the world, after Brazil, making forest protection one of the demands that arise in tenurial forestry conflicts. In Indonesia, the adat community movement is strongly influenced by the idea of forest protection, because adat communities claim that they are the guardians of the forest (Tsing 2007).

The third objective relates to the benefits that local community members can obtain from corporations operating in forest areas. Local community members sometimes perceive a company's operation in their area as an opportunity to improve their living standards. These opportunities include jobs, business contracts, and land use cooperation between the community and the company. In Indonesia, companies that conduct natural resources extraction activities are required to conduct corporate social responsibility (CSR) programmes. Activities within the CSR programme may take the form of construction of public facilities, such as schools, churches, and roads. Therefore, local community members can benefit from the company. In addition, community members can be involved in the management of CSR funds, in order to implement empowerment for local communities surrounding the concession area.

The fourth objective of local community members in forest tenure conflicts concerns compensation. The Forestry Law stipulates that a community whose land is designated as forest area, and who loses access to the forest, can seek compensation from the government. Although this provision is stipulated in the Forestry Law, the Ministry of Forestry has never made operational regulations on this subject. Local

communities are demanding to obtain compensation, because the community members argue that they have lost their rights and access to the forest as a result of the company's concessions in their area. One of the case studies in this thesis (Chapter 4) discusses compensation claims made by communities whose former villages are now designated as forest areas where the government has granted mining concessions to corporations. Two main reasons usually appear in land conflict cases where local communities have formulated their goal for getting compensation from a big corporation. On the one hand, they are no longer dependent on forest area because they have an alternative source of income. On the other hand, the local community believes that they will not succeed in stopping big companies operating in their territory.

2.4. Emerging options for solving forest tenure conflicts

The previous section explains that forest conflicts occur when there is a reason for government institutions to enforce a state forest boundary. Government institutions do this when they are present in the forest area concerned, they have enough capacity (in terms of manpower) to defend the forest, and there are people actually trespassing on the boundaries of a business concession area or national park. Forest conflicts develop when local communities resist the enforcement of state forest boundaries. During the colonial and the first decade of the New Order regime, local communities could only resort to 'civil disobedience' to voice their resistance - for example, via land occupation, illegally logging trees, burning forest plantations, or conducting violence against company and government officials in response to land conflicts. At that time, there were no legal procedures for solving land conflicts, but this has changed since the 1980s. In this section, I will present an overview of the legal solutions that have developed since then (starting with community-based forest management), and that have proliferated in many kinds of social forestry schemes – including (at present) the option of state recognition of customary forest rights. The question here is whether or not these successive legal solutions have been effective in ending forest tenure conflicts.

2.4.1. Promotion of social forestry policies

Starting in the late 1970s, international funding agencies, national NGOs, and academic scholars proposed that the government recognise community-based natural forest management (CBFM) as a legal and

non-violent solution to land conflicts (Siscawati 2012:179-80). This was the start of a process by which the government incrementally set up policies and programmes to provide forest management access and rights to local communities.

Figure 4. Rp. 100 coins featuring the text 'Hutan untuk Kesejahteraan' (Forest for prosperity) (Source: en.ucoin.net)

In October 1978, the Food and Agriculture Organisation (FAO) and the Government of Indonesia organised the Eighth World Forestry Congress, on 'Forests for the People', in Jakarta. The government enthusiastically issued a series of Rp. 100 coins featuring the text '*Hutan untuk Kesejahteraan*' ('Forest for Prosperity').

Next, the FAO and SIDA (the Swedish International Development Cooperation Agency) set up a worldwide programme on 'Forestry for Local Community Development'. Its main objective was to promote and support programmes related to forestry uses for rural development, especially in developing countries (Siscawati 2012:140-4). Although the programme did not directly affect local community participation in forest management, it did increase awareness - including amongst Ministry of Forestry officials - of the fact that people's participation in forest management was essential to develop further at that time (Siscawati 2012:138). Subsequently, numerous publications on forest management, and forestry programmes supported by international funding agencies and government institutions, addressed the terms 'community forestry', 'community-based forest management', and 'social forestry'.

In line with these developments, in 1984 the State Forestry Company (Perhutani) came up with a programme that provided temporary access to landless farmers to grow and maintain the teak forest in Java. With the support of the Ford Foundation, Perhutani developed a programme called 'social forestry' which included efforts to involve villagers as labourers in forest management (Siscawati 2012:150). The type of social forestry developed by Perhutani focused on 'intercropping' (*tumpang sari*). Perhutani employed local community members to plant teak seeds

on Perhutani land, and then allowed farmers to plant annual crops for a few years. Farmers were obliged to take care of the planted teak seedlings during that period. The work arrangement was similar to the model adopted by the *Boschwezen* in 1883, known as *De djaticultuur* (Peluso 1992:63-5). However, the model developed by Perhutani did not support the resolution of forestry conflicts in Indonesia, for two reasons. The first is that the cooperation model only gave local communities a very short period to cultivate land in the forest. The second is that the scheme was limited to Perhutani's working areas in Java, so it did not affect forestry conflicts elsewhere, for example, in Kalimantan, Sumatra, and Sulawesi. Despite its limitations, the Ministry of Forestry encouraged private forest companies in the outer islands to involve local communities in their concessions, via the Forest Concessions Village Development Programme *(Hak Pengusahaan Hutan – HPH – Bina Desa)* (Safitri 2010b:51).

Although Perhutani's programmes did not have a significant impact on the resolution of land conflicts, government officials gradually began to adopt the term 'social forestry'. Meanwhile, NGO activists and academic forestry scholars recognised the positive change in the government's attitude as an opportunity to use social forestry as a tool for the emancipation of rural communities and other social groups from the destructive power of capital and authoritarian rule (Moniaga 1993 cited in Siscawati 2012:10). National NGOs, such as Walhi and YLBHI, began to assist communities involved in forest tenure conflicts. In various regions, NGOs were created by local intellectuals and activists in response to the deprivation of public living space due to the operation of logging companies, for example the regional NGO KSPPM in Parapat, North Sumatra, which organised protests against PT. Inti Indorayon Utama (see Chapter 5). The government's openness to social forestry presented an entry point for NGO actions, which was rare under the authoritarian New Order regime.

NGO activists also used the discourse on social forestry to criticise the deforestation that had occurred because the government had given large-scale permits to companies to clear natural forests. In 1982, the primary forests in Indonesia had been reduced to 119.3 million hectares (or 62% of the country's land surface) (RePPProt 1990). The deforestation rate accelerated between 1982 and 1993, reaching up to 2.4 million hectares/year (Bobsien and Hoffmann 1998; cited in Siscawati 2012:98). In addition, NGO activists criticised the international conservation organisation, World Wild Fund for Nature (WWF), complaining that it

was not interested in social justice for forest-dependent people, but only cared about saving endangered species of flora and fauna (Siscawati 2012:182).

Since the 1980s, the international funding organisation, The Ford Foundation, has provided support for key actors to develop social forestry further. The support included sponsoring a visit by a delegation of government officials and representatives of Perhutani to social forestry pilot projects in India and Thailand, some main lessons from which were afterwards applied in Indonesia (Siscawati 2012:124). An important lesson from the comparative studies in Thailand was the strong role of NGO activists and academic scholars in helping people to develop their own community-based forest management schemes.

Despite these positive initiatives, social forestry could only become a formal solution to forest conflicts if it were incorporated into the national legal system. The regime change in 1998, which ended the authoritarian New order period, opened up a new opportunity to accommodate social forestry. Democratisation since 1998 had boosted the idea that the people should own the forest, and the Ministry of Forestry has changed a lot since 2000.

The Ministry of Forestry, Perhutani, and forestry companies conducted several experiments that allowed local communities to cultivate land, or otherwise engage in utilising the forest, in production and protection forest areas. Such experiments were legally supported, either by ministerial regulations or by joint agreements between local communities and government agencies or corporations (Safitri 2010b; Siscawati 2012). In 2014, President Joko Widodo announced a national target to release 12.7 million hectares (or around 10%) of the state forest for social forestry programmes. Subsequently, forest area is now also a target for implementing land reform programmes. Under the land reform programme, the government planned to distribute 4,9 million hectares of forest area to farmers. This political commitment was part of the national development plan, and it became one of the priority national programmes. Social forestry programmes then developed into various schemes providing management access to state forest areas to local communities. Nevertheless, implementation of these programmes still falls far short of the target set by the government. The following sections will discuss the legal framework for social forestry and its realisation up to the present day.

2.4.2. Government schemes for resolving forest conflicts

Since 1990, the Ministry of Forestry has created nine schemes to address forest tenure conflicts and involve local communities in forest management. The Ministry of Forestry classifies some schemes as social forestry programmes, including community forest (Hutan Kemasyarakatan/HKm), village forest (Hutan Desa/HD), peoples' plantation forest (Hutan Tanaman Rakyat/HTR), conservation partnership (*Kemitraan Konservasi*), community-company partnership (*Kemitraan Perusahaan-Masyarakat*), and customary forest recognition. To understand the difference between these schemes, I will first describe them from the Ministry of Forestry's bureaucratic point of view; this means referring to which options can legally be applied in which areas, and under which circumstances. Afterwards, I will analyse the main characteristics of each option from the point of view of local community interests in forest tenure conflicts.

Nine schemes for resolving forest tenure conflicts

1. Community forest (Hutan Kemasyarakatan/HKm)
2. Village forest (Hutan Desa/HD)
3. Peoples' plantation forest (Hutan Tanaman Rakyat/HTR)
4. Conservation partnership (*Kemitraan Konservasi*)
5. Community-company partnership (*Kemitraan Perusahaan-Masyarakat*)
6. Approval of forest use for public facilities
7. Individual land claims and verification procedures
8. Agrarian reform programmes in the forestry sector
9. Customary forest recognition

The Ministry of Forestry view of what constitutes suitable solutions to forest tenure conflicts consists of three considerations. The first is the category of forest areas. Based on Forestry Law (Number 41/1999), the Ministry of Forestry designates forest areas based on three functions: conservation forest, protection forest, and production forest. The second category for consideration is the adequacy of forest areas, because the government must maintain at least 30% of the watershed, island, or province as forest area. Next, the Ministry categorises in accordance with the actual condition of land which overlaps the government and local community claims. If the overlapping land is already being used for public facilities, such as schools, places of worship etc., then the solution

offered by the government is different from that offered for land which has been cultivated in order to grow food crops. Additionally, cultivated land is only to be considered for social forestry schemes if local community members have used it for more than 20 years.

Figure 5. Options for solving forest tenure conflicts, based on the three categories of forest use.

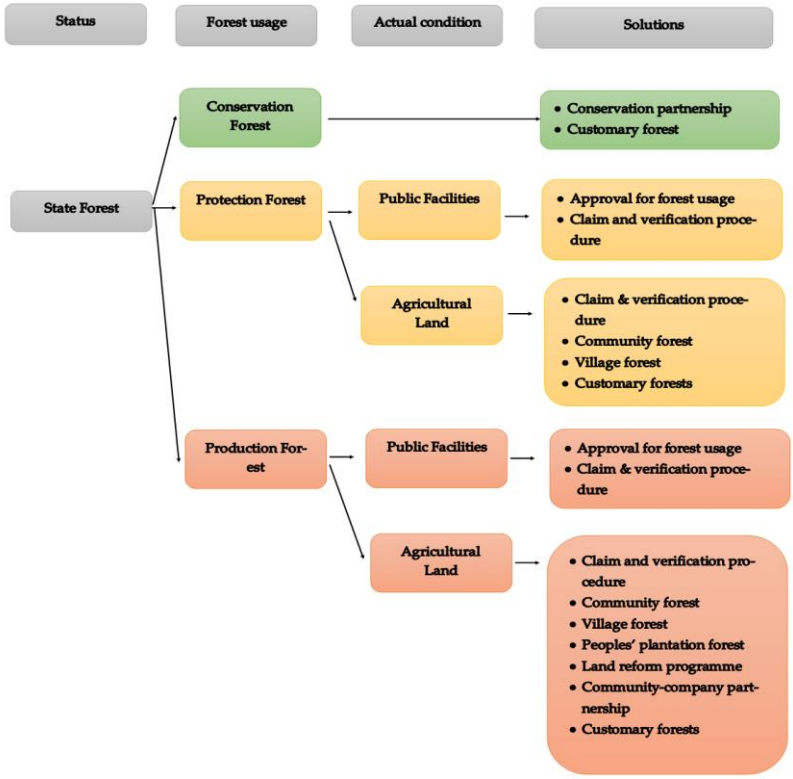


Figure 5, above, shows options for resolving forest tenure conflicts concerning state forest areas within the three categories of forest use. The first category is concerned with land conflict in conservation forest areas. There are two options to resolve forest tenure conflicts between local communities and state conservation agencies, mainly working with national park agencies: conservation partnership, and customary forest recognition. A conservation partnership (*kemitraan konservasi*) is a cooperation between regional conservation units under the Ministry of Forestry (or conservation permit holder) and local communities, based

on the principles of mutual respect, mutual trust, and mutual benefit.[17] Local communities can apply to the Ministry of Forestry to create collaborative management with government agencies in what is called the 'Utilisation Zone' - just one of the categories of zones in conservation forests. In the utilisation zone, local communities are allowed to use non-timber forest products, mainly for non-commercial purposes. If local community members want to cultivate forest products for commercial purposes, they need to apply to another unit within the Ministry of Forestry, for a different permit.[18] The Ministry of Forestry also restricts the type of plants allowed to grow in conservation forests, excluding (for example) palm oil trees. Under these restrictions, the scheme is not likely to resolve local communities' land conflicts with forestry agencies. The only alternative to collaborative conservation partnership is customary forest recognition, which involves a long and difficult legal process, as will become clear in Chapter 6 of this thesis.

The second category of land conflict occurs in protection forest areas. There are five options available for local communities to settle forest tenure conflicts with the Ministry of Forestry in protection forest areas: (a) community forests; (b) village forests; (c) the Ministry of Forestry's approval of the forest area for use; (d) individual land claims and verification procedures; and (e) customary forest recognition. The first two options - community forest and village forest – are relatively similar. In these schemes, the Ministry of Forestry issues permits for local community organisations and village governments to maintain state forest area for a limited period.[19] The Ministry of Forestry can release a decree specifically for the construction of public facilities located in protected forest areas. This kind of decree is called a decree to approve forest area usage (*persetujuan penggunaan kawasan hutan*). The Ministry of Forestry official encourages local community members to be involved in social forestry programmes. For the regional government, local community involvement in social forestry programmes located in protected forests is important to increasing local people's income from forest resources, whereas the MoF benefits from engaging local communities in reforestation. Also, customary forest recognition is an

[17] Article 1, point 13 of Peraturan Direktur Jenderal Konservasi Sumber Daya Alam dan Ekosistem Nomor P.6/KSDAE/SET/Kum.1/6/2018.

[18] Article 5 (4) of the Peraturan Direktur Jenderal Konservasi Sumber Daya Alam dan Ekosistem Nomor P.6/KSDAE/SET/Kum.1/6/2018.

[19] For more detail about social forestry schemes, see Safitri 2010b: 112-21.

alternative solution for resolving forest conflicts in protection forest, as I will explain in detail in Chapter 3.

The third category is the land conflict that occurs in production forest areas. The Ministry of Forestry has divided production forests into three levels: permanent production forest, limited production forest, and convertible production forest. The difference between permanent production forest and limited production forest relates to the logging method conducted by forest companies in the production forest. In permanent production forests, forestry companies can carry out logging by selective cutting (*tebang pilih*) or cutting everything down *(tebang habis)*. Meanwhile, in limited production forests, logging by selective cutting is the only legal option. Convertible production forest is the lowest strata in forestry administration. The Ministry of Forestry can convert production forest into land for transmigration, plantations, and agrarian reform programmes. Generally, production forests are managed by companies that obtain concessions from the Ministry of Forestry. However, some production forests are still under the direct control of the Ministry of Forestry. In overlapping claims between local communities and forest company concession areas, the Ministry of Forestry encourages local communities and companies to get involved in forestry partnership schemes.

For production forest that is under the direct control of the Ministry of Forestry, there are seven options available to local communities for resolving their overlapping claims with forest agencies: (a) community forests; (b) village forests; (c) peoples' plantation forest; (d) Ministry of Forestry approval of the forest area for use; (e) individual land claims and verification procedures; (f) land reform programmes; and, (g) customary forest recognition. In addition to the schemes which also apply to protection forests, two new options are available that are for production forest tenure conflicts only: peoples' plantation forest (*Hutan Tanaman Rakyat*/*HTR*), and land reform programmes. Local community members can apply for HTR individually or collectively. HTR is a type of small-scale logging which is conducted by local community members. In 2014, the Government of Indonesia planned to provide 4.8 million hectares of forest area for the land reform programme, the second option for resolving conflicts in this category. This is a new opportunity, since for many decades land reform programmes could not implemented in forest areas. However, the implementation of this programme is very slow. Very few local communities have succeeded in enrolling in this

programme (Sirait 2015). One of the main restrictions is that land reform programmes can only be applied to convertible production forest. This means that if the status of the forest is 'permanent production forest', a necessary additional step in the land reform programme process would be to change the status of production forest from 'permanent' to 'convertible' production forest area.

In summary, the Ministry of Forestry has created many options for local communities to resolve forest tenure conflicts with forestry agencies and companies. Depending on the status of forest areas and compared to the options for protection and production forest, options for solving land conflicts in conservation forests are very limited. A very important conclusion from the overview of legal solutions here is *that customary forest recognition is an available legal solution in all categories of forest area.* This research will uncover to what extent customary forest recognition can resolve a variety of forest tenure conflicts.

2.4.3. Conflict solutions inspired by local community members

In the previous section (section 2.3.3), I discussed the four main local community objectives in forest tenure conflicts with government agencies and forest companies. The four objectives are sustainable livelihood, environmental protection, collaborative management, and compensation. These objectives often intertwine in forest tenure conflict cases. Different groups within local communities bring their goals and interests forward. A variety of community member interests can lead to an internal coalition to oppose forestry agencies and companies and achieve common interests. However, more often than not, competing interests amongst local community members lead to disagreement and internal conflicts, which makes settling forest tenure conflict complex and difficult.

Figure 6. Options for resolving forest tenure conflicts, based on the objectives of local community members.

Objective of local community members	Solution to achieve local community members' objective
Sustainable livelihood	Community forest Village forest Peoples plantation forest Land reform programme Claim and verification procedure Customary forest
Protecting the environment	Conservation partnership Customary forest
Obtaining benefit from the company (collaborative management, jobs, CSR etc)	Community-company partnership Conservation partnership
Compensation payment	Community-company partnership Claim and verification procedure Customary forest

The different interests of local community members implies that different strategies and options are necessary to achieve their respective goals. As I have discussed in the previous section, the Ministry of Forestry - with the support of NGOs and academic researchers - has been developing several schemes to address forest tenure conflicts. To what extent such schemes can accommodate different interests amongst local community members involved in forest tenure conflicts? The first and most dominant objective for local communities living around the forest is to gain access to forest resources which are useful for their livelihood. Local community members who depend on forest resources for their livelihood are sometimes referred to as forest dwellers or forest communities (Peluso 1992; Safitri 2010b). The communities actively cultivate agricultural land and perform agroforestry activities, such as tilling the land for open farms, and planting, maintaining and harvesting forest products. The communities' main concern is access and property rights to forest land. However, if there is opportunity to obtain property rights (either individual or collective), they will take the opportunity by considering the cost and benefit of pursuing property rights. The Ministry of Forestry has developed several options which provide access

to local communities to manage state forest for a limited period, via social forestry programmes such as community forests, village forests, and people's plantation forests. Other options for local communities to gain property rights are the land reform programme, individual land claims and verification procedures, and customary forest recognition.

The second objective relates to environmental protection. A local community member who supports this objective wants to conserve nature, animals and other resources in the forest. These groups restrict their extraction of forest resources, because their main objectives are not to gain economic benefits from such resources. If there are potential economic benefits to gain from the forests, the groups expect these to be obtained from non-extractive activities, such as incentives from natural tourism and environmental services. This group also perceived extractive activities carried out by forestry companies, or the creation of public facilities in forest areas (such as building roads) to be a threat to environmental sustainability. This group uses environmental protection as an argument to stop companies operating in forest areas. The group's objective aligns with conservation programmes undertaken by several units within the Ministry of Forestry, such as the Directorate General of Nature and Ecosystem Conservation and national park agencies. Two options for channelling this objective in forest tenure conflicts are conservation partnerships and customary forest recognition.

The third objective is concerned with collaborating with forest agencies and companies. The main goal of this group is to benefit from companies' operations. This group does not always base their claim on access and rights to forest resources, but rather on the social responsibilities of government agencies and companies to pay attention to the living conditions of local communities surrounding the company's operational areas. This group does not fully consider companies or government agencies as threats, instead thinking of them as an opportunity to gain support in improving their living standards. They perceive that a company's operation can provide new jobs and public facilities, as well as opportunities to engage in business contracts and maintain CSR funds for the company. Mostly, these community member is not very dependent on forest resources for their livelihood. The most appropriate solution to meet their objectives is collaboration, either via community-company partnerships, or via conservation partnerships if their interest relates to conservation business.

The fourth objective is obtaining compensation payment. This group argues that government agencies and companies have dispossessed

them of their land, and they pursue strengthening their land claims as a basis for demanding compensation payment from the company. The objective of obtaining compensation usually exists in a situation where a local community no longer depends on forest resources for its livelihood, or when community members think they will not be able to stop companies from operating in their area. Therefore, they want to gain benefit, in the form of compensation, for losing access and their land. These demands can be met if the community can strengthen its ownership claim to the land via claim and verification schemes and customary forest recognition. In addition, the company is also considering providing compensation as part of its working relationship with the community.

I have explained several options for resolving forest tenure conflicts, above. The Ministry of Forestry officials favour collaborative management, if forest tenure conflicts occur between local communities and companies. In forest tenure conflicts between local communities and government agencies, the Ministry of Forestry encourages social forestry schemes, such as community forest, village forest, and peoples' plantation forest schemes. However, social forestry schemes do not address the roots of forest tenure conflict, because these schemes only provide access to local communities to manage state forest for a limited period. Social forestry schemes also might not address the various interests of local community members, such as obtaining compensation and collaborative management with forest companies. Amongst the options available, only the customary forest recognition scheme is apparent in all types of forest tenure conflict. The research in this thesis specifically analyses to what extent customary forest recognition can achieve various objectives in the community, when dealing with forest tenure conflicts. What are the enabling and constraining factors in recognition of customary forests as a means to meet the objectives of local communities in forest tenure conflicts?

2.5. Conclusion

This chapter shows that the establishment of state forest areas has formed a basis for forest tenure conflicts. The Dutch colonial government began the process, by appropriating areas as state forest, and the various post-colonial governments sustained and expanded the state forest area to cover more than 60% of Indonesia's land surface (at present). Following the concept of the political forest, what constitutes a forest

area in Indonesia is not always based on biological conditions, but also on the government's political decisions. Consequently, the Ministry of Forestry not only controls trees in the forest, but also land and other resources therein. The Ministry of Forestry and other forestry agencies apply scientific forestry management and have exclusive control over forest areas, creating forest area land-use planning and administration. On the other hand, the government excludes local communities from using the forest. The denial of a local community's customary rights to forest resources has been the leading cause of forest tenure conflicts (Peluso 1992:44). The legal framework supporting state forests implies the criminalisation of customary rights and access to forest resources, which has led to local resistance of the forestry agencies (Peluso 1992:236).

Not all forest areas in Indonesia involve land conflict. Conflicts only occur when opposing interests clash; the root cause of conflict will then surface. Forest tenure conflicts occur when government agencies enforce their control to protect forestry concessions and conservation programmes, and to restrict local community access to forest resources. Local communities around forest areas are resisting the controls and restrictions imposed by the government and companies. Forestry tenure conflicts often lead to violence and the imprisonment of local community members, because of the criminalisation of their customary practices in natural resource management, or because local community members commit violence and theft, which is considered a crime by forestry law. Another type of forest-related conflict occurs when local community members protest because they feel deprived of opportunities to benefit from forest exploitation via employment in the extractive industries, by deriving income from (infrastructure) projects funded by the company, or by getting compensation payments for land use.

Since the late 1970s, international funding agencies, national NGOs, and academic scholars have encouraged governments and companies to accommodate local community interests in forest management. The government incrementally supports community-based forest management as a crucial strategy for preventing and resolving forest tenure conflicts. The Ministry of Forestry formulated regulations enabling various social forestry schemes to provide access for local communities to manage state forests. In the last two decades, local community access to state forest areas has increased, although it is still far from the government's planned target. Social forestry programmes are sometimes able to prevent conflicts. However, they have their

limitations, in terms of resolving the causes of forest tenure conflicts, particularly in conflicts with national parks and mining companies operating in forest areas. A typical limitation is that the procedure for local communities to apply for a social forestry programme is long and complicated. Moreover, social forestry programmes only provide access and use rights; they are not designed to respond to land claims based on customary land rights. Therefore, social forestry programmes do not always answer the practical needs of local communities in land conflicts. In 2013, the Constitutional Court of the Republic of Indonesia issued a ruling assigning legal status to customary forest, and it instructed the Ministry of Forestry to implement legal recognition of customary forests. Indonesian NGOs and adat community organisations celebrated this ruling as a strategic opportunity to resolve forest tenure conflicts. Can, and will, state recognition of customary forests be a solution to forest tenure conflicts? The following chapters will answer that question.

3 The genealogy of state recognition concerning customary land rights

3.1. Introduction

The previous chapter showed that, in theory, legal recognition of customary forests is the most 'ideal solution' for local communities experiencing forestry tenure conflicts, compared to other conflict resolution schemes. Customary forest not only provides access, but also recognition of the communal property of local communities. In addition, the legal recognition of customary forests can be executed for all categories of forest area that have been designated by the Ministry of Forestry. Subsequently, customary forest recognition can accommodate the various objectives of local communities in land conflicts, including protecting the environment, securing sources of livelihood, and underpinning the basis for claiming compensation.

The present chapter discusses the legal framework for customary forest, by positioning customary forest within the broader context of customary land rights. I discuss the legal framework for customary land rights in Indonesia as it has evolved over time. In doing so, I analyse the construction of customary land rights by lawmakers in parliament, by judicial authorities, and by government officials throughout Indonesian history. The central question in this chapter is: Has Indonesian national legislation provided an accessible procedure for the legal recognition of customary land rights, and if not, why not?

I investigate the debate on legalising customary land rights since the colonial period, in order to understand its effect on contemporary regulations in Indonesia. Hence, this research uncovers the contents of regulations, and the lawmaking process contexts in which the position of customary land rights has been debated. I explain three dominant narratives concerning customary land rights during different periods. The first narrative derives from the legacy of colonial policies and studies on customary law (*adatrecht*). During the colonial period, lawmakers and academic scholars debated the legal position of customary land rights under the colonial administration. The debate was full of pros and cons on the promotion or undermining of customary land rights by the colonial government. However, the core of the colonial policies at the time promoted the limited autonomy of adat communities

and traditional kingdoms to manage their resources. This approach was in line with the politics of legal pluralism and indirect rule, applied by the colonial ruler. The proponents of this approach argued that native communities had been practising self-governing systems to manage their land and resources. Accordingly, the colonial government had to respect the customary land rights of native communities and collaborate with traditional native political institutions in controlling the colony. The indirect rule policy was an efficient way to run the colonial government in the Dutch East Indies (Vandenbosch 1943:498-9). An overview of customary land rights in the colonial setting is important, because current Indonesian lawmakers, academic scholars, and NGOs continue to refer to colonial policies and studies on adat law and the adat concepts produced in the colonial period when discussing legislation concerning adat community rights, especially with respect to the concept of adat law communities (*masyarakat hukum adat*) and the right of avail (*hak ulayat*) (Benda-Beckmann 2019:399). Therefore, it is relevant to explain the study of adat law during the colonial period in order to understand the current contentions around the meaning of adat communities and customary land rights (Fitzpatrick 2007:132-6).

The second narrative emerged after Indonesian independence in 1945. With the establishment of the new state, the Indonesian state's founding fathers established new national legislation to replace colonial legislation. The new Indonesian government aimed to build a unified and centralistic administration, as well as building a national identity. In the field of economy and natural resources, the state, through central government, played a dominant role in redistributing land and resources. Customary land rights were not seen as a suitable foundation for the economic development of a modern state. For this reason, adat communities' and traditional kingdoms' powers were restricted. The government recognised customary land rights, with conditions, as long as such rights did not hinder government interests in land and resources. This developmentalist approach reached its peak during Suharto's New Order regime (1965-1998).

The third narrative derives from a response to severe problems arising because of government policies oriented towards economic development and modernisation. This narrative is in line with the emergence of the international indigenous peoples' movement, which encourages the state to recognise the autonomy of adat communities. In Indonesia, the adat community movement is associated with local community demands to exercise community-based resource

management as an alternative to state and corporation-based development. NGOs and adat community organisations encourage the government to respect community-based natural resource management practices, including the legal recognition of customary land rights. During this period, the promotion of customary land rights no longer relies on the idea of building a national identity, but instead on the autonomy of adat communities to exercise self-determination.

The three narratives above, which I will elaborate in sections 3.2 to 3.4, shape the legal framework concerning customary land rights in Indonesia. By analysing the lawmaking process, constitutional court rulings, and implementing regulations over time, this chapter discusses the genealogy of customary land rights recognition. The three narratives mentioned earlier will become clear when analysing the trajectory of customary land recognition in the Indonesian legal system.

3.2. The root of the conditional recognition clause in the colonial period

In the colonial period, colonial officials, politicians, entrepreneurs, and academic scholars debated the position of customary law and land rights in the Dutch East Indies. The main question was: Should the colonial government apply a single law to the entire population in the colony, or preserve legal pluralism to respect the customary law of native communities? To understand this debate, I will discuss two main issues, notably the relationship between customary law and European law, and the relationship between the state land domain and the customary land rights of native communities. The analysis of these adversarial concepts explains the trajectory of customary land rights recognition in the colonial setting, and its influence on the post-colonial situation.

3.2.1. The repugnancy clause: Hierarchy between colonial law and customary law

A popular strategy among European colonial governments was to preserve the customary law and traditional political institutions of native communities in the colony. For colonial rulers, this strategy of indirect rule was more efficient in terms of cost and human resources (Vandenbosch 1943:498-9). In order to sustain the politics of indirect rule, the colonial rulers divided the population into several groups and imposed different laws on them, respectively (Mamdani 1996; Furnivall 1948). In the Dutch East Indies, the Dutch colonial government divided the population into three groups, as stipulated in Article 109 of the

general regulations for the colony, *Regeringsreglement* (RR) 1854. The three groups were Europeans, Natives (*inlanders*), and Foreign Orientals (*vreemde oosterlingen*). At the time, the division was concerned with the application of law by judges in the court. Article 75 (3) of RR 1854 stated that:

> "the 'native' judge was to apply the native group their religious laws, customs and institutions - provided they were not in conflict with generally recognized principles of justice - unless the Governor-General had declared European laws applicable to the native group or the native had voluntarily subjected themselves to European law."

These provisions not only divided colonial society into three groups, but also institutionalised legal pluralism. In terms of civil matters, including land rights (for example), Europeans adhered to the European Civil Code (*Burgerlijke Wetboek*), whilst native communities were subjected to customary laws. In criminal actions, colonial administrators recognised customary rules, as long as they followed the principles of equity and justice. This conditional recognition model for enforcing customary law during the colonial period was known as the 'repugnancy clause'. The purpose of the repugnancy clause at the time was to end sadistic punishment practices, such as maiming or mutilation, which could not be tolerated by Dutch administrators (Burns 2004:93). Therefore, this principle was originally installed to provide a guideline for native courts in handling ordinary cases, as well as to protect Europeans from sadistic punishments. This principle was first introduced to Dutch East Indies by Governor-General Herman Willem Daendels (1808-1811), inspired by a revolutionary principle brought from Europe (Ball 1982:98-9). Furthermore, in 1829, the *Algemene Bepalingen van Wetgeving* institutionalised the repugnancy clause before it was adopted in Article 75 RR 1854.[20] The colonial government sustained the repugnancy clause for a long time, by positioning European law higher than the customary laws of native communities. However, this government view was often opposed by legal scholars in

[20] Article 11 of the *Algemene Bepalingen van Wetgeving* stated that: "Except for cases in which 'natives' or those persons equated with them have voluntarily subjected themselves to the European provisions on civil and commercial law, or in which those or other legal provisions are declared applicable to them, their religious laws, institutions and customs are to remain in force for those persons and are to be applied by the 'native' judge, so far as they are not in conflict with the generally recognisable principle of equity and justice." See Ball (1986:13).

the Netherlands, for example by Van Vollenhoven, who perceived that European law and customary law should be treated equally.

In 1929, the colonial government replaced the RR 1854 with the *Indische Staatsregeling* (IS). The colonial government sustained the repugnancy clause in Article 131 IS. One slight difference between RR 1854 and IS 1929 concerns the recognition of customary law. Article 75 of RR used the term 'religious norms' *(godsdienstige wetten),* 'customary institutions' *(volksinstellingen*), and 'custom' *(gebruiken)* for social norms adhered to by native communities, whereas Article 131 IS strictly used the terms 'customary law' or 'adat law' (*adatrecht*). The latter regulation had institutionalised legal pluralism in the colony. According to Burns (2004:94), the institutionalisation of the term *adatrecht* (customary law) in IS was a pivotal contribution to an extensive study on adat law at Leiden University.

The institutionalisation of legal pluralism in the Dutch East Indies gave European colonial law and customary law unequal positions. Therefore, the customary rules of native communities could only be recognised if they met with the principles of equity and justice (*billijkheid en rechtvaardigheid*), according to the perspective of European law (Wignjosoebroto 2014:46-8; Simarmata 2006:32). The hierarchical model between state law and customary law, and the repugnancy clause from the colonial period, both continued in the post-colonial period. I will discuss this model further, regarding the concept of a conditional recognition clause. Lawmakers used the clause to solve contentions between state law and customary law in the colonial and post-colonial periods (see section 3.3).

In terms of land rights, the Dutch colonial government created separate jurisdictions for European law and customary law. Article 62 (3) of RR 1854 stated that the Governor-General could not lease land to business enterprises if the land was being cultivated by native communities or belonged to villages. Furthermore, Article 62 (5) stated that "it is the responsibility of the Governor-General to ensure that no land grant of any sort shall violate the rights of the native populations". Under such circumstances, the Dutch were prohibited from holding customary land rights, and native community members were prohibited from getting private land ownership according to the Dutch Civil Code (*Burgerlijke Wetboek*). However, the colonial government created a specific procedure for native community members to obtain private land ownership (*eigendom*) through the equation process. The equation procedure applied for a native person to be a right-bearing subject

according to the Dutch civil code. The equation procedure consisted of a voluntary submission (*vrijwillige onderwerping*) and a declaration of applicability (*toepasselijkverklaring*) (Wignjosoebroto 2014:44-9). The colonial administrators created voluntary submission procedures as part of a gradual process of creating legal unification in the colony (Wignjosoebroto 2014:47-8). This procedure was first introduced by the colonial government, based on an investigation by a committee led by Scholten van Oud Harlem in the 1830s (Soepomo 1982:38).

The Governor-General would grant an equation decree once a native community member had fulfilled the following five requirements: (a) he/she has successfully demonstrated that he/she speaks Dutch fluently; (b) he/she dresses like a Dutchman; (c) he/she is actively involved in Dutch communities; (d) he/she can expedite Dutch trading activities; and, (e) wherever possible, he/she has the same religion as the Dutch, i.e. he/she is Christian (Soesangobeng 2012:107). After a candidate had applied to the Governor-General, a junior local official would be assigned to interview him/her. Subsequently, the junior local official would send the interview to the Resident via the Assistant-Resident. The next step was examination by the Department of Legal Affairs, the Council of the Indies (*Volksraad*), and then finally the Governor-General's office again. Each of these bodies had to give advice on the decision, but they rarely disregarded the original assessment by the local official (Luttikhuis 2013:547). If admitted, the candidate would receive a declaration of applicability, usually one or two years after the submission.[21] The declaration of applicability was the first step. After obtaining the declaration of applicability, a native community member had to get a decision from the district court that he/she was eligible to obtain private land ownership (*eigendom*) (Soesangobeng 2012:138).

The equation procedure in the colonial period provided an important precedent for the legal procedure to define legal personhood and land rights under different legal systems. The layered legal recognition procedures – between the legalisation of the legal subject and his/her land rights – from the colonial past have been continued in the current regulations concerning customary land right recognition in Indonesia. In the colonial context, the declaration of applicability was used to equate a native community member with a legal person under

[21] Applications for the equation process increased in the late colonial period, in particular. According to Luttikhuis, from 1920 to 1930 there were 3,608 declarations, whilst the European population in the colonies was 245,000 (Luttikhuis 2013:547).

European law. In the contemporary context, the government of Indonesia has created a legal procedure for the legal recognition of adat communities as right-bearing subjects before they are eligible to get customary land rights. The main difference here is that in the colonial period the equation process applied to individuals, whilst in the current context the legal recognition of adat communities applies to groups.

3.2.2. Public interests: State land domain versus the right of avail

Inconsistencies in how customary law was treated continued throughout the colonial period. The Dutch colonial government enacted forestry regulations (1865) and the Agrarian Law (*Agrarische Wet*) of 1870 in order to facilitate capital expansion in the forestry and plantation sectors. Subsequently, on July 20th 1870 King William III released an agrarian decree (*Agrarische Besluit*) to legitimise the colonial government's control of land and forests in the colony, via the domain declaration (*domein verklaring*).[22] The domain declaration contained a statement that all land not held under proven ownership shall be deemed the state's domain. This doctrine was inspired by a feudalist fiction that a king was an ultimate ruler, who possessed all the land in his kingdom (Harsono 1962:4). In practice, the colonial government applied the domain principle to expand its control over land and resources, and then the Agrarian Law and Agrarian Decree legitimised such practices (Thamrin dkk, 1936:9). For example, when Governor-General Daendels ruled the colony, in 1808-1811, he implemented policies to control teakwood businesses in the north of Java. Daendels declared all forests to be state domain (*staat landsdomein*), to be managed for the benefit of the state (Peluso 1992:45) (see Chapter 2). Thomas Stamford Raffles (1811-1816) institutionalised the land rent system, based on a claim that the land belongs to the colonial ruler. Another regulation was Article 62 RR 1854, which the Dutch colonial government used to lease or rent out non-cultivated land to private entrepreneurs (Fasseur 1991:36). The Dutch colonial government used the domain principle to expand its authority and to facilitate forestry and plantation businesses in the colony (Boomgaard 1992:5-6).

The Dutch colonial government extended the application of the domain principle in the colony. After the enactment of a forestry

[22] Article 1 of the Agrarische Besluit states that: *"Dat alle grond, waarop niet door anderen recht van eigendom wordt bewezen, domein van den staat is."* Kon. Besl. v. 12 Januari 1912 Number. 40 Ind. Staatsbl. Number. 235.

regulation for Java and Madura, the colonial government introduced various agrarian regulations (*agrarische reglement*) to gradually expand the domain principle in the outer islands. In the West Sumatra region, for example, the decision to enforce the domain declaration was kept secret for several years, due to concerns about protests from local communities who used their land based on customary law (Termorshuizen-Arts 2010:46). In 1875, the Dutch colonial government ruled that the domain declaration applied to the entire land in the colony (Termorshuizen-Arts 2010:44).[23] Various interpretations emerged regarding the scope of state land domain, based on the domain declaration. A broader interpretation of state land domain implied restriction of the customary land rights of native communities. There was disagreement about this issue amongst members of parliament and academic scholars in the Netherlands.

Before the 1920s, the Dutch government had already planned to amend the colonial regulation to expand state control by undermining customary land rights. This plan caused a heated academic debate in the Netherlands. The leading opponent to the proposed amendment was Cornelis van Vollenhoven, a reputable legal scholar at Leiden University. Van Vollenhoven and his colleagues at Leiden University had published books on various aspects of the customary laws of native communities, including land tenure arrangements, inheritance, and criminal action. Encountering the parliament's plan to amend Article 62 of RR 1854, he wrote a pamphlet entitled, *De Indonesier en zijn grond* (the Indonesians and their land). This pamphlet explained various injustices experienced by native communities, due to arbitrary interpretation of the domain declaration. Van Vollenhoven defended the customary land rights of native communities. According to van Vollenhoven, the native communities were divided into various jural communities *(rechtgemeenschappen)* with their own local rules, called adat law *(adatrecht)*, and with the authority to regulate their customary territory, which van Vollenhoven termed "the right of avail" (*beschikkingsrecht*).

Van Vollenhoven identified six characteristics of the right of avail amongst native communities across the archipelago, as follows (van Vollenhoven 1909:19-20): (a) The jural community and its members may make free use of virgin land within its area. The land may be cultivated; used to found a village; used for gleaning, etc.; (b) Others may do the same there, only with permission from the jural community. If they lack

[23] Staatsblad Number 1875-199a.

such permission, they commit an offence; (c) For such use, outsiders must always pay a gratuity in tribute, and members of the community may sometimes have to make such payments; (d) The jural community retains, to a greater or lesser degree, the right to intervene in questions concerning land already under cultivation within its area; (e) If there is no other party from whom recovery can be made, the jural community is accountable for whatever transpires within its area - ([this would apply] for example, in the case of offences for which the culprit remains unknown); and (f) The jural community cannot alienate this, its right of allocation, in perpetuity. Van Vollenhoven was aware that these characteristics varied between regions.

