State Courts, Traditional Dispute Resolution and Indigenous Peoples in South Kalimantan:
A Socio-Legal Study
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LLB; LLM.
Abstract

This thesis investigates the issues of recognition and protection of indigenous peoples through the local perspective from the Province of South Kalimantan. In Indonesian law, one of the essential prerequisites for recognition of indigenous peoples is an ability to reconcile disputes arising within their indigenous areas. The prerequisites are formally stated in State legislation. Without this essential prerequisite, indigenous peoples are considered as not having ‘legal and political’ elements, only ‘cultural’ elements, which are inadequate to be granted legal status. To settle disputes arising within their own indigenous areas, indigenous peoples use Traditional Dispute Resolution (TDR) which employs cultural, sociological and legal approaches.

Indigenous peoples and TDR are under a great burden to become more formalised, because the Indonesian government tends to impose the typical western concepts of a ‘legally-based’ status on indigenous peoples and a ‘tribal court’ on their TDR. Legal formalism contributes to this mindset by controlling almost all aspects of indigenous peoples, particularly their legal recognition. The government will only recognise indigenous peoples as having legal status if they have a formalised TDR, namely peradilan adat or a tribal court. Moreover, State Courts merely employ legal analysis while disregarding a socio-cultural analysis of indigenous peoples’ issues, which may cause injustice.

Meanwhile, indigenous peoples whose TDR does not adopt a ‘legal’ approach are not legally recognised as ‘a distinct group’, thus the cultural and sociological approaches of TDR are weakened. The process of recognition of indigenous peoples based on the state’s prerequisites is thus state-centred as the government makes a subjective assessment in identifying indigenous peoples. This condition provokes tension between legal formalism within State law and legal pluralism supporting adat law in general, and State Courts and TDR in particular.

This thesis investigates how both the State Courts and TDR settle disputes involving adat law and indigenous peoples within their respective jurisdictions, with a view to finding ways of addressing the tension between legal formalism within State law and legal pluralism supporting adat law and TDR. In order to answer these questions, this thesis applies both a legal and a social science perspective, and a legal and historical analysis of legislation and court decisions. Data from interviews which demonstrate legal reasoning processes are presented in order to give an empirical dimension to judgment analysis. This thesis also shows law in action, by demonstrating how the tribal chiefs and judges implement their policies and approaches to settle disputes.
It is argued in this thesis that in regard to the implementation of legal pluralism, state linkage is needed to validate living laws via ‘rules of recognition’, either through legislation or court decisions. State law pluralism becomes the more realistic option for Indonesia. It is argued that indigenous peoples would obtain greater protection and benefit if legislators and judges used a pluralist approach which considered adat law alongside legislation. Moreover, the western-formalistic definitions being used to depict the characteristics of indigenous peoples and their TDR need refinement. The formal definition and criteria of indigenous peoples have been used as barriers to the recognition of indigenous peoples. This thesis suggests a more inclusive concept of indigenous peoples.
Declaration by author

This thesis is composed of my original work, and contains no material previously published or written by another person except where due reference has been made in the text. I have clearly stated the contribution by others to jointly-authored works that I have included in my thesis.

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<th>Contribution</th>
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<td>Mirza S Buana (Candidate)</td>
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<th>Full Form</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
<td></td>
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<tr>
<td>AMAN</td>
<td>The Indigenous Peoples’ Alliance of the Archipelago</td>
<td></td>
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<td>BPN</td>
<td>The National Land Agency</td>
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<tr>
<td>DPR</td>
<td>The People’s Representative Council</td>
<td></td>
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<tr>
<td>DPD</td>
<td>The Regional Representative Council</td>
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<tr>
<td>HIR</td>
<td>Code of Civil Procedure for Java and Madura</td>
<td></td>
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<tr>
<td>HP-3</td>
<td>Concessional rights in coastal areas</td>
<td></td>
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<tr>
<td>HST</td>
<td>A Name of Regency in South Kalimantan. The name literally means the Central Headwaters.</td>
<td></td>
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<tr>
<td>HPHH</td>
<td>Small-scale forest concession</td>
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<tr>
<td>HPH</td>
<td>Large-scale forest concession</td>
<td></td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>IS</td>
<td>Dutch Indies State Regulation</td>
<td></td>
</tr>
<tr>
<td>Perda</td>
<td>Provincial Legislation, Regional and City/Municipal Legislation</td>
<td></td>
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<tr>
<td>PP</td>
<td>Implementing Regulation</td>
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<tr>
<td>Rbg</td>
<td>Code of Civil Procedure for outside Java</td>
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<tr>
<td>RR</td>
<td>Colonial Government Regulation</td>
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<tr>
<td>RO</td>
<td>Judicial Organisation Regulation</td>
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<tr>
<td>TAP MPR</td>
<td>The Stipulation of The People’s Consultative Assembly</td>
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<tr>
<td>TDR</td>
<td>Traditional Dispute Resolution</td>
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<tr>
<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous Peoples</td>
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<td>UU</td>
<td>Legislation</td>
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# GLOSSARY

