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

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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 Indoesier 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; Termorshuizen-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 resubmitted 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 (*Dekret 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 onwards, 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 (<i>Masyarakat hukum adat masih hidup</i>)	Adat law communities can be considered <i>de facto</i> , existing either territorially, genealogically, or functionally when fulfilling the following elements: <ol style="list-style-type: none"> 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 (<i>Sesuai dengan perkembangan masyarakat</i>)	Adat law communities, along with their traditions, are in accordance with societal development when: <ol style="list-style-type: none"> 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 (<i>Sesuai dengan prinsip Negara Kesatuan Republik Indonesia</i>)	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: <ol style="list-style-type: none"> 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.

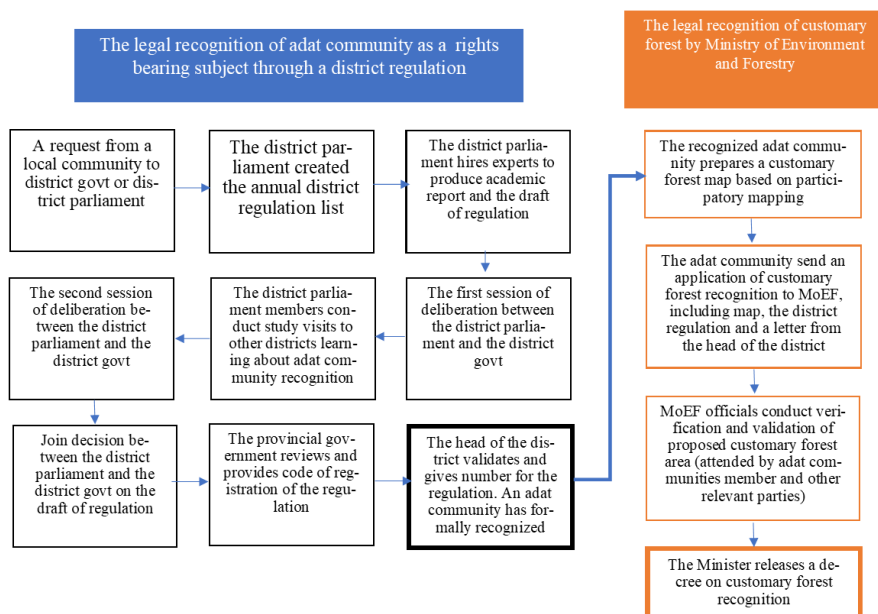
Compared to other sectors, the realisation of customary land rights recognition in the forestry sector has shown concrete results. Nevertheless, progress remains slow because customary lands that are claimed by adat communities are much larger than the customary forests currently designated by the government. 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.