Furthermore, Van Vollenhoven found that there was actually no single interpretation of 'the domain doctrine'. He explained several interpretations concerning the scope of the domain declaration, from extensive to restrictive (Van Vollenhoven 1919:53-4; cited in Burns 2004:32). The first interpretation was that state land domain applied to all land for which nobody could demonstrate a European right of ownership according to the Dutch Civil Code. This extensive interpretation of state land domain is the main challenge to the autonomy of native communities when exercising their authority regarding the right of avail. The second interpretation was all land for which neither European nor agrarian ownership (*agrarisch eigendom*, a category of land rights created in 1872) could be demonstrated. The third interpretation was all land for which neither European, agrarian, nor oriental ownership can be demonstrated – the last category is an unencumbered native right of possession (*inlandsch bezitrecht*). The most restrictive interpretation was that the domain comprised all land for which nobody can demonstrate European, agrarian, or oriental property rights, or even an encumbered native right of possession.

On the other side, Nolst Trenite was a proponent of the amendment and a senior adviser to the Dutch government on agricultural policy (Burns 2004:21). Trenite was the central figure in establishing a legal training centre at Utrecht University, designed to oppose Leiden University's domination of colonial administrative education. The debate between Leiden and Utrecht became a central academic and political discussion in the 1920s in the Netherlands. Basically, the debate reflected different policies for developing a colonial legal system - ranging from preserving legal pluralism and imposing legal centralism, through direct rule and indirect rule strategies (Burns 1999), to protecting the autonomy of native communities and expanding the

exploitation of natural resources in the colony (Termorshuizen-Art 2010:34).

After strong opposition from Van Vollenhoven, the colonial government discontinued its plan to amend the colonial regulations. However, the debate on customary land rights continued in the colony, involving Indonesian legal scholars and members of the Council of the Indies (*Volksraad*). In 1928, Tjokorde Gde Raka Soekawati, a Volksraad member representing native communities, proposed that the council initiate research on the land rights of native communities. His proposal was triggered by Ter Haar's article in the academic journal, *Tijdschrift van het Recht*, which criticised Nolst Trenite's view of the Domain Doctrine (Burns 2004; Termorhuizen-Arts 2010:60-1). Soekowati made a plea for two main issues: (a) that the governor of the region should take the rights of avail (*hak ulayat*) seriously, especially when negotiating over business concession grants for large plantations; (b) that the government should clarify the scope of the Article 51 paragraph 6 of IS provisions, regarding the right of avail. Were these provisions meant to protect and recognise the right of avail?

On May 16th 1928, the Governor-General created an Agrarian Commission to investigate the implementation of the domain declaration and its impact on the customary land rights of native communities.[24] The president of the commission was GJ du Marchie Sarvaas (an Agrarian Affairs and Compulsory Service inspector), but he was soon replaced by S. Bastiaans. Members of the commission consisted of Ali Moesa, RMAA Koesoemo Oetoyo, P.A. Kandagie, and Tjokorde Gde Raka Soekawati (Indonesian delegates to the *Volksraad*), F Blok (a Forestry Service inspector), BJ Haga (Chief of the *Binnenlandsch Bestuur* for the Outer Regions), and Logemann and Ter Haar (academic researchers at the Batavia *Rechtshogeschool*). The secretary was A.P.G. Hens (Adjunct Inspector for the Agrarian Affairs and Compulsory Service). The Commission submitted its report in 1930. It proposed that the domain declaration should be abandoned because, in practice, it caused confusion, mainly because of the loose interpretation of the scope of state domain. Additionally, the commission proposed stricter protection of the right of avail, and that such right should not be revoked, except on the grounds of 'public interest' - referring to Article

[24] The Dutch colonial government later created the Spit Commission, on June 15th 1931. This commission conducted an investigation concerning the possibility of granting land rights to the Indo-European population in the Dutch East Indies. For further details, read Upik Djalins (2012:226-269).

133 concerning the revocation of land rights (Termorhuizen-Arts 2010:61-2). The use of 'public interest' as a condition for recognising the right of avail was a key recommendation for resolving tension between state land domain and the right of avail. Later, this exact term, 'public interest', was used by Indonesian lawmakers as a strategy for the conditional recognition of the right of avail in the formulation of new agrarian law in the post-colonial context.

During the 1920s, a new generation of indigenous legal scholars emerged in the colony. Most of them had graduated from Leiden University in the Netherlands, and the *Rechtshogeschool* in Batavia. Following the Leiden approach, this group defended the position of customary law and the customary land rights of native communities (Wignjosoebroto 2014:9-10). In 1935, the Indonesian Agrarian Commission was formed independently by Indonesian scholars and activists, including M.H Thamrin, Muhammad Yamin, Koentjoro Poerbopranoto, RMAA Koeseomo Oetojo, R Loekman Djajadiningrat, R Hadi. Soekamto, Amir Syarifudin, and Soehario. This commission was created in response to the Agrarian Commission and the Spit Commission, both created by the Dutch colonial government. In particular, MH. Thamrin and his colleagues worried about the Association of Indo-European's move to convince the Dutch colonial government to provide land rights for Indo-Europeans in the Dutch East Indies. Additionally, the Chinese Association, Chung Hwa Hui, also tried to convince the colonial government to grant them rights to own land, following in the Indo-Europeans' footsteps (Djalins 2012:244-4; Djalins 2015:242).

The Indonesian Agrarian Commission investigated the domain doctrine and the land rights of native communities. In carrying out its duties, the commission requested that several Indonesian scholars provide written input, including Soepomo, Tjipto Mangoenkoesoemo, Koesoemo Soemantri, and Abdul Gafar (Luthfi 2020). The commission published its report in March 1936. The commission strengthened the right of avail - in this report, the so-called *hak lingkungan* (territorial rights) - and it has since been recognised by the IS in various provisions and court rulings in various regions (Thamrin et al. 1936:2-3). This report also emphasised that the land belonged to native Indonesians, stating that foreigners – implicitly including Indo-European and Chinese descendents – were not allowed to own native land, especially land under the right of avail. If customary land was given to foreigners, it meant that colonial regulations and customary laws were being violated

(Thamrin et al. 1936:5). The main difference between this and the previous Agrarian Commission report was that the Indonesian Agrarian Commission did not use 'public interest' as a condition for recognising customary land rights.

3.3. The pursuit of national identity and the subjugation of customary land rights

After the proclamation of Indonesian independence in 1945, the desire to create a unified legal system that would apply to the entire population became stronger. In the pursuit of new national land law, the government of Indonesia relied on modern legal principles. Consequently, customary law, customary land rights, and other traditional political institutions had only limited space in the lawmaking process. The debate relating to customary law and customary land rights can be found in the formation of the constitution and the new agrarian law, which replaced colonial agrarian law. In the constitution-making process, the Indonesian state's founding fathers recognised the limited position of local kingdoms and adat law communities, concerning local government (Article 18 of the 1945 Constitution). Meanwhile, in terms of land rights, the constitution-makers relied on the plan to create a socialist economic system as an alternative to colonial agrarian capitalism and feudalism (Arizona 2014). This objective was reflected in Article 33 of the 1945 Constitution, which required the government to take an active role in controlling all natural resources, for the greatest possible prosperity of citizens. The constitution-makers did not consider customary land rights to be a basis for developing national economic policies. The debate concerning the position of customary land rights was further elaborated in the formation of the Basic Agrarian Law.

3.3.1. Formation of the Basic Agrarian Law: Legal unification and the destabilisation of customary land rights

The government of Indonesia prepared a new agrarian law to substitute the *Agrarische Wet* 1870, for which President Sukarno established the Yogyakarta Agrarian Committee, in 1948. The commission conducted an investigation, in order to propose new principles for the new national land law. The government later created other committees to replace the Yogyakarta Agrarian Committee, including the Jakarta Agrarian Committee (1951), and the Soewahjo Committee (1955). These committees consistently recommended the abolition of the domain principle, whilst upholding the position of the right of avail (*hak ulayat*)

and implementing the land reform programme. The first bill of the Basic Agrarian Law (BAL) was drafted in 1958, under the supervision of Soenarjo, the Minister for Agrarian Affairs. In 1960 the bill was resubmit to parliament and revised by the next Minister of Agrarian Affairs, Sadjarwo. The main objective in establishing the new agrarian law was to provide legal certainty regarding land rights. The lawmakers intended to replace the legal pluralism inherited from colonial land law with unified national land law. The bill also suggested abolishing the domain declaration (*domein verklaring*), and promoted a new concept of the state right of control (*hak menguasai negara*).

Despite the government suggesting that customary land rights should be strengthened, the exact provision was not clear until it was debated in parliament. During the parliamentary session to deliberate the bill on the Basic Agrarian Law, government representatives and parliament members had a mixed approach toward the position of customary law and customary land rights. On the one hand, the government used customary law as inspiration for building national agrarian law (Article 3). The government also proposed upgrading the concept of the right of avail (*beschikkingsrecht/hak ulayat*) from only applying to adat law communities to legitimising the relationship of all Indonesians to their homeland. This concept later became known as the right of the nation (*hak bangsa*). On the other hand, the implementation of customary law and customary land rights was restricted by conditions. This mixed approach is founded in several provisions of the Basic Agrarian Law (Number 5/1960), notably Article 2 paragraph (4), Article 3, Article 5, and Article 53 paragraph (1), as follows:

1. The government can delegate the implementation of the state's right of control to adat law communities and local governments (Article 2 paragraph 4).
2. The government recognises customary land rights, as long as they still exist and are in accordance with national and state interests, based on national integrity, and as long as they do not contradict any higher laws and regulations (Article 3).
3. Agrarian law, as applied to the earth, water, and space, is customary law, as long as it is not contrary to national and state interests, based on national integrity with Indonesian socialism and the rules set out in the Basic Agrarian Law and other regulations, and respecting religious values (Article 5).
4. Secondary land rights based on customary law are recognised as temporary rights, to gradually diminish over time. These

> customary land rights include the rights of mortgage, profit-share business rights, rights of temporary land use, and rights of land lease for agricultural activities (Article 16 paragraph 1 point h and Article 53).

Although the government used the BAL to substitute for legal pluralism, this did not mean that it fully embraced legal centralism. Rather than diminishing customary law and customary land rights, the BAL recognised customary law and customary land rights, based on an 'evolutionist approach'. Some of the literature on indigenous peoples called this 'the assimilationist approach', which aims to overcome cultural differences through policies that create an "overarching identity to bring out-groups in" (Novoa and Moghaddam 2014:476). The evolutionist approach draws upon a strict line of social development, and believes that minorities will assimilate into the majority group in society. Additionally, traditionality will transform to be part of modernity. In this respect, customary law and customary land rights were temporarily recognised until the new provisions in the BAL were fully implemented. The evolutionist approach fits with a scenario to build a national identity and create a modern legal system. The government proposed that recognition of customary law and customary land rights be granted by the government, if such recognition did not undermine national and state interests, national integrity, and higher legislation. This condition resonated with the Agrarian Commission's recommendation from the 1920s, that recognition of customary land rights should not hinder 'public interests'.

However, during the parliamentary debate new conditions were added, based on the suggestions of communist, nationalist and Islamist political parties. The Islamist group in parliament proposed that religious values should also be used to restrict customary law implementation. Meanwhile, the communist and nationalist groups in parliament proposed the inclusion of 'Indonesian socialism' as a principle for limiting customary law and customary land rights. For the communist group, the legitimacy of customary law had been eroded because of feudalism and colonialism. The communist group considered that agrarian justice could not be achieved through customary land rights, but rather through Indonesian socialism and land-reform programmes. The communist group strived for the abolition of exploitative land tenure relationships based on customary law, such as land rent and mortgages.

The communist party's proposal during the formulation of the BAL, concerning the restriction of customary land rights under Indonesian socialism, was in line with President Sukarno's political agenda at the time. President Soekarno had just released the Presidential Decree on Return to the 1945 Constitution. Later, this decree was known as Presidential Decree of July 5th 1959 (*Dekrit Presiden 5 Juli 1959*). Sukarno enacted this decree in order to leave the liberal political system to pursue Indonesian socialism. Through the Presidential Decree, President Sukarno dissolved the Constitution Assembly (*Konstituante*) and re-enacted the 1945 Constitution. Furthermore, in his political speech on August 17th 1959, President Sukarno issued a political manifesto that became the basis for government policies from 1959 to 1965. The political manifesto was called Manipol USDEK - the abbreviation of *Undang-Undang Dasar 1945* (the 1945 Constitution), *Sosialisme Indonesia* (Indonesian socialism), *Demokrasi terpimpin* (the guided democracy), *Ekonomi terpimpin* (the guided economy), and *Kepribadian Indonesia* (Indonesian identity). The People's Consultative Assembly upgraded Sukarno's political manifesto to state guidelines (*Garis-garis Besar Haluan Negara*/*GBHN*). Accordingly, the manifesto was quoted several times by political party representatives during formulation of the BAL.

In short, after a preparation period of 12 years, the Basic Agrarian Law was finally enacted by parliament, replacing colonial agrarian law. The formulation of BAL in parliament took place in the spirit of post-colonial nation building, which included creating modern laws and a new national identity, as well as pursuing social justice through land-reform programmes. Customary law and customary land rights were recognised, under strict conditions. This period reflected that the government of Indonesia supported centralism rather than pluralism. The BAL recognised customary law and customary land rights, as long as they were not contrary to five aspects, including: (a) national and state interests; (b) national integrity; (c) Indonesian socialism; (d) higher regulations; and (e) religious values. Reflecting on the debate during formulation of the BAL as the continuation of a debate between legal centralism and legal pluralism from the colonial period, it was clear that the new post-colonial government would uphold a legal centralism strategy that restricted customary law and customary land rights (Jaspan 1964; Burns 2004).

3.3.2. Customary land rights under Suharto's New Order regime: An obstacle for economic development

The political turmoil in 1965-1966 led to a regime change, from Sukarno to Suharto. Suharto's New Order regime had much in common with Sukarno's Guided Democracy, in terms of how it situated customary law and customary land rights in the state legislation. To increase state revenues from the forestry and mining sectors, President Suharto enacted the Forestry Law (Number 5/1967) and the Mining Law (Number 11/1967). In addition, President Suharto also enacted the Foreign Investment Law and the Domestic Investment Law, to support his new economic development agenda. The BAL remained in place.

The BFL followed the BAL regarding the conditional recognition clause for customary law and customary land rights. This means that the implementation of customary law and customary land rights are recognised, as long as "they still exist" and do not conflict with the government's interests and higher legislation. The Forestry Law further undermined customary law and customary land rights, by considering customary land rights an obstacle to economic development (Bedner and van Huis 2008:181-2). The Forestry Law explanation states that:

> "Therefore, it cannot be justified if the customary land rights of a local adat law communities are used to obstruct the implementation of the government's planning, for example by refusing large scale forest clearance for large projects, or in the interest of transmigration programs and so on. Similarly, it cannot be justified if customary land rights are used as a pretext for local adat law communities to open forests haphazardly."

Suharto's New Order regime granted many forest concessions for private companies, facilitating extractive business in natural resource sectors. The redistributive justice agenda in the BAL was set aside, together with its land-reform programme. Unlike the BAL, which replaced colonial land law (*Agrarische Wet* 1870), the Forestry Law did not repeal the colonial forestry regulation (*boschordonantie*) which was the basis for historic colonial government control of forest areas. By continuing the colonial forestry regulations, the Forestry Law enforced the extensive interpretation of *domein verklaring* in the forestry sector, by designating forest areas as state property (Rachman 2012:41; Arizona 2014:115). Individual property and customary land rights were not allowed in forest areas. Moreover, the government used forestry maps

from the colonial government as the basis for securing government control over forest areas (see Chapter 2).

In fact, many local communities had been residing in state forest areas for decades. The government found that forest dwellers were an obstacle to granting forest concessions to private enterprises. Consequently, the government displaced local communities who were living within forest and upland areas to lowland and rice field areas (Li 2007), a policy known as 'the resettlement programme'. After the local communities had moved to a new settlement, the government granted forestry concessions to forestry or mining companies. This programme had already started during the colonial period, and it became massive under Suharto's New Order regime.

President Suharto also strengthened the structural position of the forestry agency. Previously, the forestry agency was a directorate under the Ministry of Agriculture. President Soeharto upgraded the agency into a new ministry. In contrast, the Agrarian Ministry was downgraded to a directorate within the Ministry of Home Affairs. The main consequence of this policy was that a dual land administration was created between agrarian and forestry regimes in Indonesia. Statistically, forest area currently covers 64% of the land surface controlled by the Ministry of Forestry in Indonesia, whilst non-forest area is controlled by the agrarian state agency (Safitri 2010a; Moeliono 2011; SOIFO 2020).

Suharto's New Order policies systematically marginalised adat communities, by not treating them as full citizens. While ignoring the historical fact that adat communities had lived on and managed forest resources for a long time, Suharto's New Order regime targeted adat communities as subjects to be transformed from traditional to modern society. For example, the government introduced rice and food aid programmes, in order to convert the local diet from sago and taro in Mentawai (Darmanto 2020). The food aid programme has affected the traditional agricultural activities of local communities, especially those who depend on forest products. The government also labelled local communities 'forest encroachers' (*perambah hutan*), if they lived within forest areas and practised shifting cultivation (Peluso 1994; Li 2000; Tsing 2009). In 1993, President Suharto established the Ministry of Transmigration and Settlements of Forest Encroachers. This new ministry implemented the resettlement programme for the local communities that lived off the forest. Additionally, the Ministry of Social Affairs implemented a programme to provide access to the public facilities of 'remote adat communities' (*komunitas adat terpencil*). The

latter programme seems contradictory because the government provided access to local communities. However, the programme started after the government had labelled particular groups 'remote adat communities'.

During Suharto's New Order regime, forest dwellers and local communities experienced injustice because the government's policies favoured large-scale enterprises that dispossessed them of their land. Moreover, the government characterised forest dwellers and local land users as backward, anti-development, and without any religion or culture. Through this active marginalisation the government created arguments in support of its own development programmes, which were intended to modernise local communities so that they would want to follow modern lifestyles and make way for the logging companies. The problem of injustice and misunderstanding of the local community's way of life and rights to land and forest became the basis for the rise of the adat community movement in Indonesia. This movement crystallised its agenda in its demand for state recognition of adat communities and their land rights.

3.4. Adat in the reform era: Reshaping customary land rights

3.4.1. Adat community movements and a new interpretation of adat

In Indonesia, the new attention being given to promoting customary land rights coincided with the emergence of global environmental protection agendas. In the 1990s, the government of Indonesia was actively involved in the international forum concerning sustainable development, notably in the Earth Summit (1992), which produced the Rio Declaration. President Suharto also created the Ministry of Environment, to show the government's concern about global environmental problems. Environmental activists used environmental issues as a new narrative to challenge the extractive industries promoted by the government, and they also promoted the image of local communities as good environmental protectors (Tsing 2007). In a similar vein, human rights activists took up environmental issues and the promotion of adat communities as an alternative argument for rural communities encountering land conflict with state agencies and corporations (Moniaga 2007; Afiff and Lowe 2007). Adat became an alternative to the peasant movement in Indonesia. During the New Order regime, peasant organisations experienced strong repression by the government, because the government often labelled peasant protests as being part of the communist revival. The killing of communists after

the 1965 tragedy had weakened peasantry as an argument for rural communities encountering land conflicts.

In the final years of Suharto's New Order regime, environmental and human rights activists supported the establishment of local activist networks to support adat communities facing land dispossession due to state-sponsored development programmes, such as in Banten, North Sumatra, and Central Sulawesi. After Suharto had stepped down in 1998, local networks assembled a national umbrella organisation of adat communities by establishing the Alliance of Indigenous Peoples of the Archipelago (*Aliansi Masyarakat Adat Nusantara*/AMAN). AMAN played a central role in amplifying the aspirations of adat communities from Indonesia in international forums. It also became the host organisation for the indigenous peoples' movement agenda in Indonesia (Davidson and Henley 2007). The motto of AMAN's first Congress was: "If the state does not recognise us (adat communities), then we will not recognize the state" (Li 2001; Tsing 2007).

Moreover, AMAN used the term 'adat communities' (*masyarakat adat*) as an alternative to 'adat law communities' (*masyarakat hukum adat*). The latter was used in adat law studies during the colonial period. For AMAN supporters, the term 'adat communities' is broader and more suitable in shaping the revival of indigenous peoples movements in the Indonesian context than the term 'adat law communities' from the colonial period (Tsing 2009; Arizona 2010; Benda-Beckmann 2019). Accordingly, AMAN's use of the term 'adat' was not only associated with tradition and custom, but also with the international concept of indigeneity. AMAN defined adat communities as follows:

> "adat community is a group of people who have traditionally settled in certain geographical areas because of the ties to ancestral origins, having a strong relationship with natural resources, and having system of norms that determine its economic, political, social, and legal institutions."[25]

From AMAN's perspective, pursuing state recognition required a repositioning of the relationship between state and adat communities via legislative reform. In 1999, AMAN, together with environmental and agrarian activists, successfully lobbied the People's Consultative

[25] In bahasa Indonesia: *"Masyarakat Adat adalah kelompok Masyarakat yang secara turun-temurun bermukim di wilayah geografis tertentu karena adanya ikatan pada asal-usul leluhur, adanya hubungan yang kuat dengan sumber daya alam, serta adanya sistem nilai yang menentukan pranata ekonomi, politik, sosial, dan hukum."*

Assembly (*Majelis Permusyawaratan Rakyat/MPR*) to enact a decree concerning agrarian reform and natural resource management.[26] This decree provided a normative guideline for government agencies to implement agrarian and natural resource management reform programmes (TAP MPR No. IX/2001). The recognition and respect of adat communities and cultural diversity were set up as principles for the implementation of agrarian reform and natural resource management programmes.[27] This decree was the first Indonesian regulation to unconditionally recognise the customary law and customary land rights of adat communities. Another pivotal outcome of adat advocacy in this period was the enactment of the Ministerial Regulation of Agrarian Affairs on Customary Land Rights. This ministerial regulation will be discussed in detail in section 3.5.2.

Also in 1999, the government and parliament enacted a new Forestry Law (Number 41/1999) to replace the old forestry law created under Suharto's New Order regime (Law Number 5/1967). Unlike the former law, the new Forestry Law regulated customary forests in a problematic way because it stated that customary forest is state forest that is located in customary territories (see Chapter 2). Moreover, the new Forestry Law introduced a two-step procedure for obtaining customary forest recognition. The first step is that a local community must obtain legal recognition from the provincial or district government, affording them the status of an adat community. The adat community can also apply to the Ministry of Forestry to get legal recognition of its customary forest. The primary considerations of the new forestry law - to give provincial and district governments the authority to determine the legal status of adat communities - related to the spirit of decentralization that emerged after Suharto's New Order in Indonesia. Moreover, it was difficult for the national government to recognise the different varieties of adat communities across Indonesia. The central assumption was that each district government knew best the status and condition of the adat communities in the respective regions.

Article 67 of the Forestry Law stated that there should be detailed ministerial regulations for customary forest recognition. In 2000, Ministry of Forestry officials started to prepare draft government regulations on customary forests. From 2007 to 2009, the Ministry of Forestry officials held intensive consultations involving NGOs and adat

[26] TAP MPR No. IX/2001 on Agrarian Reform and Natural Resource Management.
[27] Article 5(j) of TAP MPR.

community organisations. AMAN criticised the draft, and sent a letter to the President to halt discussion of the draft on customary forests (Arizona 2010:36-9). There were several arguments for AMAN's objection. The first was that the draft contradicts the self-determination principle contained in international laws about indigenous peoples' rights. The draft proposed that the determination of the legal status of adat communities was a political decision in the hands of the government. The second was that the draft perceived adat communities from an evolutionist perspective. In this respect, the draft only recognises current adat communities which still preserve their original traditions. In addition, the draft left no room for local communities to revitalise their traditions and be recognised as adat communities. The third reason was that the draft did not focus on regulating customary forests; instead, it overstated regulation of the procedure for legal recognition of adat communities. AMAN argued that the draft should be limited to providing procedure for customary forest recognition, in order to implement Article 67 of the Forestry Law. The fourth reason was that the draft did not regulate conflict resolution. AMAN hoped that the regulation would provide a mechanism to solve past land conflicts between adat communities and government agencies and corporations. The final reason referred to AMAN's expectation that the draft government regulation would be used to clarify the vague definition of 'customary forest' already contained in the Forestry Law.

AMAN lost hope of persuading the Ministry of Forestry to create a suitable procedure to accommodate adat community rights in the forestry sector; therefore, AMAN tried to influence other government sectors. A successful example was the incorporation of AMAN's terms and definitions of adat communities in the Law concerning the Management of Coastal Areas and Small Islands (Number 27/2007). This law used the term 'adat communities' instead of 'adat law communities', and it adopted AMAN's definition. Adat community supporters also succeeded in institutionalising the legal recognition of adat community rights in the Law concerning Management and Protection of the Environment (Number 32/2009). Unlike the former legislation, the government refused to use the term 'adat communities' in the new Environmental Law, favouring the term 'adat law communities', because it has been adopted in the constitution. But this law did use AMAN's explanation to define adat law communities. Since adat advocacy began to encourage legislative reform in 1999, it has developed into a new trend for legislation concerning natural resources to

incorporate customary land rights (Bedner and van Huis 2007; Arizona and Cahyadi 2013). The common characteristic of these laws regulating customary land rights is the conditional recognition clause. The conditional recognition clause was inserted into the Constitution as a constitutional provision, during the constitutional amendment process in 2000. Article 18B (2) and Article 28I (3) of the Indonesian Constitution recognised the adat community and customary land rights attached to the conditional recognition clause, as follows:

Article 18B (2)	:	The state recognises and respects individual adat law communities and their traditional rights, in as far as they are still alive and in line with societal development and the principle of the Unitary State of Indonesia, as regulated by Acts of Parliament.
Article 28I (3)	:	The cultural identity and the rights of traditional communities are protected in accordance with altered times and culture.

AMAN's advocacy continuously manoeuvred to stretch out the state legal framework towards the recognition of customary land rights. Another important piece of policy advocacy by AMAN concerned the political movement to establish a special law on adat community rights in Indonesia, similar to the Indigenous Peoples' Rights Act (IPRA) in the Philippines. AMAN's advocacy to establish a special law on adat communities was based on a recommendation from the evaluation of the existing legal framework in 2012, pointing at the legislative fragmentation regarding adat communities, and the laws and regulations referring to various sectors of government administration (Arizona and Cahyadi 2013). The current legislation regulates adat community and customary land rights with different interests and approaches that do not complement each other. For instance, the Law on the Environment is concerned with the traditional wisdom of adat communities. Meanwhile, the Law on Village Government provides an opportunity for adat communities to create an 'Adat Village'. These two laws are not complementary, and imply the regulation of two different types of adat community.

AMAN expected that the special law would create a coherent procedure for realising customary land rights. Additionally, drafting of the special law would also be used as an opportunity to translate UNDRIPs into national law. Some provisions contained in UNDRIPs

were inserted, such as the right to development and the right to spirituality and culture. These proposals raised resistance amongst law makers, which slowed down the process. From the third AMAN Congress in 2008 in Pontianak owards, AMAN started lobbying the government to create a special law. In 2011, AMAN drafted a full proposal for the text of the bill and sent it to the House of Representatives. However, even after having been discussed for many years, the bill has not yet received sufficient support in parliament (Arizona and Cahyadi 2013; Bedner and Arizona 2019). Therefore, it is not likely that AMAN's version of the bill will be passed any time soon.

AMAN has also tried to enhance its position within the political system. In 2014, AMAN encouraged its members from various regions to become candidates for national and local parliamentary elections. AMAN also supported Joko Widodo in the 2014 presidential election. In return, Joko Widodo included AMAN's proposals in his presidential campaign programme, called "Nawacita". The programme included ratification of the bill on adat community rights, the establishment of an independent committee for adat community issues, and the recognition of customary forests. When President Joko Widodo's first term ended, in 2019, most of these political promises had not been fulfilled, with only a few customary forests having been designated. In the 2019 presidential election campaign, AMAN therefore no longer supported Joko Widodo for his second term as President, but neither did it support his competitor. Although Joko Widodo won the election, AMAN has lost its hope that Joko Widodo will advance the recognition of adat community rights.

3.4.2. The conditional recognition clause and the Constitutional Court

The establishment of the Constitutional Court in 2003 provided a new opportunity for customary land rights supporters. AMAN and other NGOs have used the Constitutional Court as a new platform to expand the legal framework on customary land rights and challenge the concept of state forests. The Constitutional Court Law (Number 24/2003) specifies that an adat law community can be a litigant in the Constitutional Court, in addition to individuals, legal entities, and government institutions. The legal standing of an adat law community as a litigant had never been regulated in Indonesian judicial procedures before. But here too, the legal standing of adat law communities would only be accepted if the community fulfilled the requirements of the

conditional recognition clause (Article 18B paragraph (2) of the 1945 Constitution).

The Constitutional Court has adjudicated some cases concerning adat law communities and customary land rights. In this chapter, I discuss the three most relevant decisions that have significantly affected the realisation of customary land rights. The first is the Constitutional Court ruling Number 10/PUU-I/2003. This ruling explains the conditional recognition clause in Article 18B of the Constitution, as described in the following table.

Table 2. Description of the Conditional Recognition Clause based on Article 18B (2) of the 1945 Constitution

No	Conditions	Explanation by the Constitutional Court
1	Adat law communities still exist (*Masyarakat hukum adat masih hidup*)	Adat law communities can be considered *de facto*, existing either territorially, genealogically, or functionally when fulfilling the following elements: 1. Members of the community have an in-group feeling; 2. Customary institutions exist; 3. Property and/or customary objects exist; and 4. Customary rules exist. The element of customary territory is especially necessary for adat law communities with a territorial basis.
2	In accordance with societal development (*Sesuai dengan perkembangan masyarakat*)	Adat law communities, along with their traditions, are in accordance with societal development when: 1. Their existence has been recognised, based on the applicable law as a reflection of the ideal values derived from today's society, either general or sectoral laws, such as in agrarian, forestry, fishery, and other sectors, as well as in regional regulations; 2. The content of traditional rights is recognised and respected by the community members concerned, and by wider society, and it does not conflict with human rights.
3	In accordance with the principle of the unitary state of the Republic of Indonesia (*Sesuai dengan prinsip Negara Kesatuan Republik Indonesia*)	Adat law communities, along with their traditional rights, are in accordance with the principle of the Unitary State of the Republic of Indonesia, if adat law communities do not interfere with the existence of the Unitary State of the Republic of Indonesia as a political and legal unity, namely: 1. Its existence does not threaten the sovereignty and integrity of the Unitary State of the Republic of Indonesia; 2. The substance of customary rules is appropriate and does not conflict with the laws and regulations.

The Constitutional Court does not consider the conditional recognition clause to be a fundamental issue that impedes the fulfilment of adat law community rights. Instead of challenging it, the Constitutional Court upheld the conditional recognition clause, explaining it as a normative standard for realising the legal recognition of adat law communities. However, the Court ruling did not give any concrete examples of adat law communities, meaning that interpretation was left open to the government to implement the constitutional provision concerning adat community rights. Unfortunately, the Court did not use the empirical problems experienced by adat communities as the basis for addressing customary land rights problems. This limitation relates to the structural design of the Constitutional Court as a legal institution, and does not solve concrete legal problems; instead, it focusses on resolving contradictions between regulations (Isra and Faiz 2021).

The second case is the Constitutional Court ruling Number 35/PUU-X/2012. AMAN, together with two adat communities, were applicants for this case. AMAN challenged the conditional recognition clause contained in the Forestry Law (Number 41/1999). Article 67 of the Forestry Law stipulated that the legal standing of adat communities has to be determined via provincial or district regulations. According to Forestry Law, the existence of an adat law community should fulfill some requirements, including that the community is still a legal community (*rechtsgemeenschap*); that adat institutions exist; that there is a clearly defined adat law territory; that adat law institutions that are still respected exist; and that the adat community still collects forest products from the surrounding forest areas, as the main source of their livelihood.

The Constitutional Court ruled that the conditional recognition clause was constitutionally valid. The Constitutional Court considered adat law communities to be societies with mechanical solidarity, as reflected in Emil Durkheim's account dividing society into two categories, namely: mechanical solidarity societies and organic solidarity societies (Durkheim 1893). Relying on the evolutionist approach, the Constitutional Court justified the development of society from a mechanical to an organic form. With this linear approach to societal development, any adat law community that has changed because of modern development could not return to their traditional way of life. As a consequence of this ruling, the court reduced the prospects of legal recognition for extensive adat communities across the

country. In the ruling, the Constitutional Court also warned that neither adat nor indigeneity could be used as the basis for separatism.

Although the court reinforced the problematic formula concerning the conditional recognition clause, it also upheld the importance of legal protection of customary forests. In this ruling, the Constitutional Court corrected the definition of customary forest in the Forestry Law. Initially, the Forestry Law defined customary forest as state forest located within the territory of adat law communities. The definition of the customary forest as part of the state forest was the legacy of Suharto's New Order regime, which undermined adat communities. The Constitutional Court ruled that the status of customary forests must be separate from state forest status. This aspect of the ruling was a significant victory for adat advocacy in Indonesia. For AMAN, as the applicant in this case, the ruling provided a strong political argument for resolving forestry conflicts that had emerged because of arbitrary forest delineation in the past. This ruling opened a new space for renegotiating the state and adat community relationship. Abdon Nababan, the Secretary-General of AMAN, said in a press conference just after the court ruling announcement: "the government must return 40 million hectares of customary forests to adat communities". The amount was about 33% of the land area claimed by the government as state forest.

Another Constitutional Court ruling in favour of adat law communities was Number 95/PUU-XII/2014, concerning forestry crimes contained in the Law on the Prevention and Eradication of Forest Destruction (Number 18/2013). For many centuries, local communities who were living in forest areas had been criminalised because, according to Law Number 18/2013, they were carrying out illegal activities. In fact, many local communities were living in forest areas before the Forestry Law was created, and even before the Republic of Indonesia was established. The Constitutional Court ruled that people who have lived in forest areas for generations, and who use forest resources for non-commercial purposes, should be exempt from the criminal provision, especially if they customarily collect forest products and herd livestock in their community forest areas (Arizona, Cahyadi and Malik 2015:17-9).

In summary, the three rulings of the Constitutional Court have together removed the provision in the Forestry Law which obstructed the realisation of customary forest recognition. Since 2014, NGO activists and adat communities have been referring to the court rulings in their negotiations for solving land conflicts with forestry agencies and companies. However, the Constitutional Court rulings have not

completely revised the conditional recognition clause in the Forestry Law and other regulations. Therefore, although local communities can claim their customary forests from the government, they first have to obtain legal recognition as adat communities from the district government. The Constitutional Court rulings upheld a division between the legal recognition of adat communities as a right-bearing subject, and the legal recognition of customary forests. Consequently, local communities have to follow two steps of legal recognition in order to obtain recognition of their customary land rights. The national government followed up on the Constitutional Court's ruling by creating several implementing regulations to realise adat community rights. A detailed analysis of the implementing regulations concerning adat communities and customary land rights is given in the following sections.

3.5. Implementing regulations for the legal recognition of customary land rights

The government responded promptly to the Constitutional Court ruling number 35/PUU-X/2012. In doing so, some ministerial departments created implementing regulations to realise the legal recognition of adat law communities and customary land rights (Safitri 2015; Fay and Denduangrudee 2016). Before discussing the government's response to the Constitutional Court ruling in detail, this section will begin with an evaluation of the implementing regulations that were previously made by the government, in order to explain why these regulations did not work well in practice, and what improvements should be included in the new regulations. Would the regulations provide an effective mechanism to advance the legal recognition of customary land rights?

3.5.1. Implementing regulations before the Constitutional Court ruling number 35/2012

Although many laws have already recognised adat law communities and customary land rights, they did not have a concrete effect in realising customary land rights recognition. Therefore, the gap between regulations and practice is wide. The reason for this gap is that implementing regulations with practical legal provisions concerning customary land rights have been lacking. Customary land rights were recognised by the Basic Agrarian Law of 1960, but the implementing regulations regarding the procedure for legal recognition of customary land rights was only enacted in 1999, via the Regulation of the Minister

for Agrarian Affairs Number 5 of 1999, concerning Guidelines for the Settlement of Customary Land Rights. Hasan Basri Durin, who was the Minister for Agrarian Affairs at the time, issued the regulation after attending the AMAN Inaugural Congress in 1999 (Rachman et al., 2012). During his speech, the minister was pressured by participants from all across Indonesia, demanding that he create a ministerial regulation to resolve the land conflict experienced by adat communities. This ministerial regulation was the first to mention that the settlement of customary land rights should be regulated via a regional regulation; a regulation jointly created between the district parliament and the district head.

Although the ministerial regulation provided operational procedures to resolve customary land conflicts, the implementation of the regulation was not as simple as had been expected by the adat communities. The regulation did not have much impact, because of the limitations it contained. The first limitation was that the ministerial regulation could not be applied to a location where the government had released a particular land right for corporations (Bedner and van Huis 2008; Rachman et al. 2012). Therefore, the regulation could not be used to resolve ongoing land conflicts between adat communities and corporations in the mining, plantation, and forestry sectors. The second limitation was that the regulation does not apply within forest areas. This limitation is severe, because of the fact that land governance in Indonesia is divided between two main authorities. The forest area is under the control of the Minister for Forestry, and the non-forest area is under the authority of the Minister for Agrarian Affairs. In fact, forest area covers almost 64% of Indonesia's land surface, and many land conflicts involving adat communities have occurred in forest areas.

With the two constraints, the Regulation of the Minister for Agrarian Affairs Number 5 of 1999 was insufficient to resolve customary land conflicts between adat communities and government agencies and companies. Only one community obtained recognition of their customary land rights as a result of the implementation of the ministerial regulation, notably, the Baduy Community in Lebak District (Banten Province). The customary territory of the Baduy community is located outside of forest area, and it has no land conflict with plantation companies. The successful recognition of the Baduy's customary land inspired other adat communities in the district. For example, Kasepuhan communities tried to follow the example of the Baduy by solving the land conflicts they had with the national parks (see Chapter 6 and 7).

Another case of implementation of the ministerial regulation was found in Kalimantan. The Government of Nunukan District (East Kalimantan) issued a regional regulation to recognise customary land rights in Nunukan. However, the regional regulation contained a general provision concerning the procedure for identifying customary land rights. The actual realisation of this district regulation was very problematic because of the contested claims between tribes and sultanates and the original principal of customary land rights (Bakker 2009). A similar condition is also discussed in Chapter 4 of this thesis, where the Cek Bocek community tried to claim its customary land rights against a mining company, but the Sumbawa Sultanate challenged the customary land claim.

3.5.2. Implementing regulations after the Constitutional Court ruling number 35/2012

a. Ministry of Home Affairs Regulation on Identification of Adat Law Communities

In 2013, the Constitutional Court ruling on customary forests pushed the government to rethink the importance of realising customary land rights. Responding to the court ruling, three ministries issued implementing regulations to create a legal recognition procedure for adat community customary land rights and forests. The Ministry of Home Affairs created the first implementing regulation by enacting Ministerial Regulation Number 52/2014 concerning Guidelines for the Recognition and Protection of Adat Law Communities. Through this regulation, the Minister for Home Affairs directed provincial and district governments to create a committee to identify adat law communities in their respective regions. However, not all local governments implemented this regulation, for various reasons, but mainly because of a lack of budget for implementation. Additionally, district governments perceived that the identification of adat communities was not their top priority.

Some provincial and district governments implemented this regulation with different approaches and results. In Kalimantan, for example, the provincial and district governments considered local kingdoms and traditional tribe elites to be part of adat communities. Other local governments focused on documenting traditional cultural expressions, such as language, traditional houses, and dances, rather than focusing on solving customary land conflicts. As a result, the implementation of this regulation has not had a considerable effect on

leveraging marginal adat communities who are encountering land conflicts with state agencies and corporations.

b. Ministry of Agrarian Affairs Regulation on Communal Land Rights

The second initiative came from the Ministry of Agrarian Affairs and Spatial Planning (MAASP). The minister enacted a ministerial regulation on 'Communal Land Rights' (Number 9/2015) as a substitute for the previous regulation (Number 5/1999). The new ministerial regulation introduced a new term, 'communal land right' (*hak komunal atas tanah*), that was not contained in previous Indonesian land laws. Maria Sumardjono, an expert in Indonesian agrarian law, stated that the concept of communal land rights introduced in this ministerial regulation was different from the rights of avail contained in the Basic Agrarian Law (Sumardjono 2015). The communal land rights in the ministerial regulation not only applied to adat communities, but also to other collectives of citizens who have been cultivating a land plot for more than 15 years. In short, communal land rights are broader than customary land rights, and the subject of this regulation is not only adat communities. Therefore, this regulation is more inclusive.