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Adat law</td>
<td>Customary or living law. The word is taken from Arabic.</td>
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<tr>
<td>Balai</td>
<td>A place to conduct indigenous ceremonies including harvest celebration, informal gatherings and <em>balian</em> (a ceremony to call ancient ancestors and to remedy misfortune)</td>
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<tr>
<td>Balian</td>
<td>Shaman</td>
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<tr>
<td>Bumi Putera</td>
<td>Indonesian</td>
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<tr>
<td>Cultuurstelsel</td>
<td>Enforcement planting</td>
</tr>
<tr>
<td>Domein Verklaring</td>
<td>The land which was part of the state domain</td>
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<tr>
<td>East Indie</td>
<td>Dutch’s name for Indonesia</td>
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<tr>
<td>Habib</td>
<td>A noble tittle or peerage of Middle East (Arab)</td>
</tr>
<tr>
<td>Masyarakat adat</td>
<td>Indigenous peoples</td>
</tr>
<tr>
<td>Membari supan</td>
<td>Ashamed and cursed by holy ancestors</td>
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<tr>
<td>Musyawarah</td>
<td>Deliberative discussion</td>
</tr>
<tr>
<td>Nusantara</td>
<td>Indonesia’s old name</td>
</tr>
<tr>
<td>Panglima</td>
<td>Malay title of commander or chief of troops</td>
</tr>
<tr>
<td>Pembakal</td>
<td>An informal leader of the village</td>
</tr>
<tr>
<td>Peradilan adat</td>
<td>Tribal court</td>
</tr>
<tr>
<td>Rechtstaat</td>
<td>Rule of Law</td>
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<tr>
<td>Tahil</td>
<td>A form of tribal fine</td>
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<td>Ulayat</td>
<td>Indigenous rights</td>
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CHAPTER 1 – INTRODUCTION

I INTRODUCTION

This thesis explores the issues of recognition and protection of indigenous peoples (*masyarakat adat*) through the local perspective from the Province of South Kalimantan. In Indonesia, one of the most essential prerequisites of the legal recognition of indigenous peoples is their ability to settle disputes arising within their indigenous territory.\(^1\) The ‘ability’ to settle disputes signifies that indigenous peoples are capable of maintaining and enforcing their law and order within their own community. Without this essential prerequisite, indigenous peoples are considered not to have ‘legal and political’ elements, only a ‘cultural’ element, insufficient to be granted legal status. The government therefore only recognises as legally-based indigenous peoples (*masyarakat ‘hukum’ adat*),\(^2\) indigenous peoples who can maintain law and order through the effectiveness of their tribal institution. Indigenous peoples use Traditional Dispute Resolution (TDR) which employs cultural, sociological and legal approaches to settle their disputes. Therefore this thesis adopts the concept of TDR.

The issue becomes of much relevance as the government of Indonesia is inclined to impose typical western concepts of ‘legally-based’ on indigenous peoples, and ‘tribal court’ on TDR. The government will only recognise indigenous peoples as having legal status if they have a formalised TDR, namely *peradilan adat* or tribal court in which the word ‘*peradilan*’ expresses the jurisdiction of the court. Meanwhile, indigenous peoples whose TDR does not apparently adopt legal approach are not legally recognised as ‘a distinct group’: the cultural and sociological approaches of TDR are undermined.

Indigenous peoples and TDR are under much pressure to become more formalised, because both must comprise legal elements.\(^3\) This condition provokes indigenous peoples to imitate State law’s structures in general, and State courts’ structures in particular.\(^4\) Legal formalism contributes to this

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1. Law No. 41 of 1999 on Forestry Law (Indonesia) elucidation of art 67(1). Four requirements for legally-based indigenous peoples are: (1) the community has well organised groups; (2) the community has its own territory; (3) the community has its own tribal institution (in particular a tribal court); and (4) the community has both material and spiritual goods.
4. In Central Kalimantan, indigenous peoples have advocated a more formalised *adat* structure in order to fit with the State’s parameter. The tribal court in Central Kalimantan has similar concepts to the State Court’s structure: it has *adat* ‘judges’, ‘prosecutors’ and ‘lawyers’. See Regional Regulation of the Province of Central Kalimantan No. 16 of 2008 on *Adat Institutions in Central Kalimantan* (Indonesia).
mindset by dominating almost all aspects of indigenous peoples’ lives. This policy may create discrimination against those indigenous peoples whose TDR does not have legal status. The government may confine access to justice for indigenous peoples by narrowing and categorising them based on their approach to dispute resolution.