The ministerial regulation stated that district governments should establish an inventory committee to identify land use and management.[28] Furthermore, the Ministry of Agrarian Affairs replaced the regulation with another ministerial regulation, Number 10/2016, Number 10/2019, and finally with Ministerial Regulation Number 18/2019. Although the MAASP has changed ministerial regulations on communal land rights many times, to create inclusive procedures for the recognition of customary land claims, the implementation of these regulations has never provided concrete results. Up to the moment of writing this thesis, no case has recognised adat community land as their own communal land, based on the MAASP implementing regulation.

c. Ministry of Environmental and Forestry Regulation on Customary Forests

Another implementing regulation was created for the forest sector. Article 67 of the Forestry Law (Number 41/1999) obliged the government to create a government regulation to realise customary forest recognition, but the government regulation was not passed because of objections from AMAN (see section 2.4.1). The MoEF was also never too

[28] *Panitia Inventarisasi Penguasaan, Pemilikan, Pengelolaan, dan Pemanfaatan Tanah* (Panitia IP4T).

enthusiastic about designing programmes to implement customary forest recognition, until the Constitutional Court ruling number 35/PUU-X/2012. Responding to the Constitutional Court ruling, the MoEF enacted a ministerial regulation that set up a legal procedure for realising customary forest recognition. With considerable support from environmental and indigeneity NGOs, the Ministry of Environment and Forestry officials formulated Ministerial Regulation Number P.32/2015 on Forest Rights. Based on this regulation, the Director General of Social Forestry at the MoEF created a team to accelerate customary forest recognition, which consisted of government officials, NGO activists, and academic researchers. This team prepared pilot projects for customary forest recognition. As a result, in December 2016 the MoEF recognised the customary forests of adat communities for the first time. The celebration of this historic event was conducted at the Presidential Palace, where President Joko Widodo directly handed over the decree for customary forest recognition to the representatives of nine adat communities (see the opening of Chapter 1). Two of the nine adat law communities presented at the Presidential Palace are the subject of my research. Their stories will be elaborated on in Chapters 5, 6 and 7 of this thesis.

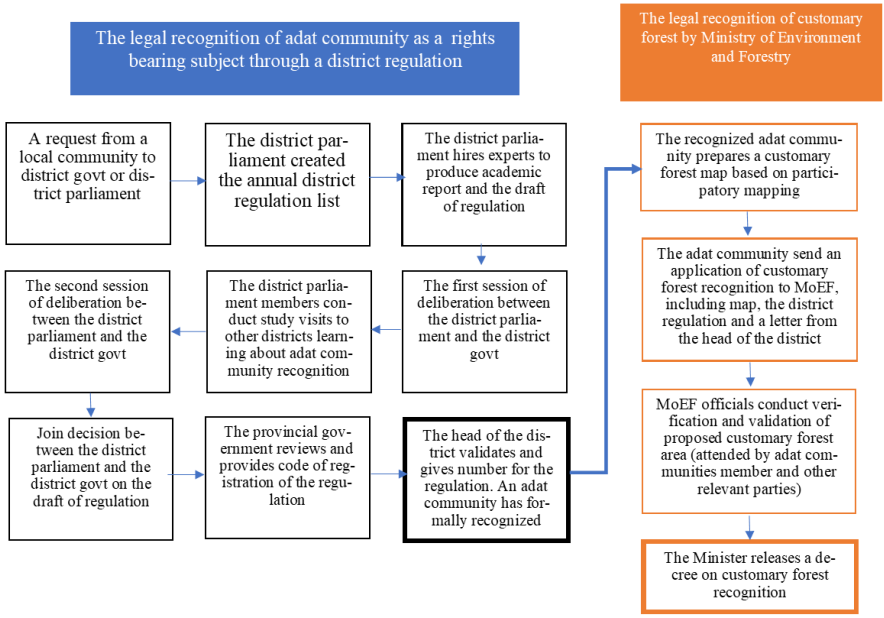
Compared to other sectors, the realisation of customary land rights recognition in the forestry sector has shown concrete results. Nevertheless, progress remains slow because customary lands that are claimed by adat communities are much larger than the customary forests currently designated by the government. BRWA,[29] an informal agency created by AMAN and several NGOs, has compiled maps of adat community areas with a total area of 11,179,714 hectares. In order to incorporate such maps into the legal recognition process, the Minister for the Environment and Forestry created a new ministerial regulation, Number P.21/2019. The new ministerial regulation adopted a new status of 'customary forest reserve'. The customary forest reserve is an indicative location for customary forests, based on the participatory map produced by NGOs. The Minister designated customary forest reserve areas by creating an indicative map of customary forests. By January 2021, the Minister for the Environment and Forestry had enacted 1,090,754 hectares of indicative areas for customary forest recognition.[30]

[29] Badan Registrasi Wilayah Adat (BRWA)

[30] *Presiden Serahkan SK Hutan Sosial, Hutan Adat dan TORA di 30 Provinsi.* https://www.menlhk.go.id/site/single_post/3503 (accessed on May 25th 2021).

The Minister for the Environment and Forestry has shown her intention of recognising customary forests, but first district government must create a district regulation to determine the legal status of adat communities. The district regulation on adat communities and indicative areas for customary forest will be used as the bases for adat communities to apply for customary forest recognition. This layered and complicated procedure is illustrated in the following figure.

Figure 7. The procedure for legal recognition of adat communities and customary forests



In 2020, the Minister revised the ministerial regulation again by enacting another regulation, Number P.17/2020, on customary forest and forest rights. The latest regulation removed the customary forest reserve mechanism and replaced it with customary forest appointment (*penunjukkan hutan adat*). The appointment of customary forest is the initial step in the legal recognition process by the MoEF. After the MoEF has appointed a particular area as a customary forest site, the relevant adat communities and forestry agencies will conduct delineation and verification. The results of the verification activities will end with a decree from the minister as a final step in the legal recognition of customary forests.

This condition shows that operational procedures are unstable, and changing all the time. Moreover, with these implementing regulations the government made the procedure for legal recognition more complicated. For instance, the former ministerial regulation allowed the head of district government decree to be the basis for adat communities to apply for customary forest recognition. The latter ministerial regulation strictly considered only regional regulations as the legal bases to apply for customary forest recognition, if the proposed area is located in state forest. This complicated procedure is one of the main reasons why legal recognition of customary forest moves very slowly. Up until April 2021, the MoEF had recognised 75 customary forest sites, covering 56,903 hectares. Nevertheless, when compared to the procedures available at the Ministry of Home Affairs and the Ministry of Agrarian Affairs and Spatial Planning (MAASP), the implementation of customary forest recognition in the MoEF is much better, because it provides concrete outcomes.

3.6. Conclusion

In analysing the Indonesian legal framework, I found that customary land rights have been controversial and strongly debated since the colonial period. The debate on the position of customary land rights always intertwines with state control of land and resources. Colonial policies have institutionalised legal pluralism, in order to protect the customary land rights of native communities, but in practice, loose interpretations of the state land domain have contributed to uncertainty about the position of customary land rights. The establishment of new agrarian law in the post-colonial period tried to simplify pluralistic land tenure arrangements inherited by colonial legislation. The lawmakers and the government used customary law as inspiration to build a new national agrarian law, but it also placed restrictions on the application of customary land rights. The conditional recognition clause for recognising customary land rights was established to gradually transform customary land rights into modern property land rights. Furthermore, Suharto's New Order regime (1965-1998) undermined customary land rights by considering that such land rights were an obstacle to economic development. Suharto's administration granted extensive large-scale concessions to companies in the forestry and mining sectors. The granting of such concessions was done systematically, to get rid of local communities who have lived in the concession areas for a long time. After Suharto's New Order regime,

local communities experiencing land conflict due to New Order development projects gained a new argument, by institutionalising adat as the basis for their land claims. This adat strategy emerged within a situation of political freedom and demands for decentralisation, following the New Order period. In addition, the movement coincided with the emergence of indigenous people's rights advocacy, at international and regional levels. A network of NGOs promoting customary land rights established AMAN and advocated for legal reform to reinforce customary land rights in the legal system. In terms of quantity, many legislations, court decisions, and implementing regulations have been created by the state authorities to support the realisation of customary land rights recognition.

However, these legal developments have not provided significant results. Only a few adat communities have obtained legal recognition of their customary land rights. I found some critical problems contained in the current legal framework on customary land rights in Indonesia. The first is that the state recognizes customary land rights with certain conditions, and these conditions are hard to fulfill. The conditional recognition clause in Indonesian legislation followed the colonial legislation to solve the tension between state land and customary law. This clause was further established in the formulation of the BAL 1960. Elements in the conditional recognition clauses continue to change over time. During Sukarno's Guided Democracy, customary land rights were recognised, but they were not allowed to contradict the pursuit of Indonesian socialism. Under Suharto's New Order regime, customary land rights were not allowed to impede the government project to exploit mining and forest resources. However, in the post-Suharto era, customary land rights and indigeneity issues were perceived by the government as a threat to national integrity. Currently, the conditional recognition clause has been included in the constitutional provision, making it a normative standard for implementing constitutional provisions, as well as for evaluating the validity of legislation concerning customary land rights.

A second concern relates to the bureaucracy for recognition of customary land rights. The current legal framework divides legal recognition of adat communities and customary land rights between several government agencies. Adat communities have to negotiate their rights with different departments, especially when the land conflict they face involves various administrative territories and multiple departmental authorities. Every government agency, such as forestry,

mining, and water resources, provides different definitions and requirements for the legal recognition of adat community rights. The current draft of the bill on adat community rights proposes establishing a national commission on adat community rights, in order to overcome such bureaucratic problems. Bureaucratic change relies heavily on the outcome of discussions in parliament, and it is not yet clear how many existing ministries will be willing to hand over their authority in controlling adat to the new commission.

The third problematic element of the legal framework for customary land rights is the separation between the legal recognition of adat communities and the recognition of their rights to natural resources. The legal determination of adat community status is decided by the district parliament and district government, via a process to create a district regulation. This means that granting the status of an adat community is a political decision, made at the district level. After obtaining district recognition, adat communities can apply to get their natural resource rights recognised by the national government. With respect to customary forests, the Ministry for Forestry can grant customary forest recognition only after adat communities fulfil all the formal requirements. In short, the legal framework for the legal recognition of adat communities and customary land rights in Indonesia is complex. Adat communities have to comply with the legal requirements, lobby government officials and politicians at different levels, and scrutinise several decisions, in order to ensure that no actors are slowing the process down.

Under these circumstances, it is a puzzle to understand how local communities can navigate such a complicated process and secure their rights against land dispossession by state agencies and corporations. The next four chapters will discuss case studies regarding the legal recognition of customary land rights - at different stages, and with different results. Why are some adat communities failing to obtain legal recognition, while others are relatively successful? Consequently, this thesis will identify the enabling and constraining factors in the legal recognition of customary land rights as a solution for land conflicts in Indonesia.

4 Claiming adat community rights against a mining company

4.1. Introduction

Chapters 4 to 7 are case study chapters which follow the analytical framework to discuss the process of legal recognition of customary land rights. In Chapter 1 I explained that the analytical framework for understanding the legal recognition process consists of four stages. The first stage shows how local community members identify land tenure problems, because of the overlapping claims of local communities and government agencies or corporations. The second stage is preparation, in which local community members become more aware of land conflict and then categorise it as customary land problems. The third stage is the legal recognition process, which includes a discussion of the available forums, handling of the legal recognition process, and the outcome of legal recognition. The final stage scrutinises the situation after legal recognition, in order to understand the implementation and impact of legal recognition. Each case study focuses on a different stage of the recognition process.

This chapter analyses the pre-legal recognition process (stages 1 and 2), to understand why and how local communities engage in adat advocacy as a strategy to pursue their objectives in land conflict situations. The main questions in this chapter are as follows: What are the real life problems of the people who (eventually) apply for recognition as an adat community and the pertaining land rights? Moreover, how did the process of categorising these problems develop from framing them as customary land problems? The reason for asking such questions is that the problem that community members want to solve by obtaining legal recognition is not always clear, especially regarding how and why their problem has been categorised as a customary land rights problem.

In this chapter, I discuss a land conflict between a local community and a mining corporation in Sumbawa. I focus on the case of the Cek Bocek community in Sumbawa, which claimed historical ties to ancestral land as preparation for embarking on the legal recognition process. I selected this case from a total of 40 cases investigated by the National Commission on Human Rights, following the 2013 Constitutional Court

Ruling concerning the human rights of adat communities in forest areas (see Chapter 1).

The Cek Bocek community members identify themselves as a minority ethnic group living in the southern part of Sumbawa Island. During the colonial period, they were displaced from Elang Dodo forest to new settlement areas, by the colonial government and Sumbawa Sultanate. The main reason for the displacement was that the Dutch colonial government had imposed a new village government and tax reform, requiring that local communities reside in controllable areas. The community members lived in poverty, with a lack of public facilities, for decades. They had difficulty finding income-generating opportunities in their localities.

In 1986, a large-scale gold mining company, PT Newmont Nusa Tenggara (PT. NNT), started investigating the potential of mining deposits in the former Cek Bocek village areas in the Elang Dodo forest. The company has offered some benefits for the local population, but many locals – including the community in this case study – cannot access these benefits. To counter these problems, the community members have tried several strategies, with the ultimate aim of receiving compensation payments, or other benefits, from the gold mining company. The most recent strategy the community used was to frame their claims as 'reclaiming dispossessed adat forest land'. In order to validate their adat land right claims, they had to reinterpret (and sometimes reconstruct) the history of prior occupation of the land, and the links that present-day community members have with its original occupants.

The campaign to validate their rights has been directed at the government, it being the authority that can provide legal recognition. If it would grant recognition, the community will have a stronger position in negotiations about compensation vis-à-vis the mining company. However, the local political situation has not been conducive for the community campaign. For several decades, the shared interest of the government and the mining company has been to secure land that could be used for gold mining as state property; the economic interests in this are huge. Moreover, there is resistance to the community's claims and campaign from the Sumbawa Sultanate, which lately has been revived with the help of the government and mining company. The Sultan serves as a competing adat institution in the district, helping the government and mining company to arrange constituency consent for the company to use the land.

This case will show how local communities using legal recognition strategies have trouble proving the validity of their customary land claims in a local political context full of competing claims. If the community members do not have a shared analysis of the main land-related problem they want to solve by using the adat strategy to claim land rights, they will not be able to obtain legal recognition of their customary land rights.

4.2. The Cek Bocek community case in context

This section describes the local political landscape and competition for resources in Sumbawa. This description is crucial to analysing how present politics is strongly related to history, and how the struggle over the meaning of adat in local society has evolved. I argue that understanding the present-day strategies of adat communities starts with analysing the differentiation between the actors involved and their interests. Moreover, in order to validate claims to land and authority, various parties in adat politics refer back to local political history.

4.2.1. The Cek Bocek community's relation to the Elang Dodo forest

The Cek Bocek community case started in the colonial period, when the name Cek Bocek was not yet in use. The community resided in the middle of the forest located in the southern part of Sumbawa Island. The community members are descendants of the Kedatuan Dewa Mas Kuning, one amongst several small autonomous polities in the region. The descendants of Kedatuan Dewa Mas Kuning use the Berco language, which differs from the language spoken by the majority population in Sumbawa. Therefore, during the colonial period they named themselves the Berco community, referring to their unique language.[31]

In the 1930s, under colonial rule, the government resettled the Berco community members to an area 20 kilometres north of their original villages in Elang Dodo forest. The government moved them to new residential areas, close to other settlements in the villages of Lawin, Lebangkar, and Aek Ketapang. The purpose of the colonial resettlement

[31] I use the term 'Berco community' to refer to all the descendants of the Kedatuan Dewa Mas Kuning, who moved from their original villages in Elang Dodo forest to the villages of Lawin, Lebangkar, and Aek Ketapang. Meanwhile, I use the term 'Cek Bocek community' to refer to the Berco community group who tried to strengthen their historical connection to Elang Dodo forest, in order to provide a legitimate basis for claiming compensation from the mining company.

policy was to facilitate control over the population and to involve local communities in rice cultivation. For some community members, this move was an opportunity to improve their living standards. Nevertheless, other members, especially the traditional leaders, regarded the resettlement as a forced eviction, which was detaching them from their cultural roots. The feeling of repression at that time was captured in a short vernacular rhyme that lives on in the heads of many of the community leaders:

> *"Dapit padado lodana, uleng pamojang makura. Kacendeng enteng ramodeng, pararen tukanga jangi."* [English: We arrived at a shelter, but we did not know where to go. It was our fate to leave our ancestral land.]

After the resettlement programme, the colonial government designated Elang Dodo a state forest area and restricted the activities of local communities in that area. The Dutch colonial officers started to search Elang Dodo forest for potential gold deposits. One of the elder community members told me that, once, a colonial government officer came to take a bag of soil, to investigate the gold deposit potential of Elang Dodo forest. Rumour spread throughout the region that the Elang Dodo forest contained significant mining resources. Even the 'local kingdom' in this area used to be called Kedatuan Dewa Mas Kuning, which literally means 'The God of Yellow Gold', indicating that the area has always had gold resources.

The colonial period resettlement did not much change the living standards for Berco community members, neither did they change much after Indonesia became independent. Even into the 2000s, community members still lived in poverty and lacked public service facilities. For many decades, villagers could only reach the capital of Sumbawa on horseback. A new asphalt road to the capital only opened a few years ago.

The majority of the Berco community population are farmers. They raise horses and cattle, and cultivate rice, nutmeg and coconut gardens, but these economic activities do not yield enough to provide a good income. Many young people migrate to the city for work, whilst others stay in the village to work in agriculture, or as traditional gold miners. Many 'illegal mining pits' are located near the villages. The Berco's former villages at Elang Dodo forest also contained large gold mining deposits. Local community members do not have the advanced

technology to dig for gold deposits. Moreover, they do not have secure access to the mining deposits in their area.

Initially, I found that the Berco community profile fitted the common understanding of indigenous peoples in international law, especially when referring to the working definition of indigenous peoples by Jose Martinez Cobo (1982).[32] The first reason for this is that the Berco community experienced land dispossession in the colonial period, under pressure from the Sultan of Sumbawa and Dutch colonial officers. The colonial government reformed the village government, increased local communities' participation in rice cultivation, and implemented a new tax system. The second factor is that the Berco community is a minority ethnic group, and they consider that they have a different history and culture to the majority population in Sumbawa. The main difference is their local language. The third is that the Berco community is a non-dominant group. The Berco have been marginalised in the local political context, because they have lacked access to public facilities and political decision making. The fourth factor is that they preserve their cultural identity, although the role of customary institutions has been weakened because of the prevalent role of formal village government in the rural area.

Although the Berco ethnic community profile fits with the main characteristics of indigenous peoples in international discourse, this does not mean that the community can automatically be regarded as an adat community in the Indonesian legal context. The following sections will elaborate on preparations for the legal recognition process to acquire this status. But first, the next section will discuss the local political context and conflict over resources in Sumbawa.

4.2.2. The main parties in Sumbawa's political context

Sumbawa Island is one of the islands located in West Nusa Tenggara Province. The island covers 15,414 km² and has a population of 4.2 million people. Mount Tambora, which two centuries ago was a huge volcano, lies in the northern part of the island. The Tambora volcano eruption in 1815 covered half of the Earth's atmosphere with dark clouds. The haze was even signaled as one of the factors in Napoleon's defeat in the Battle of Waterloo, which halted Napoleon's expansion in Europe (Brogan 2018). In Sumbawa island, the eruption also scorched

32 See the working definition of indigenous peoples according to Joseph Martinez Cobo (1982) in Chapter 1.

one of the four local kingdoms, the Tambora Kingdom. The three local kingdoms that survived the eruption were the Sumbawa Sultanate in the western part of the island, the Bima Sultanate, and the Dompu kingdom in the eastern part of Sumbawa.

The Sumbawa Sultanate was the largest kingdom on the island, having been established in 1674, after the Kingdom of Gowa (from Sulawesi) expanded its political influence into the area and spread Islam throughout Sumbawa. The Sultan of Sumbawa was a descendant of the Banjar Sultanate, from Kalimantan. Before the Sumbawa Sultanate was established, local communities in Sumbawa were ruled by 12 small local polities, including the Kedatuan of Dewa Mas Kuning of Selesek, located in the southern part of Sumbawa island (Mantja 2011:9). Political power centred around the northern coast of the island, where the Sultanate was established. In comparison, the southern part of the island was remote forest. The Sumbawa Sultanate was the centre of business for traders from Java, Sulawesi, and Maluku. When the VOC expanded its business in the eastern archipelago, and the Sumbawa Sultanate first refused to collaborate, several wars occurred between the Sumbawa Sultanate and the VOC, in the northern coastal region. Later on, the Sultan of Sumbawa made political agreements with the Dutch colonial government, and the first political contract was made in 1875 (Noorduyn 2007). In 1885, the Dutch colonial government enacted a decree (*besluit*) to recognise the position of the Sultan. Finally, in 1938, the Sumbawa Sultanate was incorporated into the system of indirect rule (Swapradja government/*zelf-besturende landschap*), under the Dutch colonial authority. Consequently, the Sultan of Sumbawa acted as the head of the swapradja government in Sumbawa.

Furthermore, in 1938, the Dutch colonial government created the *Inlandsche Gemeente Ordonnantie voor de Buitengewesten (IGOB)*, forming a new model for village government and expanding its control over the entire population outside Java. For this purpose, the Sumbawa Sultanate and Dutch colonial officials displaced local communities living in forest areas, most of which were located in the southern part of Sumbawa, where descendants of the Kedatuan Dewa Mas Kuning lived. They were forced to move out of the Elang Dodo forest and merge with several nearby villages. This showed that the descendants of Kedatuan Dewa Mas Kuning did not have significant power within the local political setting.

In 1942, the Dutch colonial government was defeated by the Japanese army, which took over the government of Indonesia. The

Republic of Indonesia was established in 1945, as the Dutch sent troops to Indonesia to restore their power. The Sumbawa Sultanate tried to organise its position within the new political structure. In 1946, political elites from 13 areas including Bali, Lombok, Maluku, Sulawesi, and Sumbawa created the State of Eastern Indonesia *(Negara Indonesia Timur*), supported by the Lieutenant-General of the Dutch East Indies, Hubertus Johannes van Mook, who tried to promote the establishment of a federal system for Indonesia (Matanasi 2016). The Sultan of Sumbawa, Sultan Kaharudin III, acted as Chairman of the Parliament of the State of Eastern Indonesia. In 1950, the State of Eastern Indonesia, based on the federal system, was dissolved, and Indonesia was transformed into a unitary state (Schiller 1955).

At the beginning of the post-colonial period, the national government of the Republic of Indonesia continued using 'the *swapraja* system' of government based on local kingdom during the colonial period. However, in 1959, the government adopted a new system of provincial and district government units. The national government created the Sumbawa District and appointed Sultan Kaharudin III as interim head of the district, from 1959 to 1960. Subsequently, the president appointed a new definitive head of the district, removing the sultan from his political position and depriving him of formal political power, albeit not his title. In 1975, Sultan Kaharudin III passed away and the position of sultan stood vacant, which also had the effect of dissolving the sultanate as a cultural entity in local society. However, although the sultanate has not been a dominant actor in local politics since 1959, local politicians from the northern part of the island have remained in power. They have channeled government-sponsored economic development projects towards their own localities, leaving residents of the southern part of the island in poverty.

After 33 years of centralistic governance under the New Order regime (1965-1998), the new democratic government of Indonesia opted for decentralisation from 1999 onwards. This policy stimulated the desire of local political elites to revitalise traditional local identity (Klinken 2007). In Sumbawa, this aspiration was apparent in the revitalisation of the Sumbawa Sultanate. After a 35-year vacuum, a new sultan was coronated in 2011. The district government, and some local political elites in Sumbawa, supported the revitalisation of the sultanate. The largest mining company on the island, PT. NNT, was also in favour of 'the return of the Sultan'. The government and the mining company had a shared interest in securing land that could be used for gold mining

as state property. The sultanate could ensure consent on behalf of local communities for such land dispossession. The cooperation between the government, the sultanate, and the mining company becomes more apparent when we zoom in on the case study below.

4.2.3. State forest area and mining concessions

The government of Indonesia continued colonial forest policies in Sumbawa, with the implication that the Elang Dodo forest should remain a state forest area. The Ministry of Forestry designated some parts of the Elang Dodo as protected forest, and some parts as production forest. Consequently, the Ministry of Forestry had the authority to grant permits for the extraction of natural resources in Elang Dodo forest, whilst simultaneously restricting Berco community members' access to the forest.

However, although Berco community members had moved and established settlements in new villages, they kept visiting their original villages in the Elang Dodo forest. For many decades, they regularly returned to the Elang Dodo forest to hunt, harvest coconut and rattan, and establish lodges for the production of palm sugar. They also made pilgrimages to the 1,525 ancestral graves in Elang Dodo. Those activities continued after the government granted concession to a mining company.

In 1986, Suharto's New Order regime granted a mining concession in Sumbawa Island to PT. Newmont Nusa Tenggara (PT. NNT), for an area covering 66,422 hectares. This company is part of Newmont Mining Corporation, based in Denver, Colorado. The PT. NNT mining concession area was located in forest areas, including the Elang Dodo forest and the Batu Hijau mining sites. In 2000, the company started open-pit mining activities at the Batu Hijau site, currently in the West Sumbawa District. PT. NNT invested US$ 1.8 billion in the Batu Hijau mining site, and since 2000 it has produced approximately 3.6 million tons of copper and 8 million ounces of gold - up until 2019.[33] The ongoing PT. NNT operation at the Batu Hijau mining site is the second-largest gold mining operation in Indonesia.

In 2016, PT. NNT sold the company to new shareholders, who changed the company name to PT. Amman Mineral Nusa Tenggara (PT. AMNT), but maintained similar mining locations and plans. Imminent closure was planned for open-pit mining in Batu Hijau, but the company

[33] http://www.amnt.co.id/tentang-kami (accessed on March 5, 2019)

started developing a new mining site, with significant potential, in the Elang Dodo forest. This led to conflict with local communities.[34] However, local communities responded variously to expanding the company's operations at the Elang Dodo mining site. Some perceived the new situation as a land conflict, because the company was operating in Elang Dodo forest without the consent of the Berco community. Some local community members warned about potential environmental destruction from the mining activities, whereas others preferred to focus on new opportunities offered by the mining.

4.3. Shifting strategy from individual to communal land claims

4.3.1. A variety of responses to mining expansion

Although the PT. NNT has had a mining concession since 1986, its actual extractive activity began in 2000, when the company started an open-pit mining site in Batu Hijau. Thenceforth, the communities around the new mining site started to become aware of the company's presence in their areas. These local communities were not only the Berco community. For some local community members, the mining company operation provided opportunities to find jobs, as well as other benefits. Meanwhile, others responded against the mining operation, and began formulating their own strategy and arguments against the company, until it fulfilled their demands (Welker 2014:159-63).

An environmental protection campaign against the extractive mining industry was the first narrative that local communities used to protest against the company's mining activities (Welker 2014:6). Open-pit mining inevitably destroys the landscape, leading to environmental degradation around the mining concession area. Accordingly, environmental activists from the district city encouraged local communities to protest against the mining operation. They argued that the open-pit mining activities by the PT. NNT had a devastating impact on the environment at the Batu Hijau mining site. In 2004, a local NGO, concerned about the environmental impact of the mining activities, conducted an investigation and published a report claiming that residents around Senunu Bay, where the company released its waste, had experienced severe health problems, such as itching, rashes, and skin problems (Putro and Tolomundu 2006). In the same year, PT.

[34] In 2016, the PT. NNT divested its share to local government and to national private companies. The current majority shareholder is PT. Amman Mineral International Tbk (PT. AMI). Subsequently, the company's name has changed from PT. NNT to PT Amman Mineral Nusa Tenggara (PT. AMNT).

Newmont Minahasa Raya (PT. MNR), another subsidiary company of Newmont Mining Corporation in Indonesia, was under government investigation, because local communities in Buyat Bay, North Sulawesi, were experiencing the symptoms of Minamata disease; symptoms such as numbness in the hands and feet, general muscle weakness, and damage to their hearing and speech (Walhi 2004).

In response to the NGO's investigation in Senunu Bay, PT. NNT reported the NGO's director to the police. The district court sentenced the NGO activist, because the judges considered that the activist had defamed the company.[35] Since then, the narrative that gold mining creates environmental pollution has never been used again by local community members as an argument to stop mining operations. Arguments concerning environmental protection have never been used in the land conflict about the Elang Dodo forest, partly because the company has not yet started open-pit activities there, but also because the mine is sited far away from the current community settlements, so it does not affect people's daily activities and health. Indeed, local community members have never seen environmental issues as their main problem. Instead, their main problems are poverty and the lack of public facilities in their villages.

The most popular objective amongst local community members, regarding the mining concession area, was to benefit from the mining company's operations in their area. Some local community members hoped that the mining operation would create jobs to help them escape from poverty. They imagined that the company would hire them as contractors in construction activities, or to cater food for the company staff. They also saw potential opportunities arising from the company's corporate social responsibility funds, to develop supporting public facilities in their villages. There was no strong motivation in the local community to preserve the Elang Dodo forest area as the main source of their livelihood. A few years ago, local community members stopped their small palm sugar activities in the Elang Dodo forest, because the activities were located a long way from their settlements and they had obtained other sources of income closer to their village - mainly working at new and illegal gold mining pits near the village. Since the company started operating in the forest, many rumours have circulated amongst community members that the company intimidated villagers who entered the Elang Dodo forest, which appeared to be an effective

[35] The Sumbawa Besar District Court Decision Number 12/Pid.B/2005.

deterring strategy. Local communities realise that the actual intention of the company is to begin gold mining exploitation in the Elang Dodo forest, and they do not want mining operations to take place without benefitting them.

Amongst the Berco, objectives varied even more. They felt that they had a legitimate claim to obtain more benefit from mining operations in their former villages. They aimed to get compensation payments for use of their former village for mining activities. They argued that they would lose their historical connection to the Elang Dodo forest, if the company created an open pit, as it would demolish their ancestral graveyards. They offered proof that ancestral graves and the former traditional houses of their ancestors still existed in Elang Dodo forest. However, such a claim was not enough to get compensation, as that would need formal government recognition. Moreover, the Berco community's arguments challenged the government, because it had already designated the Elang Dodo forest as a state forest area. According to state regulation, the state forest is state property and is free from individual and communal land rights. If the Berco community members still wanted to receive compensation, they would need to seriously underpin their property relations to the Elang Dodo forest, either individually or collectively.

4.3.2. Strengthening individual land claims

In 2004, activities to strengthen the community's legal claims followed a meeting organised by the Sumbawa district government, between company representatives and local communities, to provide information about the company's plan to start mining exploration in the Elang Dodo forest area. The meeting was conducted at Lawin Village, where most of the Berco live. The Indonesian Mining Law requires that mining companies organise an information meeting for local communities around a mining site, in order to inform them about mining activities and operation schedules.[36] Moreover, the Indonesian Company Law (Number 40/2007) also requires that every company engaged in natural resource extractions implements corporate social responsibility (CSR) programmes. Local community members who attended the afore-mentioned meeting thought that the company would describe actual benefits, which would help to lift them out of poverty. However, the meeting did not have a constructive effect. Instead, it led to a deadlock,

[36] In the Indonesian context, this type of meeting is called *sosialisasi.*

because the participating community members were not satisfied with company staff responses to their demands.

After the meeting, some Berco community leaders established the Elang Penaru Foundation (*Yayasan Elang Penaru/YEP*), as a forum for organising protests against the company. On behalf of affected community members, the leaders visited the Sumbawa district parliament office to report their grievances. They proposed that the district government and district parliament should act as mediators in their conflict with the company, which is a common procedure in land conflicts. Another suggestion was that the government could revoke the company's permits. During the meeting, the district government officials suggested that the community create 'Letters of Land Possession' (*Surat Keterangan Pemilikan Tanah*/SKPT), to serve as the legal basis for their Elang Dodo forest land claims.[37] Some Elang Penaru Foundation leaders convinced the heads of Lawin and Lebangkar villages to create SKPT. The head of Lawin village created an SKPT for every two hectares of land plot in the Elang Dodo forest. He did not conduct actual delineation in the forest, but he divided the land plots on a map. The village heads expected that such letters would be sufficient evidence of land ownership in the Elang Dodo forest, and that they could subsequently be used to get compensation from the mining company. However, according to the Basic Agrarian Law, SKPT lacks the basis of land right evidence. In fact, it can only be used as a basis of information about land use.

Interestingly, the head of Lawin village not only created SKPT for the Berco community members who had a historical claim to the Elang Dodo forest, he also sold the letters to outsiders. The SKPT stated that the document holder had a land plot in the Elang Dodo forest area, covering two hectares, and provided information about name of other document holders in all directions. The SKPT was signed by the village head and the head of the sub-district (*camat*). However, the SKPT did not mention anything about the forest land being customary land (*tanah adat*). The head of the village released SKPT for Berco community members, but also for outsiders. Outsiders had to pay around USD 35 (or more) to obtain the document from the head of the village. Many outsiders bought SKPT with the expectation that the company would

[37] In Indonesian land law, this kind of letter is commonly used by villagers as preliminary evidence for land registration, land sales, land mortgages, and for requesting compensation for land acquisition projects.

pay compensation to SKPT holders. SKPT were sold to district parliament members, government officials, police officers, traders, and other people who wanted to claim land in the Elang Dodo forest. Furthermore, some recipients of SKPT also sold them on to others. Despite SKPT lacking legality, an informal land market was established amongst villagers and SKPT recipients.

Nevertheless, the company refused to pay compensation to SKPT holders. Company officials argued that SKPT were illegal. The company justified the legality of its operations, pointing at the mining concession from the government. Moreover, the company argued that any individual or collective land claim in the state forest area was unlawful, according to Indonesian legislation. As a result, the villagers' strategy to obtain compensation payment by creating SKPT had failed. The SKPT holders did not have their money reimbursed by the head of the village, despite SKPT not being a valid basis for claims to compensation from the company.

4.3.3. Switching to collective adat claims

After the failure of the SKPT strategy, the village leaders tried to think of something else that would strengthen their bargaining position vis-à-vis the company. Alwi, one of the Berco community members holding a large number of SKPT, came to the AMAN office in Jakarta to ask for assistance. Simultaneously, several traditional leaders of the Berco community living in Lawin village revitalised their customary institutions. This group proclaimed itself the Cek Bocek Selesek Ren Sury (hereafter, the Cek Bocek community), led by Datu Sukanda. Datu Sukanda is the legitimate heir of Kedatuan Dewa Mas Kuning. At the moment of the proclamation, the Cek Bocek community members consisted of 339 households in Lawin village. Through the customary rights strategy, the aspirations of local community members to obtain compensation from the company regained strength. This time, the compensation seekers were no longer using SKPT to claim individual land ownership in the Elang Dodo forest. Instead, they claimed that the Elang Dodo forest was part of the Cek Bocek community's customary land. From this moment onwards, local communities who demanded compensation payment shifted the basis for their land claims from SKPT to communal customary land rights. For this purpose, SKPT recipients from non-Berco communities also supported customary land claims; they expected that, if the customary land argument became a successful way to obtain compensation payments from the company, the

customary community leaders would be in charge of distributing any compensation paid to all SKPT holders. The SKPT holders acted as '*tim sukses*' (support teams), providing moral and financial support to the Cek Bocek community leaders in developing their customary land claim strategy.

Following its general and well-developed customary land strategy, AMAN helped the Cek Bocek community report the case to the National Commission of Human Rights (NCHR). In 2012, the NCHR organised a meeting in Jakarta between the representatives of the Cek Bocek community, the mining company managers, Sumbawa district government officials, and academic researchers, in which the NCHR acted as mediator. The Cek Bocek community representatives hoped that the company would recognise their customary land rights and begin to talk about compensation payment. However, in the meeting, the mining company argued – based on a study conducted by an academic researcher from the University of Indonesia – that the Cek Bocek's claim to customary land rights in Elang Dodo forest should be rejected. This research concluded that the Cek Bocek community did not qualify as an adat community under Indonesian legislation. According to Indonesian law, an adat community should be recognised by a district regulation, created by the district government and district parliament together (see Chapter 3). As a consequence, the company also rejected the Cek Bocek community's claim for compensation payments.

Although the meeting organised by the NCHR did not achieve the results that the Cek Bocek community members had expected, they insisted on the customary land claims. They could prove their historical relationship to the Elang Dodo forest, and the ancestral graves that remained there. As the traditional leader of the Cek Bocek community, Datu Sukanda actively engaged in national meetings organised by AMAN, in order to increase political support for the customary land rights strategy. The goal of the Cek Bocek community remained not to stop the mining company's operation, but rather to obtain compensation via negotiation with the company. This resonates with AMAN's strategy to encourage the Cek Bocek community case as an example of exercising free, prior and informed consent (FPIC) for an adat community to get compensation payment from a company.[38] Concretely, Sukanda's offer

38 Free, Prior and Informed Consent (FPIC) is a specific right that pertains to indigenous peoples, and it is recognised in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It allows indigenous peoples to give or withhold consent to a project

in the negotiations was to relocate the ancestral graveyard; in return, the community would obtain compensation from the mining company. However, this demand did not receive a positive response from the company.

In 2013 a new opportunity arose after the Constitutional Court granted AMAN's petition regarding the status of customary forests (see Chapter 3). The court reaffirmed the legal status of the customary forests of adat communities. Moreover, the court held that the government of Indonesia had to recognise the customary forest and redistribute state forest area to adat communities. Responding to the court ruling, Cek Bocek community members came to the Dodo Forest mining campsite. They posted a sign stating that: "According to the Constitutional Court of the Republic of Indonesia number 35/2012, this forest is no longer state forest, but the customary forest of the Cek Bocek community". This intervention almost resulted in a physical conflict between Cek Bocek community members and the security guards of the company. A few days later, local police officers summoned several members of the Cek Bocek community for interrogation.

Figure 8. Cek Bocek community putting up a signpost stating their customary forest is no state property, while armed police are watching ©: Suhardin- Elang Dodo forest, September 8, 2013

that may affect them or their territories. FAO 2016 (https://www.fao.org/3/i6190e/i6190e.pdf) (Accessed on December 20, 2021).

At the national level, the NCHR responded to the court ruling by conducting a national inquiry to investigate violations of the human rights of adat and local communities in forest areas. The NCHR selected 40 cases for investigation and the land conflict between the Cek Bocek community and PT. NNT was one of them. During the national inquiry session, both local government and company representatives were invited to public hearings. The Cek Bocek community representatives expressed their problems, and the company responded to the Bocek community's arguments. The hearings were more about fact-finding, rather than being negotiations to achieve mutual conclusions. Therefore, the meetings did not result in the resolution of the land conflict. Nevertheless, the national inquiry reinforced local government and parliament awareness of the customary land rights of the Cek Bocek community. In response, the Sumbawa district government and the district parliament started to consider the importance of a district regulation to determine the Sumbawa district adat communities.

4.4. Elevating the Cek Bocek community to a regional politics case

The Constitutional Court ruling and the national inquiry conducted by the NCHR convinced the Sumbawa district government and the district parliament to begin the process of creating a district regulation recognising adat communities. From this moment onwards, the compensation seekers felt more optimistic, having shifted their strategy from individual land claims to customary land rights. Nevertheless, the success of this strategy relied on the question of whether the Cek Bocek community would be recognised as an adat community by the district government. The Cek Bocek community had to make its historical connection to the Elang Dodo forest visible, and fulfil the requirements for embarking on the legal recognition process. In this matter, AMAN Sumbawa began supporting the Cek Bocek community, by offering its expertise in the legal recognition process.

4.4.1. Competition over adat representation

AMAN Sumbawa expanded the basis of its campaign for legal recognition by including more adat communities under AMAN's flag, putting pressure on the district parliament to prepare a district regulation on the legal recognition of adat communities in Sumbawa. The district regulation AMAN has proposed would concern not only the recognition of the Cek Bocek community, but also that of other adat communities in the district. Most AMAN Sumbawa community

members were involved in land conflicts with the forest agencies, but only the Cek Bocek community encountered the mining company operating in forest areas. With this broadened constituency, AMAN Sumbawa hoped that the district parliament and the Sumbawa district government would give the district regulation process high priority in their legislative agendas.

To strengthen the Cek Bocek community's claim to customary land rights, AMAN (together with adat community members) conducted participatory mapping to define the boundaries of customary territories. The result indicated that the Cek Bocek community claimed customary land rights covering 28,975.74 hectares, of which around 16,000 hectares overlapped with the mining concession area. The map was a useful preparatory step towards embarking on the legal recognition process. The district parliament also had to prepare, by conducting research, before creating a district regulation. The Sumbawa district parliament hired academic researchers from a local university, to produce an academic review (*naskah akademik*) and to draft the district regulation on legal recognition of adat community rights in Sumbawa. Separately, AMAN Sumbawa also conducted research and held discussions to support the process of creating an academic review and a draft of the district regulation. This research resulted in a book, which provided academic legitimacy for the Cek Bocek community claim to the Elang Dodo forest. In 2015, AMAN Sumbawa held a large mass demonstration, attended by hundreds of adat community members. They pushed the district parliament members to speed up the process of creating the district regulation.

During the preparation of the district regulation, district parliament members started to wonder about the definition of customary law, and who the adat communities in Sumbawa were. This is because the Sumbawa district parliament had just enacted a District Regulation on Tana Samawa Customary Council (*Lembaga Adat Tana Samawa*/LATS). The Sumbawa District Regulations on LATS (Number 10/2015) granted the newly coronated Sultan of Sumbawa the position of supervisor of the adat council in Sumbawa. Furthermore, the district regulation on LATS also gave the Sultan of Sumbawa the authority to act as a formal representative of adat communities in the Sumbawa District, especially on matters relating to traditional ceremonies. This development was part of a general trend in Indonesia, after the government started its decentralisation policy in 1999, when every region was trying to present its local identity, including by revitalising customary institutions (van

Klinken 2007). However, the District Regulation on LATS effectively created legality and legitimacy for the Sultan of Sumbawa, presenting him as a customary institution at the district level. Therefore, AMAN's initiative to promote the creation of a district regulation on adat communities was perceived by the sultanate's promotors as a subversion of the authority that had just been granted to it in Sumbawa.

The revival of the Sumbawa sultanate, after several decades of vacuum, thus became a major challenge to the articulation of customary land claims by the Cek Bocek community. In many parts of Indonesia, the return of the Sultan made customary identities more contested, a trend recorded by Laurens Bakker (2009), in his research in Paser, East Kalimantan, and by Gerry van Klinken (2004) in West Kalimantan. The Sumbawa district government and PT. NNT fully supported the coronation festival for the new Sultan in 2011. The district government also subsidised the renovation of the Sultan's palace, setting him up as the trustee of customary institutions in the district. Adat-based activities, like cultural festivals and traditional clothing competitions, flourished. In addition, the Sumbawa sultanate became a symbol of Sumbawan adat, with the *Keraton Nusantara Festival* - an annual festival of sultanates and local kingdoms across Indonesia, organised by the kings and sultanates associations in Indonesia (Tufail 2013). I interviewed the Sultan of Sumbawa at his home in Jakarta, where he spent most of his time after having retired from his job as a banker. The return of the sultanate made the Sultan and his supporters the authoritative actors representing adat in the district.

The contention between the sultanate and the AMAN-led advocacy movement brings the complexity of identifying adat communities to the surface. Local communities have to identify themselves, in order to comply with indigenous slots and to meet the statutory requirements for being legally designated an adat community (Li 2001; Muur 2019). The case in Sumbawa shows that indigenous slots are not singular, but that there can be competition between local groups regarding the validity of the claims on their adat identities. Both the Sumbawa sultanate and the Cek Bocek community took advantage of adat revivalism in the post-New Order period. However, their objectives for and interpretation of what constitutes an adat community were different. Subsequently, these different aspirations inflated political discussions throughout the district parliament process of creating a district regulation. In such cases, the government decision to recognise adat communities had become more political than legal.

4.4.2. Under the wings of AMAN

When the academic review and the draft of the district regulation were ready, the Sumbawa district parliament held public consultations to gather public opinion on the draft district regulation. The draft of the district regulation contained a definition and a detailed procedure for the legal recognition of adat communities. The Sumbawa district parliament conducted three public meetings in different sub-districts. There were not many participants from AMAN and its allied member communities, because the public consultation meetings were held outside AMAN's member community areas. During the public consultation meetings, many participants – especially the sultanate's supporters – strategically changed the subject of discussion and argued that the proposed regulation on recognising adat communities was problematic. Participants in the public consultation meeting compared the legitimacy of the Cek Bocek community and the Sumbawa sultanate, in terms of representing adat in the district. For them, especially those favouring the Sultan, the Sumbawa sultanate had a more obvious written history, and occupied a more legitimate position for the preservation of adat. Other adat communities assisted by AMAN Sumbawa, including the Cek Bocek community, were not well known by the local population as adat communities, because of a lack of information about their origin and role in local histories. Therefore, the Sultan's proponents argued that the adat communities supported by AMAN were inventions.

Following subsequent public consultation meetings, the Sumbawa district parliament wondered whether deliberation over the district regulation draft should be continued or terminated. In the following district parliament session, all political party representatives in the district parliament refused to continue the discussion about district regulation. The main reason for their refusal was the Sultan of Sumbawa's royal decree (*titah Sultan*), stating that no adat communities exist in Sumbawa, except the Sumbawa sultanate. What happened in parliament shows that, in general, local communities will not be able to obtain legal recognition as adat communities when their adat claim in the district is contested by other, more powerful, traditional leaders.

For AMAN Sumbawa and the Cek Bocek community, the failure to push the district parliament to enact a district regulation on the legal recognition of adat communities in the Sumbawa district was a decisive defeat in adat advocacy. Nevertheless, the Cek Bocek community

continued to believe that the adat strategy could be used to achieve their goals in its conflict with the mining company. Moreover, the Cek Bocek community is involved in broader adat advocacy with AMAN, to find an alternative way to achieve their goals. Through AMAN, they still received support, good media coverage, and access to the national network of adat advocacy. AMAN involved Datu Sukanda, the top leader of the Cek Bocek community, as a witness, when it filed a petition to the Constitutional Court challenging criminal provisions in the Law on the Prevention and Eradication of Forest Destruction (Number 18/2013). In the court session, Datu Sukanda testified to the Cek Bocek community members' experience of repression by local police and company guards, in their land conflict with the mining company. However, Datu Sukanda's involvement in the court process had no effect whatsoever on the community's land conflict with the company.

When I did my first fieldwork in 2018, the Cek Bocek community managed to expand their supportive network even further. AMAN, together with the Asia Indigenous Peoples Pact (AIPP), ran a learning exchange activity on Cek Bocek community territory for a week. Participants in this activity came from various countries, including Cambodia, the Philippines, Malaysia, India, Bangladesh, Nepal, Thailand, Vietnam, and Denmark. At the end of the training activity, participants made a solidarity statement addressed to the President of the Republic of Indonesia, the Head of Sumbawa District, and the mining company, with the aim of gaining recognition of Cek Bocek community customary land rights and halting mining expansion until the company has engaged in meaningful consultations with the Cek Bocek community, and a consensus has been reached.[39]

After the week of training ended and participants from different countries returned to their home countries, I extended my stay to live in the village for a few weeks. I met with several villagers to ask their opinions on the Cek Bocek community and training activity. My interviewees told me that they were delighted that many people from different countries had visited their village. Adat leaders hoped that the solidarity statement issued after the training would be heard by the United Nations, international institutions, and top managers from the mining company. I realised, informed by my previous engagement with

[39] The full version of the Solidarity Statement can be reached using this link: https://iphrdefenders.net/indonesia-article-18b-2-indonesian-constitution-1945-constitutional-court-decision-no35-2012-recognise-cek-bocek-community-indigenous-peoples-masyarakat-adat/ (Accessed on September 9, 2020).

advocacy, that the statement would not help much in reaching the desired solution for the land. However, the Cek Bocek community members really believed that such solidarity statements would provide a positive influence. This also illustrates how heavily the Cek Bocek community's adat strategy was relying on the support of outsiders, especially AMAN.

During my fieldwork, I also found that social solidarity among the Cek Bocek community members was fragile. There were different interests and strategies present amongst the elite of the Cek Bocek community. Even in Lawin village, where most of the population are Berco, not all the villagers fully supported the customary land rights claim invoked by the Cek Bocek community. Some local community members do not support the demand for compensation from the company. For them, obtaining a business contract and employment provided by the company would be a more realistic proposal, whereas for the elite of the Cek Bocek community, working for the company is considered a betrayal of the customary land struggle.

Another precondition for strengthening customary land claims is the support of the village government. During my interview with him in 2018, the village head adopted a passive position concerning the adat land claim strategy. He was not as interested as his predecessor (who had created SKPT) had been in supporting the compensation payment strategy. During my next fieldwork period, in 2019, the Cek Bocek community leaders supported a candidate in the village head elections who had challenged the incumbent head. The community leaders hoped that the new village head would issue a village regulation incorporating the Cek Bocek community leader as the formal customary institution at village level. In 2020, the newly elected village head – supported by the Cek Bocek community – indeed passed such a regulation. The Cek Bocek community perceived the village regulation as a gradual process of recognition. By obtaining legal recognition from below (at village level), they expect the next level (district government and the company) to recognise their customary rights as well. However, the existing village regulation did not provide a legal basis for recognising customary land rights, and it was therefore also an invalid argument for the Cek Bocek community in seeking compensation from the mining company.

4.4.3. The mining company's response

Whilst the Cek Bocek community is busy convincing the district government to ask for legal recognition, the company is moving away

from the land conflict. It seems that the opponent is now the district government, rather than the company. The company is not involved in the legal recognition process in the district parliament. Shifting away from discussions about the land conflict has helped the company secure its interest to continue mining operations in Elang Dodo forest. Moreover, the company's experience at the Batu Hijau mining site provides lessons for the company in how to deal with social protest and attract local community acceptance of the company's activities continuing. At the Batu Hijau mining site, PT. NNT developed CSR programmes and created a positive image of the company caring for the environment (Welker 2014:158-9). The company developed extensive social and sustainability programmes to counter criticism from environmental NGOs, who depicted PT. Newmont Nusa Tenggara as 'Newmonster', which was destroying the environment. The company management developed a counter-narrative, by promoting 'Goodmont'. The company expanded its CSR programmes and conducted activities to benefit local communities and the environment, such as employing workers, and building mosques, schools, and clinics (Welker 2014: 1). PT. NNT also hired researchers from the local university to conduct actor mapping, regarding conflicts between local communities and the mining company. Subsequently, the company used the study result to undermine local communities' protests. The company's main approach was to recruit key actors who had previously rejected the company operations, employing them as company officers for community relations (Comrel). With such co-optation, the company could use local community members to secure the company interest. In addition, local police protected company property, using the argument that mining resources are national strategic assets.

The collaboration of the police and Comrel to protect the company interest became clear when I did my field research in Lawin village. When I attended the training workshop held by AMAN and AIPP in the Cek Bocek community area, in 2018, which I mentioned above, some local police and Comrel were surveying the training activities. During seven days of training, the police and Comrel were on standby outside the meeting place, and they scrutinised what was being discussed in the meeting.

The company continued to refuse the compensation claims by the Cek Bocek community for using their former village for mining activities. Company officials argue that the Cek Bocek community's claim is illegal, because there is no district regulation determining that

the Cek Bocek community is an adat community. In my interview with company staff members, they admitted that the Cek Bocek community indeed had a graveyard in the mining site, but they added that there were only a few graves. Furthermore, one of them said that it is common in Sumbawa to find an ancestral graveyard in the middle of the forest, because in the past local communities lived in the forest. The company relied on the mining concession from the government as the legal basis for its operation, and it left the Cek Bocek community land claim to be handled by the government. In this way, the company removed itself from the contention between the Cek Bocek community, the sultanate, and the district government, regarding the legal recognition of the adat community's rights.

4.5. Analysis and conclusion

4.5.1. An inadequate basis for customary land rights recognition

The Cek Bocek community case indicates one of the main obstacles for local communities in Indonesia when they use the adat strategy to claim land: they have an inadequate basis for embarking on the process for legal recognition of land rights, because the district government must first recognise them as adat communities before they can claim customary land rights.

In this case, the customary land right claim was an alternative strategy, after the initial strategy to obtain compensation from the company based on individual land claims had failed. The shift in strategy had the disadvantage that it was too obviously an opportunistic move. Many parties, including the head of the district, the district parliament members, and supporters of the sultanate, claimed that the Cek Bocek community is an invention, and that local elites created the community just to seek financial benefit. Therefore, for such parties, the Cek Bocek community was not naturally representing a genuine adat community. The fact that the Cek Bocek customary movement was created to strengthen demands for compensation from the mining company contradicted the broadly advocated idea that adat communities are the guardians of the environment, and that they would therefore be more likely to campaign for environmental rather than economic objectives.

Adat revivalism as an environmental movement is the dominant image presented by the indigenous peoples' movement in Asia, distinguishing it from the agenda for sovereignty in anglophone countries, and the pursuit of local autonomy in Latin America (Tsing

2007; Inguanzo 2016). With her research in Central Sulawesi, Tania Li (2001) has warned that identifying indigenous communities as environmental saviours burdens the local community itself. This is clearly the case in Sumbawa, where the demand to obtain compensation payments was considered to be irreconcilable with recognition as an indigenous community. A similar condition also appears in the case of orang asli Sorowako againts a mining company in South Sulawesi (Robinson 2019:475-7). In addition, the basis of the Cek Bocek community's land claim was weak, because they were no longer reliant on the Elang Dodo forest for their livelihoods.

The absence of effective control over customary land is the factor that has often weakened adat-based claims over land, also in this case. Although Datu Sukanda is genealogically a legitimate leader of the Cek Bocek community, he no longer lives permanently in the village. He occasionally visits the village for private matters, or is involved in activities related to adat advocacy. When the Cek Bocek community members have social problems – for instance, disputes amongst community members – they prefer to consult the village head instead of the customary leaders. Currently, the village government is more effective in organising local community members, coupled with support from the district government in terms of budgets and administrative authorities. The village government's support for articulating indigenous identity is crucial, but in the Cek Bocek community case, such support is unstable.

As an intermediary actor, AMAN Sumbawa has played an important role in the articulation of customary land claims by the Cek Bocek community. However, AMAN Sumbawa's political connections at district level were insufficient to strengthen the Cek Bocek community's position in the legal recognition process. AMAN Sumbawa's staff members have good relationships with local academics, because some of them are lecturers at local universities. Those contacts were essential for strong academic support when proving evidence for the Cek Bocek community's land claims. One AMAN Sumbawa staff member owned a law firm, which strengthened the quality of the legal assistance that AMAN provided for adat communities involved in land conflicts with government agencies and corporations. However, for legal recognition to be successful a strong relationship with policymakers is required, both with members of the district parliament and with the District Head (van der Muur 2019; Arizona et al. 2019). A positive relationship between local community members and local politicians at

district level depends on the community's potential as a constituency of voters in district elections. Because the Cek Bocek community consisted of only 339 households, its size is insignificant to local politicians, which does not help to establish strong relationships.

AMAN Sumbawa staff were undoubtedly aware of this problem, which is why it tried to capitalise on its relationship with the many adat communities by assembling them into a political constituency for district elections. The chairman of AMAN Sumbawa has twice run for a seat in the district parliament, but he failed both times. In the 2014 elections, he ran as a candidate for district parliament from the Ropang sub-district election area, where the Cek Bocek community lives. Even then, he was not elected as a district parliament member, neither did he get a significant number of votes from Cek Bocek community members. The result indicated that not all villagers in Lawin perceived AMAN Sumbawa as their best representative and intermediary for channelling their complaints in the face of conflict with the mining company. On the other hand, the lack of support for AMAN's representation also indicates that the leaders of the Cek Bocek community had not been effective in translating AMAN's agenda to all the members of their community, thus failing to convey the message that having a representative in the district parliament was essential to reaching their common objectives.

4.5.2. Conclusion

What does this case teach us about the process of categorising community members' problems through to framing them as customary land problems? I found that using the customary land rights strategy to solve community members' issues is problematic, for several reasons. The first concerns identifying land tenure problems and the objectives of local community members encountering land conflicts (Step 1 of the analytical framework). The interests of local community members are diverse. However, in this case, all the community members had in common that they would like to obtain benefits from the mining operation - in particular, compensation. However, this objective of obtaining compensation from the company does not fit the general image of adat revivalism in Indonesia. In Indonesia, the adat community movement is associated with environmental objectives, by presenting an image that adat communities are environmental stewards. Therefore, the community objective of pursuing compensation – instead of opposing mining operations to protect the environment – is perceived

by the district government and company staff as a non-genuine adat claim.

The second problem is the complexity of categorising local community grievances, in order to obtain the formal requirements for customary forest recognition (Step 2 of the analytical framework). Customary land rights advocacy requires a legal basis where the local community must first be recognised by a district regulation created between the head of the district and district parliament. Therefore, the customary land claim strategy requires policy advocacy at district level. NGO activists helped the local community to prepare its formal requirements for legal recognition, including the revitalisation of customary institutions, by documenting the history of the community and creating maps of customary land territory. These documents, showing how the community meets the formal requirements, must be conveyed to district government decision makers, which implies that the community needs good connections with local policymakers, including the district head and members of district parliament. Having political ties with district parliament members is crucial in the legal recognition process. Such ties are conducive, if the number of adat community members is significant enough to form a constituency for winning local elections. Therefore, the effectiveness of adat strategies relies on, and changes with, political opportunities and to what extent the community can present its strategic position in the local political context.

The third problem is related to contestation of the legitimacy of adat claims at district level. The competing claims between several adat groups generate a debate about the meaning of adat representation in the local political context. When adat claims are contested amongst different adat communities living in the same area, it will be impossible to obtain legal recognition as an adat community. An easy strategy for mining (or plantation) companies is therefore to support one of the competitors, thereby inflating contestation within the local adat community at large.

Ultimately, the Cek Bocek community failed to obtain legal recognition of customary land rights. The question is: Will all cases where adat strategies are used in conflicts between adat communities and companies face similar constraints? The following chapters of this book discuss cases in which local communities have succeeded in reaching the next levels of the legal recognition process.

5 A labyrinth of legal recognition: Complexity in obtaining customary forest recognition

5.1. Introduction

Chapter 4 showed that consensus within local communities about the character of land tenure problems and strategies for solving land conflicts is not always self-evident. Without consensus, there is no substantial basis for trying to receive state legal recognition of customary land or forest rights. The present chapter discusses the next step in the process for obtaining legal recognition as a way of solving land conflicts between local communities and business enterprises. In terms of my analytical framework for analysing the legal process of obtaining customary land rights recognition from the government, this chapter focuses on the step following legal procedures and lasting until recognition is granted. The central question is: What are the requirements and factors that enable customary communities to succeed in obtaining legal recognition from the government?

I have chosen the land conflict between local communities and a pulpwood company, PT. Toba Pulp Lestari (PT. TPL), in North Sumatra, as the empirical case for this chapter. I focus on the Pandumaan-Sipituhuta community case, because the community successfully passed the steps of obtaining legal recognition as an adat community from the district government and customary forest recognition from the Ministry of Environment and Forestry (MoEF). For the adat movement in Indonesia, the case is a famous example of a successful struggle against a forest logging company. Since its operation in 1986, the company has been involved in many land conflicts with local communities in North Sumatra. The conflict between the Pandumaan-Sipituhuta community and the company started in 2009, when the company expanded its plantations in the community's benzoin forests. The conflict was violent, and the police arrested some Pandumaan-Sipituhuta community members.

Many actors have supported the Pandumaan-Sipituhuta community in opposing the company, including (local, national and international) NGOs, environmental media, student organisations, and churches. After framing their land dispossession as a problem concerning customary land rights, the Pandumaan-Sipituhuta

community pursued a remarkable political strategy. They nominated one of their members to become a district parliament member, and the member was successful. They also made a political deal with district head candidates, negotiating that the district government would create a district regulation to recognise the Pandumaan-Sipituhuta community as an adat community, in exchange for their votes. This strategy has been quite successful in elevating the political position of the Pandumaan-Sipituhuta community.

In 2016, representatives of the Pandumaan-Sipituhuta community were invited by the President of the Republic of Indonesia to the president's palace. President Joko Widodo symbolically handed over a decision allocating 5,172 hectares of company concessions to be converted to Pandumaan-Sipituhuta customary forest. However, soon after the ceremony, the community realised that the ceremony was insufficient to obtain actual, fully recognised rights to their adat forest. The final recognition of customary land rights should be preceded by legal recognition by the district government of the Pandumaan-Sipituhuta as an adat community. The case analysed below shows that the process of resolving conflicts through the legal recognition of customary forests is complex, as it involves many actors and decision making processes. Amidst that complexity, the government agencies involved use their power either to slow down the process or to divert claims by adat communities.

NGOs have often presented the Pandumaan-Sipituhuta community story as a best-practice case for resolving land conflict between adat communities and forestry companies. My research, however, indicates that success might be only partial – concerning one type of recognition, but not yet fulfilling all the requirements. In the advanced phase of legal recognition, communities easily get trapped in complicated procedures. To expand my analysis of this case, I also gathered information to compare the legal recognition strategy pursued by the Pandumaan-Sipituhuta community with other local communities that also experienced land conflicts with PT. TPL. However, before providing more details about the conflict, I will give some brief information about the forest tenure setting of the conflict in North Sumatra.

5.2. The setting and problems of forest tenure conflicts in North Sumatra

The case discussed in this chapter is a typical example of conflict between a local community and a forest production company that has

received concessions from the government for large-scale forest exploitation. It is just one of the many cases in North Sumatra, in which logging companies have dispossessed local communities. For example, in 2018, a local NGO recorded that 62 land conflicts had occurred from 2003 until 2018 between the pulp company, PT. TPL (central to this chapter), and local communities. One of these conflicts is the case of Pandumaan and Sipituhuta. The following section will start with the historical context of land dispossession in North Sumatra, then gradually zoom in on the Pandumaan-Sipituhuta case.

5.2.1. Large-scale forest concessions and land conflict in North Sumatra

In Indonesia, large-scale land acquisitions to supply global market products started a few decades ago, under the authoritarian Suharto government (1966-1998), which opened a wide door for domestic and foreign investment in natural resource extraction (McCarthy et al 2012). During Suharto's New Order regime, the Ministry of Forestry granted many concessions for big forestry corporations to produce pulp, rayon, and wood. During that period, forestry companies played a dominant role in national economic development. The government granted forest concessions to its inner circle of government supporters, which resulted in an alliance between the government and business enterprises. Forestry statistics in 1994 showed that the government had granted 28 million hectares (45%) of logging concessions to ten companies close to President Suharto's circle, including business tycoons, Bob Hasan and Probosutedjo. Bob Hasan is a timber entrepreneur who President Suharto, in his final days in power, appointed as Minister of Industry and Trade (1998). Probosutedjo is the adopted younger brother of President Suharto. The extent of forestry concessions at that time contributed to the increase in timber export production from Indonesia, especially to Japan (FWI 2002: 9). The massive extractive operation of forestry companies has had a significant impact, in terms of reducing the forest cover in Indonesia. Currently, the MoEF has designated 34.18 million (28.3%) out of 120 million hectares of forest area for extractive forest activities, such as logging and timber plantations. This area is almost equal to the size of Germany.

In Sumatra, the Ministry of Forestry granted large-scale forestry concessions to the Royal Golden Eagle/Asia Pacific Resources International (RGE/APRIL). This concession was granted in Suharto's

New Order period, and it remains valid today. This company has several subsidiary companies operating in North Sumatra, Riau, and Jambi. In total, the company has a concession area of 1.2 million hectares, which represents 26% of the total pulpwood concessions on Sumatra. With extensive concession areas and huge assets, Sukanto Tanoto, the owner of the company, became one of the richest people in Indonesia. In North Sumatra, Royal Golden Eagle's subsidiary, PT. Inti Indorayon Utama (PT. IIU), obtained forest concessions from the Minister of Forestry in 1992, which covered 269,060 hectares located in several districts in North Sumatra.

5.2.2. Local communities versus PT. Inti Indorayon Utama (PT. IIU)

PT. IIU operation in North Sumatra causes land conflicts because the company's concession areas overlap with local community land, especially with Toba Batak customary land. The Toba Batak is an ethnic community living around the Toba Lake, dispersed throughout five districts in North Sumatra. The total population of Toba Batak is around 5 million (22%) of the North Sumatran population. Local community members living around the company's concession areas have been using the land as the main source of their livelihoods, cultivating rice, palm sugar, and benzoin gum. Some Toba Batak leaders, especially those who no longer reside in the contested area but live in cities, such as Medan and Jakarta, argued that the PT. IIU company operations would help to reduce poverty in this area. However, voices from the Toba Batak community countered that development based on the argument that capital interests would increase poverty. The leading cause of poverty would be that the company would be grabbing local communities' productive lands in order to establish a monoculture plantation (Silalahi 2020). Moreover, such operations would degrade environmental conditions. These arguments characterised the contestations in this case from the start, in the 1980s.

In 1986, PT. IIU established a pulp factory in Porsea, Toba District. Furthermore, the company began land clearing to establish eucalyptus plantations to supply feedstock for pulp and paper production. The government granted the forest concession without properly consulting the affected communities.

Local NGOs assisted the communities who confronted the company with arguments that company operations had caused land dispossession and environmental degradation. Local community protests against company operations were widespread. The community conducted

demonstrations and filed a lawsuit against the company. In 1988, ten older women in Sugapa village pulled out eucalyptus plants planted by the company, because they thought that the company was illegally occupying their customary land. The case attracted national NGO attention, because the leading protesters were women, which was very unusual at the time. Company staff reported the ten women to the police. Subsequently, the district court sentenced them for obstructing company activities. The case inspired many local communities in North Sumatra to fight against the PT. IIU, and it became an exemplary case of the adat struggles against big corporations in North Sumatra (Simbolon 1998; Silaen 2006; Manalu 2007). After the case received national attention, representatives of the Sugapa women came to Jakarta to meet the Minister of Home Affairs, Rudini. As the result of that meeting, the Ministry of Internal Affairs intervened to release the ten women, and suggested that the company return the customary land to the Supaga community (Silalahi 2020:17). The outcome of the meeting also supported activists' strategic analysis, which posited that elevating conflicts to the national level can help to resolve specific cases.

The Sugapa community was assisted at the time by KSPPM (*Kelompok Studi dan Pengembangan Prakarsa Masyarakat*), an NGO created by several Toba Batak academics and activists,[40] including Asmara Nababan, who later became a member and chairperson of the National Commission of Human Rights (1993-2002). Through KSPPM's national network, conflicts between local communities versus PT. IIU were elevated to national-level NGOs' concern level. One such national NGO was Wahana Lingkungan Hidup (Walhi). In 1988, Walhi, a leading environmental NGO in Indonesia, filed a class action at Central Jakarta District Court, concerning pollution caused by PT. IIU in North Sumatra. For the first time in Indonesia, the court acknowledged the legal standing of an environmental organisation in an environmental case, which made it a landmark case. However, the court rejected Walhi's petition regarding water pollution committed by the company. The lesson of this court case was that basing the rejection of PT IIU operations

[40] In 1983, some scholars, activists and religious leaders with Batak ethnic background established KSPPM, to respond to the top-down development model of Suharto's authoritarian regime. For decades, KSPPM has been assisting local farmers and labourers in defending their rights against land dispossession and injustice. Although the KSPPM office is in a district in North Sumatra Province, KSPPM staff have good connections with national NGO activists in Jakarta. Asmara Nababan, one of KSPPM's founders was the chairman of the National Commission on Human Rights of the Republic of Indonesia.

on environmental arguments was not an effective legal strategy for NGOs to pursue (Silaen 2006; Manalu 2007).

Local communities that rejected PT IIU's operations repeatedly protested with various demands, ranging from requests for compensation for using their land to establish the company factory, to stopping violence against local community members, returning the customary land of adat communities, and ending environmental pollution. Massive demonstrations by local communities managed to stop the company's operations for some time; for example, in 1993 (15 days), 1998 (4 months), and from 1999 to 2003 (4 years) – encouraged by the political reforms in 1998. The people's protest attracted the national government's attention. In 1999, during massive protests against PT. IIU in North Sumatra, President BJ. Habibie decided to stop PT. IIU operations and ordered an environmental audit to investigate potential water pollution committed by the company.

In 2003, President Megawati Sukarno Putri allowed the company to recommence operations after it proposed 'a new paradigm' to promote sustainability and social acceptance for its operation. The company name was changed from Inti Indorayon Utama (PT IIU) to Toba Pulp Lestari (hereafter PT. TPL). This renaming was conducted to increase the social acceptance of company reoperation by local communities. The name Toba comes from the name of Lake Toba, which is the largest lake in North Sumatra, and it has a central position in Toba Batak culture and history, the word 'Pulp' indicates that the company is focused on pulp production, rather than rayon production, and the word 'Lestari' (Sustainable) indicates the company's commitment to environmental conservation. In addition to the renaming, the company also hired several Toba Batak company managers, strengthened the company's sustainability programme, and allocated 1% of the company's net sales to Corporate Social Responsibility (CSR) programmes. These programmes are carried out by a foundation that has been jointly created by district governments and the company.

Nonetheless, conflicts between the company and local communities persisted. The current conflict is no longer about environmental pollution, but instead concerns about overlapping land claims between local community members and the company once again. Local community members base their land claims on customary rights, whilst the company underpins its operations with legal permits provided by the government. In the next section, I will zoom in on one of these disputes, to explore why and how the community and its allies tried to

obtain legal recognition of the customary forest rights as a strategy for solving the conflict with PT.TPL.

5.3. The Pandumaan-Sipituhuta case

As I already mentioned, the Pandumaan-Sipituhuta case is a national showcase of local community success in obtaining customary forest recognition in order to solve a land conflict with a big company. However, my research, which includes the history of the conflict, the proliferation of actors involved, and the strategies that they have used, shows that the story is much more complicated than just one adat victory. In this section, I will explain how the land conflict started and developed, and how local communities have gradually come to frame the land conflict as a customary land problem. My analysis shows the complexity of the rules and procedures which the Pandumaan-Sipituhuta community had to deal with when they followed the legal procedure for recognition of customary forests as a solution to solve their land conflict with a company. I will end the section with a discussion about the obstacles and achievements involved in following this route.

5.3.1. The origin of land conflict

Pandumaan and Sipituhuta are the names of two villages in the Humbang Hasundutan District in North Sumatra Province. The inhabitants belong to the Toba Batak community. Most of the community members are Protestant or Catholic, and religious and customary institutions play an essential role in people's lives there. The Pandumaan and Sipituhuta community members cherish their customary practices, because they have been cultivating benzoin trees in the forest for more than 300 years. The benzoin tree (Styrax benzoin, *tombak haminjon*, in Batak) is endemic to the area, and the Pandumaan-Sipituhuta forest is the most significant benzoin production area in Indonesia. Benzoin trees produce gum, which is used as a base material for incense and perfume production. For hundreds of years, the benzoin gum from this area has been exported to China, Turkey, India, and Arabian countries. The historical relationship of local community members to the benzoin forest is preserved through oral storytelling. A local myth tells how the benzoin tree is personified as a woman, the benzoin gum symbolising the woman's tears. The benzoin forest is the

main source of income for the community, and it has been a marker of local identity for many generations.

Figure 9. Left: a benzoin farmer extracts benzoin gum. Right: benzoin gum on a benzoin tree. (© Yance Arizona, Pandumaan, 2019)

Almost all the Pandumaan and Sipituhuta village residents have benzoin forest plots, which they either cultivate themselves or rent out to others. For many years, they maintained the benzoin forest without any interruption from outsiders. However, this situation changed when a forest exploitation company established a eucalyptus plantation in their forest. When the company obtained its concession permit in 1986, Pandumaan and Sipituhuta residents did not know that the PT. TPL concession area overlapped with their customary forest. The community members did not really mind, as long as the company was exploiting parts of the forest that were far from their settlements and not being used for benzoin cultivation. For most of the community members, it became apparent that they had a land conflict when the company started to clear out the benzoin forest, in 2009. Local community members held protests and stopped the expansion of the company operation by using violence and a blockade to forcibly evict company staff from working in their forest areas.

The community members were aware that if they did not stop the company expansion they would lose their benzoin forest. A fight occurred when a crowd of community members confiscated 14 chainsaws and brought them to the village, stopping company activities.

The company reported this to the police. Subsequently, hundreds of police officers came to the village to reclaim the chainsaws, and they arrested 16 villagers. The police officers brought them to the police office in the capital of Humbang Hasundutan District. Hundreds of local community members went to the police office to protest, demanding that their family members be released. Protesters also went to the district parliament and the district head office, requesting support for their demands. As a result of intense pressure from community members, the police released the arrested villagers. The district government sent a letter to the company stating that it should stop its operations in the Pandumaan and Sipituhuta areas.

Nevertheless, the company did not abide by that prohibition. The company's excavators entered the benzoin forest again in 2013. This time, police officers guarded the company staff, but there was another fight, and the story involving police officers arresting villagers and villagers protesting about it repeated itself. However, this time, the police officers relocated the detainees to Medan, the capital city of North Sumatra Province. With this act, the police moved the conflict to the next level. The violence experienced by Pandumaan and Sipituhuta community members encouraged solidarity from provincial NGOs, student organisations, and local Protestant Christian organisations, who all urged the police to release the arrested villagers. This problem also caused a dilemma for Ronal Lumban Gaol, a mid-level police officer from Pandumaan village, who was posted at the Medan police office. Ronal secretly provided support for the detainees. When his superiors found out, they intimidated him and assigned him a new post in a remote area. When Ronal decided to resign from the police department, villagers from Pandumaan-Sipituhuta asked him whether he would be willing to run as a candidate in the upcoming district parliament elections, promising to support him. Having a representative at the district parliament was essential for the Pandumaan-Sipituhuta community struggle, because usually they would come to the district parliament to report their grievances.

Most of the Pandumaan and Sipituhuta community members opposed company operations in their area, but there were internal differences of opinion and interests. Originally, Pandumaan and Sipituhuta were two separate villages consisting of 3,272 inhabitants (Statistics for Humbang Hasundutan District 2014), but the inhabitants of the villages ultimately united in their resistance against the company.

I observed three distinct groups of community members, each with their own strategy and interests in the land conflict. The first category is the majority group, who opposed the company. Most of them belong to the first settler clans (*marga tano*), who established the villages centuries ago. They claim exclusive rights as the landowners, based on customary law. The second group consists of the 'newcomer clans' (*marga boru*), who have received permission to live in the village because of marriage, or for other reasons. According to the customary law, they only have land-use rights for agricultural land, and they must return the land to the landowning clan when they are no longer cultivating it. This group joined the struggle to protect the benzoin forest, because they believed they had equal rights to the forest.[41] The third group consists of a minority of community members that favor the company. They originate from the first settler clans (*marga tano*) and live in the most accessible areas, near the main road to the capital city. This group is less dependent on the benzoin forest, because some are village government staff, coffee traders, and local contractors, who all benefit from company operations, such as receiving grants from the charity fund, free seeds and fertilizer, and business contracts. The differentiation between villagers' strategies and interests corresponds to the variation in levels of dependency on, and their property relationships to, the benzoin forest. As my research concentrates on community strategies for reclaiming dispossessed land, I focus on the group opposing the company and pursuing legal recognition of their customary forest as the solution for securing their benzoin forests.

5.3.2. A twist in strategic framing: From benzoin farmers to an adat community

When the community members were facing a land conflict with PT. TPL for the first time, in 2009, they created a new organisation for coordinating protests and demands. Instead of revitalising a traditional institution, local community members agreed to establish The Benzoin Farmer Group of Pandumaan-Sipituhuta (*Kelompok Petani Kemenyan Pandumaan-Sipituhuta*). The group became the leading organisation for representing community members in meetings opposing the company and the government agencies. The organisationchairperson was James Sinambela, a community member from the newcomer clan (*marga boru*). The Benzoin Farmer Group collected donations from community

41 Interview with Prof Bungaran Antonius Simanjuntak, June 30th, 2018.

members and their families in the cities, in order to support the struggle. Some local NGOs and lawyers assisted the community, but most community members preferred working with the NGO, KSPPM. The main reason for this collaboration was because community members were aware that KSPPM had good experience in assisting local communities against the PT. TPL. Moreover, KSPPM had good connections with national and international NGOs. KSPPM had also assisted the Pandumaan-Sipituhuta community in meetings with government agencies.

In the beginning, the Pandumaan-Sipituhuta community members did not identify themselves as an adat community who could demand a special right distinguishing them from other Toba Batak groups in the region (Silalahi 2020:106). Nevertheless, customary norms play a central position in Pandumaan-Sipituhuta people's daily lives. Traditional ceremonies are often performed – primarily concerning the human life cycle, birth, marriage, death, and the building of monuments (*tugu*) – to respect community ancestors. *Tugu* is the lineage monument for the community's main forefather, symbolising the lineage's long-standing ties to the land. Most Toba Batak, including Pandumaan-Sipituhuta community members, keep the history of their family lineage alive through oral narratives. From this oral history, I learned that Batak lineages go back 15 or 16 generations in Pandumaan and Sipituhuta villages.

Traditional ceremonies reinforce people's sense of belonging to the shared heritage of their ancestors and to their duty to protect the benzoin forest. Pandumaan-Sipituhuta community members often organise meetings and traditional ceremonies, to make collective decisions concerning issues in their community. During my fieldwork in 2018, I witnessed two traditional meetings and ceremonies.

However, the Pandumaan-Sipituhuta community has no solid customary institution that can serve as a traditional governance organisation. Collective decisions are taken, based on deliberation between representatives of all the lineages living in the two villages. In short, they do not have a traditional structural organisation – as is required for legal recognition – to represent their adat community interests.

KSPPM assisted the Pandumaan-Sipituhuta community members in revitalising their customary rules, institutions and ceremonies, to serve as the basis for their adat claims protesting against PT. TPL. For example,

NGO staff helped the local community document customary norms related to benzoin forest management, mapped the customary territories, and supported the role of the Benzoin Farmers Group as representative for the Pandumaan-Sipituhuta community in any dialogue with government agencies. In the early stages of the 2009 conflict, KSPPM accompanied the Pandumaan-Sipituhuta community members to meetings with district parliament members and the district head.

Furthermore, KSPPM assisted the Pandumaan-Sipituhuta community members in contacting national government agencies. In 2010, they reported the case to the National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*/Komnas HAM) and the National Forestry Council (*Dewan Kehutanan Nasional*/DKN), a national advisory body of the Minister of Forestry. KSPPM asked the council to mediate the land conflict between the Pandumaan-Sipituhuta and the company.[42] Komnas HAM recommended that the company stop its operations in the meantime, in order to solve the actual land conflict. The DKN created a team to conduct an investigation, and facilitated a meeting between the company and local community members which was assisted by KSPPM. After the DKN had investigated the case, it gave recommendations to the Minister of Forestry, in 2011 and 2012, suggesting that the ministry release the conflicted area from PT. TPL concession's territory. However, the minister did not take any steps towards solving the land conflict. In 2013, after the peak of the land conflict in which police arrested local community members, the General Director of Forestry Business Development at the Ministry of Forestry came to the Pandumaan-Sipituhuta community. He encouraged Pandumaan-Sipituhuta community members to make an agreement with the PT. TPL regarding collaborative management for areas affected by land conflicts. However, the Pandumaan-Sipituhuta community members refused the collaborative management scheme, because being involved in the partnership schemes would implicitly accept the legitimacy of the company's claim over their benzoin forests. The community members argued that the benzoin forest was their ancestral land, and it could not be alienated to other persons. The MoEF official also proposed social forestry schemes, such as community forest, village forest, and community plantation forest, to the Pandumaan-Sipituhuta

[42] The DKN is a multi-stakeholder institution consisting of representatives from national government, forestry companies, local communities, and NGOs.

community. However, the community members also turned these offers down, because the schemes do not acknowledge their historical relationship to the benzoin forest. Thus, the land conflict persisted.

In May 2013, a new opportunity arose when the constitutional court announced ruling Number 35/PUU-X/2012, reinforcing the legal status of customary forests (see Chapter 3). Pandumaan-Sipituhuta community members and NGOs expected that the ruling could be applied to solve the land conflict. Representatives of the Pandumaan-Sipituhuta community erected a signpost in the conflicted area, stating that "According to the constitutional court Ruling (Number 35/PUU-X/2012) this area is no longer a state forest, but Pandumaan-Sipituhuta customary forest". In the days following, company staff removed the signpost, and the local community members returned to erect another one. Seeing an opportunity created by the constitutional court ruling, the Pandumaan-Sipituhuta community members were convinced that the customary forest recognition could provide an alternative strategy for voicing their grievances and demanding justice. With the support of KSPPM, the Pandumaan-Sipituhuta community members prepared themselves to fulfil the legal requirements for obtaining customary forest recognition, such as having fixed customary land territory, customary law that is actually implemented, and a functioning customary organisation.

Figure 10. Pandumaan-Sipituhuta community members erect a signpost responding to the Constitutional Court ruling on customary forest. (© Ayat S Karokaro/Mongabay Indonesia).

A few years earlier, with the help of NGOs, the Pandumaan-Sipituhuta community members made a participatory map of their

benzoin forest. They found that the area which overlapped with PT. TPL's concession covered 5,172 hectares. Also with the support of NGOs, local community members documented the customary law regarding benzoin forest management. For the first time ever, the Pandumaan-Sipituhuta community used customary law to defend its communal land against external forces; this was a new strategy for them, because usually adat only plays a role in internal matters. Another impediment to applying an adat-based strategy was that traditional organisation has disappeared. Around a century ago, the Batak community, including the Pandumaan-Sipituhuta community members, were divided into traditional village units called *huta.* A federation of huta was called a *bius,* chaired by a traditional leader called *raja bius* (Situmorang 2004:67-76). In the colonial period, the Dutch colonial government created *negeri* to replace the *bius* system. After Indonesian independence, a modern village government (*desa*) was institutionalised, in particular by the Village Law of 1979. Currently, the organisation of local communities works under a new model of villages led by a village head. However, although the traditional organisation has disappeared, the traditional lineage leaders still play a dominant role in decision-making at the local level.

Because the Pandumaan-Sipituhuta community have to fulfil the requirement of having traditional governance institutions, if they want to obtain customary forest recognition, they changed the Benzoin Farmers Group into an adat community organisation in 2015. In doing so, they created a new letterhead for the organisation: The Pandumaan-Sipituhuta Adat Community (*Masyarakat Adat Pandumaan-Sipituhuta*). From that moment on, Pandumaan-Sipituhuta was no longer the name of a benzoin farmers organisation, but instead an adat community organisation.

Around that period, at national level, NGOs and some progressive officials in government bodies were looking for pilot projects to implement the constitutional court ruling. Noer Fauzi Rachman, a senior agrarian reform activist and advisor at the presidential office, proposed the Pandumaan-Sipituhuta land conflict (Afiff and Rachman 2019). Following results from the participatory mapping of their territory, KSPPM helped the Pandumaan-Sipituhuta community propose that 5,172 hectares of the company's concession be allocated for customary forest recognition. Noer Fauzi Rachman and progressive officials successfully manoeuvred, convincing the Minister of Forestry to release

the conflicted area from PT. TPL's concession.[43] After some delays, on December 30th 2016 President Joko Widodo made the symbolic decree, as an initial step towards the legal recognition of the Pandumaan-Sipituhuta customary forest – as presented in the opening of this book (see Chapter 1).