Moreover, the Constitution, particularly in the Chapter of Judicial Power, does not recognise the existence of ‘tribal courts’; instead it only recognises formal judicial institutions and processes. This legal text makes the recognition of indigenous peoples and their TDR unclear and ambiguous. As consequences, disputes that have been settled by TDR are often unrecognised by the State, and State courts merely use legal analysis while ignoring socio-cultural analysis of indigenous peoples’ issues. The common view, supported within Indonesia, is that the majority of judges are legal formalists. In this setting, the judge must always consider the existing positive laws, while ignoring other social-cultural values in their legal reasoning processes. This condition escalates the tension between legal formalism within State law and legal pluralism supporting adat law.

TDR also suffers from several limitations. At the interface of the two legal systems, particularly with respect to jurisdictional authority, TDR may create double-jeopardy because an offender would encounter two legal systems, procedures and punishments. TDR also lacks legal certainty because the substantive adat law is unwritten and based on oral tradition. In some regions, TDR often fails to settle vested-interest cases and it is only effective in settling matrimonial and small-scale disputes. The vested-interest cases are disputes that involve power-related interests that aim to influence conditions, actions or arrangements particularly for selfish personal ends. This thesis investigates vested-interest cases involving companies, local government and local people’s interests. The cases relate to the communal land and natural resources aspects settled by both State Courts and TDR in South Kalimantan. The objects of dispute were contested by interested parties, including indigenous peoples, companies and local government.

5 The 1945 Constitution of Indonesia (Amended) (Indonesia) art 24 (2). ‘the judicial power shall be implemented by a Supreme Court and judicial bodies below it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court’. See Law No. 18 of 2009 on Basic Principles of Judiciary (Indonesia) art 18.
6 Most of judges’ reasons are formalistic by referring to The 1945 Constitution (Indonesia) art 24 (2) and The Basic Principles of Judiciary Law (Indonesia) art 18.
9 World Bank Indonesia, Forging the Middle Ground: Engaging Non-State Justice in Indonesia (World Bank, 2008) xi.
10 Ibid.
A brief description of adat law and the adaptation of legal pluralism in the Indonesia legal system are important as a background for this thesis. The issue of recognition of indigenous peoples is related to a deeper discussion on adat law which is, an Indonesian customary law, because adat law is a substantive law for indigenous peoples in Indonesia. The recognition of adat law has fallen in and out of favour. The Dutch colonial regime used the adat law to lessen Islam’s influence by strengthening both the procedural law and the adat law. After Indonesia gained independence, the government of Indonesia legislated to recognise ‘tribal court’ (peradilan adat). However, this legal recognition by the State was short-lived because Sukarno, the first President of Indonesia, abolished the ‘tribal court’. Sukarno considered tribal courts to be a product of Dutch colonialism that could impede national development and a unification policy. The second President of Indonesia, Suharto, through his authoritarian government influenced the People’s Representative Council (DPR) to pass legislation which supported the unification of the judicial system in Indonesia. Therefore indigenous peoples and their TDR were marginalised under his regime.

Following the reformasi movement in 1998, the Constitution of Indonesia (as amended) now recognises adat law, local knowledge and its institutions as long as they correspond to Indonesia’s national law. This recognition is asserted in two chapters: Article 18B (2) of the Regional Autonomy Chapter and Article 24 (2) of the Human Rights Chapter. Those articles recognise indigenous peoples’ rights, particularly their property rights, but it also limits these rights by proposing several conditional requirements. In this respect, recognition of rights is not necessarily the same as recognising indigenous peoples’ legal systems. Following Griffith’s theory of legal pluralism, this condition can be called ‘state law pluralism’.