5.3.3. Organising district government support

However, final recognition of the customary forest still depended on whether or not the district parliament and district government would create a district regulation to grant adat community status to the Pandumaan-Sipituhuta community. This had not yet happened. For the district government, defining this particular group as an adat community was problematic, because the Pandumaan-Sipituhuta community members do not live that differently from other villagers in the district. The district government invited experts to identify whether or not the Pandumaan-Sipituhuta community had fulfilled the requirements for being designated as an adat community. Based on an academic review from experts, the district parliament and the district government discussed the draft district regulation. For local community members (as for any common citizen), bringing a request for legislation to the district government required a profound connection with the district parliament. During the local elections in 2014, the Pandumaan-Sipituhuta community members successfully nominated Ronal Lumban Gaol, a former police officer from Pandumaan Village, as a district parliament member. Ronal was elected, and the Pandumaaan-Sipituhuta hoped that he would be a formal representative of the community in the district parliament. However, having one representative at the district parliament would not be enough to create a district regulation to recognise the Pandumaan-Sipituhuta as an adat community. This was particularly challenging, because 13 of the 25 district parliament members had some links with PT. TPL, either as land clearing and planting contractors, or for other projects financed by the company.

Pandumaan-Sipituhuta community members expanded their political ties to district decision makers by inviting the three candidates for the 2015 district head elections (*pilkada*) to attend a public debate in the village. The population of the Pandumaan and Sipituhuta villages

[43] Interviews: with Saurlin Siagian in December 2018, and with Noer Fauzi Rachman in December 2019.

(3,272 inhabitants in total) was sufficiently attractive for district head candidates, in terms of potential votes for winning the election. With the support of local NGOs, the Pandumaan-Sipituhuta community members proposed that the three district head candidates sign a document of political commitment. The document would state that, if they were to be elected as the district head (*bupati*), they promised to create a district regulation on the recognition of the Pandumaan-Sipituhuta community as an adat community. The election result was that the candidate from PDIP – who had given his commitment to Pandumaan-Sipituhuta recognition – won, and became the new district head. The Pandumaan-Sipituhuta community members had strong faith that the new district head would support creation of the district regulation, not only because of his commitment, but also because he represented the President's political party who had promised to resolve the Pandumaan-Sipituhuta community land conflict during the ceremony at the Presidential Palace in 2016.

Parallel with political change at district level, the National Commission on Human Rights (NCHR) conducted a national inquiry regarding the violation of adat community rights in forest zones. This was yet another initiative from a national institution to ensure the implementation of the constitutional court ruling on customary forests. The Pandumaan-Sipituhuta case was one of 40 case studies analysed for the national inquiry. Sandra Moniaga, an NCHR commissioner, visited Pandumaan-Sipituhuta community members in order to get insight into the actual land conflict. She met with the district head to suggest that the district government respond to the community's demand for creating a district regulation on the legal recognition of the Pandumaan-Sipituhuta community as an adat community. However, the district regulation process continued not to show any significant progress for more than a year.

5.3.4. Bureaucratic obstacles to the legal recognition of customary forest rights

Although the community had obtained support from the national government, the local situation had become much more complicated than the Pandumaan-Sipituhta community members had expected. Debate around the scope of the district regulation had been slowing the legal recognition process down. I noticed that community members, NGOs, and the district government all had different motivations in terms of encouraging or discouraging the creation of a district

regulation. Local NGOs wanted to use the district regulation to recognisemore groups as adat communities in the district. District parliament members were reluctant to provide an exclusive right to a particular group within the district, because they saw no hard proof that there was a difference between Pandumaan-Sipituhuta community members and the majority of the district population. Conversely, the Pandumaan-Sipituhuta community members were demanding a special regulation that only applied to them.

After the representative of the Pandumaan-Sipituhuta community increased pressure, the district parliament finally enacted the district regulation on recognising the Pandumaan-Sipituhuta community as an adat community, in July 2018. I attended this meeting in the district parliament building, during my fieldwork. However, the enactment of the district regulation was not the end of the story. The district parliament first had to apply to the provincial government, in order to have the district regulation formally registered. Furthermore, the provincial government asked for advice from the Ministry of Internal Affairs before validating the district regulation, which was unusual. The provincial government officials argued that they could not register the district regulation, because it was the first of its kind on adat communities in the North Sumatra Province. Nevertheless, finally, after six months of consultation, the district regulation was formally enacted in early 2019.

Encouraged by the newly acquired district regulation, the Pandumaan-Sipituhuta community applied to the Ministry of Environment and Forestry (MoEF) for customary forest recognition. However, another problem occurred, this time concerning the delineation of the community's customary forest. The ministry staff produced a map which differed from that proposed by the NGOs and the Pandumaan-Sipituhuta community. In 2016, before the president invited them to the presidential palace, NGOs had proposed that the MoEF allocate 5,172 hectares of the TPL's concession area to be designated as Pandumaan-Sipituhuta customary forest. This proposed area included around a 400 ha area of benzoin forest that the company had cleared out to create a eucalyptus plantation. Apparently, the MoEF staff did not use the map proposed by the NGOs and the Pandumaan-Sipituhuta community, using instead the map created by company staff. Although both maps covered the same 5,172 hectare area, the borderlines on the maps differed. The company map excluded around

400 hectares from the Pandumaan-Sipituhuta community area, which the company had been cultivating. Moreover, the company map proposed a customary forest area for the Pandumaan-Sipituhuta community that would overlap with the territories of other villages.[44] If the map were to be enforced, a conflict amongst local communities would probably occur. Therefore, the Pandumaan-Sipituhuta community members and NGOs rejected the ministry's map and insisted on using their own. With the ongoing dispute about the map, government officials could no longer regard this case as "clean and clear"[45] – a requirement for issuing their customary forest recognition.

Apart from this problem, the MoEF faced another obstacle to recognising the customary forest of the Pandumaan-Sipituhuta community. The ministry had changed the Ministerial Regulation on customary forests, No. P21/2019 had replaced No. P.32/2015. In the 2019 regulation a new category was introduced, that of "customary forest reserves" (*pencadangan hutan adat*). Customary forest reserve status could be applied to the customary forest proposed by adat communities, but this has not yet been formally designated by the minister because he is waiting for the district government to recognise the Pandumaan-Sipituhuta as an adat community. In 2020, with Ministerial Regulation No. P.17/2020, the minister revised the regulation again, and the term "customary forest reserves" was substituted by the term *penunjukkan hutan adat*, which can be translated as "an area allocated for the transformation of legal status into a customary forest". The new regulation set up new procedures for customary forest recognition, consisting of allocation (*penunjukkan*) and enactment (*penetapan*). With these new procedures, the status of the proposed Pandumaan-Sipituhuta customary forest became uncertain once again.

In 2020, in order to clarify the position of the customary forests proposed by the Pandumaan-Sipituhuta community, MoEF officials conducted verification activities. This time, the MoEF officials created a verification team chaired by an anthropologist from North Sumatra University. The verification process went awry. The chair of the verification team did not pay close attention to the complex history of land conflict, or to several of the stages that the Pandumaan-Sipituhuta

[44] Interview with a former employee of PT. TPL, in July 2018.

[45] There is no exact legal definition of "clean and clear" in Indonesian legislation. However, this term is often used by government officials, especially in the Ministry of Environment and Forestry, to make statements about land without any contested claims or administrative validation.

community had passed towards obtaining customary forest recognition. She forced the application of anthropological concepts to evaluate the legal position of the Pandumaan-Sipituhuta as an adat community. Instead of verifying the boundaries of the customary forest proposed by the Pandumaan-Sipituhuta community, the verification process repeated the question of whether the Pandumaan-Sipituhuta were fulfilling the necessary criteria for an adat community. The chair ignored the fact that the district government had already designated the Pandumaan-Sipituhuta community as an adat community. She thought that an adat community must have restricted social norms, strong customary institutions, and be different from the majority population in the region.[46] KSPPM staff and Pandumaan-Sipituhuta members challenged her approach in the verification process, because they thought that repeated verification processes would create another obstacle for the Pandumaan-Sipituhuta community in regaining their customary land rights. Finally, after a hard debate, the verification results showed that the Pandumaan Sipituhuta community was eligible. In addition, the verification team also clarified that the area proposed by the Pandumaan-Sipituhuta community for customary forest recognition covers an area of 5,172 hectares.

In early 2021, President Jokowi invited representatives of adat communities and forest communities to the presidential palace in Jakarta. He performed another ceremony to show his political commitment to expanding peoples' access to and management of forestry areas. President Jokowi granted 2,929 social forestry licenses (covering 3,442,460.20 ha) and 35 customary forest recognition decrees (covering 37,526 ha). On this occasion, President Joko Widodo also granted legal recognition of the Pandumaan-Sipituhuta customary forest. For the Pandumaan-Sipituhuta community, this decree should be the final stage in the legal recognition of their customary forest. At first, local communities and NGOs thought that their long struggle to get customary forest recognition had reached its conclusion, but it still was not entirely successful. The MoEF's decree on the Pandumaan-Sipituhuta customary forest only stipulates 2,393.83 hectares of the 5,172 proposed area hectares. Unlike the result of the verification process, the MoEF only stipulated areas of benzoin forest, thus preserving the company's interests in controlling the Pandumaan-

[46] Interview with the chair of verification team on January 16th, 2021.

Sipituhuta customary area which had already been cleared and converted into eucalyptus plantation in 2009. Another surprise was that the minister had allocated 2,051.22 hectares of the Pandumaan-Sipituhuta customary area to serve as a location for the national food estate strategic programme.[47] The Indonesian government is currently initiating several food estate development sites, arguing that this national strategic project is necessary in order to overcome the food crisis. Food estate programmes require large-scale land acquisitions that often involve land grabbing and the taking over of local community land rights without their consent (Boras and Franco 2012). In addition to North Sumatra, the government also initiated the establishment of food estates in Papua, Central Kalimantan and in Central Sumba. In the case of the Pandumaan-Sipituhuta, the government recognised part of their customary forests, but simultaneously imposed new restrictions on their customary territory by starting its new state intervention programme.

5.4. The labyrinth of legal recognition and management of recognition

The course of the Pandumaan-Sipituhuta case shows the complexity of the legal procedure and application for customary forest recognition. The Pandumaan-Sipituhuta community gained national attention when the president symbolically handed over the decree allocating the company's concession area to be recognised as the Pandumaan-Sipituhuta customary forest. However, this was only the start of a long and frustratingly layered and conditional legal recognition process. After a local community has obtained the legal status of an adat community from the district government and parliament, the adat community must apply to the MoEF for customary forest recognition. Furthermore, the success of legal recognition is determined not only by the fulfilment of all the formal requirements stipulated in the regulations, but also by the amount of political pressure mounted by adat communities and NGOs.

The story of the Pandumaan-Sipituhuta community illustrates the inefficiency of legal recognition strategies for local communities fighting

[47]The president grants social forests, customary forests, and TORA in 30 provinces. Source: https://www.menlhk.go.id/site/single_post/3503 (accessed on September 4th, 2021). In December 2022, after subsequent protests to the Minister decision, then the Minister of Environment and Forestry revised her decree to recognise all desirable land of the Pandumaan-Sipituhuta community.

against land dispossession by business enterprises. Local communities have to follow a complex, costly, and lengthy legal procedure to convince the national and district level governments to grant legal recognition, as a precondition to having meaningful dialogue with the company in question. They absolutely need NGO assistance in navigating those legal procedures. The case also points at the fact that, by pursuing state legal recognition of customary forest, the definition of the nature of the conflict shifts from a land conflict between local communities and a forest exploitation company, to a legal conflict between community representatives and the government agencies involved with the interpretation of legislation. During the process, many actors tried to slow things down by adding procedures that hindered the acceleration of customary forest recognition. I would characterise this as a labyrinth of recognition, where local communities easily get lost trying to find their way to the exit. Consequently, the end goal of the struggle changed from the community's initial demand to obtain justice in land tenure security, to the seeking of legal recognition of adat rights as an objective in itself.

Another assumption amongst adat community rights supporters is that the government would provide a supportive role and act as a mediator to solve land conflicts concerning customary land rights. In fact, government officials are often not enthusiastic about granting land rights based on identity, and they eschew the revocation of company concessions. By navigating the legal recognition processes, I found that the complicated legal recognition procedure involves different governmental actors (across all levels) and encompasses several decision making moments. Local communities and local NGOs cannot control the legal recognition processes. Furthermore, under an unstable legal framework for recognising customary land rights, government officials can easily manoeuvre to slow the process down. Using their specific and limited conception of customary land rights, the government agencies exert their discretionary power in selecting which land claims will be granted and which will be refused. In short, government agencies manage the applications for customary land rights submitted by local communities, and they select what fits with their own interests and their own interpretations of customary land rights.

5.5. Customary forest recognition is not a perfect option

In Chapter 2, I explained that customary forest recognition is a prominent potential solution to forest tenure conflicts, because it can apply to any type of forest use and can strengthen the collective property rights of local communities. However, the Pandumaan-Sipituhuta case shows that customary forest recognition is not an easy solution. In order to broaden my analysis and to position customary land recognition as an alternative solution regarding land conflicts, I expanded my observations to other local communities involved in land conflicts with PT. TPL.

I visited a group of Sipituhuta community members who used a different strategy in the land conflict with the company. This group did not engage with the adat community movement to obtain legal recognition of their customary land rights. As I described above (in section 5.3.1), this group consists of a Sipituhuta minority which favours the company. They originate from the first settler clans (*marga tano*) and live in the most accessible area, near the main road to the capital city. This group has more diverse sources of livelihood and is less dependent on the benzoin forest. Several leaders of this group run business projects provided by the company. The group also received financial support from the company, to renovate the local church. During the peak of the land conflict, in 2013, they maintained a good relationship with the company, whilst most of the other villagers opposed the company's operations. The company promised to intensify collaboration with the group by cultivating joint management of the benzoin forest. For this purpose, the community members created a new benzoin farmers' organisation, and proposed that the company fund some of its activities. However, as my interlocutors told me, these programmes have never materialised.[48]

Furthermore, I interviewed some top managers from the company during my fieldwork in 2019. I explored how they handle conflicts with local communities protesting against the company's operations, as well as the company's own views regarding the customary land claims submitted by local communities. The company managers said that they relied on the government, and that if the government agencies recognised adat communities and customary land rights, they would comply. However, I found that the company kept reporting villagers to the local police, arguing that they had committed a crime by obstructing

[48] Interview with Dosmer Nicky Lumban Gaol, on October 26th, 2019.

company activities; most of the villagers reported were champions of customary land claims against the company (see section 5.6, below).[49]

Currently, the company is intensifying its strategy to create collaborative management with local communities, as part of its Community Development and Corporate Social Responsibility (CD/CSR) programmes. In Indonesia, business enterprises in natural resource sectors have to conduct CSR programmes. When the company reopened in 2003, PT. TPL allocated 1% of its net sales to community development and corporate responsibility programmes. However, during that time, CSR funds were managed by a foundation jointly created between the company and the district government. Consequently, the CSR funds were controlled by local political elites for their own purposes, such as providing projects for their political constituents elsewhere. It did not create a positive impact on the communities that should have been addressed. In 2017, the company took over fund management for CSR, so it could be more flexible in manoeuvring its strategy for approaching communities. The company used CSR funds more effectively, providing benefits for local communities through collaborative management schemes.

The company director invited me to attend a meeting with a local community that had agreed to sign a collaborative management agreement. The company promised to provide access for local communities to manage land in their concession areas. Beforehand, this community had claimed that the conflicted area was its customary land, but then they decided to join the company scheme to create collaborative management, meaning that they accepted the legality of the company concession in their customary land. The head of the district forestry office facilitated the meeting at his office. During the meeting, the head of the district forestry office stated that he really encouraged local communities to create collaborative management with the company. Before this meeting, three other communities had also shifted their strategy from adat strategy to collaborative management. The company staff actively approached one particular group within each community,

[49] The most recent case took place in Sihaporas community in 2019, in which villagers who had blocked the company's operations on disputed land were convicted. In 2018, when I did my initial field research, I came to Sihaporas community to attend a traditional ceremony. Sihaporas community members had revitalised adat institutions as a basis for strengthening their customary land claims against the company. Sihaporas village is located inside of the PT. TPL's concession area, and to enter the village people have to go through the company's gate, which is guarded by company security.

to initiate a collaboration scheme, whilst leaving out other community groups who upheld their claims to the land.

I also visited other local communities in other districts, which had been making customary land claims against the company for years but had eventually decided to collaborate with the company. Nursedima, a female leader from Nagahulambu community (Simalungun District), told me that her community members had given up on using adat strategy, despite the fact that they had obtained support from a local NGO for more than ten years. She complained that the NGO had promised to solve the land conflict, but no parcels of land had been released as she had hoped they would be. Realising the frustration of the Nagahulambu community, the company staff approached them, proposing to start collaborative management by providing land, seeds, assistance, and a road to the community's hamlet. However, after months of collaboration, the company manager was displeased because the community members did not maintain their promise to cultivate the land properly. In an interview with me, the company manager expressed his confusion about what the original objective of the community had been in the land conflict. According to the company manager, after a decade of serious land conflict with the company, obtaining access to new arable land was not the primary objective of the community.

Later, I returned to ask the NGO activists who had assisted the local communities for many years against the company. The local NGO staff told me that the company's strategy to involve local communities in collaborative management schemes was not new. For decades, the company has tried to divide and rule the protesting communities, by approaching a particular group within a community and providing them with small benefits.[50] For the NGO activist, this approach was not sustainable, and it did not solve the actual land conflicts. Their statement reminded me of a minority group in Sipituhuta village, who chose to collaborate with the company instead of joining the majority Pandumaan-Sipituhuta community members who opposed it. This minority group expected benefits when they agreed to collaborate with the company, but now they are questioning the company because its promises to the group did not materialise.

[50] Interview with Delima Silalahi, on October 23rd, 2019.

5.6. Political pressure and options for customary forest recognition

Although the company began to make agreements with local communities, it did not mean that the company had actually stopped its repressive approach. For community groups that oppose the company operations, violence and criminalisation persist. In 2019, violence occurred in the conflict between PT. TPL and the Sihaporas community in Simalungun District. PT. TPL managers reported the customary leaders of the Sihaporas community to the police, because of their violent response to the company workers who had planted eucalyptus trees in the community's customary territory. In 2020, the Simalungun district court sentenced two Sihaporas community leaders, Jhonny Ambarita and Thomson Ambarita, to nine months in prison, because they had beaten up the company staff working in the conflicted areas.

In May 2021, another violent conflict occurred between local community members and PT. TPL workers in Natumingka village, in Toba District. As 500 PT. TPL workers prepared to plant eucalyptus trees, Natumingka community members blocked the roads and prevented company workers from planting anything, claiming that the company was grabbing their customary land. In the physical conflict that ensued by company security guards many Natumingka community members were injured. They reported the violence to the police, but the police did not follow up by arresting the company security guards. The conflict that occurred in the Natumingka community was taken up by many organisations that had been unhappy with the company's operations around Lake Toba. In addition to KSPPM and AMAN, which had both been opposing PT. TPL for a long time, protests also came from the Indonesian Church Association (*Persekutuan Gereja-Gereja Indonesia*/PGI), the largest Protestant Christian church organisation in Indonesia. Togu Simorangkir, an environmental activist in Lake Toba and the grandson of King Sisingamangaraja XII (the most famous national Batak hero) also joined the protests. This time, the narrative of the group opposing the operations of PT. TPL became even more diverse than in the previous 30 years. In addition to the arguments regarding land grabs and environmental pollution, there was also a narrative that marginalised groups should be protected against "the oppressive giants", and a link with the struggle against colonialism in Batak land, in the spirit of Sisingamangaraja. The shared demand of this diverse group of opponents was to close PT. TPL in North Sumatra. Inspired by the fact that, in the past, the people's protest movement had once

succeeded in convincing the government to stop the company's operations, they were fully confident it could happen again.

KSPPM and other NGOs gathered together all the local communities involved in conflicts with PT. TPL, to strengthen the message that PT. TPL should be closed down. Meanwhile, Togu Simorangkir, and ten other Batak, did a foot march from Lake Toba to Jakarta, in order to draw attention to the community's land conflict with PT. TPL. The march was a 44-day walk, covering 1,758 km, and it gained widespread national media attention. Anticipating the increasing escalation of local community action demanding the closure of PT. TPL, the Minister of Environment and Forestry visited KSPPM and local communities in North Sumatra. The results of the meeting were reported to President Joko Widodo. On August 6th 2021, President Joko Widodo received Togu Simorangkir at the presidential palace, in Jakarta. The president said he would read the documents brought by Togu, adding that it was not easy to close PT. TPL. Instead, the president promised to release legal recognition of 15 more of the customary forests of adat communities in conflict with PT. TPL.[51]

The current situation is different from that of 1999, when the government closed down the company. Currently, closing a company is not a good option from the government's perspective, because it would not support the government aim to create a positive business investment climate. In addition, the government has created many conflict resolution mechanisms to address forest tenure conflicts (see Chapter 2). Within this new political context, legal recognition of customary forests might once again become a relevant option for the government to channel local community grievances in land conflicts. The Pandumaan-Sipituhuta case is an example that legal recognition of customary forests can be used to channel land conflict between local communities and PT. TPL. Nevertheless, it seems that the 15 newly-recognised adat communities will suffer the same fate, and will get entangled in the complexity of procedures for recognising customary forests, just like the Pandumaan-Sipituhuta community.

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[51] President Jokowi receives environmental activist, Togu Simorangkir, at the palace. Source: https://www.presidenri.go.id/siaran-pers/presiden-jokowi-terima-aktivis-lingkungan-togu-simorangkir-di-istana/?fbclid=IwAR0NSORNz3uGB-QPyTS6ah_wtoAEJqKwVB9YWo-6479aFb0EQhot7TfRgFc (Accessed on September 4, 2021)

5.7. Conclusion

This chapter shows that the process for obtaining legal recognition of customary forest is complex, costly, and lengthy. Dispossessed farmers find themselves caught in a legal recognition trap, deprived of alternatives to protect their land. Several factors cause this stalemate situation. First, state regulations on legal recognition procedures have been changing over time. Second, the two-phased process requires legal recognition as an adat community before customary forests can be recognised. Third is the discretion of government agencies to slow down the process, and to divert and select from the demands of local communities. The fourth is uncertainty about the outcome of legal recognition. The consequence of pursuing legal recognition in land conflicts is that the core activity of the struggle shifts from protecting customary land rights to finalising the complicated procedure of legally defining customary identity and obtaining legal recognition. Such a shift changes the stakes in land conflicts.

The Pandumaan-Sipituhuta case shows that legal recognition can be obtained, but that it will not put an end to land conflict with big corporations if the recognition is only partial, and thus not implemented. Celebration of the victory of the adat movement and community at the presidential palace in 2016, and again in 2021, was premature. The community and NGOs had indeed finalised the complicated procedure of legally defining customary identity and obtaining legal recognition, but that was insufficient for reclaiming their land. The government can even implement a new project on customary forest land without the consent of the adat community members, under the pretext of national strategic programmes, such as food estate programmes.

Companies have extensive resources for co-opting local community groups and increasing social acceptance of their business activities (Li and Semedi 2021). Companies can also strengthen their influence on policy makers at district and national levels, and serve the government's economic interests. In turn, the government should protect companies' interests, when they operate in accordance with state regulations, and with all the necessary government permits and licenses (Lund 2021). This condition makes legal advocacy of customary land rights recognition more complicated, when dealing with big companies.

This chapter shows that the effectiveness of adat strategy not only relies on fulfilling formal requirements stipulated in legislation, it also depends on how the various actors involved deal with the process, or

even hinder it. Legal recognition will have a better chance of success if the community and NGOs have an extensive network and the ability to put strong pressure on government policy makers at both regional and national levels. This chapter emphasises that legal recognition is not merely a legal, but also a political, process. Finally, although the legal recognition strategy has limited value as a solution for land dispossession caused by large companies, perhaps there is still potential benefit in adat strategies for solving other types of land conflicts. The next chapter will discuss the legal recognition strategy employed by local communities involved in land conflicts with national parks.

6 Getting legal recognition for customary forests

6.1. Introduction

Following my analysis of two complex cases of uncompleted legal recognition of customary land rights, in the previous two chapters, it might seem that full legal recognition of customary land rights is impossible in Indonesia. However, that is not true. This chapter shows that some adat communities have indeed been successful in their struggles to obtain legal recognition of their customary land rights. These communities have not only successfully identified their land tenure problem in land conflicts with external actors (stage 1) and categorised their problems as customary land tenure issues (stage 2), they have also successfully followed legal procedures to obtain legal recognition of their customary land tenure from the state (stage 3). The central questions in this chapter concern the explanation of success. Why and how did these local communities succeed in obtaining state recognition of their customary land rights? What were the enabling factors, and who were the most determinant actors in the state legal process for the recognition of customary land rights?

In this chapter,[52] I analyse the course of events in the two successful cases by systematically following the legal recognition process steps described in chapter 1. This chapter focuses on two communities: the Kasepuhan Karang community (Banten Province) and the Marena community (Central Sulawesi). Both communities obtained legal recognition of their customary forests, in order to end their land conflicts with forestry agencies. The cause of the land conflict in these cases was similar, in that national park agencies were restricting local community use of the forest areas and resources near their settlements.

When the national parks were established, in the 1980s and 1990s, local community members did not consider the overlapping land claims between themselves and the national parks to be a violation of their customary land rights. They began to articulate their land claim using

52 This chapter is based on the article : Yance Arizona, Muki Trenggono Wicaksono & Jacqueline Vel (2019). 'The Role of Indigeneity NGOs in the Legal Recognition of Adat Communities and Customary Forests in Indonesia,' *The Asia Pacific Journal of Anthropology*, 20:5, 487-506, DOI: 10.1080/14442213.2019.1670241

an adat narrative after they started receiving assistance from local NGOs. Local NGOs helped local community members to revitalise customary law and institutions and supported the mapping of customary territories as a basis for land claims against the national parks. Furthermore, local NGOs and their national networks became intermediary actors, urging district governments and the Ministry of Environment and Forestry (MoEF) to recognise customary forests, as a solution to forest tenure conflicts. This strategy gained momentum when the constitutional court released a ruling that affirmed the legal status of customary forests as separate from that of state forests. Subsequently, the MoEF started to develop regulation and pilot projects to recognise customary forests, in order to implement the court ruling. NGOs which specialised in promoting the legal recognition of customary land rights promoted some communities – the Kasepuhan Karang and Marena communities, amongst others – as pilot projects. Furthermore, local community and NGO networks engaged in local and national political processes, to ensure that government agencies at different levels included the agenda of legal recognition in their policy programmes. In the end, with significant support from the NGOs, the Kasepuhan Karang and Marena communities managed to gain legal recognition of their customary forests.

The analysis of the Kasepuhan Karang and Marena community cases results in the preliminary conclusion that successful cases of legal recognition of customary land rights always concern land conflicts between communities and the government agencies in charge of conservation forest areas. For the national adat movement, such successes have become showcases of state commitment to fulfilling adat community rights. Both cases discussed in this chapter indeed concern adat communities that have been involved in land conflicts with the national park authorities. Instead of reproducing the superficial conclusions found in adat movement reports about these cases, this chapter goes deeper, answering the question regarding the character of success and the reasons for it, with an in-depth analysis of the process of recognition - from the initial problems, to full and final recognition.

Before analysing the case studies, this chapter will first describe the context of land conflicts in forest conservation areas. This description is needed in order to understand the nature of forest conservation conflict compared to forest tenure conflict with mining or forest production/logging companies. I will then explain and analyse the two case studies in Banten and Central Sulawesi. The case studies discuss the

actual legal processes and results regarding customary forest recognition, and how local communities can navigate the complex procedure and obtain legal recognition.

My analysis of the case studies focuses on two specific aspects. The first is concerned with the identification factors which enable local communities to obtain legal recognition. I also distinguish between internal and external enabling factors for the legal recognition of customary forests. The second is analysis of the roles of the most prominent actors in the legal recognition process. I found that NGOs are the most significant actors at every step of the legal recognition process. I classify the NGOs involved in the legal recognition process, and explain their roles at each stage of legal recognition.

6.2. Land dispossession for forest conservation projects

Literature on land grabbing shows that large-scale land dispossession occurs because governments and business enterprises claim large areas of land for extractive industries, but also for nature conservation purposes. This 'green grabbing' – the appropriation of land and resources for environmental ends – is an emerging land dispossession process, with specific characteristics (Fairhead, Leach and Scoones 2012). In Indonesia, from colonial times onwards, the government has claimed large-scale forest areas in order to establish forest conservation areas. In some cases, the government has involved the private sector in managing its conservation projects. To the present day, the government of Indonesia has designated 554 conservation areas, spread throughout all provinces of the country and covering a total area of 27.4 million hectares, or 23% of the total forest area (SOIFO 2020).53 To give a sense of size: the total conservation area in Indonesia is larger than the United Kingdom.

The government created national park agencies to manage forest conservation areas. The management of forest areas by government agencies is supported by two main assumptions. The first assumption is that the government is the most appropriate manager of conservation areas. The second assumption is that conservation areas must be under the direct control of state agencies, and a boundary must be created which indicates that the forest conservation area is state property. Thus, the government determines what kind of human activities can be

53 Conservation areas in Indonesia consist of forest conservation areas (22.1 million hectares) and marine conservation areas (5.3 million hectares). (SOIFO 2020)

preserved and what types of plants can be cultivated in conservation areas.

From this government policy perspective, local communities are considered to be a threat to the preservation of nature. Because of productive activities being limited in conservation areas, most regions with large conservation areas, such as in the Banten and Central Sulawesi Provinces, are those with low gross regional domestic product. Usually, people who live close to conservation areas are poor subsistence farmers. Access to the forest, to gather non-timber forest products or to grow crops beneath or between trees, are sources of livelihood on which these farmers depend for their daily needs. Therefore, when conservation areas are expanded and the restrictions imposed by national park agencies on local community access to the forest become more severe, there will be conflicts between the government and local communities.

The legal options for solving forest tenure conflicts in forest conservation areas are limited. As I explained in Chapter 2, there are two options. The first option is to create a conservation partnership, where local communities agree to create joint activities with national parks, in order to preserve state forest conservation areas. The second option is customary forest recognition, in which the MoEF recognises the customary land rights of adat communities, and leaves the management of conservation areas to adat community organisations. In this chapter I focus on the second option, in order to understand how the adat communities in Banten and Central Sulawesi follow the legal recognition strategy to end their land conflicts with national park agencies.

6.3. Two successful cases: Kasepuhan Karang community and Marena community

The following case studies present the results of field research that I conducted in 2010-2019. Research on the Kasepuhan Karang community was partly conducted by Muki Wicaksono, then completed by my own recent fieldwork, in 2018-2019. Research on the Marena community derived from my previous research and engagement in customary land rights advocacy, in 2010, 2013, and 2016. Information was gathered through interviews, with villagers, adat elders, NGO activists, donors, and government officials at the national, district and local levels. Additionally, I gathered data while engaging in legal empowerment activities in the Lebak and Sigi districts. Four reports by NGO activists

(Wiratraman 2010; Sutrisno 2015; Vitasari and Ramdhaniaty 2015; Nurhawan and Ramdhaniaty 2015), about the two case studies in this chapter, provided secondary data.

6.3.1. Kasepuhan Karang community v. Mount Halimun-Salak National Park in Banten

The Kasepuhan Karang community is one of many Kasepuhan communities in the Lebak district. According to oral history, this community first settled in the Kasepuhan Karang area during the colonial period. The majority of community members are farmers who cultivate vegetables, rice, and fruits, such as banana, durian, and mangosteen. Fruit production has become the leading cash earning activity, with constant demand from the urban markets of Jakarta and Bogor, nearby. Membership of the Kasepuhan community is determined by kinship, respect for the elders, and obedience to customary laws. Currently, the Kasepuhan Karang settlement is part of the administrative village, Jagaraksa, where three other Kasepuhan communities also reside.

Land conflicts with Kasepuhan Karang began in 1924-1936, when Dutch colonial rule determined that the Halimun Mountains should be preserved as forest areas. The colonial government considered the area to be unoccupied land, and thus state property. Using the forest area without government permission was not allowed. This rule continued during the transition to national independence in 1963, when the Forestry Agency changed the Halimun forest's status to 'nature reserve'. In 1975, the Forestry Agency changed the forest's status to 'forest production area', under the control of Perhutani, a state-owned forestry enterprise. Perhutani allowed villagers to cultivate forest areas, whilst levying "informal taxes" for their use, and this became a common practice in the Halimun Mountains (Cahyono et al. 2016:168-9). In 1992, a part of the Perhutani area, which the Kasepuhan Karang also had claim to, was reincorporated into the Gunung Halimun Salak National Park. Furthermore, in 2003, the Ministry of Forestry expanded the national park area to include the former Perhutani areas located in the Kasepuhan Karang area. In practice, this did not change the villagers' access to the forest, but the status of the national park included restrictions on the kinds of trees that villagers could cultivate, and fruit trees were prohibited. Following the sequence of land dispossession, only 29% of the land remained under community authority (Ramdhaniaty 2018).

Due to these state enclosures to local community members, and their precarious legal position, the community members started to protest. They demanded legal access to the forest, for their agricultural activities and to collect non-timber forest products. They also demanded an end to extortion by forestry officials and the lifting of restrictions on fruit tree cultivation.

6.3.2. Marena community v. Lore Lindu National Park in Central Sulawesi

The second case study is the Marena community, in Central Sulawesi. The area now called Marena was first inhabited by members of the Kulawi ethnic group from Bolapapu village, who settled in the area in the 1930s. Gradually, a few other migrants followed from various districts and provinces in Sulawesi, as well as from Java. They created livelihoods as farmers, cultivating cacao, rice and vegetables. Despite the diversity of its origin, Marena's population gradually became a community with its own internal rules.

The first land conflict between Marena community members and state agencies began in the 1970s, when the Provincial Forestry Bureau initiated a programme to rehabilitate degraded land. In reality, the bureau aimed to establish a clove plantation, by dispossessing Marena community members of their land (Sutrisno 2015). When the clove price dropped, the Provincial Forestry Bureau transferred the land to a local government enterprise, PD Sulteng. This local enterprise continued clove and cinnamon cultivation, but the plantation was not well maintained and was finally abandoned in 1986. However, the land kept its status of 'state land', and local community members could not cultivate the land legally and physically.

The second land conflict arose when the government established the Lore Lindu National Park in 1982, covering 231,000 hectares. The national park claimed the western part of Marena's territory, without consulting with and obtaining consent from Marena community members. The third conflict concerned the eastern side of the Marena's territory, where the government had established a protected forest area. As a result of this, Marena community members were squeezed between the two state territorialisation projects, and were left with insufficient land for expanding their settlement areas or agricultural activities. After the three waves of dispossession, only 24% of the land remained under community authority (Sutrisno 2015). The Marena villagers wanted to

retain access to the national park area, to continue their customary forest practices, and to preserve their agricultural land for future generations.

It is important to note that the Marena community is not the only local community involved in land conflicts with the national park in Central Sulawesi. The land conflicts between local communities and forestry agencies, including the national parks, is pervasive because the government designated nearly 70% of the total provincial area as state forest, overlapping with many local community settlements (Sangadji 2007).

6.3.3. Framing and claiming identity

Local communities engaged in land conflicts regarding conservation forest areas often face restrictions and intimidation by national park rangers. Generally, local community members follow the restrictions imposed on them, because they cannot resist park rangers' demands. Usually, local community members simply avoid confrontation with park rangers, which is a common strategy for weak peasants in land conflicts (Scott 1985). The power imbalance between local community members and national park rangers is ubiquitous, especially in conservation areas located in frontier areas. Therefore, local community members seek support from outsiders. This offers an opportunity for local NGOs to support local communities involved in land conflicts. NGOs act as intermediaries between local communities and state agencies, when discussing solutions to land conflicts. Local community members expect NGOs to help leverage their community bargaining positions in land conflicts. From their side, NGOs support local communities in expanding their constituencies to legitimise their agendas. Initiatives to build relationships between local communities and NGOs vary, depending on specific conditions in the field, as we can see in the Kasepuhan Karang and Marena community cases.

In the case of the Kasepuhan Karang community, Wahid, the newly elected head of Jagaraksa village, tried to find a local NGO that could help them. In 2011, he visited the Rimbawan Muda Indonesia (RMI) office, a local NGO based in Bogor. Founded in 1992, RMI has been working with Kasepuhan communities since 2001. RMI has experience assisting Kasepuhan communities who have overlapping land claims with forestry agencies in Banten province, mainly those from Halimun Salak National Park. Wahid expected that RMI would help them counter repression by national park rangers, following the intimidation of a Jagaraksa villager, whilst he was making charcoal, by a national park

ranger. In the beginning, Wahid did not think about adat as a basis for countering the national park agency. He was just concerned with the restrictions and repression imposed by the national park agency on his community members.

By contrast, the Marena community members first tried to file a complaint to the district government in the 1990s about their land conflict with the national park, but there was no response. New momentum emerged after the fall of the Suharto regime. In 2000, a local NGO, Lembaga Pencinta Alam Awam Green (LPAAG), visited Marena community members. LPAAG was a provincial NGO, established in 1995 by students based in the provincial capital, Palu. Originally, LPAAG was a nature loving student organisation, which cared about environmental issues. However, after seeing the structural problems experienced by local communities in Central Sulawesi, due to restrictions from national parks, they began to pay attention to advocacy. LPPAG has a strategic partner, the NGO YBH Bantaya, also based in Palu.[54] YBH Bantaya in Central Sulawesi and RMI in Banten are also strategic regional partners of the national legal advocacy NGO, HuMa, based in Jakarta (Vitasari and Ramdhaniaty, 2015:23). Together, they started to support Marena community members intensively. How their coalition operates will become clear at the next stage of the legal recognition process.

When the Kasepuhan Karang and Marena community members spoke with NGOs, NGO staff framed their land problems as the consequence of state territorialisation in frontier areas. A popular strategy amongst national advocacy NGOs such as HuMa and AMAN, and their partners at the local level, is to use customary land claims to argue against state territorialisation. Implementing this strategy in Banten and Central Sulawesi resonated with other cases that had been successful in articulating adat as an argument for securing land tenure for local communities in other provinces. In 2001, the Lebak District Parliament (Banten) enacted the first district regulation to recognise customary land rights in Indonesia, for the Baduy community (Toha 2007).[55]

Since 2005, inspired by the legal recognition of Baduy customary land rights, RMI has engaged in promoting district regulations for the

[54] Interview with the first author and the Head of Marena village, in November 2016.
[55] The Baduy community is a famous exclusive traditional community that rejects any modern influences, including electricity, formal education, and formal religion.

legal recognition of the Kasepuhan as adat communities, as well as supporting them in claiming rights to their customary land. In the beginning, the district government did not acknowledge the Kasepuhan's adat claims, arguing that Kasepuhan communities did not fulfil the required criteria to be defined as adat communities. The majority of Kasepuhan community members had converted to Islam, had received a formal education, and had not maintained adat practices to the same extent as the Baduy, all of which weakened their claim to be a distinct adat community (Vitasari and Ramdhaniaty 2015:27-8).

Similarly, LPAAG and YBH Bantaya, in Central Sulawesi, learned the use of adat strategy from another NGO, Yayasan Tanah Merdeka (YTM), which had successfully assisted the Lindu people in their struggle against land dispossession for a mega-dam project (Sangadji 1994; Sangadji 2007:327). Another strategic case prevented the displacement of the Katu people from a national park area (D'Andrea 2013; Rachman and Masalam 2017). In these cases, using adat as the basis for (re-)claiming land from state authorities was a new strategy that had emerged after rural communities contacted urban activists (Li 2000; Sangadji 2007).

Thereafter, NGOs supported the revival of adat in the Kasepuhan Karang and Marena communities, by promoting the revitalisation of traditional ceremonies, training the villagers to revive customary rules and institutions, and conducting participatory mapping (Nurhawan and Ramdhaniaty 2015; Wiratraman et al., 2010:118-9). The NGOs' intervention can be regarded as a remoulding of existing traditions into a format that is legally acceptable regarding the procedures for customary forest recognition. Customary elders supported these activities, because they strengthened their traditional roles. The NGOs also worked with young community members, to engage them in the adat cause whilst training them in new skills to produce participatory mapping and conflict documentation. The idea was that, as a result of this work, the younger generation would have the ability to transfer the NGOs' agenda to the respective community members (Sangadji 2007:330). In this way, NGOs offered a new way to frame the land struggle regarding adat and indigeneity.

In Kasepuhan Karang, local community members were worried about continuing their agroforestry activities in areas that the government has designated national park. This is coupled with concern caused by the repression they faced when one of their community members was interrogated by the police for making charcoal. Unlike

Kasepuhan Karang, the Marena community have taken active action to counter land dispossession. In 2001, the Marena community took control of 125 hectares of former PD Sulteng plantation land. The community members used the land to establish public facilities and a hamlet. They divided the reclaimed area up into plots of 225 m², one for each family involved in the reclaiming process. When I visited Marena village in 2016, the village head informed me that the National Land Agency had delineated land plots in the area, and Marena community members would receive an individual land certificate for the former PD Sulteng plantation land.

After the successful land claims regarding the PD Sulteng area, the Marena community continued their struggle to obtain better access to the national park area. In negotiations with forestry officials, and with the support of NGOs, the Marena community relied on adat as the basis of their claim. In 2006, NGOs facilitated a meeting with national park officers, aiming to solve the problem of overlapping areas through dialogue, but the National Park officers refused Marena's community land claim. In 2007, adopting an alternative strategy, Marena community elders held an adat tribunal to indict a ranger who had entered the Marena territory without permission, and had then fired his gun into the air for no reason. Instead of accusing the ranger as an individual, the elders adjudicated on the national park as an institutional perpetrator. The head of the national park at the time accepted the adat tribunal's decision, and agreed with the Marena's proposal to establish co-management responsibilities for managing the areas overlapping the Marena community and the national park. This was the first legal recognition to be obtained by the Marena community from a state institution. Unfortunately, it was never implemented, because the head of the national park was replaced, and his successor refuted the previous agreement.

6.3.4. Political opportunities and the legal recognition strategy

With the support of local and national NGOs, the Kasepuhan Karang and Marena communities engaged in various activities to strengthen the basis of their customary land claims. NGOs helped them to revitalise customary values and institutions, and supported the creation of customary land maps. Strengthening their adat identity is a prerequisite to a community obtaining customary land rights recognition. However, national park officers, in both Banten and Central Sulawesi, rejected the Kasepuhan Karang and Marena communities' customary land claims.

This was linked with neglecting to implement regulations to recognise the customary forest of adat communities. At this point, there were no promising solutions available to resolve the conflicts.

In 2013, a new opportunity to solve land conflicts emerged, when the constitutional court granted AMAN's petition for the legal recognition of customary forest. National NGOs pushed the government agencies to create implementation regulations, in order to realise customary forest recognition (see Chapter 3). The MoEF created ministerial regulations on customary forest recognition procedures, and established a working group to select pilot projects. In order to follow-up on this, the national NGO, HuMa, and its local partners, including RMI and YBH Bantaya, conducted a study for a pilot project to implement the court ruling. With financial support from the Rainforest Foundation Norway (RFN), NGO researchers conducted research and proposed that 13 customary forests be granted legal recognition by the government, including Kasepuhan Karang and Marena. The National Commission on Human Rights of the Republic of Indonesia (NCHR) also conducted a national inquiry on violating adat communities' rights in forest areas (see Chapter 3). Both communities were also included as selected case studies by NGOs and NCHR (Cahyono et al., 2016). Therefore, the Kasepuhan Karang and Marena cases became national pilot projects to implement the court ruling.

The legal work turned out to be complicated, because the legal recognition of customary forest required local communities to have the appropriate legal standing as adat communities. This meant that the Kasepuhan and Marena communities first had to be recognised by district governments as adat communities, before the MoEF could designate customary forest recognition. For RMI and its partners, Constitutional Court ruling Number 35/2012 propelled their plan to encourage the local government to create a district regulation on the legal recognition of adat communities in the Lebak district. One of the petitioners for the case in the constitutional court was another Kasepuhan community, the Cisitu, which made the ruling even more symbolically relevant for all Kasepuhan communities. Advocates used the court ruling to convince Lebak's district government that every Kasepuhan community should be recognised as an adat community.

In early 2014, RMI and some national NGOs organised a meeting with Lebak's district parliament, which resulted in the parliament agreeing to prepare a district regulation for the legal recognition of

Kasepuhan communities. The leaders of SABAKI,[56] a membership-based organisation of Kasepuhan communities, requested that the district parliament involve specialist NGOs in producing an academic review (*naskah akademik*) and draft regulation. The district parliament agreed and asked Epistema Institute and RMI staff to do the job, the financial support for which was received by the NGOs from the Toyota Foundation. At the time, I was working for the Epistema Institute and was one of the authors of the academic review. Moreover, with the support of Prorep-USAID, an American donor agency, the Epistema Institute organised a knowledge exchange programme for parliament members from various districts, about the law-making process for legal recognition of adat communities and their customary rights (Vitasari and Ramdhaniaty 2015:37). Another national institution, Kemitraan, a semi-NGO donor agency, provided financial support to local NGOs, so that they could explain and discuss the draft district regulation at village level (Vitasari and Ramdhaniaty 2015:38). With considerable support from donor agencies, local NGOs included more adat communities in their constituency, in order to increase political pressure on district government and parliaments.

Meanwhile, in Lebak, the political situation changed in favour of the Kasepuhan communities. A political deal between the incumbent district head and the Kasepuhan communities worked out well, when votes for the district head's daughter as candidate in the district head elections in 2013 were offered in return for his support to recognise adat communities. The district head issued a decree that recognised 17 Kasepuhan communities, and pledged to create a district regulation accommodating more Kasepuhan communities. This strategy led to election victory for his daughter, who was on a ticket together with a Kasepuhan member as deputy district head candidate. Furthermore, the local parliament elections in 2014 resulted in an increase in local parliament members with a Kasepuhan community background. The chairman of Lebak's district parliament, who is also a member of a Kasepuhan community, actively promoted the legal recognition of Kasepuhan communities. Finally, in November 2015, the Lebak district parliament passed a district regulation that recognised 522 Kasepuhan

[56] *Satuan Adat Banten Kidul* (SABAKI) is an adat organisation that consists of 66 Kasepuhan communities from the Lebak, Bogor and Sukabumi districts. The organization was established in 1968, and it later became a regional branch of AMAN in Banten Province (Mahmud et, al., 2015).

community groups and designated 116,789 hectares of land (equal to one-third of the total area of Lebak district) as Kasepuhan territories.

A similar strategy was also carried out by NGOs and local communities in Sigi district, Central Sulawesi. Anticipating trouble in getting a district regulation through parliament, YBH Bantaya, HuMa, and some Marena community members negotiated with the Sigi district government to obtain a district head decree concerning the recognition of the Marena community. Besides a district regulation, a district head can also create a decree to recognise adat communities (see chapter 3). In 2015, the Head of Sigi district issued the desired decree, which had been drafted by YBH Bantaya staff, with substantial input from Marena community members. In the same year, the Central Sulawesi AMAN branch, with support from the Epistema Institute, tried to convince the Sigi district head to issue recognition decrees for the To Kulawi and To Kaili communities, as well. The district head was susceptible to the adat campaign, because he saw the opportunity to barter for political support from local NGOs and adat communities for his wife, who was running as a candidate in the upcoming district head elections.

On the basis of the legal recognition by district governments and parliaments, national NGOs went on to propose that the Kasepuhan Karang and Marena customary forests should receive legal recognition by the MoEF. The NGO specialists assessed their chances of success as favourable because their colleagues, whom the ministry had invited to join a team accelerating the legal recognition of customary forests, could support their case. The next step was the validation and verification of the proposed customary forests by ministry officials. In the case of the Kasepuhan Karang, MoEF officials were hesitant – during the verification and validation process – because the area overlapping with the Mount Halimun-Salak National Park was occupied by thousands of local land users performing agroforestry activities. They assumed that, if legal recognition of customary forest were to be granted to the Kasepuhan Karang community, individual land users might sell the land, because the land plots had been individualised as agroforest gardens. The process was delayed for nearly one year, because a high-level official at the ministry obstructed customary forest designation. National political realities eventually forced the ministry to grant recognition, because part of President Joko Widodo's election campaign was to promise to include the legal recognition of adat community rights in the national development programme. The ceremony in December 2016, at the Presidential Palace, where President Joko Widodo handed

over the legal recognition decree for customary forests, was the final fulfilment of the president's pledge to adat communities.

In Marena, the verification and validation of customary forests at ground level generated problems. When Marena community members found out that MoEF officials had not included the national park area that overlaps with Marena customary territory, they objected to the area that was ear-marked for recognition. Their objection caused a delay.[57] Finally, in 2017, while attending the AMAN Congress in North Sumatra, the Minister of Environment and Forestry announced that the government would grant legal recognition of the Marena customary forest. However, that too did not resolve the forest tenure conflict between the Marena community and the Lore Lindu National Park, because that recognition also excluded the national park area.

6.3.5. Outcomes of legal recognition

These two case studies show that it is possible for local communities to obtain legal recognition of their customary forests in Indonesia. The Kasepuhan Karang community gained customary forest recognition for the first time in 2016, along with other adat communities invited by the president to receive a legal recognition decree at the presidential palace. In the customary forest recognition decree, the MoEF released some national park areas, redesignating them as customary forest areas of the Kasepuhan Karang community. In addition, the MoEF also redesignated some non-forest areas – originally outside of the MoEF jurisdiction – located in Kasepuhan Karang territory as customary forest areas, because the geographical conditions of the land need to be protected as forest. Ironically, customary forest recognition expanded the MoEF authority to implement forestry regulation into Kasepuhan Karang community territory. On the other hand, the legal recognition of the Kasepuhan Karang customary forest ended repression by national park rangers. Therefore, adat communities are not completely free of the Ministry of Forestry's control.

Although the MoEF had recognised the customary forest, other problems emerged in the follow-up. Many local land users had cultivated land plots in the customary forest for a long time, but most of them were not members of the Kasepuhan Karang community. A detailed analysis of this, and other 'after the victory' problems, will be discussed in chapter 7.

[57] Interview with the Executive Director of HuMa, in June 2018.

In contrast to the Kasepuhan Karang community, which gained full recognition of its customary territory, the Marena community only received partial legal recognition. From the start of the conflict, Marena Community members had been complaining that their land overlapped with the national park. During the verification process for their application to get customary forest recognition, MoEF officials refused to include any part of the national park in the area to be recognised as Marena customary forest. This led to protests from Marena community members. As an alternative to the community's land claims, MoEF officials had shifted the location of the application to include 405 hectares of protected forest outside of the national park. The ministry had also added 756 hectares of Marena territory non-forest area to the customary forest application. Nonetheless, the Marena customary forest application now covered a smaller area - around three quarters of what they originally claimed. The area was also different in quality, because the Ministry of Forestry had excluded the national park area, and had compensated for it by providing a portion of protected forest area as Marena community customary forest.

Similarly to the Kasepuhan Karang case, the MoEF expanded its authority by designating non-Marena community territory forest as customary forest areas under MoEF supervision. Consequently, the legal recognition process of customary forests expanded MoEF control over customary territories. Moreover, the MoEF restricted adat community members from maintaining the forest according to its natural condition and forest function, as determined by the MoEF. Land transactions are not legally allowed, because the MoEF stated in its recognition decree that adat community members are prohibited from selling land in the customary forest. This means that legal recognition of customary forests does not guarantee adat communities full autonomy in exercising their authority over customary forests.

6.4. Enabling factors for legal recognition of customary forests

The success of customary forest rights recognition not only relies on the fulfilment of legal requirements stipulated in regulations, it also depends on other enabling and constraining factors. Identifying enabling factors helps to understand why adat communities, in some cases, have succeeded in getting legal recognition, whilst others have failed. From my analysis of the two case studies of the communities in Kasepuhan Karang and Marena, I have identified internal factors related to characteristics or conditions within the communities, and external

factors referring to supporting circumstances created by actors outside the communities.

6.4.1. Internal factors supporting recognition

Reflecting on the process in the two cases, I found at least five internal enabling factors for the legal recognition of customary forest. The first factor is consensus amongst the community members regarding their land tenure problems, their objectives, and their strategies for obtaining legal recognition to resolve forestry tenure conflicts. This seems to be a very obvious factor, but as the previous chapters have shown, it is not self-evident at all in practice.

The second factor is continuous support from the most powerful groups in the community. It is commonly known that a local community is not a single entity, but that it consists of different social groups. A local community is divided by clan, ethnicity, and occupation. Another crucial factor is the support of village heads. Both the case studies in this chapter show how important strong support from the village head is to the legal recognition agenda. In Indonesia, the village head is elected through direct elections by all villagers; therefore, the village head has political legitimacy at the local level. In addition, the village head is also representative of the state government, because they implement government programmes and obtain financial support from the government.

The third factor is the presence of community members capable of acting as intermediaries between all stakeholders. These key actors hold doubly strategic positions. On the one hand, they hold the position of representing local community interests when dealing with government officials. On the other hand, they have the ability to translate, for most community members, the advocacy agendas led by NGOs. This key actor is not always a formal or traditional leader in a local community. Sometimes, the actor comes from an educated group in society, because of his/her formal education. Or it is someone who masters playing the double role, because they are experienced in interacting with outsiders - for instance, because they have worked in a city.

The fourth factor concerns the ability of local community members to put political pressure on policymakers. Local communities can pressure policymakers at the national and district levels through demonstrations and other forms of social protest. Another way to put pressure on policymakers is through national and local elections. Local communities with a significant number of voters can encourage

candidates for the head of district elections, and district parliament members, to make legal recognition a priority in their campaign agendas. The Kasepuhan Karang and Marena community cases both show how significant numbers of local community members can support other community members in getting elected to district parliament. They can also convince candidates for district head elections to make a political contract to support the legal recognition agenda.

The last enabling factor concerns the potential transformation of adat from a set of social rules into a tool for exclusion in land conflicts. Many local communities still practice traditions inherited from their ancestors, for various purposes. The main role of adat can be found in many ceremonies regarding the life cycle - for example, those celebrating birth, marriage, and death. Most local communities also preserve traditional practices in land and natural resource management, for instance, by conducting post-harvest festivals. Both case studies show how local community members apply customary rules in everyday life, but using adat as the basis for collective land claims, and excluding outsiders (in these cases, the national park agencies), is a relatively new strategy for the communities.

6.4.2. External factors supporting recognition

External factors refer to the supporting circumstances created by actors outside of adat communities. The first external factor is the intensive support of NGOs in promoting legal recognition. In Chapter 1, I identified four types of NGOs in adat advocacy: local NGOs, national advocacy NGOs, specialised NGOs, and international NGOs. The diverse support of various categories of NGO is the most important element for legal recognition. Local NGOs intensively assist adat communities and connect with other categories of NGO at the national and international levels. Support from specialised NGOs makes the articulation of adat as a basis for land claims clearer, because NGOs can help adat communities to deliver their messages using policy language. For instance, NGOs can create customary land maps that clearly define the boundaries of customary territories, which is essential for making policymakers aware of such territories. Another important activity is transforming the demands of adat communities, via specialised legal NGOs, into draft regulations on the legal recognition of adat communities and customary forests.

The second external factor is a supportive national political and legal climate. A legal-political opportunity was created by the Constitutional

Court's ruling number 35/PUU-X/2012, affirming the status of customary forests as being separate from state forests. The ruling provided momentum for national NGOs to urge the national government to create procedural regulations on the legal recognition of adat communities and customary forests. National NGOs were involved in preparation of the regulation, and became members of a team created by the government to prepare pilot projects for customary forest recognition.

Another factor related to opportunity is supportive political momentum, particularly in terms of general elections – including those for president, district head, and district parliament. This opportunity is created because candidates need voters to obtain political positions at the national and district levels. Adat communities with a significant number of voters attract the attention of candidates. At the national level, AMAN played a role in encouraging presidential candidate, Joko Widodo, to incorporate the agenda of legal recognition into his political programmes. In return, AMAN conducted a campaign for the election of Joko Widodo. After Joko Widodo was elected as president, AMAN and other NGOs worked to ensure Joko Widodo realised his political promise. Similar negotiations were conducted by adat communities in Banten and Central Sulawesi. They made political contracts with district head candidates to include an agenda of legal recognition in their political programmes.

The third factor is the character of the opponent in forest tenure conflicts. The two case studies in this chapter discuss land conflicts between adat communities and national park agencies. The national park agency is a unit under the Ministry of Environment and Forestry; therefore, it is a government agency. In this kind of conflict, actors involve adat communities versus state agencies. I acknowledge that state agencies are not a single entity, consisting instead of various branches, with various authorities and operating regulations. In the context of legal recognition, if the top policymakers in government agencies (for example, the president and ministers) have recognised adat communities and customary forests, then subordinate agencies will follow the legal recognition. This is different in the context of conflict between adat communities and companies, as I discussed in chapters 4 and 5. In such conflicts, the characteristics of conflict are more complex, because they involve three groups of actors: adat communities, business companies, and state agencies. In this kind of conflict, legal recognition is an intermediary step for adat communities in solving their land

conflicts with business companies. I argue that the more direct conflict is, with legal recognition actors in government agencies, the more likely it is that adat communities will obtain legal recognition.

The fifth factor relates to the legal status of forests in land conflicts. Forest areas can be designated as production, protected, and conservation forest. A detailed explanation of the differences between the three functions is discussed in Chapter 2. The Kasepuhan Karang and Marena communities face land conflicts in conservation and protected forest areas. In these areas, no natural resource extractive businesses were in operation, as in the case of the Cek Bocek community (in Chapter 4) and the Pandumaan-Sipithutan community (in Chapter 5). In Kasepuhan Karang and Marena, land conflicts occurred between adat communities and national park agencies. The national park agency manages conservation forests, aiming to protect the forests from degradation. This aim aligns with the argument in the legal recognition of customary forests that adat communities are also guardians of the forest. Therefore, in land conflicts related to conservation areas, government agencies and adat communities share, at least in name, a similar value: to protect the environment and apply sustainable forest management. This idea of adat communities as guardians of the environment is an essential element of the emerging indigenous peoples' movement in Asia (Li 2001; Tsing 2007; Inguanzo 2018). The idea is supported by current customary forest recognition statistics. As of 2021, the government designated 75 customary forest sites throughout Indonesia. Of these 75 cases, 70 customary forest recognitions are designated from forest conservation and protected areas, and forest areas where the government has granted no land concessions to business enterprises. It shows that legal recognition hardly applies as a solution to land conflicts between adat communities and business enterprises.

The sixth factor is the support of government agencies with interests that converge with community interests. Both cases in this chapter reflect adat community interests in gaining legal access to agroforestry land, and adat communities can apply conservation-based customary rules in their territories. Other claims that often arise amongst local communities in land conflicts, such as demands for compensation or employment (as reflected in Chapter 4), did not appear in these cases. The community demands, in both cases, aligned with district government and MoEF interests. District governments support income generation for local communities from what used to be conservation

areas. In addition, the MoEF can expand its territory, because it also designates non-forest areas to be included in customary forest areas.

6.5. Conclusion

The case studies in this article provide two examples of how a local community manages to obtain legal recognition of their customary forest in a situation of land conflict with a national park agency. One community obtained full recognition, whilst another was partly successful. With the help of local development NGOs, the local communities translated their land problems into grievances that can be solved via legal recognition of their customary forests. Local NGOs trained local community members in presenting their grievances to policymakers, following the criteria for recognition, (for example) by using participatory mapping and by reviving expressions of traditional culture. After decentralisation moved recognition authority to the district level, specialised NGOs used their legal expertise to draft district regulations recognising specific adat communities. They worked as consultants for various parties involved in negotiations about customary land and forests. Local communities also started to engage in district politics, bartering constituency votes for political support for legal recognition. The consequence of this narrow focus on legal recognition is that recognition itself has become the end result of both projects.

This chapter also shows that successful case studies are not only determined by fulfilment of the formal requirements for legal recognition, as required in the regulations. Notably, encountering internal and enabling factors is crucial to being successful in the legal recognition process. Full combination of these factors is a rare coincidence. Internal and external enabling factors for the legal recognition process are complementary. However, this chapter shows that NGOs providing support, and the ability of adat communities to push government agencies to create legal recognition decrees, are the most determinant factors in the legal recognition process.

Successful legal recognition cases can inspire other local communities to follow a legal recognition strategy as an option for solving their own land conflicts. However, the effectiveness of customary forest recognition in addressing the main causes of land conflicts has not often been researched. The questions remain: Does legal recognition resolve the initial complaint by local community members, concerning land dispossession? Does legal recognition guarantee tenure security for individual land users? These questions will be explored in

the following chapter, where I discuss the impact of legal recognition on customary forests.

7 After the victory: The implementation of legal recognition and tenure security

7.1. Introduction

The final stage in the process for legal recognition of customary forest rights (as in the analytical framework applied in this research) is the post-legal recognition phase. This phase includes both the implementation and the impact of legal recognition. The post-legal recognition phase has not been clearly defined in state regulations. Only a very limited number of local communities in Indonesia have obtained legal recognition, so this phase has not been widely investigated. This chapter is intended to fill that gap. The central questions are: How is the legal recognition of customary forest being implemented, in practice? What is the impact of state recognition on local community members? Who benefits most from legal recognition, and why does the recognition of customary land rights provide tenure security for local land users? Lastly, does the formalisation of customary land rights lead to the formation of a land market?

Again, this chapter discusses the Kasepuhan Karang community case as a follow up to chapter 6, concentrating on the situation after recognition. I begin with an exploration of the assumptions and expectations regarding post-legal recognition in state regulations, scholarly literature, and the narratives of various actors involved in the implementation of legal recognition. Furthermore, I examine activities in the field by different actors, following legal recognition. The Kasepuhan Karang community case shows that legal recognition is important for rural development, because recognised communities can become the recipients of development projects. This chapter shows that, like obtaining legal recognition, the implementation phase is not a one-sided, top-down process from the government to adat community members. Various actors, with their own interests and strategies, shape the meaning of customary forest recognition.

Besides analysing the actors and processes involved in the implementation of legal recognition, this chapter also analyses the impact of customary forest recognition on tenure security and the development of a land market. The case findings suggest that legal recognition of customary forest as communal property does not

guarantee full land tenure security for individual land users. Some individual land users worry that customary forest status will reduce their access to land which they have cultivated for decades. In response to this situation, the village head in Kasepuhan Karang initiated the possibility of informal land registration for plots of land within the customary forest. The establishment of informal land registration, in this case, shows how individual and communal, as well as formal and informal, land management has become intertwined with the implementation of legal recognition, and how this has resulted in a hybrid model of land governance. With these findings, the chapter challenges Indonesian activists' and academics' main assumptions regarding the concept of customary land tenure. Furthermore, I will analyse whether the formalisation of a local community's land rights, through customary forest recognition followed by informal individual land registration, encourages the establishment of land markets within that community. A common assumption by the proponents of land tenure formalisation is that formalisation transforms the land into an asset that can be integrated into the market system, for examples transforming land into an asset for mortgaging and transaction. The lack of state recognition for customary land rights is considered to affect people's tenure security, which in turn impinges on people's social-economic security and development (Ubink 2009:7).

7.2. Assumptions and expectations regarding the implementation of customary forest recognition

Formal state recognition of customary forest rights might seem to imply a self-evident legal status, which provides the community involved with a new land regime, and clear rules on rights and obligations. However, in practice, that is not the case. Many stakeholders will try to realise the objectives that legal recognition entails from their own perspective. Implicitly, they either assume or expect that recognition will have specific effects. Here I distinguish between the assumptions that have been described in literature on customary land tenure recognition, the provisions in customary land right regulations, and the expectations from stakeholders directly involved in the legal recognition process.

From my academic literature review on the legal recognition of customary land rights, I found that the first assumption is that local communities will maintain their recognised customary forest in a way that protects the sustainability of the forest. This is in line with the assumption that local communities can manage the forest in more

sustainable ways, when that management is controlled by local and traditional institutions (Colchester 1994). The second assumption is that adat communities will maintain a permanent property relationship with their land. Therefore, customary land is inalienable, and any attempts by adat community leaders or individual land users to transfer customary land are prohibited. In other words, adat communities will strengthen their control over customary land rights, and avoid land markets, after obtaining legal recognition of their customary land rights.

The government perspective on implementation of legal recognition can be found in some of its regulations. For instance, the MoEF's ministerial regulation on customary forest (P.32/2015) stipulates that adat communities can obtain incentives from the government for customary forest community holders, including: empowerment programmes provided by the government, to increase customary forest management skills within the community; legitimised access, in order to collect non-timber forest products from the customary forest; and timber legality certificates. However, one year after customary forest recognition, the Kasepuhan Karang community members have not yet received any of these benefits from the MoEF. This indicates that what is stated in the ministerial regulation and the customary forest decree is not being immediately implemented by government agencies, in practice. Additionally, the Ministry of Environment and Forestry restricts adat communities from selling their customary forest to outsiders. This restriction is stated in the MoEF's regulation on the legal recognition of customary forests.

What is stated in the regulations is often not in line with the expectation of various stakeholders involved in implementation. During my fieldwork, I have explored the expectations of various actors involved – such as community leaders, NGOs, and government officials – regarding the implementation of legal recognition. In 2017, the local NGO, RMI, the Lebak District government, and the Jagaraksa village government initiated the first Customary Forest Festival. The festival was held in Jagaraksa village, to commemorate the first anniversary of customary forest recognition by the president. Representatives of the MoEF and the Presidential Staff Office attended the festival. During the opening of the Customary Forest Festival, the Head of Lebak District, Ivi Octavia, delivered a statement. She declared that: "The festival is a form of our strong commitment to the welfare of the Kasepuhan community, whose territory overlaps with the claims of other parties, namely

Gunung Halimun Salak National Park (TNGHS) and Perum Perhutani". For a long time, the Lebak district government had opposed TNGHS, because the local government could not run economic development programmes *and* support local communities' activities within the national park area. The Lebak District government has supported many initiatives challenging the domination of the national park agency in the district because, from the district government perspective, greater recognition of customary forest would lead to higher economic production in the district. The Bupati expected that other Kasepuhan communities in the district would replicate the Kasepuhan Karang initiative.

In a similar vein, RMI and a coalition of NGOs advocating for the recognition of customary forests hoped that the festival would inspire other Kasepuhan communities to submit their own requests for customary forest recognition to the MoEF, particularly the communities that have an area overlapping with the national park. These NGOs measure the success of their campaign for customary forest recognition in terms of the number of local communities that have obtained legal rights to their customary forests. Lebak District Regulation Number 8 of 2015 stipulated that there are 522 distinct Kasepuhan communities in Lebak District, and most of them claim an area that conflicts with the national park. As already mentioned in the previous chapter, the Ministry of Forestry unilaterally designated many Kasepuhan territories as national park areas, without first obtaining consent from local communities. This began in the Dutch colonial period, and was sustained by subsequent governments. The most recent government decree on expanding the national park territory was enacted in 2003. Since 2003, 42,925 ha out of the 304,472 ha Lebak District area (14%) was under the control of the national park (see Chapter 6). The Lebak District Government released data which showed that 11,015.50 ha of agricultural land and 1,118.50 ha of residential area overlapped with national park area. The overlap caused a situation in which 8% of the Lebak District population became vulnerable, because they could be accused of either illegal squatting or illegally accessing the forest, according to the Forestry Law. Therefore, NGOs expected that successful implementation of customary forest recognition in the

Kasepuhan Karang would attract the attention of other Kasepuhan communities following a similar path.[58]

Jaro Wahid, the head of Jagaraksa village, had his own (more concrete) expectations for the implementation of customary forest recognition. He expected that local community members would receive government incentives, financial support, or activities to directly improve community-based forest management, especially from the Ministry of Environment and Forestry. Most land users who had been using land in the customary forest area for decades expected that customary forest recognition would release them from restrictions imposed on them by national park officials. They would be free to cultivate forest gardens, to generate a household income. By contrast, some of the land users from outside of the Kasepuhan Karang community who had cultivated land plots in the customary forest area for many decades also felt worried about the new status of the customary forest. They assumed that customary forest status could mean that further cultivating their plots would be prohibited by Kasepuhan customary leaders.

All these different assumptions and expectations led to a variety of strategies for implementing legal recognition. It opened up a new arena of land politics, concentrating on questions about who owns what, who does what, and who gets what after the community has obtained customary forest recognition, as well as what they do with it, and why (Bernstein 2010, 23). The following section will zoom in on the Kasepuhan Karang community case, to provide a foundation for answering these questions.

7.3. After the Kasepuhan Karang community victory

After obtaining legal recognition, there were four main developments in the Kasepuhan Karang customary forest case. First, the community had to inform and convince other stakeholders of the forest's new legal status. Second, community members had to secure the continuation and expansion of their economic activities in the customary forest, and use the opportunity to qualify for government-led economic development projects targeted at adat communities. Thirdly, they had to transform land-use rights in the customary forest into official documents, so that

[58] In 2019, the MoEF recognised other Kasepuhan community customary forest, including the Kasepuhan Citorek (1.647 ha), the Kasepuhan Pasir Eurih (580 ha), the Kasepuhan Cirompang (306 ha), and the Kasepuhan Cibarani (490 ha).

they could use their entitlement to part of the customary forest as collateral for loan from a local credit union. And finally, the village head created an informal land registration system for individual rights to customary forest land.

7.3.1. Exercising community control over customary forest areas

After the MoEF recognised the Kasepuhan Karang customary forest, community members tried to take effective control of the disputed areas. Beforehand, local community members were afraid to cut down trees in the disputed area with the national park; this changed, once they had obtained legal recognition from the minister. The first thing the community members did was to create a camping ground. Jaro Wahid encouraged young people in the village to build a tourist destination in the customary forest. A youth group established the Cepak Situ camping ground, by clearing some teak trees. Once the camping ground had been established, two forest rangers visited the location and asked the group why they had cut down the teak trees. Finding that they could not explain the meaning of the new status of recognised customary forest to the rangers, the boys called on the village head, Jaro Wahid. He spoke to the forest rangers and clarified that the teak forest in Cepak Situ was no longer part of the national park area, because the forestry minister had recognised the area as a Kasepuhan Karang customary forest area. To convince the forest rangers, Jaro Wahid showed them the MoEF's decree on customary forest recognition. The national park rangers had not been informed about the customary forest recognition, because the national park was not involved in its preparation.

In an interview during my fieldwork (in 2018), I met with national park managers in their office. One of the staff confirmed that the national park was not involved in the legal recognition process to establish the Kasepuhan Karang customary forest, despite the fact that the national park agency was part of the MoEF. The national park rangers did not know that the minister had designated some parts of the national park area as Kasepuhan Karang community customary forest. Moreover, the ranger mentioned that although the government had recognised the Kasepuhan Karang community customary forest, the national park area map still included forest area within the Kasepuhan Karang territory. This confusion around the forest area's legal status indicated a lack of communication between various institutions under the MoEF, and highlighted the existence of various interpretations of customary forest recognition within the state forestry agencies. It became clear that the MoEF was not a monolithic institution wherein the minister's policy

would automatically be followed by subordinate agencies, such as the national park.

National park officials became quite worried about the number of proposals from Kasepuhan communities for legal recognition of their customary forest. Officials were aware that the successful Kasepuhan Karang customary forest case would encourage other Kasepuhan communities to apply for customary forest recognition. Consequently, national park area would be reduced. Park officials wanted to prevent this, since they assumed that the national park had done a good job in protecting forest area and substantiating the significant value of ecosystems for endangered species within the national park area. They believed that the national park should continue to maintain the natural condition of the forest, to ensure biodiversity in the Halimun Salak mountains. On the other hand, they also realised that the capacity of national park officials to protect the area was very limited, and that local communities were important actors in protecting the forest area.

Figure 11. The grand launch of the Cepak Situ Camping Ground by the Lebak District Head. (© aman.or.id, Kasepuhan Karang, December 16-17, 2017)

Although the national park rangers were initially reluctant to accept the camping ground, they could not stop it being established. For local community members, establishing the camping ground was an action designed to take effective control of the conflict site. Their success in creating the camping ground increased community members' confidence in expanding their control into a wider area of the previously disputed land. The Cepak Situ camping ground became a pivotal site for

implementing customary forest recognition in Kasepuhan Karang. The camping ground was launched in 2017, one year after the Kasepuhan Karang community obtained customary forest recognition, during the first customary forest festival. Young community members manage the camping ground, as a source of local income for Jagaraksa village. They collect parking fees and rent equipment, such as tents, mattresses, and a meeting room for visitors. Their income fluctuates, but on average they earn about Rp. 400,000, per person, per month. Youth leaders occasionally organise fun activities and celebrations of national holidays (such as National Hero Day, Independence Day, and New Year's Eve) at the campsite, to attract visitors. The village government also involves young people in expanding the agroforestry activities in the customary forest area. The camping ground has become a vital site for involving young community members in the promotion of adat in the village.

7.3.2. Securing income from customary forest

Most Kasepuhan community members are farmers. They cultivate rice for subsistence, using local rice seeds, and sharing their labour when planting and harvesting rice. After the harvest, most Kasepuhan communities organise traditional rituals to lift the rice into traditional rice barns (*leuit*). Most of the paddy fields are located outside the national park area.

Apart from rice production, fruit gardens provide cash income for local community members. Most of the fruit gardens in the Kasepuhan Karang community are located in the newly recognised customary forest area. All year round, farmers cultivate bananas, petai, and sugar palms, which all provide a weekly income. They also obtain seasonal income from fruits such as durian, mangos, and langsat (duku). This is supported by the condition that they can access goods markets to sell fruits in big cities, such as Bogor and Jakarta, which are only three hours away, by car, for local brokers. Local community members also grow various tree species that they can log and sell as a source of income over an extended period.

I conducted fieldwork in the Kasepuhan Karang community (in 2019) during the durian harvest season. Almost all the farmers in the village have durian trees in their community forest gardens, which provide them with a profitable side income. There were 18 durian traders in the village, and some of them calculated that the annual sale of durian from the village is about Rp. 9 billion, received during the two-month durian season. A study by AMAN and CLUA indicated that the

economic value of agricultural products (durian, paddy, mangosteen, and duku) from Jagaraksa village is Rp. 29.17 billion, annually. These data show the economic importance of fruit production in the customary forest.

Before the government expanded the national park area into local farmers' land, in 2003, local community members had been planting fruit trees in the area for a long time. Overlapping land claims, between the owners of the farmland and the national park, restricted local community members to planting more fruit trees to increase their income. Under the authority of the national park, local community members were restricted to planting fruit trees and vegetables which provided them with more direct income. After customary forest recognition, local community members would be able to freely determine the type of crops that they cultivated in the customary forest area. Therefore, they expected that the implementation of legal recognition would sustain their fruit production.

Jaro Wahid has been seeking information about government programmes concerning rural development following customary forest recognition. He realised that customary forest recognition could open up opportunities to improve rural livelihoods, especially from non-timber forest products. He submitted a proposal for a project sponsored by the Provincial Agriculture Office of Banten, together with the Asian Development Bank (ADB) as a back donor organisation. In 2018, Jagaraksa village was the recipient of this programme, worth Rp. 2 billion, to be implemented in three stages. The first stage was the creation of a cowshed and the procurement of ten buffaloes. Jaro Wahid directly managed the project, and built the cowshed on his land. In Indonesia this practice is ubiquitous - the project manager receives personal benefit from the project in which he or she is involved (Li 2016). In the second and third years, the buffaloes should be producing enough manure to supply the village with organic fertiliser. The final stage of the project consists of fruit seed support, distributed to and planted by the village community. Jaro Wahid is very optimistic that this project can increase villagers' incomes, because fruit production is already the primary source of cash income.

In the same year, Jaro Wahid convinced the Provincial Agriculture Office to develop coffee cultivation in the customary forest area. Some NGOs also encouraged villagers to grow coffee trees, as the coffee business is currently a trend for community economic development in

Indonesia (Agustin 2018). The Provincial Agriculture Office provided aid in the form of machines for coffee grinding and roasting, to be maintained by the village government. Young people, involved as implementation actors for this programme, distributed coffee seedlings free of charge to land users, who then planted them between the other crops and trees in their forest gardens. Young villagers alsos set up a coffee business in the village, and created the new brand, South Banten Coffee (*Kopi Banten Kidul*), which is produced in the customary forest.

The latest project implemented in the village is the construction of a community market building. For many years, villagers in Jagaraksa had to go to the nearest city centre to buy their daily supplies and sell their agroforestry products. Jaro Wahid managed to get funding from the Lebak District Government to build the local market. In the market, farmers can sell their products more quickly within the village, to direct consumers and to middlemen who buy fruit and vegetables to sell on in the city. These developments indicate how customary forest recognition can become the entrance ticket to many new economic opportunities. Inclusion as members of a customary community is a requirement for benefitting from government projects of this special category.

7.3.3. Capitalising on customary forest rights

Farmers' access to capital is an important aspect of improving their farm productivity. Many banks provide microcredit to farmers, to help them increase their investment in agricultural activities. If available, villagers can use land certificates as collateral for their loans. Knowing that the Kasepuhan Karang community has legal access to land in the customary forest area, one of the commercial banks from the district capital city approached the village head, to offer its loan programme to villagers. However, Jaro Wahid rejected the bank's proposal, because he was worried that such a scheme would increase the danger that customary forest land would be transferred to outsiders. The MoEF decree on customary forest recognition prohibits the alienation of any land plots in customary forest area. If land plots within the customary forest were to be used as collateral for loans to a commercial bank, and if the borrower could not pay off the debt, it would be possible for the bank to sell their customary forest land to outsiders.

Offering the villagers an alternative to the commercial bank's proposal, the NGO, RMI, initiated a credit union in Jagaraksa village. Once a credit union had been created in the village, the alienation problem was solved. RMI staff trained six women villagers to manage

the credit union. RMI believed that the credit union programme would support local agricultural activities and increase women's participation in the community, because women would fully manage the credit union. As in most Kasepuhan communities, the role of Jagaraksa women in decision making was very limited. Therefore, RMI hoped that having women manage the credit union would empower them to get involved in other decision making processes in Jagaraksa.

RMI has given a two-hundred-million-rupiah revolving fund to the credit union's management, so that it can run its business. Local community members can borrow money from the credit union, and repay their debt with paddy after the annual harvest. During my fieldwork in 2018, only a few villagers borrowed money from the credit union, because most land users did not yet know about this opportunity. The credit union funds were also very limited, and borrowers' repayments were slow, because they had to wait until the rice harvest season to repay their debts. I interviewed six local community members who had borrowed money from the credit union. None of them had used their loan to invest in agricultural activities, but instead, two had used it for house renovations, whilst the others had spent it on attending a family wedding in the city. For the time being, the credit union's loans have not led to any increased investment in local agriculture.

7.3.4. Building an informal land registration system

Local community members in Jagaraksa village had a mixed response to the recognition of their customary forest. In the beginning, they felt safe from extortion by national park officers and secure in the knowledge that they could continue commercial fruit cultivation on their farmland. However, some land users who came from outside the Kasepuhan Karang community feared the effects of the customary forest's new status. If it meant that the customary forest would be turned into communal land that belonged exclusively to Kasepuhan Karang community members, they would lose their access to the forest. They worried that the legal recognition of customary forest, specifically for the Kasepuhan Karang community, would transform their land into plots under the exclusive control of Kasepuhan Karang community leaders. In fact, many land users in customary forest areas do not belong to the Kasepuhan Karang community. The Kasepuhan Karang community itself is only one amongst three Kasepuhan communities in Jagaraksa

village, and many customary forest area land users come from outside Jagaraksa village.

Confronted with this problem, Jaro Wahid devised an informal land registration system, to provide land tenure security for individual land users. He had previously (in 2013) engaged with several NGOs to create a map of the Kasepuhan Karang customary forest as a requirement for getting legal recognition from the MoEF. Jaro Wahid had sufficient knowledge to manage the land mapping, so this time he decided not to involve NGOs in developing his informal land registration plan. Instead, he informally hired district government officials who were experts in land mapping, to help him establish the informal land registration system. Efficiently organising the work, he created mapping teams and determined their job descriptions. One team had the task of using GPS (global positioning system) to measure and delineate all the land plots. The team involved every land user in the land delineation, in order to avoid creating land disputes regarding the borders between land plots. The second team worked on transforming the GPS data into spatial data, as the basis for creating a map of the individual land plots. The third team was responsible for designing, printing, and distributing land-use certificates to land users. The final output of the informal land registration was land-use certification for all the cultivated areas of the Kasepuhan Karang customary forest (see Figure 12, below). Land users had to pay a fee of Rp 2 million, per hectare, to obtain a land-use certificate, and the village head used the money to pay the mapping team members their fees.

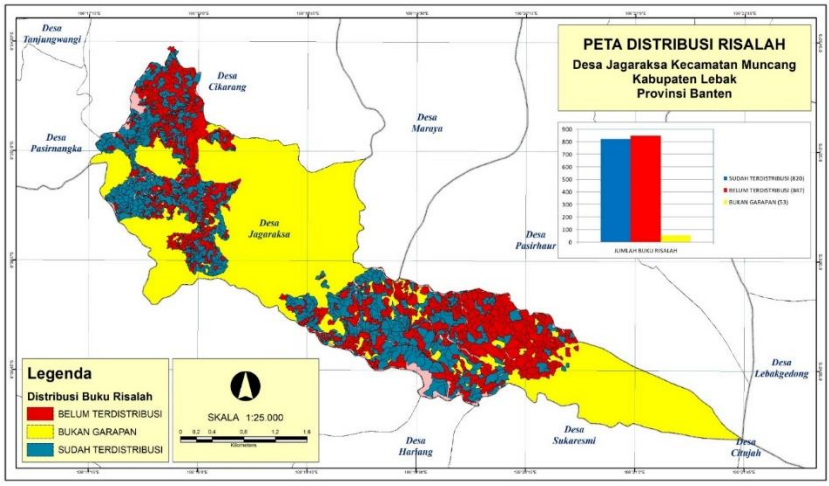

Figure 12. Distribution of land-use certificates in the Kasepuhan Karang customary forest © Jaro Wahid, Kasepuhan Karang, 2018.

The map for this informal land registration showed that 1,630 land plots were being cultivated by land users within the customary forest. Also, none of the land users have land plots that exceed 4 hectares, showing that the land is equally distributed amongst them. Interestingly, around 40% of the land plots in the customary forest are owned by land users from outside Jagaraksa village, suggesting that many non-members of the Kasepuhan Karang community are land users in the customary forest. They do not belong to the Kasepuhan Karang community, and they live in villages around Jagaraksa. They have land plots in the customary forest area, and they have cultivated the land for several generations. In spite of this, they also need a legal document from Jaraksa village and the Kasepuhan Karang community to ensure that their access is secured, despite the fact that the government has recognised the Kasepuhan Karang customary forest.

In my fieldwork, I found that, up until December 2018, the Head of Jagaraksa village had issued 820 land-use certificates to land users in the customary forest. The rest of the 810 certificates had not yet been issued, because some land users found that obtaining land-use certificates was too expensive for them. Moreover, they did not see the benefit of such a land-use certificate. Although the village government staff told land users that they could use the land-use certificates as collateral to borrow money from the credit union, many land users were not very interested in this opportunity.