[References]
14 Law No. 19 of 1948 on Basic Principles of Judiciary (Indonesia).
15 Urgent Law No.1 of 1951 on Basic Principles of Judiciary (Indonesia).
17 The 1945 Constitution of Indonesia (Amended) (Indonesia) art 18B (2). ‘the state recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law’.
18 Ibid 281 (3). ‘the cultural identities and rights of traditional communities shall be respected in accordance with the development of time and civilisations’. Also art 32 (1): ‘(1) the state shall advance the national culture of Indonesia among the civilisations of the world by assuring the freedom of society to preserve and to develop cultural values’.
It is important to note that during the post-Suharto era, Indonesia has evolved into a democratic country which acknowledges rule of law and human rights principles. These new perspectives have also enriched judges’ approaches in regard to the settling of disputes involving indigenous peoples, for instance the Constitutional Court made a landmark decision to recognise indigenous adat forests in the 1999 Forestry Law.\textsuperscript{21} The struggle of indigenous peoples through judicial review and adjudication can be considered as an attempt to expand plural legal orders.\textsuperscript{22} Indigenous peoples have challenged the well-established State’s law supremacy, a supremacy in which legal formalism and legal centralism are key factors. As a response to the Constitutional Court decision concerning indigenous forest, the government issued the 2014 Village Law which is more inclusive, because it explicitly recognises the structure of adat villages and the role of adat law.\textsuperscript{23} It can be argued that recognition of indigenous rights and participation are now moving in the right direction. In other words, the practice of legal pluralism in Indonesia has progressed from socio-cultural facts to legal reality.\textsuperscript{24} This thesis aims to analyse the events leading to the recognition and protection of indigenous peoples in Indonesia and South Kalimantan in particular and how formal law has been used alternatively to both promote and undermine legal pluralism.

In order to achieve these purposes, this thesis utilises a social science perspective to enrich legal research. There are a growing number of studies regarding indigenous peoples in Indonesia from a social and a legal perspective, but they seldom focus both on tribal chiefs’ and judges’ legal reasoning. Arizona’s work elaborated on historical-constitutional issues on indigenous peoples, and analysed some court decisions regarding natural resources and indigenous peoples.\textsuperscript{25} However his work was more specific on the principle of state acquisition rights in the Constitution. Butt did an analysis of the same Constitutional Court decisions.\textsuperscript{26} However, their analyses are different, as the focus and research questions are different from this thesis. Both works did not analyse the Supreme Court’s decisions.

This thesis intends to fill a gap by providing a legal and historical analysis of legislation and court decisions, and an exploration of the socio-cultural context of indigenous peoples and disputes arising within their villages. Information obtained from interviews enriches the judgment analysis and illustrates the underlying ‘interests’ in TDR practice. This thesis shows how the tribal chiefs and judges implement their policies and approaches in settling disputes, and thus examines which

\textsuperscript{21} Indigenous Forest Law Case (2012) 35.
\textsuperscript{22} Ihsan Yilmaz, Muslim Laws, Politics and Society in Modern States (Ashgate, 2005) 26-27.
\textsuperscript{23} Law No 6 of 2014 on Village (Indonesia).
forum settles dispute more effectively. Lastly it suggests a reform policy which would both settle the tension between the legal formalism/centralism within State law and legal pluralism, and support indigenous peoples’ rights.

Apart from after the fall of Suharto, the Indonesian government has accommodated the aspirations and participation of indigenous peoples, particularly with regard to the recognition of indigenous sovereignty over their forests. Nevertheless the existence of indigenous peoples in general, and the practice of TDR in particular, have still come under increasing pressure. The effectiveness of *adat* law and TDR, especially in the settling of vested-interest cases is decreasing due to pressure from vested-interest parties. Additionally, TDR has become a more formal process. At the same time, State Courts merely employ legal analysis while disregarding a socio-cultural analysis of indigenous peoples’ issues. This may legitimise injustice. Indigenous peoples would obtain greater protection and benefit, if the judges considered legal pluralism discourse and use not only a legal approach, but also a socio-cultural approach, because then they would consider *adat* law.

II  RESEARCH QUESTIONS

The main questions that this thesis poses are:

How can the tension between legal formalism within State law and legal pluralism supporting *adat* law be redressed?

How can both the State Courts and TDR settle disputes involving *adat* law, indigenous peoples and other interested parties within their respective jurisdictions?

The main questions are further elaborated in the following sub-questions.

(1) What are the theoretical and historical-doctrinal reasons for the underlying tension between legal formalism within State law and legal pluralism supporting *adat* law in the Indonesian legal system in general and, the judicial system in particular?

(2) Within State Courts, what are the judicial reasoning processes and the policies or approaches which judges consider when deciding cases involving the *adat* law and the indigenous peoples?

(3) Within TDR, what policies or approaches are used by the tribal chiefs to de-escalate disputes?

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The research was conducted through both the national and the local perspective of the Province of South Kalimantan. However, national legislation and court decisions could not be disregarded, because Indonesia is a unitary state in which national legislation plays significant role as overarching legislation for all regional legislation. The scope of this approach presents some limitations that will be addressed.