The village government created the informal land registration system, in order to record the existing land use situation. Accordingly, the informal land registration process did not lead to land redistribution. The village government used aspects of the formal land registration system procedure by the National Land Agency (NLA), such as using GPS and the NLA's delineation process, involving the land users and creating land-use certificates. The land-use certificate issued by the village government also used the format and type of paper used for formal land certificates issued by the NLA. The village government imitated the NLA land certificates, with the intention of making local community land rights 'legible' to government officials. Representatives of the Kasepuhan Karang customary leadership and the village head of Jagaraksa signed every land-use certificate. The result was two signatures from Wahid, who represented both the official village government and the Kasepuhan customary leaders. Jaro Wahid told me that he had received a mandate from customary leaders to set up the land registration system. Therefore, he could put two signatures on the certificates. Moreover, he explained that these double signatures were intended to prevent the alienation of land-use certificates to other parties. In this way, he tried to maintain control over how individual land users viewed their land-use certificates.

I visited the NLA office in the district capital city, to ask their opinion about informal land registration created by the Jagaraksa village government. In Indonesia, the land is administered by two major institutions, in which forest areas fall under the authority of the MoEF and non-forest areas under that of the NLA (Safitri 2010b). The NLA's practical work is to record land rights and administer land ownership certificates. When I showed a land-use certificate created by the Jagaraksa village government to the head of the NLA district office, he was impressed by how smartly the village government had imitated the formal land registration procedures. He commented that such informal land registration by the village government could be essential to providing legal certainty for land users, and he showed appreciation for Jagaraksa's informal land registration system.

7.4. Land market development and tenure security

The case in this chapter shows that formal land legalisation by the MoEF, through recognition of a customary forest, can be followed by an informal land registration system. The Kasepuhan Karang case suggests a hybrid model of land governance, which recognises collective and

individual land rights through both formal and informal land registration. This hybrid model of land governance supports land tenure security for land users within the forest area. Nevertheless, the effectiveness of this hybrid model relies on the character of the village head, who controls the implementation of legal recognition. Therefore, the main challenge of such hybrid models concerns their sustainability over an extended period. Some villagers worry that, if Jaro Wahid were no longer the head of village, informal land registration might not be sustained.

From the literature on land governance, we know that individual land titling often leads to the formation of a land market, transforming land value from mere use-value into market value, such as land for mortgage or purchase (Wallace and Wiliamson 2006). Hernando de Soto (2000), the prominent proponent of land formalisation, argued that land formalisation is a way for the rural and urban poor to escape poverty. Land formalisation provides a precondition for the emergence of land markets, thereby transforming parcels of land into flexible commodities within capitalist market economies. However, in the Kasepuhan Karang case, registration of individual land possession has not immediately lead to a land market, in the sense that land users can buy and sell plots of land. However, individual land users can use their land-use certificate as collateral to obtain a loan from the credit union.

Although a land market has not developed fully, there is a market for fruit trees growing on the certified plots. In the Kasepuhan Karang community, a fruit tree growing on the land is more valuable than the land itself. Selling and purchasing trees growing on farmland has been common practice for many decades. As a consequence, it is often the case that fruit trees (such as durian, mangosteen, or rambutan) growing on a plot of land belong to someone other than the landowner.

The practice of informal land registration in Kasepuhan Karang is also central to the question of the relationship between customary forest recognition and tenure security. To some extent, the villagers felt safe from extortion by national park rangers', and they could freely use the farmland for fruit production. Feeling safe was crucial for villagers' basic security, and as a precondition for making a livelihood within the customary forest area (Safitri 2010b). Customary forest recognition strengthened the position of land users in relation to national park rangers. However, a new type of tension emerged in the Kasepuhan Karang community after they obtained customary forest recognition.

The tension was now between community members and those who were excluded from membership of the community. Jagaraksa's informal land registration system was intended to ensure that the land rights of individual land-users – both community members and those from outside the community - remained protected. An extended investigation into the further impact of legal recognition on tenure security and the development of a land marketis still needed.

7.5. Conclusion

This chapter shows that granting legal recognition of customary forest, and having this secure legal status, does not automatically resolve land conflicts between adat communities and national park officials. State agencies like the Ministry of Forestry are plural institutions, so the implementation of legal recognition is also shaped by the perception of ministry sub-agencies, regarding their control over forest land and resources. Similarly to the process for obtaining legal recognition discussed in Chapter 6, the implementation of legal recognition is also strongly influenced by power relations between various actors, such as adat communities, NGOs, local government representatives, and MoEF officials. In terms of using their own farmland, which is located in the customary forest area, legal recognition positively affects community members' confidence. Recognition also supports either community representatives or the village government in acquiring government-funded development projects; for example, those related to increasing the income from non-timber forest products from the customary forest. In the implementation of legal recognition, adat communities demonstrated a symbolic performance of their rights, in order to underpin their control over disputed land within the national park. During the implementation stage, village head Jaro Wahid played a dominant role in this matter. Subsequently, the legal recognition of customary forest has strengthened his control over land use in the village.

This chapter shows that customary land recognition does not, in itself, always provide tenure security for land users. Moreover, the outcome of the legal recognition process does not always correspond with the objectives of those seeking recognition. For community members, the difference between communal and individual land rights is not very important. What matters for them is to what extent their land rights, either communal or individual, will protect their private interests. The Kasepuhan Karang case illustrated the gradual nature of the land

legalisation process. The first stage was customary forest recognition by the Ministry of Forestry, where land users obtained partial tenurial security when released from the repression of national park officials. The second stage followed informal land registration and was established by the village government; it complemented the missing part of full tenure security for land users.

The central assumption in land registration, whether by formal or informal procedures, is that it leads to the formation of land markets. The chapter shows that that does not always happen, and that in this particular case, such a land market is restricted. The MoEF's decree on customary forest recognition prohibited customary forest being alienated. The informal land registration established by the village government has the same purpose to strengthen village government control over the land as customary leaders. Nevertheless, the consistency and durability of such restrictions can be questioned. Frequently, the prohibition of formal land transactions does not stop the informal land market process. Only the future will tell whether informal land registration has affected the village economy, and whether an illicit land trade will emerge.

8 Conclusion: Rethinking legal recognition of adat communities and customary forest rights

8.1. Introduction: The root cause of forest tenure conflicts

As many studies have demonstrated, in Indonesia, forest tenure conflicts between local land users and corporations, or the government, have existed since the colonial period. Forest tenure conflicts occurred due to the colonial government policy of territorialising the customary land of native populations (Vandergeest and Peluso 1995). Through territorialisation, the Dutch colonial authority claimed that the forest area was state property, divided it into forest types and functions that distinguished it from non-forest area, and excluded the local populations living near forest area. Forest management practices from the colonial period still form the foundation of the national forestry system. As a result, land conflicts in the forestry sector – forest tenure conflicts – have expanded, along with the current government expansion to control land and resources as state forest area.

The Government of Indonesia has continued the forest management policy of the Dutch colonial government, by controlling forest areas as state property. From the 1960s onwards, state control has expanded into frontier areas, mostly forest areas outside Java. The Ministry of Forestry continues to divide forest areas into various categories for nature conservation, forest production and extractive activities. Meanwhile, forestry regulation facilitates concessions for corporations, but limits local community access and their rights to benefit from forest land and resources. The government has claimed exclusive control over forest areas by declaring them state property, separate from individual and collective private property. Local communities' activities in forest areas are criminalised by various forest regulations. The denial of rights and access for local communities living around forest areas has triggered many conflicts.

When local land users feel their tenure security decreasing, whilst their vulnerability to criminalisation increases, a basis for land conflicts is established. Conflicts arose when government authorities and companies holding forest concession permits claimed the boundaries of forest areas for conservation purposes and for the exploitation of natural resources. Such conflicts were proliferating, but the government was

unwilling to make any concessions, especially during the colonial period and under the New Order regime.

In the late 1970s, the Food and Agriculture Organisation of the United Nations (FAO) began to stress the importance of local community involvement in forest management, in terms of overcoming the timber crisis that occurred after World War II. In Indonesia, a network of NGOs and academic scholars began to grow, and this network encouraged the government to make room for community involvement in forest management. NGO and academic networks promoted community-based forest management, based on the argument that engaging local communities in forest management would provide opportunities to overcome the root causes of forest tenure conflict. In response, the government began to develop schemes to resolve forest tenure conflicts between local land users and the government (or companies). Various terms, such as 'social forestry', 'community forestry', and 'community-based forest management' appeared during this period.

After the fall of Suharto's authoritarian regime, in 1998, initiatives to create a proper mechanism to address forest tenure conflict were expanded. This was supported by a democratic environment, in which more NGOs were being established, and local communities were becoming more courageous about championing their rights, in order to obtain a solution to their conflicts with companies and government agencies.

With the support of NGOs, academics, and international funding agencies, the government of Indonesia incrementally created policies and programmes to address forest tenure conflicts by engaging local communities in forest management. The Ministry of Forestry created various schemes to increase local communities' legal access to state forests, through licensing (village forests, community forests, people's plantation forests), and through cooperation agreements between communities and companies or state conservation agencies. However, the schemes did not address the root cause of the problem, where land ownership status was concerned. The schemes legitimised state control over forest areas, and legalised only temporary community access to manage state forest during a certain period. Nonetheless, these social forestry schemes helped to prevent conflict, and contributed to increasing the income of people living near forest areas.

By contrast, customary forest recognition (in theory) addresses the root cause of forest tenure conflicts. This option gained momentum in

2013, when the Constitutional Court affirmed the legal status of customary forests and urged the government to recognise customary forests legally. Adat community rights advocates considered the court decision a significant victory, and expected it to create breakthroughs in resolving forestry conflicts. Their expectation was based on the fact that recognition of customary forests could be implemented for various categories of state forest area. In addition, the recognition of customary forests can be a solution to various interests that community members have in forest tenure conflicts; for example, to secure tenure or resources for their livelihood, to protect the environment, or to obtain compensation and other benefits from companies or government agencies operating in their territories. In response to the court ruling, and in order to solve forest tenure conflicts, several ministries have created operational regulations which allow the recognition of customary forests.

However, until now, only a few adat communities have obtained customary forest recognition. The combination of a promising option for a legal solution and the meagre results in practice led to my opening question: Why has state legal recognition of adat communities and customary land rights in Indonesia not been effective in reducing land dispossession in situations of land conflict?

My research has shown that legal recognition of customary forest has become a real option for settling tenure conflicts in various types of state forest. My research has also shown that legal recognition of customary forest has many limitations. I will discuss the limitations in this concluding chapter, starting with issues related to legal requirements, following with the processes involved, and ending with the results of legal recognition. Despite the meagre results so far, I do not want to rule out the possibility of change in the legal recognition procedure in future. Therefore, the final section of this chapter will propose some insights into resolving forestry tenure conflicts, such as adapted social forestry schemes, and legal reform to simplify legal procedures and enable local community access to forest areas and resources.

8.2. There are no simple land conflicts

The Constitutional Court's 2013 ruling, affirming the legal status of customary forests, offered new hope for the resolution of land conflicts. In 2016, for the first time, the Minister of Environment and Forestry

recognised nine customary forests. Supporters of adat community rights hoped that these successful cases could be used as models, which could be replicated to resolve forestry tenure conflicts in various places in Indonesia. This has turned out to be difficult, mainly because each case is so different, and even the success cases are complex. Investigating the characteristics of each forest tenure conflict is therefore essential to understanding the nature of forest tenure conflicts, generally.

Defining the main problem in a land conflict is the necessary first step towards solving it. Often, NGO activists simplify a land conflict by framing it as a two-sided adversarial relationship between a local community and a company, or a government agency. Government agencies and NGOs have standardised the cases into quantifiable units of land conflict, without paying attention to the variety of conflict types and causes. Subsequently, land conflict cases have been counted annually and aggregated into national figures, which give the impression that land conflicts are escalating and occurring everywhere. By contrast, my research has shown that cases of forest tenure conflict are much more complex. Local community members, government agencies, and corporation units are not monolithic units (Welker 2014). Within each category of actors there are sub-groups, each with different positions and interests. The different actors (with their different interests) determine the strategies, objectives, and indicators by which the success of a strategy is measured.

This point is particularly relevant where communities are concerned. NGO activists and researchers usually define a community as a group of people who have the same interests, strategies and objectives. In land conflicts, activists and researchers usually perceive an adat community as an homogeneous group, which is isolated, reliant on subsistence agriculture, and has social, economic, and political autonomy. By contrast, my in-depth ethnographic research found a variety of factions within all the communities. I looked at the differences referring to status and interests; for example, between men and women, old and young, educated and ordinary people, natives and immigrants, farmers and traders. Each combination of status and interest corresponds with specific objectives and strategies in the face of conflict.

I found that, in every forest tenure conflict, community members have at least four different objectives, including: securing their source of livelihood; protecting the environment; obtaining benefits from natural resource extraction companies in their region (such as joint management arrangements, business contacts, and CSR programmes); and obtaining

compensation payment. These objectives may be aligned, but they may also conflict. The various groups in a community (with their own aspirations) can act as a coalition, but they often compete. An agreement amongst different groups about the common objectives and expectations of the whole community is crucial, in order to build group solidarity and form a strong party in negotiations with government institutions and corporations. Only when there is consensus about problem definition, objectives and expectations, will it be clear which conflict resolution measures are suitable. Hence, achieving a conflict resolution agreement based on customary forest recognition does not always end a land conflict.

8.3. A process approach for studying land conflicts

Every land conflict involves an interplay between actors with their own interests, over a long period of time. Therefore, it is impossible to get a better understanding of a particular case by capturing only a specific moment in the course of the conflict. In this thesis I have used a process approach to analysing the course of land conflicts. Specifically, I analyse the legal recognition of customary forests as a process in which local communities involved in land conflicts with government agencies and corporations seek solutions by following legal procedures. The process approach is constructed to analyse every step of legal recognition, from the idenitification of land tenure problems, through the categorisation of conflict as customary land conflict, and the identification of enabling and constraining factors in achieving legal recognition, to the implementation and impact of legal recognition.

From the case studies discussed in this thesis, I found that agreement between community members on the problem behind the land conflicts they are experiencing is an essential step towards obtaining legal recognition of their local community customary land rights. Such agreement is important to reducing friction in the community, and to being a unified actor in the campaign for recognition. Given that the process for obtaining legal recognition is long and complicated, community solidarity is essential for keeping spirits up. The next step is categorising a conflict as an adat land conflict. Local communities underpin their land claims and strategies with arguments about the position of adat in the history of a specific community. Often, the communities show or revitalise adat institutions, in order to make the adat nature of a community visible to policymakers. Other actors

relevant in the preparatory steps of the legal recognition process are the intermediary actors, especially NGO activists and academics, who can transmit the interests of adat communities to policymakers at regional and national levels.

Support within the national and local political context is a key factor in legal recognition. At the local and regional levels, adat communities use general elections for village heads, district and provincial heads, and parliament members in the region to negotiate their demand for legal recognition. Adat communities promise to secure votes for the candidates and, in return, they ask that candidates put the legal recognition of adat communities and their customary land rights at the top of their political agenda. Political democracy, after the demise of the New Order regime, has provided the opportunity for such communication between adat communities and policymakers. However, even if adat communities can influence regional policymakers via general elections, this does not offer any guarantee that the process of legal recognition will run smoothly. Adat communities, with the support of NGOs, cannot fully control decision making in the legal recognition process. Actors in government have the power to slow down the legal process, divert local community demands, or even reject claims made by adat communities. Aside from the government, other actors, such as companies and competing adat communities within the region, also often challenge customary land claims (see Chapter 4).

If a community has succeeded in obtaining legal recognition as an adat community with its customary forest rights, the process has not ended, because the existing conflict still has to be solved. That is why my research included the implementation and impact of legal recognition at the local level. From the case study in Chapter 7, I observed that full legal recognition of customary forests does not always provide tenure security for individual land users, especially for inhabitants who are not members of the adat community concerned. In that case, the village government can establish an informal land registration system to ensure individual tenurial security for recognised customary forest land users. However, such a registration system opens up opportunities for an informal land market, which may in turn lead to the alienation of customary community land.

The process approach in this study helps to analyse the complexity of the legal recognition of adat communities and customary forests. It enables a sophisticated analysis, which connects problems experienced

by local communities to solutions that will address the root causes of these problems.

8.4. Adat community is a political concept

During my research, I found that what constitutes an adat community is not as self-evident as it sounds. As a legal problem, the question is how to assess a community's identity by criteria for who belongs to the community and who is excluded from it, as defined by law. Compliance with such criteria is decisive in determining which communities are eligible for state recognition.

I found that the legal definition of adat communities is inadequate for recognising communities as such, and thus for supporting the realisation of adat community rights. Scholars have proposed alternative ways to define adat communities, particularly in international discussion about the definition of indigenous peoples. Miller (2003) defined four dominant academic approaches to indigenous groups, based on historical, substantial, prototype, and relational criteria. The historical approach identifies an indigenous community based on its local history, primarily to underpin that the community was living in a particular area before the arrival of other dominant groups, including colonial rulers. The working definition of indigenous communities by Jose Martinez Cobo, a former UN special rapporteur, is the most widely referred to definition in the discussion of indigenous peoples at the international level, and it emphasises the historical process as a critical element for determining the identity of an indigenous group. This element is particularly relevant in the context of settler colonialism, such as in Canada, the Americas, New Zealand, and Australia. However, it is less relevant to many countries in Asia and Africa, where native communities have established new nation states and passed through a period of post-colonisation (by Europeans). This historical approach is not only relevant to understanding the relationship between the local population and European colonials, but also to understanding the competition between different claims from the local population itself. In Indonesia, this approach is relevant to cases of competition between adat groups that are arguing about the prior occupation of a particular area of land, or about prior rule – as per the situation which occurred between the Sultanate and the Berco community in the Sumbawa case discussed in Chapter 4.

The substantive approach emphasises cultural differences between the adat community and dominant groups in rural communities. This approach depicts an indigenous community as unique, homogeneous, isolated, prioritising harmony over conflict, and practising subsistence agriculture rather than supplying products for the global market. NGOs and representatives of adat communities often use this approach in advocacy campaigns and political debates, to underscore the importance of their cultural rights. The revitalisation of adat institutions and rituals follows this approach. However, this perspective ignores the fact that, at present, adat communities are well-connected to the rest of the world, including the government, companies, NGOs, and academics. Claiming to be a distinct cultural group serves arguments for recognition, when encountering external forces or land dispossession.

The prototype approach perceives indigenous groups as a fixed category that can be distinguished from other categories. Customary law studies during the colonial period in the Dutch East Indies divided native communities in the colony into several types of social group. The division of native communities was based on genealogy, territory, or a combination of the two (Haar 1962). The Constitutional Court ruling Number 35/PUU-X/2012 added another category of adat community, based on how a community functions. This category defines the status of an adat community, with reference to its roles within the government structure and society. Similar to the substantive approach, this approach tends to see all adat communities as a fixed and static group. This approach is also supported by the notion of community held by internal adat community members. Adat community members identify themselves as a community, based on ethnicity, kinship, forefathers, and a 'myth of origin'. Their identity markers are essential for internal use within the clan (inheritance, land use, sharing common resources), and for relations with other clans under the same, but larger, adat community society (marriage, exchange of goods). The prototype approach is adopted in legislation, because it provides a standard for policymakers to identify adat communities. This approach assesses indigenous communities as a formalistic legal concept. Therefore, if a community has met all the criteria, then it can be recognised as an adat community.

My conclusion, derived from the previous chapters, is that: (1) the first three approaches are essential for constructing the criteria and arguments for legal recognition; but (2) the decision about what constitutes an adat community is ultimately political. This means that

the definition of adat communities relies on the power relations between various parties involved in the legal recognition of adat communities and customary land rights. This relational approach considers the position of an adat community to be the result of negotiations between various actors in the process of legal recognition. Following this argument, a local community that meets the legal criteria to become an adat community will not always obtain legal recognition. On the other hand, a community which does not fulfil all the criteria for an adat community can obtain legal recognition if the community members, supported by intermediary actors, can convince policymakers to grant legal recognition (see Chapter 5). In this concept, membership of adat communities relies on the active participation of local community members in presenting adat as a tool for self-identification. Additionally, legal recognition depends on competing interests and the interpretation of legal procedures by different actors involved in the legal recognition process, which is why I conclude that adat community is a political concept.

8.5. State recognition is conditional

A central theme in the debate about adat community rights in Indonesia concerns the conditions that a community has to fulfil for legal recognition. In this thesis, I have argued that conditional legal recognition of adat community rights was first applied in the colonial period. In the Dutch East Indies, the colonial government introduced the repugnancy principle, to ease the distinction between customary law and the newly introduced European law. It made the implementation of customary law dependent on a sense of justice according to European law. The repugnancy principle was introduced in the field of criminal law, in order to avoid the inhuman punishment of Dutch colonial officials. It was quite concerned with perceived lack of 'civilisation' in criminal punishment, generally. When the Republic of Indonesia was established in 1945, a similar principle was used as a strategy to ease tensions between customary law and state law, including in land law. At the time, lawmakers were concerned with creating legislation to support national development. The Basic Agrarian Law of 1960 recognises the rights of adat communities to land, with several conditions, such as that customary land tenure management exists and is actually practiced, and that customary land rights do not contradict national and government interests. They do not conflict with the state laws and regulations. This

conditional recognition clause was followed by many laws regarding adat communities in Indonesia, and was adopted into the constitutional norm during constitutional amendments in 1999-2002.

Conditional recognition is a structural problem, and it is embedded in Indonesian land law for realising adat community rights to land. This conditional recognition clause is limiting rather than empowering adat communities. On the one hand, this clause provides specific standards for adat communities to obtain legal recognition. On the other, it provides legitimacy for the government to not recognise customary land tenure if it is not in line with government interpretations and interests. For many decades, the government of Indonesia was reluctant to recognise customary land rights. However, the rise of an adat community movement in Indonesia and the widespread use of adat claims in land conflicts have both led to a new interpretation of adat in Indonesia. This new interpretation of adat community rights is connected with the global discourse and movement on human rights and environmental protection. By referring to international instruments on environmental law, the Constitutional Court ruling in 2013 affirmed the status of customary forests, but it did not correct the conditional recognition model (see Chapter 3). This is because conditional recognition has become an integral part of the Indonesian constitution (Article 18B [2]), adopted in the constitutional amendment in 2000. Therefore, any attempt to assert the existence of adat community rights is subject to these legal restrictions. Consequently, this condition makes an effort to obtain the legal recognition of adat communities and customary land rights the subject of negotiations about and interpretations of laws and regulations, in practice.

8.6. Legal recognition is the result of negotiation

In my initial understanding, legal recognition was a process by which a government institution would provide a document determining the legal status of adat communities, with regard to their rights to land and resources. In short, a local community can automatically become an adat community when it fulfils all the formal requirements to get legal recognition from government agencies. In this sense, legal recognition confirms the status, land rights, and natural resource management practices of adat communities. My initial views have changed during the writing of this thesis. I found that legal recognition is a process of political negotiation. Therefore, the capacity of actors, networks,

strategies, and opportunities needs to be analysed, in order to understand the legal recognition process.

Legal recognition, understood as a negotiation process, will only succeed if two main conditions are met. The first is that local communities, supported by NGOs, have the ability to exert political pressure on state agencies, in order to ensure that they will put legal recognition on their agenda. The second is the willingness of key government agencies, and any corporations involved, to negotiate. If the parties involved in the conflict are reluctant to cooperate, the legal recognition process will be long and complicated. Chapter 5 shows the complexity of legal recognition amid ongoing land conflict between local communities and forestry companies. In that recognition process, adat communities (supported by NGOs) had to ensure that government agencies would not slow down the process or divert the community's demands. In the continuing negotiation process, the moment when legal recognition is obtained is not the end of the land conflict, but rather a step towards raising the position of local communities, after which negotiations can continue to meet the initial demands of local community members.

8.7. The chances of legal recognition are limited

In theory, legal recognition of customary land rights is more likely than other social forestry schemes to resolve different types of forest conflict, and to accommodate the diverse interests of the local communities involved. However, this research shows that legal recognition is not always an ideal solution. The legal recognition process for customary forests is even more complex than those for other schemes to settle forestry tenure conflicts. In the customary forest recognition process, many actors are involved at the village, district, provincial, and national levels. The legal procedure is long and layered, because local communities must first obtain legal recognition as an adat community group, before applying to gain legal recognition of their customary forest. The legal recognition process also involves a technical process, supported by academic scientific research, and an administrative process concerning the fulfilment of requirements. Finally, there is the political process of decision making by local governments and the minister of forestry.

Until 2021, there had only been a few successful cases of legal recognition of customary forest as a solution to forest tenure conflict. My

conclusion is that most of the legal recognition of customary forests is conducted by the Ministry of Forestry, in order to turn non-forest areas into the customary forests of adat communities. I found that 62 of the 75 customary forest recognitions involved the transformation of non-forest area to being under the jurisdiction of the Ministry of Forestry.[59] Following this pattern, customary forest recognition strengthens the authority of the Ministry of Forestry both to expand the forest area and to impose restrictions on how local communities manage their land.

My research also indicates that if the disputed location is a forest concession area for forestry or mining operation companies, legal recognition of the customary forest is difficult to obtain (see chapters 4 and 5). The situation is different if the prospective customary forest is in a location directly under the control of the forestry agencies; for example, conservation forests managed by national parks, and production forests managed by forest units under the Ministry of Forestry (see chapters 6 and 7). In short, legal recognition is more likely if the land use of conflicting parties can actually be combined – as in cases of nature conservation plus the gathering of non-timber forest products or the cultivation of small gardens.

Recognition of customary forest could become easier for local communities in forestry tenure conflicts, if the legal recognition procedures and processes are simplified. Adat communities are often trapped in a complex process of adat identification, as a precondition to resolving their actual land conflicts. Chapter 5 illustrated this through the case of local land users, who initially only wanted to defend their land against dispossession, but then became entangled in the procedure for obtaining legal identity as an adat community group. The process diverted the efforts of community representatives away from their initial interests to end land dispossession. Therefore, the simplification of legal procedures is an elementary factor in speeding up the legal recognition process.

8.8. Conclusion: Land conflicts require tailor-made solutions

No one procedure is the most effective for resolving forestry tenure conflicts. This is because each forestry tenure conflict has different characteristics; different actors, interests, objectives, and strategies, and

[59] Personal communication with Kasmita Widodo, the head of Badan Registrasi Wilayah Adat (BRWA), a non-government organisation dedidated to gathering all the maps of customary territories in Indonesia (December 20, 2021).

different categories of forest allocation by government agencies. There is no single mechanism that can resolve all kinds of forestry tenure conflict. Therefore, the effectiveness of a particular mechanism should not be measured by its ability to resolve all types of land conflict, but instead by its precision in solving specific cases simply and quickly. In addition, the success of a conflict resolution mechanism must be measured by referring to the expectations and objectives of the parties involved, especially the land users, when they first categorise the problems they face as forest tenure conflict problems. In short, the effectiveness of land conflict resolutions should be measured by their ability to provide a remedy, by comparing the outcome with the initial expectations of the groups involved in the conflict.

Under certain conditions, legal recognition as customary forest is the ideal solution for resolving forestry tenure conflicts. This thesis shows several conditions, as prerequisites for legal recognition as a solution to land conflicts. The first is that the dominant group in a local community has succeeded in formulating their common problems as problems related to customary land conflict. This will be supported by the creation of internal solidity in the community, to maintain the land as a source of livelihood and commitment to protect the environment for future generations. The second is the support of intermediary institutions, such as NGOs and academic scholars, who can bridge community interests and the interests of the government. In addition, intermediary actors can help the community fulfil the requirements stipulated in regulations, regarding the legal recognition of customary land rights. The third factor is the government's openness to cooperation. This is strongly encouraged by the common interests of the government and local community, which might converge; for instance, interest in protecting the environment, or increasing local community production in agroforest activities. Nevertheless, not all of these conditions arise in land conflicts where local communities are using adat land claims as their argument to defend their rights and interests. Therefore, customary land claims are often ineffective in the resolution of land conflicts.

Assessing the effectiveness of conflict resolution mechanisms also requires analysis over a more extended period, considering that conflict resolution models are not static, but are developed based on the successes and failures in their implementation over time. For example, in Indonesia, social forestry programmes as a mechanism to resolve forestry tenure conflicts began in 1980, with the intercropping scheme.

After more than three decades, social forestry schemes are developing which provide a solution to addressing many types of land conflicts. Such schemes include the simplification of procedures for local communities to engage with social forestry programmes, and extensive support from NGOs in implementing the programmes. As a result, the number of social forestry permits is rapidly increasing. In short, procedures for the resolution of forestry tenure conflicts are very dynamic, and their response to practical problems are encountered by local communities in land conflicts. Likewise, the current procedure for legal recognition of customary forests has many limitations. This legal recognition process can be developed and made more effective, if some obstacles in its implementation can be eliminated.

In order to make the legal recognition mechanism an effective solution for resolving forestry tenure conflicts, several things need to be considered. On a technical level, the procedure for customary forest recognition should be more straightforward. The current procedure for legal recognition is long and complex. It does not focus on resolving land conflict, but gets distracted by identifying the adat community's legal personality. In addition, the government also needs to provide more flexible options for local communities addressing land conflicts. The current regulation on forest tenure conflicts is complicated. It is impossible for the local community who have gained access to social forestry to change their territory's status as customary forest. Therefore, the government needs to create a transitional regulation, from various social forestry schemes into legal recognition of customary forest. The choice of conflict resolution options should not be a fixed and final decision, but rather an attempt to eliminate the root cause of land conflict and obtain a remedy. A flexible mechanism will significantly help local land users in resolving land conflicts to obtain remedy.

Although this study concludes that legal recognition of adat communities and customary forest has not had much impact on the resolution of forestry tenure conflicts in Indonesia, it does not recommend that adat strategies should be discarded altogether in land conflicts. Adat will continue as an alternative narrative for local communities in response to land conflicts, since adat is the basis of entitlement that connects people, land and history. Local communities will continue to use what they have, including adat, as an argument to support their interests in land conflicts, especially if there is no other effective land conflict mechanism to uphold their demands.

Summary

Rethinking adat strategies: The politics of state recognition of customary land rights in Indonesia

In Indonesia, rural communities use state legal recognition of customary land rights as a strategy to protect and reclaim their land against dispossession by companies and government agencies. This has been the prominent strategy after the demise of the-Suharto regime, in line with the democratisation process, decentralisation policies, and support from international funding agencies for environmental protection and indigenous people's rights. This book discusses recent developments in the use of customary land rights strategies in which the main assumptions are that state legal recognition will provide adat communities legal certainty and will lead to solving land conflicts.

This thesis questions these assumptions. It is based on socio-legal research, combining legal and empirical research. For this purpose, I have created a specific analytical framework, to understand the legal recognition of customary land rights as a policy-making process that involves many actors, at various levels. My empirical research focused on cases in the three provinces North Sumatra, Banten, and West Nusa Tenggara. These cases were selected based on an inventory of current initiatives for gaining legal recognition of adat communities and customary land rights. On the one hand, the case studies selected have in common that the local communities involved were supported by local and national NGOs, and received extensive media coverage, making them showcase examples of state legal recognition of adat rights. On the other hand, they vary in terms of geographical location, the extent of NGO support, their stage in the legal recognition process, types of land tenure conflict, the characteristics of the opponents in the conflict, and finally the extent to which dispossession of adat land threatens the adat community's members' economy. With this diversity, I was able to analyse which factors enable or constrain the legal recognition of adat communities and their customary land rights..

This book is divided into eight chapters. Chapter 1 is an introduction, in which I describe the background and purpose of my

research, as well as the academic debates to which this study contributes. After having discussed international advocacy on indigenous identity and land rights, I zoom in on how in Indonesia the international concept of indigeneity has become intertwined with the concept of adat. Backed up by this international support, claiming legal identity and adat land rights has become an important strategy for local communities involved in land conflicts. However, according to the Indonesian legal framework, local communities must first obtain state-legal recognition before they can claim their land rights when their land is being dispossessed by companies and state institutions. The big question is therefore whether state legal recognition of adat communities and customary land rights in Indonesia has brought solutions to land dispossession in land conflict situations. This central question is elaborated in each of the following chapters.

Chapter 2 analyses the characteristics of forest tenure conflicts and the existing options for resolution. The first part describes the social, political, and historical context of forest tenure conflicts in Indonesia, from the colonial period up until the present. The colonial government legally established 'forest areas', which covered a large part of the country, and this designation has been continued by successive Indonesian governments up until the present. This policy is the main cause of forest tenure conflicts because it ignores the customary rights of local communities. The policy that makes forests into state property is backed up by the idea that government agencies are best equipped to maintain and manage the forests properly. National forest regulations criminalise people who claim customary rights, which ignites land tenure conflicts between local communities and government agencies or companies. These conflicts occur when a government agency or company expands its operational activities into an area that overlaps with land used by local communities. The second part of the chapter discusses different types of forest tenure conflict, the variety of actors and interests involved in them the strategies they pursue, and the different options for resolving conflicts. Since the 1990s, the Indonesian government has opened up several opportunities for this purpose such as community forests, customary forests, village forests, peoples' forest plantations, and co-management with government agencies and companies. Most of these options only provide temporary access for local communities to manage forest areas and resources. Only the customary forest recognition scheme changes the legal status of forest land and transfers ownership from the state to adat communities.

Therefore, theoretically, recognition of customary forests is the only solution that goes to the root cause of forest land conflicts.

In Chapter 3, I analyse the national legal framework regarding the recognition of adat communities and customary land rights, before I discuss in the following chapters how that legal recognition works out in practice. In this chapter, I also analyse the laws and law-making process related to land rights. Although many studies have discussed the legal framework regarding the rights of adat communities in Indonesia, there are no studies scrutinising the teleological dimension of the debate over customary land rights by analysing the minutes of meetings in parliament. I trace the origin of the present conditional recognition of adat communities and customary land rights from findings in colonial legal history. Furthermore, I highlight several key concepts regarding customary land rights, as they are found in colonial and contemporary national law.

After Indonesia's independence, the key debate on the recognition of adat communities, customary law, and customary land rights took place during the preparation of the Agrarian Law (No. 5/1960). The government and the legislature faced the dilemma of either preserving the legal pluralism of land governance inherited from the colonial government, or establishing a new unified national land law. In formulating the Agrarian Law, the majority of MPs in the National Parliament supported the formation of new national land law. However, the experts involved in the legal drafting had mixed attitudes towards the position of customary law and customary land rights. On the one hand, they labelled customary law officially as the basis of national land law. On the other, they subjugated customary law and customary land rights to national law by some conditionalities incorporated into the law, stating that a customary land right should not contradict national interests, Indonesian socialism, religious values, and any higher regulations. As a result, the Agrarian Law led to the emasculation of customary land rights at the discretion of state officials. Subsequent legislation and amendments to the Indonesian Constitution have reinforced the conditional recognition model for legalising customary land rights, which has resulted in a complicated procedure. The following chapters discuss why in one case the local community succeeded to gain legal recognition, while in other cases the strategy failed. Together, the case study chapters (4 to 7) aim to identify the enabling and constraining factors in realising state legal recognition of customary land rights.

When local communities want to use the legal recognition strategy their first step is to phrase solid arguments for their customary rights claims. Which conditions need to be fulfilled in order to make adat claims so strong that they will convince government institutions and parliament to provide legal recognition? Chapter 4 addresses this question, by analysing a case in which a local community failed to obtain state-legal recognition of their customary land rights. The case concerns the Cek Bocek community in Sumbawa (West Nusa Tenggara), which was involved in a land conflict with PT Newmont Nusa Tenggara, a big mining company operating on the community's ancestral land to develop the second largest gold mine in Indonesia. The chapter shows how local community members have various interests and corresponding strategies to respond to mining operations. Their strategies vary from rejecting the company's operations and demanding compensation payments, through pursuing contracts from the mining company for small business or service projects, to trying to get a job at the company or trying to obtain a share of the company's social development funds. In this specific case, the villagers used customary claims primarily to obtain compensation payments from the mining company. Initially, the village head set up an informal land documentation system, providing letters of possession as proof of individual land claims within the ancestral domain, to be used as a basis for requesting compensation payments. Only after this strategy failed did local communities revitalise their adat institutions and shift their strategy towards gaining legal recognition of their customary forests. However, this second strategy also failed, because the local parliament refused to legally recognize the local community as an adat community. Instead, the Sumbawa district parliament recognised the Sumbawa Sultanate as the official representative of local customary communities. This case indicates that legal recognition of customary rights is hard to obtain if various actors in the field contest crucial adat claims.

Chapter 5 addresses some other difficulties which occur when local communities pursue legal recognition to resolve land conflicts. This chapter analyses a case of a land conflict between local communities and PT Toba Pulp Lestari in North Sumatra, which has continued for more than three decades. Over the years, local community members have applied various strategies against the company activities, including actions against land dispossession, campaigns to protect the environment from pollution caused by the company's operations, and efforts at empowering women, as the latter are the ones who have

suffered most from land dispossession. In the last decade, customary land claims have become the dominant strategy used by local communities against the company. In this chapter, I focus on the Pandumaan-Sipituhuta community, analysing why and how communities engage in the use of adat strategies to oppose the company's operations in their benzoin tree adat forests, which yield valuable resin. In 2016, the Ministry of Environment and Forestry reallocated 5,172 hectares of the company's concession area to the Pandumaan-Sipituhuta community as customary forest. However, the precondition for legal recognition of this customary forest was that the community should first gain recognition of their status as an adat community from the district government. The legal recognition process became complicated because it involved many political actors at both district and national levels. In 2021, under political pressure, the Ministry of Environment and Forestry finally recognised the Pandumaan-Sipituhuta community customary forests. However, this did not resolve the conflict. While the government recognised particular areas of customary forest, it also designated some other customary forest areas for national food estate projects, without asking for the consent of Pandumaan-Sipituhuta community members.

Chapters 4 and 5 show that adat communities face many obstacles in the process of obtaining legal recognition of customary forests in conflicts with large corporations and how much they depend on the government when pursuing such recognition.

In Chapter 6 I discuss two cases of communities that have been more successful in obtaining legal recognition to resolve their land conflicts. The cases in this chapter concern the Kasepuhan Karang community (Banten Province) and the Marena community (Central Sulawesi). Both communities were involved in conflicts with national parks whose forest conservation areas overlapped with the territories of these communities. With the support of NGOs at various levels, these two communities managed to complete all procedures for legal recognition. By focussing the analysis on steps in the legal recognition process, from articulating community problems to finally solving them, this chapter shows how NGOs played a dominant role in directing the legal recognition process. These NGOs are specialized in indigenous rights advocacy and have been supporting local communities both at the national and the regional level. A crucial lesson from the two cases here is that the chances for obtaining legal recognition are larger for adat communities involved in a land conflict with government agencies engaged in nature

conservation than they are for those facing mining or plantation companies. In conservation forest areas, the goals of adat communities and government agencies sometimes converge, as in the specific cases of chapter 6 where the shared objective was to preserve nature in the forest area.. This contrasts with the case studies in the previous two chapters, where the companies and adat communities had interests which were diametrically opposed. However, although the two adat communities discussed here have gained customary forest recognition, their success ultimately depends on what happens in the years after the recognition.

This is discussed in chapter 7, which looks at what happens after legal recognition, and how this legal decision is being implemented. The chapter continues with the case in chapter 6, concerning the Kasepuhan Karang community, and demonstrates how in this case recognition of customary forests led to new tensions. New social distinctions became relevant. Many villagers from outside the Kasepuhan Karang community had been cultivating fields in the customary forest for decades and started to feel unsafe after the customary forests were recognised. They feared that the recognition of Kasepuhan Karang customary forest would reduce their own access to it. In response, the village head created an informal land registration system and provided land-use certificates to each land user. The informal land registration records show that 40% of the land users in the Kasepuhan Karang customary forest are not members of the Kasepuhan Karang community. This case study illustrates the critical role of village heads and customary leaders in the implementation of legal recognition, which may produce serious disputes within a community. It also shows that customary land rights do not always provide tenure security for land users, especially users who are not members of a particular adat community.

Chapter 8 is the concluding chapter, in which I reflect on the main lessons learned from the previous chapters. I revisit the roots of forestry tenure conflicts and how the legal recognition strategies of adat communities and customary forests play a role in conflict resolution. It is clear that resolving forest tenure conflicts is not a simple matter. The case studies in this thesis show the complexity of each forest tenure conflict. The variety of actors, interests, and strategies used by local communities depends largely on the context, the network, and the opponents who are in conflict. The process approach that I have used in this research enabled me to systematically analyse such complex cases. It helped me to carefully examine each stage of a conflict, starting with preparation, continuing with the legal process, and ending with post-

recognition of the customary forest. This approach can also help to evaluate the effectiveness of a conflict management strategy.

The chapter further invites readers to think of "adat communities" as a political concept. Many scholars perceive adat communities or indigenous communities as a legal concept or as an anthropological reality. Using adat communities as a political concept indicates that their existence is greatly dependent on political relations. Thus, there may be situations where a community does not meet all the requirements for an adat community, but it can nevertheless get legal recognition from the state. On the other hand, some communities satisfy all the requirements but do not obtain recognition. It is important to realise that state recognition is always conditional. This implies that the government holds the power to grant legal recognition and can apply this power at its discretion. Hence, the legal recognition of local community rights is a political process involving various actors at both the district and the national level. With my overview of the many restrictions, and how difficult it is to comply with all of them, I recommend adat community rights supporters to rethink the legal recognition strategy for solving adat communities' land dispossession problems. Pursuing legal recognition has increasingly made adat communities subordinate to the legal system. Thus, instead of gaining autonomy, adat communities risk subjugation via the legal recognition process, and in most cases, recognition does not solve their land conflicts.