The ‘tension’ that the thesis explores is a theoretical disagreement between two prominent theories: legal formalism as a foundation of State courts, and legal pluralism as a supporter of adat law. Adat law is a central element of TDR and indigenous peoples. The tension especially arises from legislation that regulates indigenous peoples and their natural resources. Borrowing Santos’s concept, this thesis examines the tension in both ‘mental maps’ (legal formalism and legal pluralism), and ‘cartographic maps’ (within legislation and court decisions). Santos elucidates that sometimes judges and legislators misread and/or choose the ‘mental maps’ aiming to strengthen their own position and exclusiveness, in other words, to have a monopoly over the regulation and control of social action within a legal territory.28 This tension will be explored in this thesis.

Significant conflicts between Islamic law and State law and adat law will not be discussed. These conflicts still occur in indigenous regions because conduct which is acceptable under local traditions, such as gambling and alcohol consumption at tribal-social gatherings, is unacceptable both in Islamic and State law. In such cases, adat law and State law can be used to resolve the conflict because Islamic law does not apply to non-Muslim indigenous peoples in South Kalimantan.29

IV RESEARCH APPROACH AND METHODOLOGY

This study not only uses legal research by exploring literature, legal norms and text documents, but also takes fieldwork to produce a comprehensive vision of its subject.30 This is a socio-legal study. In others words, legal scholarship is at its core, but socio-cultural information obtained through fieldwork containing semi-structured interviews and observation are also pivotal to enrich the legal analysis. Findings and other information obtained from interviews and observation are positioned as

29 Interview with Norsewan, Secretary Office of Hinas Kiri village (Hinas Kiri village, 25 January 2014).
illustrations on how ‘law in action’ operates within the judiciary and to depict the empirical dimension of the disputes.

The legal research in this thesis is founded on a presentation of the conceptual framework of legal pluralism: it discusses some concepts of legal pluralism discourse, and explores its disagreement with legal formalism. With regard to the Indonesia’s specific legal context, the thesis also elaborates some specific concepts in the literature review. Further, the thesis analyses relevant Acts which regulate indigenous peoples’ rights and natural resources management. The aim of this approach is to trace the historical developments and the tension between legal formalism and legal pluralism in those Acts. A case law approach is also used which aims to highlight judges’ interpretations of indigenous peoples’ rights and adat law. Both the analysis of legislation and court decisions analysis benefit this thesis, as Acts are often considered as a ‘static’ law, and court decisions as ‘actual’ laws. Court decisions analysis aims to sharpen the analysis of the relevant legislation.

To enrich and to give more empirical insights to legal analysis, fieldwork was conducted in 2014. The fieldwork was employed within two legal systems: State Courts and TDR within indigenous villages. In general, the aim of the fieldwork was to obtain evidence to show how the State Courts, both at national and local level in South Kalimantan, accommodate and limit indigenous peoples’ rights, and how indigenous peoples and their TDR settle vested-interest cases and negotiate within the State Court system in South Kalimantan.

As a consequence of employing both legal analysis and fieldwork, information obtained from interviews is presented in Chapter 5 and 6 as additional evidence which will further develop the analysis of the decisions. The analysis will make clear which statements from part of the decision and which are derived from the interviews.

Since theories and methodologies are inextricably inter-linked, this thesis adopts both conventional and contemporary approaches to legal pluralism. The former is employed by ‘mapping the legal universe’. This is carried out by contrasting the two legal theories: legal formalism within State law, and legal pluralism supporting adat law. The latter is carried out by describing the mutual influence, and interaction between legal orders and traditions. These two approaches of legal pluralism will be further elaborated in the next chapter.

A Collection and Analysis of Documents

Legal research was started by collecting relevant literature and important documents as library-based research to provide a background of general and specific information dealing with legal pluralism theory, specific concepts relating to indigenous peoples, and adat law in Indonesia. This research was conducted mainly in the library of the School of Law and Duhig Library at the University of Queensland (UQ) prior to fieldwork in Indonesia. During fieldwork, the researcher gathered further literature at the National Library of Indonesia in Jakarta.

The main part of this thesis consists of a historical-doctrinal analysis of legislation and court decisions. This necessitated collecting relevant Indonesian Acts concerning indigenous peoples and natural resources. The issues of natural resources and indigenous peoples are inter-related because indigenous peoples are land-based minority groups. The Acts analysed were the Basic Agrarian Law (BAL), the Forestry Law, the Plantation Law and the Village Law. This research also examined court rules and other aspect of procedure as they are relevant as guidelines for further analysis of court decisions.

Court decisions both in the national and local context were selected based on their strong influence on indigenous peoples’ rights and protection. The relevant court decisions were handed down by the District Court, High Court, Supreme Court and Constitutional Court. The Constitutional Court’s decisions were: Indigenous Forest Law Case (2012) 35, Coastal and Small Islands Law Case (2010) 3, and Plantation Law Case (2010) 5. At the local court level the decisions were the Temuluang Cave Dispute in the Kotabaru District Court, and Communal Land Dispute in the HST District Court. Other higher courts’ decisions were also examined, because disputes between indigenous peoples and the State and corporations in the District Courts can be appealed to those courts. It is also important to note that these courts handed down unanimous decisions. Dissenting opinions are not accepted in the District and High Courts, only in the Supreme and the Constitutional Court.32

There was difficulty in getting the local court decisions and local regulations as unlike the Constitutional Court decisions, most of District Courts, High Courts and Supreme Court decisions are not online. Other relevant documents were collected from various networks, including government officers, NGO activists, and university lecturers. Those documents benefitted the analysis by adding more detailed information concerning the cases.

32 Law No 5 of 2004 on Changes of Law No 14 of 1985 on Supreme Court (Indonesia) art 30 (3). Law No 24 of 2003 on Constitutional Court (Indonesia) art 45 (10).
The Acts and court decisions were analysed qualitatively by referring to legal pluralism and legal formalism theories in general, and legal interpretation theory in particular. The legal pluralism and legal formalism theories inform the analysis of legislation by highlighting the role of the government in accommodating indigenous peoples’ rights. The analysis focused on the Acts’ history and their political background. Using legal pluralism as a parameter, this thesis exposes the drawbacks of the Acts. Legal interpretation theories help to reveal the standing of judges in the case law analysis. It also shows the mindset of judges when dealing with indigenous peoples’ issues: whether judges are keen to employ a socio-cultural approach on legal analysis, or use formal legal analysis.

By examining and elucidating past and current Acts and court decisions, this thesis can trace the development of the legal pluralism concept both in legislature and judicial system. This analysis creates a trajectory aiming to determine the beginning, middle and current ‘narrative’ and the application of legal pluralism in Indonesia.\(^{33}\) It provides an historical-doctrinal explanation in understanding tension between legal formalism and legal pluralism in Indonesia.

However, this legal research has little to say about the practice of State Courts and TDR in settling disputes involving indigenous peoples’ rights. Therefore, this thesis places those past and current legislation and court decisions in an empirical context by employing fieldwork research consisting of interviews and observation.

**B Interviews**

Data collection through fieldwork consisting of semi-structured interviews through selected sampling and observation was used for this research.\(^{34}\) The interviews examined the judicial practice of State Courts and the real-life context of indigenous peoples and their TDR in South Kalimantan, particularly in the two regencies of Kota Baru and *Hulu Sungai Tengah* (HST). These areas are the most traditional and remote from urban areas, and within which natural resources disputes have occurred. This research entailed creating balanced sampling; ensuring that sufficient informants from both State Courts and indigenous villages were selected.

The nature of the interviews is qualitative rather than quantitative. They seek to gather the perspectives and experiences of the informants on the disputes. Due to the nature of dialogue and cultural modes of discussion with indigenous peoples, the questions asked during the interviews

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\(^{33}\) The words ‘trajectory’ and ‘narrative’ inspired by Paul Ricoeur, *Time and Narrative* (University of Chicago Press, 1984) 38.

were less specific than a structured interview. However, the researcher prepared an interview guide consisting of detailed topics and well-developed sequenced questions.\(^{35}\) The interviews sought a range of insights and opinions. Interviews allow the researcher to follow up ideas and investigate motives and feelings.\(^{36}\) By nature, opinions and feelings are subjective, so there is no way to diminish the ‘subjectivity’ in this research. Instead, it is the very nature of ‘subjectivity’ which strives for greater ‘objectivity’.\(^{37}\)

Due to the sensitive nature of the information discussed, the interviews were not recorded. This made the interviews less formal and more relaxed. However, the researcher took written notes, which were further developed within an hour of the interview, by including any further information the researcher could remember. The interview notes were written in the language in which each interview was conducted. The local language quotes are retained to maintain and showcase the cultural uniqueness and originality of the information. The information was sensitive, thus some informants asked not to disclose their identity. Before conducting fieldwork, the researcher had applied for ethical clearance and the University of Queensland Ethics Committee had approved the application.

1 *Interviews in State Courts*

The aims of conducting the interviews in the State Courts were twofold: first, to understand the underlying judicial approach and reasoning of the judges; second, to know judges’ personal perceptions of the cases in general, and the issues of legal pluralism and indigenous peoples’ rights in particular. Those aims were designed to strengthen and enrich the analysis of court judgments.