Samenvatting (Summary in Dutch)

Adat strategieën in een nieuw licht: Het politieke spel rond wettelijke erkenning van gewoonterecht met betrekking tot land in Indonesië

In Indonesië gebruiken rurale gemeenschappen het aanvragen van wettelijke erkenning door de staat van gewoonterecht (adat) als middel om hun land te beschermen tegen onteigening door bedrijven en overheidsinstanties. In de periode na de val van het Soeharto-regime werd dit een prominente strategie, die paste in de algehele sfeer van democratisering, decentralisatiebeleid, en steun van internationale organisaties voor milieubescherming en rechten van inheemse bevolkingsgroepen. Dit boek bespreekt recente ontwikkelingen in het gebruik van dergelijke adatstrategieën, waarbij de basisaannames zijn dat wettelijke erkenning door de staat leidt tot rechtszekerheid voor de betreffende adatgemeenschappen, en tot de oplossing van landconflicten. Dit proefschrift stelt deze aannames ter discussie.

Dat doet het op basis van sociaal-juridisch onderzoek, een combinatie van juridisch en empirisch onderzoek. Daartoe heb ik een specifiek analytisch kader gecreëerd om de wettelijke erkenning van adatrechten op land te begrijpen als een beleidsvormingsproces waarbij vele actoren, op verschillende niveaus betrokken zijn. Mijn empirisch onderzoek richtte zich op casestudies in drie provincies, namelijk Noord-Sumatra, Banten en West Nusa Tenggara. Deze casestudies zijn geselecteerd na een inventarisatie van lopende initiatieven voor wettelijke erkenning van adatgemeenschappen en hun landrechten. Enerzijds zijn er overeenkomsten: de betrokken gemeenschappen in alle geselecteerde casestudies werden ondersteund door lokale en nationale NGO's. Ook hebben zij uitgebreide media-aandacht gekregen waardoor de cases bekend zijn komen te staan als succesvolle voorbeelden van wettelijke erkenning van adatrechten. Anderzijds variëren de cases in termen van geografische ligging, de mate van NGO-ondersteuning, het stadium in het proces van wettelijke erkenning dat de adatgemeenschap heeft bereikt, het type landconflict, de aard van de tegenstanders in het conflict, en tot slot de mate waarin het landconflict de economie van de adatgemeenschap bedreigt. Vanuit deze diversiteit aan cases heb ik

kunnen analyseren welke factoren de wettelijke erkenning van adatgemeenschappen en hun landrechten bevorderen of juist verhinderen.

Dit boek is verdeeld in acht hoofdstukken. Hoofdstuk 1 is de inleiding, waarin ik de achtergrond en het doel van mijn onderzoek beschrijf, evenals de academische debatten waaraan dit onderzoek bijdraagt. Na het bespreken van internationale belangenbehartiging voor de erkenning van identiteit en landrechten van inheemse volken, zoom ik in op hoe, in Indonesië, het internationale concept van "indigeneity" verweven is geraakt met het Indonesische concept adat. Gegeven die internationale steun is een beroep op adatidentiteit en landrechten een aantrekkelijke optie geworden voor gemeenschappen die betrokken zijn in landconflicten. Maar volgens het Indonesische nationale recht moeten lokale gemeenschappen eerst wettelijk erkend worden door de staat voordat zij hun landrechten op basis van gewoonterecht kunnen claimen in situaties waarin hun land bezet of onteigend wordt door bedrijven en overheidsinstanties. De grote vraag die centraal staat in dit proefschrift is: Heeft de wettelijke erkenning door de staat van adatgemeenschappen en hun landrechten in Indonesië oplossingen opgeleverd voor het beslechten van landconflicten? In de volgende hoofdstukken wordt deze centrale vraag verder uitgewerkt.

Hoofdstuk 2 analyseert de kenmerken van conflicten over eigendomsrechten in bosgebieden en de bestaande beleidsopties voor oplossingen voor die conflicten. Het eerste deel bespreekt de sociale, politieke en historische context van dergelijke conflicten, van de koloniale periode tot nu. De koloniale overheid voerde een ruimtelijk bestemmingsbeleid waarin grote delen van het land de wettelijke status van 'bosgebied' kregen en dit beleid is voortgezet door opeenvolgende Indonesische regeringen. Dit is de belangrijkste oorzaak van conflicten over eigendomsrechten in bosgebied, omdat het de adatrechten van lokale gemeenschappen negeert. Het beleid maakt het bosgebied staatseigendom, wat wordt gerechtvaardigd met het argument dat overheidsinstanties het meest geschikt zijn om de bossen goed te beheren. De nationale regelgeving voor bossen maakt degenen die zich beroepen op adatrechten strafbaar, wat landconflicten tussen lokale gemeenschappen en overheidsinstanties of bedrijven tot gevolg heeft. Het hoofdstuk gaat in op verschillende soorten conflicten over eigendomsrechten in het bosgebied, evenals op de verscheidenheid aan actoren en belangen in het conflict. Deze verscheidenheid betekent dat

de strategieën van de partijen die bij het conflict betrokken zijn en de mogelijkheden om het conflict op te lossen per geval sterk verschillen.

Sinds de jaren negentig heeft de Indonesische regering mogelijkheden gecreëerd om conflicten over bosbezit op te lossen. Zo zijn er verschillende regelingen tot stand gekomen waarmee gemeenschappen betrokken kunnen worden bij bosbeheer, zoals door instelling van gemeenschapsbos, adatbos, dorpsbos, gemeenschappelijke bosplantages, en voor gezamenlijk beheer van bosprojecten met overheidsinstanties en bedrijven. De meeste van deze opties bieden echter alleen een tijdelijke mogelijkheid voor lokale gemeenschappen om bosgebieden en hulpbronnen te gebruiken. Alleen de optie van erkenning van het adatrecht op een stuk bosgebied verandert de juridische status van het bos, waarbij de eigendom overgaat van de staat naar de adatgemeenschap. Daarom biedt alleen deze laatste optie een echte oplossing, die de kern raakt van landconflicten in het bosgebied.

In hoofdstuk 3 analyseer ik het nationaal-wettelijke kader met betrekking tot de erkenning van adat-gemeenschappen en landrechten, voordat ik in de volgende hoofdstukken inga op hoe die wettelijke erkenning in de praktijk uitwerkt. In dit hoofdstuk analyseer ik ook het wetgevingsproces en de uitkomsten daarvan met betrekking tot landrechten. Hoewel veel studies het juridische kader met betrekking tot de rechten van adatgemeenschappen in Indonesië hebben besproken, zijn er nog geen studies die de teleologische dimensie van het debat over adat landrechten hebben onderzocht door de notulen van vergaderingen in het parlement te bestuderen. Na de onafhankelijkheid van Indonesië vonden de meest kritische discussies over de erkenning van adatgemeenschappen, gewoonterecht en adat landrechten plaats tijdens de voorbereiding van de Agrarische Wet (5/1960). Regeringen en wetgevers stonden voor een dilemma: ofwel het behoud van de koloniale erfenis van rechtspluralisme in het landrecht, ofwel het instellen van een nieuw, uniform nationaal landrecht. Bij het formuleren van de Agrarische Wet steunden de meeste parlementariërs dat laatste, maar de betrokken wetgevingsjuristen hadden een dubbele houding ten aanzien van de positie van het adatrecht. Officieel vormt het adatrecht de basis voor het nationale recht met betrekking tot land. Maar adatrecht en adat landrechten zijn onderworpen aan strikte voorwaarden, namelijk dat een adatlandrecht niet tegenstrijdig mag zijn met nationale belangen, Indonesisch socialisme, religieuze waarden en hogere regelgeving. Als gevolg hiervan leidde de Agrarische Wet tot de

onderschikking van adat landrechten aan het nationale recht, met een grote mate van beleidsvrijheid in de uitvoering door staatsfunctionarissen. Latere wetgeving en wijzigingen van de Indonesische grondwet hebben de erkenningsvoorwaarden voor het legaliseren van adatlandrechten verder verzwaard. Het model van voorwaardelijke erkenning heeft geleid tot een ingewikkelde procedure. In de volgende hoofdstukken wordt besproken waarom de lokale gemeenschap er in het ene geval wel in is geslaagd wettelijke erkenning te krijgen en in het andere niet.

Deze hoofdstukken (4 tot 7) proberen te identificeren wat de factoren zijn die de wettelijke erkenning van adatlandrechten bevorderen dan wel beperken. Wanneer lokale gemeenschappen de strategie van wettelijke erkenning van hun adatrechten willen toepassen, is de eerste stap het formuleren van solide argumenten voor hun adatclaims. Aan welke voorwaarden moet worden voldaan om deze aanspraken zo sterk te maken dat ze overheidsinstellingen en parlement weten te overtuigen wettelijke erkenning te verlenen? Hoofdstuk 4 behandelt deze vraag door een case te analyseren waarin een lokale gemeenschap er niet in slaagde wettelijke erkenning te verkrijgen. De zaak betreft de Cek Bocek-gemeenschap in Sumbawa (West-Nusa Tenggara), die betrokken was bij een landconflict met PT Newmont Nusa Tenggara, een mijnbouwbedrijf dat de op een na grootste goudmijn van Indonesië exploiteert op het land dat traditioneel toebehoorde aan de gemeenschap. Mijn onderzoek laat zien dat leden van de lokale gemeenschap verschillende belangen en bijbehorende strategieën hebben om op de mijnbouwactiviteiten te reageren. Deze varieerden van het afwijzen van de activiteiten van het bedrijf en het eisen van compensatiebetalingen tot het binnenhalen van projectopdrachten voor het mijnbouwbedrijf, het proberen een baan bij het bedrijf te krijgen, of het bemachtigen van een deel van de sociale ontwikkelingsfondsen van het bedrijf. In dit specifieke geval gebruikten de dorpelingen hun adatclaims uiteindelijk vooral om compensatiebetalingen van het mijnbouwbedrijf te verkrijgen. Aanvankelijk creëerde het dorpshoofd een informeel landdocumentatiesysteem, dat schriftelijke bewijzen van landbezit verstrekte als bewijs van individuele landclaims binnen het voorouderlijke domein, om te gebruiken als basis voor het aanvragen van compensatiebetalingen van het mijnbouwbedrijf. Pas nadat die strategie mislukte, probeerden de leden van de lokale gemeenschap hun adatinstituties nieuw leven in te blazen en de strategie te verlegen naar

het verkrijgen van wettelijke erkenning van hun adatbos. Ook deze tweede strategie mislukte. In plaats van de Cek Bocek te erkennen als individuele adatgemeenschap, erkende het districtsparlement het sultanaat van Sumbawa als de officiële vertegenwoordiger van alle lokale adatgemeenschappen in het district. Deze case laat zien hoe moeilijk het is wettelijke erkenning van adatrechten te verkrijgen als verschillende actoren in het veld cruciale adatclaims betwisten.

Hoofdstuk 5 behandelt enkele andere problemen die optreden wanneer lokale gemeenschappen wettelijke erkenning van adatrechten nastreven om landconflicten op te lossen. Dit hoofdstuk analyseert een landconflict tussen lokale gemeenschappen en het bedrijf PT Toba Pulp Lestari in Noord-Sumatra, dat al meer dan drie decennia duurt. In de loop der jaren hebben leden van de lokale gemeenschap verschillende strategieën toegepast om zich te verzetten tegen de activiteiten van het bedrijf, waaronder acties van een boerenorganisatie tegen landonteigening, campagnes om het milieu te beschermen, en empowerment van vrouwen omdat die het meest te lijden zouden hebben als gevolg van landonteigening. In de laatste tien jaar is het naar voren brengen van adat landclaims de dominante strategie van de lokale gemeenschappen tegen het bedrijf geworden. In dit hoofdstuk concentreer ik me op de Pandumaan-Sipituhuta-gemeenschap, waarbij ik analyseer waarom en hoe gemeenschappen adatstrategieën gebruiken om zich te verzetten tegen de activiteiten van het bedrijf in hun adatbossen. Deze bevatten veel benzoëbomen, waarvan de hars een waardevol product is dat door leden van de gemeenschap wordt gewonnen en verhandeld. In 2016 heeft het ministerie van Milieu en Bosbouw 5.172 hectare van het concessiegebied van het bedrijf opnieuw toegewezen als adatbos aan de Pandumaan-Sipituhuta. Voorwaarde voor wettelijke erkenning van dat adatbos was echter dat de gemeenschap eerst erkenning van hun status als adatgemeenschap zou krijgen van de districtsregering. Dit bleek heel ingewikkeld gezien het aantal politieke actoren dat er bij betrokken was, zowel op districts- als op nationaal niveau. In 2021 heeft het ministerie van Milieu en Bosbouw onder politieke druk eindelijk het adatbos van Pandumaan-Sipituhuta erkend, maar stelde tegelijkertijd een deel ervan ter beschikking aan een groot nationaal voedsel project – zonder toestemming aan de Pandumaan-Sipituhuta-gemeenschap te vragen.

De twee cases in hoofdstuk 4 en 5 laten zien dat adatgemeenschappen allerlei obstakels moeten overwinnen bij het verkrijgen van wettelijke erkenning van hun adatbossen als een

oplossing voor landconflicten met grote bedrijven. De cases laten ook zien hoezeer de adatgemeenschappen afhankelijk zijn van de overheid bij het nastreven van de wettelijke erkenning.

In hoofdstuk 6 bespreek ik twee gemeenschappen die meer succes hebben gehad, doordat ze er wel in slaagden wettelijke erkenning te krijgen en hun landconflicten op te lossen. Het gaat om de Kasepuhan Karang-gemeenschap (provincie Banten) en de Marena-gemeenschap (Midden-Sulawesi). Beide gemeenschappen hadden een conflict met een nationaal park dat overlapte met hun adatterritorium. Met de steun van NGO's op verschillende niveaus hebben de twee gemeenschappen alle procedures voor wettelijke erkenning succesvol doorlopen. Het hoofdstuk laat zien hoe essentieel deze gespecialiseerde NGO's zijn in het aansturen van het proces van wettelijke erkenning, zowel op nationaal als op regionaal niveau. Een andere cruciale les is dat de kans op wettelijke erkenning van adatgemeenschappen wettelijke erkenning krijgen als de tegenstander in het landconflict een overheidsinstantie is die zich bezighoudt met natuurbescherming (in plaats van een mijnbouwbedrijf of plantageonderneming). De reden is dat in beschermde bosgebieden de doeleinden van adat-gemeenschappen en overheidsinstanties goed te verenigen zijn. In de specifieke cases van hoofdstuk 6 was het gemeenschappelijke doel het behoud van de natuur in het bosgebied, in tegenstelling tot de cases in de vorige twee hoofdstukken waar de bedrijven en adatgemeenschappen tegengestelde belangen hadden. Hoewel de twee adatgemeenschappen hier wettelijke erkenning van hun adatbossen hebben gekregen, bleek dat het succes van hun strategie uiteindelijk afhing van wat er gebeurde in de periode na die erkenning.

Hoofdstuk 7 gaat in op die laatste fase en bespreekt wat er in de gemeenschap gebeurt na de wettelijke erkenning door de staat, en hoe deze erkenning wordt geïmplementeerd. In dit hoofdstuk ga ik verder met de case in hoofdstuk 6, over de Kasepuhan Karang-gemeenschap. Hier leidde de erkenning van hun adatbos tot nieuwe spanningen binnen de gemeenschap. Veel dorpelingen die oorspronkelijk van buiten de Kasepuhan Karanggemeenschap komen hebben decennialang akkers in het adatbos bewerkt. Deze landgebruikers begonnen zich zorgen te maken dat door de erkenning van het adatbos van de Kasepuhan Karang hun eigen toegang tot het bos in gevaar zou komen. Om de situatie te stabiliseren creëerde het dorpshoofd een informeel landregistratiesysteem, waarbij hij landgebruikscertificaten aan elke grondgebruiker verstrekte. Uit de informele landregistratiegegevens

bleek dat veertig procent van de landgebruikers in het adatbos van Kasepuhan Karang geen lid waren van de Kasepuhan Karang-gemeenschap. Deze case study illustreert de cruciale rol van dorpshoofden en adat leiders bij de implementatie van wettelijke erkenning. Het laat ook zien dat erkende adatlandrechten niet altijd eigendomszekerheid bieden aan landgebruikers, met name voor gebruikers die geen lid zijn van een bepaalde adat-gemeenschap.

Hoofdstuk 8 is het afsluitende hoofdstuk, waarin ik reflecteer op de belangrijkste lessen uit de voorgaande hoofdstukken. Ik ga opnieuw in op de oorzaken van conflicten over bosbezit en hoe de wettelijke erkenningsstrategieën van adatgemeenschappen en hun adatbos een rol spelen bij het beslechten van conflicten. In het algemeen blijken conflicten over bosbezit zeer hardnekkig. De casestudy's in dit proefschrift laten de complexiteit van elk conflict zien. De verscheidenheid aan actoren, belangen en strategieën die door lokale gemeenschappen wordt gebruikt, hangt grotendeels af van de context, het netwerk en de tegenstanders in het conflict. De procesbenadering die ik in dit onderzoek heb gebruikt maakt het mogelijk dergelijke complexe gevallen systematisch te analyseren, van de de voorbereidingsfase, via de stappen in het het juridische proces tot aan de slotfase na de wettelijke erkenning van het adat bos. Deze benadering kan helpen bij het evalueren van de effectiviteit van een strategie voor conflictbeslechting. Dit onderzoek bepleit verder om het begrip "adatgemeenschap" in de eerste plaats te zien als een politiek concept, en niet als een juridisch gegeven of een antropologische realiteit. Als politiek concept is het bestaan van adatgemeenschappen sterk afhankelijk van politieke verhoudingen. Zo kunnen er situaties zijn waarin een gemeenschap niet aan alle vereisten voor een adatgemeenschap voldoet, maar toch wettelijke erkenning kan krijgen van de staat. Anderzijds zijn er gemeenschappen die aan alle eisen voldoen maar geen erkenning krijgen. Het is belangrijk zich te realiseren dat erkenning door de staat altijd voorwaardelijk is. De overheid heeft een discretionaire bevoegdheid om wettelijke erkenning te verlenen of af te wijzen. Als gevolg daarvan is de juridisch procedure en politiek proces waarbij verschillende actoren op zowel districts- als nationaal niveau betrokken zijn. Op basis van mijn overzicht van alle beperkende voorwaarden, en hoe moeilijk het is daaraan te voldoen, is een aanbeveling van dit proefschrift aan de "adatrechtbeweging" om de strategie voor wettelijke erkenning in dit licht te zien en te heroverwegen. Door het nastreven van wettelijke erkenning zijn

adatgemeenschappen in praktijk in toenemende mate ondergeschikt gemaakt aan het nationale rechtssysteem; in plaats van autonomie te verwerven riskeren zij door deze juridische weg te bewandelen juist het verlies van hun rechten en in de meeste gevallen levert het geen oplossing voor landconflicten.

Ringkasan (Summary in Bahasa Indonesia)

Memikirkan kembali strategi adat: Politik pengakuan negara atas hak tanah adat di Indonesia

Di Indonesia, masyarakat pedesaan menggunakan pengakuan hukum negara atas hak tanah adat sebagai strategi untuk melindungi dan mengklaim kembali tanah mereka dari perampasan tanah oleh perusahaan dan instansi pemerintah. Hal ini menjadi strategi utama pasca tumbangnya rezim Suharto, sejalan dengan proses demokratisasi, kebijakan desentralisasi, dan dukungan lembaga pendanaan internasional untuk perlindungan lingkungan dan hak-hak masyarakat adat. Buku ini membahas perkembangan terkini dalam strategi penggunaan narasi hak atas tanah adat dengan asumsi utama bahwa pengakuan hukum negara akan memberikan kepastian hukum bagi masyarakat adat dan akan membantu penyelesaian konflik pertanahan. Disertasi ini, yang ditampilkan dalam bentuk buku, mempertanyakan asumsi-asumsi tersebut.

Buku ini didasarkan pada penelitian sosio-legal, yang menggabungkan penelitian hukum dan penelitian empiris. Untuk tujuan itu, saya telah membuat kerangka analisis tersendiri guna memahami pengakuan hukum hak atas tanah adat sebagai proses pembentukan kebijakan yang melibatkan banyak aktor, di berbagai tingkatan. Untuk penelitian empiris saya berfokus pada kasus di tiga provinsi yaitu Sumatera Utara, Banten, dan Nusa Tenggara Barat. Studi kasus yang digunakan dalam penelitian ini dipilih berdasarkan inventarisasi inisiatif yang berlangsung dari masyarakat untuk mendapatkan pengakuan hukum sebagai masyarakat adat dan hak atas tanah adat. Di satu sisi, studi kasus yang dipilih berbagi fakta bahwa masyarakat lokal yang terlibat telah didukung oleh LSM lokal dan nasional, dan telah menerima liputan media yang luas, membuatnya menjadi percontoh pengakuan hukum negara atas hak adat. Di sisi lain, ketiga kasus tersebut berbeda dalam hal lokasi geografis, besarnya dukungan LSM, tahapan proses pengakuan hukum, jenis konflik penguasaan tanah, karakteristik lawan dalam konflik, dan akhirnya

sejauh mana perampasan tanah adat mengancam perekonomian masyarakat adat. Dengan keragaman tersebut, saya dapat menganalisis faktor-faktor apa saja yang memungkinkan atau menghambat pengakuan hukum terhadap masyarakat adat dan hak atas tanahnya.

Buku ini terbagi menjadi delapan bab. Bab 1 adalah pendahuluan, di mana saya menjelaskan latar belakang dan tujuan penelitian, serta perdebatan akademis dimana penelitian ini dikontribusikan. Setelah membahas advokasi internasional tentang pergulatan mengenai identitas adat dan hak atas tanah, saya meneropong lebih jauh bagaimana konsep indigeneity internasional telah berkelindan dengan konsep adat di Indonesia. Didukung oleh bantuan internasional, upaya untuk mengklaim identitas hukum dan hak tanah adat telah menjadi argumen alternatif bagi masyarakat lokal yang terlibat dalam konflik pertanahan. Namun, menurut kerangka hukum Indonesia, masyarakat lokal harus terlebih dahulu mendapatkan pengakuan hukum negara sebagai masyarakat adat, sebelum mereka dapat mengklaim hak atas tanah mereka ketika tanah mereka diambil alih oleh perusahaan dan instansi pemerintah. Oleh karena itu, pertanyaan besarnya adalah: Apakah pengakuan hukum negara terhadap masyarakat adat dan hak tanah adat di Indonesia membawa solusi bagi perampasan tanah dalam situasi konflik pertanahan? Pertanyaan sentral ini diuraikan dalam setiap bab berikut.

Bab 2 menganalisis karakteristik konflik tenurial kehutanan dan opsi penyelesaian yang ada. Bagian pertama menggambarkan konteks sosial, politik, dan sejarah konflik tenurial kehutanan di Indonesia, dari masa kolonial hingga saat ini. Pemerintah kolonial secara resmi menetapkan 'kawasan hutan' yang menutupi sebagian besar wilayah negara, dan penunjukan tersebut diteruskan oleh pemerintah Indonesia secara terus menerus hingga saat ini. Kebijakan ini menjadi penyebab utama konflik tenurial kehutanan, karena mengabaikan hak tradisional masyarakat lokal. Kebijakan yang menjadikan hutan sebagai milik negara didukung oleh gagasan bahwa lembaga pemerintah adalah yang paling siap untuk memelihara dan mengelola hutan dengan baik. Peraturan kehutanan nasional mengkriminalisasi orang-orang yang mengklaim hak adat, yang memicu konflik penguasaan tanah antara masyarakat lokal dan instansi pemerintah atau perusahaan. Namun, konflik nyata hanya terjadi ketika suatu instansi pemerintah atau perusahaan memperluas kegiatan operasionalnya ke wilayah yang tumpang tindih dengan wilayah yang digunakan oleh masyarakat setempat. Bab ini membahas berbagai jenis konflik tenurial kehutanan,

serta berbagai aktor dan kepentingan dalam konflik tersebut. Keragaman dalam hal ini berarti bahwa strategi yang digunakan oleh pihak-pihak yang terlibat dalam konflik, dan pilihan untuk menyelesaikan konflik, juga beragam. Sejak tahun 1990-an, pemerintah Indonesia telah membuka beberapa peluang untuk menyelesaikan konflik tenurial kehutanan. Pemerintah telah menyiapkan berbagai skema yang memungkinkan masyarakat untuk terlibat dalam pengelolaan hutan, seperti dalam mengelola hutan kemasyarakatan, hutan adat, hutan desa, dan hutan tanaman rakyat., dan dalam pengelolaan bersama dengan pemerintah. Sebagian besar opsi ini hanya memberikan akses sementara bagi masyarakat lokal untuk mengelola kawasan dan sumber daya hutan. Hanya skema pengakuan hutan adat yang mengubah status hukum lahan hutan dan kepemilikan dari negara kepada masyarakat adat. Oleh karena itu, secara teoritis, pengakuan hutan adat merupakan satu-satunya solusi nyata yang menyentuh akar permasalahan konflik tenurial kehutanan.

Dalam Bab 3, saya menganalisis kerangka hukum nasional tentang pengakuan masyarakat adat dan hak atas tanah adat, sebelum membahas dalam bab-bab berikutnya bagaimana pengakuan hukum itu bekerja dalam praktik. Dalam bab ini, saya juga menganalisis proses pembentukan undang-undang dan produk-produknya yang terkait dengan hak atas tanah. Meskipun sudah banyak kajian yang membahas kerangka hukum tentang hak masyarakat adat di Indonesia, namun belum ada kajian yang menelaah dimensi teleologis perdebatan hak atas tanah adat, dengan menganalisis risalah rapat di parlemen. Saya menelusuri asal mula pengakuan bersyarat masyarakat adat dan hak atas tanah adat saat ini dari temuan-temuan dalam sejarah hukum kolonial. Selanjutnya, saya menyoroti beberapa konsep kunci mengenai hak tanah adat, seperti yang ditemukan dalam hukum kolonial hingga hukum nasional kontemporer. Setelah Indonesia merdeka, diskusi paling kritis tentang pengakuan masyarakat adat, hukum adat, dan hak atas tanah adat terjadi selama penyusunan Undang-Undang Pokok Agraria (UU No. 5/1960). Pemerintah dan pembuat undang-undang menghadapi dilema, antara kepentingan untuk merawat pluralisme hukum tata kelola pertanahan yang diwarisi dari pemerintah kolonial, atau membentuk kesatuan hukum pertanahan nasional yang baru. Dalam merumuskan Undang-Undang Pokok Agraria, sebagian besar suara di DPR mendukung pembentukan undang-undang pertanahan nasional yang baru. Namun, para ahli yang terlibat dalam penyusunan hukum memiliki sikap yang beragam terhadap posisi hukum adat dan

hak atas tanah adat. Di satu sisi, hukum adat dijadikan sebagai dasar hukum pertanahan nasional. Di sisi lain, hukum adat dan hak atas tanah adat tunduk pada hukum nasional oleh beberapa persyaratan yang dimasukkan ke dalam undang-undang, yang menyatakan bahwa hak atas tanah adat – dalam hal ini hak ulayat – tidak boleh bertentangan dengan kepentingan nasional, sosialisme Indonesia, nilai-nilai agama, dan peraturan yang lebih tinggi. Akibatnya, UU Agraria menyebabkan subordinasi hak atas tanah ulayat, apalagi atas diskresi penyelenggara negara. Lebih jauh lagi, legislasi dan amandemen UUD Indonesia selanjutnya telah memperburuk pengakuan bersyarat untuk mengesahkan hak tanah adat. Model pengakuan bersyarat telah menghasilkan prosedur yang rumit, dan bab-bab berikut membahas mengapa dalam satu kasus masyarakat lokal berhasil mendapatkan pengakuan hukum, sementara di kasus lain strategi tersebut gagal. Secara bersama-sama, bab-bab studi kasus (4 sampai 7) diarahkan untuk mengidentifikasi faktor-faktor pendukung dan penghambat dalam mewujudkan pengakuan hukum negara atas hak-hak tanah adat.

Ketika masyarakat lokal ingin menggunakan strategi pengakuan hukum, langkah pertama adalah mengajukan argumen yang kuat untuk klaim hak atas tanah adatnya. Syarat apa yang harus dipenuhi agar klaim adat begitu kuat sehingga dapat meyakinkan lembaga pemerintah dan parlemen untuk memberikan pengakuan hukum? Bab 4 menjawab pertanyaan ini, dengan menganalisis kasus di mana masyarakat lokal gagal mendapatkan pengakuan hukum negara atas hak tanah adat mereka. Kasus tersebut menyangkut masyarakat Cek Bocek di Sumbawa (Nusa Tenggara Barat) yang terlibat konflik pertanahan dengan perusahaan tambang besar yang beroperasi di tanah leluhur mereka. PT Newmont Nusa Tenggara mengoperasikan tambang emas terbesar kedua di Indonesia yang terletak di pulau Sumbawa. Perusahaan telah memperluas operasi penambangannya ke area komunitas Cek Bocek. Penelitian saya menunjukkan bahwa anggota masyarakat setempat memiliki berbagai kepentingan dan strategi untuk menanggapi operasi pertambangan. Strategi mereka bervariasi dari menolak operasi perusahaan dan menuntut pembayaran kompensasi, mengejar kontrak dari perusahaan pertambangan untuk usaha kecil atau proyek jasa, atau mencoba mendapatkan pekerjaan di perusahaan, atau mencoba mendapatkan bagian dari dana pengembangan tanggungjawab sosial perusahaan. Dalam kasus khusus ini, penduduk desa menggunakan klaim adat terutama untuk mendapatkan pembayaran kompensasi dari perusahaan pertambangan. Awalnya,

kepala desa membuat sistem pendokumentasian tanah secara informal, memberikan surat keterangan sebagai bukti klaim tanah individu dalam wilayah adat mereka, untuk digunakan sebagai dasar untuk meminta pembayaran kompensasi dari perusahaan. Setelah strategi itu gagal, masyarakat lokal merevitalisasi lembaga adat mereka dan mengubah strategi mereka untuk mendapatkan pengakuan hukum atas hutan adat. Strategi kedua ini juga gagal, karena DPRD menolak secara hukum mengakui masyarakat adat. Alih-alih mengakui Cek Bocek, DPRD Sumbawa justru mengakui Kesultanan Sumbawa sebagai perwakilan resmi masyarakat adat setempat. Kasus ini menunjukkan bahwa pengakuan hukum atas hak-hak adat sulit diperoleh, jika berbagai aktor di lapangan memperdebatkan hal-hal mendasar dari klaim-klaim adat.

Bab 5 membahas beberapa kesulitan lain yang terjadi ketika masyarakat lokal mengejar pengakuan hukum untuk menyelesaikan konflik pertanahan. Bab ini menganalisis kasus konflik pertanahan antara masyarakat lokal dengan PT Toba Pulp Lestari di Sumatera Utara yang telah berlangsung selama lebih dari tiga dekade. Selama bertahun-tahun, masyarakat setempat telah menerapkan berbagai strategi melawan aktivitas perusahaan, antara lain aksi gerakan petani menentang perampasan tanah, kampanye perlindungan lingkungan dari pencemaran akibat operasi perusahaan, dan pemberdayaan perempuan – karena merekalah yang paling menderita dari perampasan tanah. Dalam satu dekade terakhir, klaim tanah adat menjadi strategi dominan yang digunakan masyarakat lokal terhadap perusahaan. Dalam bab ini, saya fokus pada masyarakat Pandumaan-Sipituhuta, menganalisis mengapa dan bagaimana masyarakat terlibat dalam penggunaan strategi adat untuk menentang operasi perusahaan di hutan adat mereka yang penuh dengan pohon kemenyan yang menghasilkan getah yang sangat berharga. Pada 2016, Kementerian Lingkungan Hidup dan Kehutanan merealokasi 5.172 hektar areal konsesi perusahaan untuk hutan adat masyarakat Pandumaan-Sipituhuta. Namun, prasyarat pengakuan hukum atas hutan adat tersebut adalah masyarakat harus terlebih dahulu mendapatkan pengakuan statusnya sebagai masyarakat adat dari pemerintah kabupaten. Proses pengakuan hukum menjadi rumit, karena melibatkan banyak aktor politik baik di tingkat kabupaten maupun nasional. Pada tahun 2021, di bawah tekanan politik, Kementerian Lingkungan Hidup dan Kehutanan akhirnya mengakui hutan adat masyarakat Pandumaan-Sipituhuta. Namun, ini tidak menyelesaikan konflik. Ketika pemerintah mengakui sebagian hutan adat yang diusulkan, pemerintah juga

menetapkan sebagian lain dari hutan adat Pandumaan-Sipituhuta untuk proyek ketahanan pangan nasional, tanpa meminta persetujuan dari anggota masyarakat Pandumaan-Sipituhuta. Dua kasus pada Bab 4 dan 5 menunjukkan bahwa masyarakat adat menghadapi banyak kendala dalam proses memperoleh pengakuan hukum negara atas hutan adat sebagai solusi konflik tanah dengan perusahaan besar. Kasus-kasus tersebut juga menunjukkan seberapa besar ketergantungan masyarakat adat pada pemerintah ketika mereka mengejar pengakuan hukum.

Dalam Bab 6 saya membahas dua komunitas sebagai contoh sukses, karena mereka benar-benar berhasil mendapatkan pengakuan hukum dan menyelesaikan konflik tanah mereka. Kasus-kasus dalam bab ini menyangkut masyarakat Kasepuhan Karang (Provinsi Banten) dan masyarakat Marena (Sulawesi Tengah). Kedua komunitas menghadapi konflik dengan taman nasional yang mengelola kawasan konservasi hutan yang tumpang tindih dengan wilayah mereka. Dengan dukungan Ornop di berbagai tingkatan, kedua komunitas tersebut telah menyelesaikan semua prosedur pengakuan hukum. Dengan memfokuskan analisis pada langkah-langkah dalam proses pengakuan hukum, dari mengartikulasikan masalah masyarakat hingga akhirnya menyelesaikannya, bab ini menunjukkan bagaimana Ornop memiliki peran dominan dalam mengarahkan proses pengakuan hukum. Ornop yang bergerak di bidang advokasi masyarakat adat selama ini telah mendukung masyarakat lokal dalam memperoleh pengakuan hukum atas hak atas tanah adat, dengan kegiatan baik di tingkat nasional maupun daerah. Pelajaran penting dari dua kasus di sini, peluang untuk memperoleh pengakuan hukum lebih besar bagi masyarakat adat yang terlibat dalam konflik tanah dengan lembaga pemerintah yang bergerak di bidang konservasi alam (daripada dengan perusahaan pertambangan atau perkebunan). Di kawasan hutan konservasi, tujuan masyarakat adat dan instansi pemerintah terkadang bertemu. Dalam kasus khusus Bab 6, tujuan bersama adalah untuk melestarikan alam di kawasan hutan. Hal ini kontras dengan studi kasus di dua bab sebelumnya, di mana perusahaan dan masyarakat adat memiliki kepentingan yang berlawanan. Meskipun dua komunitas adat yang dibahas di sini telah memperoleh pengakuan hutan adat, keberhasilan mereka pada akhirnya bergantung pada apa yang akan terjadi beberapa tahun setelah pengakuan hukum diperoleh.

Bab 7 membahas apa yang terjadi setelah pengakuan hukum, dan bagaimana pengakuan hukum itu dilaksanakan. Pada bab ini saya

melanjutkan kasus pada bab 6, tentang masyarakat Kasepuhan Karang. Dalam hal ini, pengakuan hutan adat menimbulkan ketegangan baru. Perbedaan sosial baru menjadi relevan. Ternyata, banyak warga desa dari luar masyarakat Kasepuhan Karang yang sudah puluhan tahun bercocok tanam di hutan adat. Beberapa pengguna lahan dari luar masyarakat Kasepuhan Karang mulai merasa tidak aman setelah adanya pengakuan hutan adat. Mereka khawatir pengakuan hutan adat Kasepuhan Karang akan mengurangi akses mereka sendiri. Menanggapi situasi ini, kepala desa membuat sistem pendaftaran tanah informal dan memberikan 'sertifikat penggunaan tanah' untuk setiap pengguna tanah. Catatan pendaftaran tanah informal menunjukkan bahwa 40% pengguna tanah di hutan adat Kasepuhan Karang bukan anggota masyarakat Kasepuhan Karang. Studi kasus ini menggambarkan peran penting kepala desa dan tokoh adat dalam pelaksanaan pengakuan hukum. Hal ini juga menunjukkan bahwa hak ulayat tidak selalu memberikan kepastian tenurial bagi pengguna lahan, terutama pengguna yang bukan merupakan anggota masyarakat adat tertentu.

Bab 8 adalah bab penutup, di mana saya merenungkan pelajaran utama yang dipetik dari bab-bab sebelumnya. Saya meninjau kembali akar konflik tenurial kehutanan dan bagaimana strategi pengakuan hukum masyarakat adat dan hutan adat berperan dalam penyelesaian konflik. Jelas bahwa menyelesaikan konflik tenurial kehutanan bukanlah perkara sederhana. Studi kasus dalam buku ini menunjukkan kompleksitas dari setiap konflik tenurial kehutanan. Keragaman aktor, kepentingan, dan strategi yang digunakan masyarakat lokal sangat bergantung pada konteks, jaringan, dan lawan dalam berkonflik. Pendekatan proses yang saya gunakan dalam penelitian ini sangat berguna untuk menganalisis kasus-kasus kompleks secara sistematis. Ini membantu saya untuk memeriksa dengan cermat setiap tahapan konflik, mulai dari persiapan, melanjutkan proses hukum, dan berakhir dengan pengakuan hutan adat. Pendekatan ini dapat membantu ketika mengevaluasi efektivitas strategi manajemen konflik. Pada dasarnya, bab ini menyoroti temuan kunci dari penelitian ini.

Penelitian ini mengajak pembaca untuk berpikir tentang "masyarakat adat" sebagai sebuah konsep politik. Banyak sarjana memandang masyarakat adat atau masyarakat asli sebagai konsep hukum atau realitas antropologis. Sebagai konsep politik, keberadaan masyarakat adat sangat bergantung pada hubungan politik. Dengan demikian, mungkin ada situasi di mana suatu komunitas tidak

memenuhi semua persyaratan sebagai masyarakat adat, tetapi tetap dapat memperoleh pengakuan hukum dari negara. Di sisi lain, ada komunitas yang memenuhi semua persyaratan tetapi tidak mendapatkan pengakuan. Penting untuk disadari bahwa pengakuan negara selalu bersyarat. Hal ini menyiratkan bahwa pemerintah memegang kekuasaan yang besar untuk memberikan pengakuan hukum, untuk memberikannya hanya pada kasus-kasus tertentu, atau bahkan untuk menolak permohonan yang diajukan oleh masyarakat adat. Akibatnya, pengakuan hukum atas hak-hak masyarakat juga telah menjadi proses politik antara berbagai aktor baik di tingkat kabupaten maupun nasional. Dengan tinjauan yang saya lakukan tentang banyaknya pembatasan, dan betapa sulitnya untuk memenuhi semua persyaratannya, saya merekomendasikan kepada pendukung hak-hak masyarakat adat untuk memikirkan kembali strategi pengakuan hukum untuk menyelesaikan permasalahan perampasan tanah masyarakat adat. Mengejar pengakuan hukum semakin membuat masyarakat adat berada di bawah kendali sistem hukum negara. Jadi, alih-alih memperoleh otonomi, masyarakat adat berisiko ditundukkan melalui proses pengakuan hukum, dan dalam banyak kasus pengakuan hukum juga tidak menyelesaikan konflik tanah mereka.

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Curriculum Vitae

YANCE ARIZONA was born in Kerinci (Sumatra), Indonesia on 24 March 1983 and he spent his childhood there. He travelled to Padang to complete his undergraduate degree at the Faculty of Law, Andalas University. After completing his degree in constitutional law, he moved to Jakarta to work for NGOs promoting local and indigenous communities' rights who encounter land conflicts with companies and state agencies (HuMa and Epistema Institute).

During his involvement in NGO activities, he continued his academic studies. Yance holds a master's degree in constitutional law from the University of Indonesia (2012) and a Master of Arts (MA) from the Oñati International Institute for Sociology of Law at Universidad del País Vasco in Spain (2016). Yance started his PhD research at Leiden Law School on January 1, 2017 under the supervision of Professor Adrian Bedner and Dr. Jacqueline Vel. He obtained LPDP Scholarship for completing his PhD. He began his academic career as a lecturer at President University (2011-2021). In 2021, he joined the Department of Constitutional Law, Gadjah Mada University.

Yance participated in international conferences and short courses on law, the environment, and indigenous peoples' rights, such as the tailor-made course on *Agrarian Transition for Rural Development* at the Institute of Social Studies, the Netherlands (2011); *Beahrs Environmental Leadership Program* at University of California Berkeley (2013); and *the Indigenous Studies Summer Program* at Columbia University, New York, the USA (2014). Yance has received fellowships from a number of international institutions. In 2014 he received *the Indigenous Leaders Conservation Fellowship* sponsored by Conservation International, and in 2019 he was awarded a *Sasakawa Young Leadership Fellowship Fund* (SYLFF) from the Tokyo Foundation to conduct visiting research on customary land rights in Australia (UNSW) and Japan (Osaka University of Tourism).

Yance is the author of several books and journal articles written mostly in Bahasa Indonesia. His work is also published in international publications such as *the Asia Pacific Journal of Anthropology*, *Asian Journal of Law and Society*, *Constitutional Review*, and book chapters published by Gottingen University (Germany), Hurights Osaka, and Oxford University Press (forthcoming in 2022).