In the early stage of the fieldwork, the researcher used a formal approach for contacting judges by submitting an Information Paper to the Chief of the Courts indicating the purpose of the interviews. However, the researcher realised the fact that the Supreme Court system in particular is known as an overly-bureaucratic institution. This was the most challenging hurdle of the research. To overcome the hurdle, the researcher used an informal approach by using an ‘insider’ to contact the judges. The ‘insider’ was an administrative officer at the Supreme Court office in Jakarta. He assisted in contacting the judges and arranging the interviews.

The sampling was selected on the basis of the following criteria: first, the people who heard and decided the dispute involving indigenous peoples and *adat* law, in this respect judges from District


Courts, High Court, Supreme Courts and Constitutional Courts were included. The chairperson of the judges’ committee was prioritised to be interviewed. The Justices both in the Supreme Court and the Constitutional Court who are also academicians were interviewed, not only in the context of judgment, but were also asked in regard to the specific Acts concerning indigenous peoples and the Courts’ structure and procedures. The thesis is less concerned with the evidentiary processes exercised by police officers and public prosecutors, because the research is narrowly focussed on judicial reasoning processes. Second, the people who had a central role in the cases, including plaintiffs, lawyers, and defenders were all closely interviewed. The third group consisted of those people affected by the decision of the case, including indigenous peoples, and local government officers. Fourth and lastly are, the people who have strong knowledge and insight into indigenous peoples and legal pluralism in Indonesia. These people include academics, NGO workers and researchers.

Within the State Court system, the researcher interviewed 18 informants including a member of the judiciary and the legal profession: a retired Supreme Court judge, two retired Constitutional Court judges, a current Constitutional Court judge, two Supreme Court judges, a High Court judge, three District Court judges and two lawyers. Additionally, three research academics and three NGO workers were also interviewed. However, there were ‘issues’ in finding more judges to interview. In the Constitutional Court, most of the judges who had heard the cases had already retired. Particularly in the High and District Courts, judges are regularly moved to other courts within Indonesia’s jurisdiction due to the transfer policy of judges. The interviews with the judges were conducted mostly in Jakarta and other cities on Java Island. Despite the fact that the researcher was unable to interview all involved judges, most of the chairpersons on each case were interviewed. The concentration is on qualitative issues, not quantitative ones. 38

In order to find out the judicial reasoning processes and the factors which judges consider when deciding cases involving adat law and indigenous peoples, the interviews were conducted on the basis of a list of questions. Interviews with judges aimed at obtaining their perspectives on how adat law relates with State law, whether judges have been responsive to adat law and indigenous peoples, and how judges exercise their judicial reasoning in dealing with cases involving adat law and indigenous peoples. However, the list of questions was continuously adapted on the basis of new insights from fieldwork. The data obtained were then analysed qualitatively by referring to legal interpretation theories. The information, insights and legal doctrines given by the informants were compared and contrasted with the court decisions, particularly their ratio decidendi. It is

38 Ibid 295.
important to note that findings from interviews were used for illustrative purposes only. The information added insights to the legal analysis of court decisions by uncovering the underlying legal reasoning processes. The researcher only interviewed judges who either chaired or held and decided the relevant cases. Therefore the information obtained from interviews corresponds to the cases.

2 Interviews in Indigenous Peoples’ Villages

The purposes of conducting interviews in indigenous villages are threefold. First, it aims to fully understand the nature of the disputes and the real-life context of indigenous peoples in their villages. Second, it uncovers the underlying ‘interests’ in the cases. Third, it aims to fully understand the practice of TDR, approaches and policies used by the tribal chiefs. These aims provide an empirical dimension for legal analysis; ensuring that the issue is not explored through one lens, but rather a variety of perspectives.39

Unlike in State Courts, in indigenous villages, the researcher adopted a different approach. Both communication and interaction with the informants had to be carried out in culturally appropriate ways. Fortunately, the researcher knows the language and is aware of the local values and habits of indigenous Dayak villagers. To build a strong relationship with the informants, cultural ties need to be expressed. However, at the first meeting, the villagers, particularly tribal chiefs were reluctant to express their perceptions. To overcome this issue, the researcher asked a fellow indigenous activist to accompany the interviews’ processes. To avoid bias, the presence of government influences was avoided.

The key informants interviewed were tribal chiefs dealing with disputes within the villages, elder people, chief of village, secretary of village and villagers. They were selected as informants because they had had a crucial role and information regarding cases that were brought both to TDR and State Courts. Within indigenous villages and the local governments, this research interviewed 18 informants including: four tribal chiefs, three retired chiefs of village, two chiefs of village, three local government officers and six villagers involved in the disputes.

Questions with special focus on the practice of TDR were asked of tribal chiefs and indigenous peoples who were involved in disputes. The questions were: what are the significant influences of adat law in indigenous communities, what are some effects of government policies to indigenous peoples, and how are tribal chiefs dealing with State law and its judicial institutions? These

questions were aimed to uncover the real-life context of indigenous peoples, the nature of disputes, and to find out policies or approaches used by tribal chiefs to de-escalate disputes. However, the list of questions would be continuously adapted on the basis of new insights from fieldwork.

C Observation and Cross-Check Interviews

Additionally, in order to ascertain and test the trustworthiness of the data from disputes involving indigenous peoples, the researcher undertook observation and cross-check interviews.\textsuperscript{40} The first approach was observation of the way in which the indigenous peoples acted in dealing with their disputes. The researcher observed TDR practice by regularly attending TDR meetings and casually chatting with the elders and the parties. The researcher often invited villagers to have coffee and \textit{wadai} (snacks) at a nearby \textit{warung} (traditional coffee shop) and they usually accepted the invitation. The \textit{warung} in the villages is the best place to promote informal and casual conversation, where specific information can be gathered. The researcher mingled with individuals who were observed and interviewed. By observing real-life contexts of indigenous peoples involved in TDR, the nature and the underlying triggers of disputes within indigenous villages can be revealed. In other words, observation produced a broader understanding of the dispute.

The second approach was through cross-check interviews. This approach was undertaken aiming to validate and compare the information with information obtained from different informants. The researcher also interviewed local government officers to gather further information from indigenous informants. Moreover, additional data such as the habits, traditions, ceremonies, and local values of indigenous peoples can also enrich the legal analysis. In sum, the observation and cross-check interviews can validate the data obtained.

V THE CONCEPTS

A Living Adat Law

A review of literature offers a large number of diverse definitions relating to the law that could be applied to local Indonesian indigenous communities. Researchers who embrace common law traditions such as Allott\textsuperscript{41} and Forsyth\textsuperscript{42} often utilise the concept of ‘customary law’ to depict the phenomena. On the other hand, civil law scholars such as Van Vollenhoven use the terms ‘living

\textsuperscript{40} Norman K Denzin, \textit{The Research Act: A Theoretical Introduction to Sociological Methods} (McGraw-Hill, 1978), 304.
\textsuperscript{42} Miranda Forsyth, \textit{The Bird that flies with two wings: Kastom and State Judicial System in Vanuatu} (ANU Press, 2009).
law’ or ‘adat law’, adat has a broader meaning than customary law. Van Vollenhoven considers adat is ‘folk law’, ‘people’s law’ or ‘living law’, with dynamic and flexible characteristics. Hooker adds: ‘It can mean any one of the following: law, rule, precept, morality, usage, custom, agreement, conventions, principles, the act of conforming to the usage of society, decent behaviour, ceremonial, the practice of sorcery and ritual’.

According to Ehrlich who formulated the sociological concept of the living law, it is closely linked to adat law because it is ‘the law which dominates life itself even though it has not been posited in legal proposition’. In Ehrlich’s concept, living law is not directly linked to the State; instead it involves with the inner workings of various social groups or associations. Similar to any other social norm, it relies on recognition by the people in their everyday lives. Therefore it does not ultimately depend on recognition by the State. Further, Ehrlich opposed the formalist claim that the only valid law is legislation, legalised by the legislature or state political power.

This thesis will refer to living adat law which merges Ehrlich’s living law with the concept of adat law. The term is a manifestation of legal pluralism in Indonesia. It both reflects the people’s legal cultures, and is opposed to legal centralism. Living adat law is an unwritten and genuine law of Indonesia which has been influenced by religious laws. Adat as a living law has several general concepts, elements, and divisions that are consistently ordered. Therefore, even though it is considered to be indigenous law, living adat law can be called a legal system.

Ehrlich differentiated between two main functions of the law. The first is the rule of conduct, representing the ‘inner order of social association’. This is not only a rule according to which people customarily regulate their conduct, but also a rule according to which they ought morally to do so. The rule of conduct is the societal law that gains its authority through its dynamic input-

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44 MB Hooker, *Adat Law in Modern Indonesia* (Oxford University Press, 1978) 50
46 Ibid 488.
47 Ibid 137.
48 Buana, ‘Living’ above n 3, 105-106.
49 Soepomo, *Bab-Bab tentang Hukum Adat [Chapters on Adat Law]* (Penerbitan Universitas, 1962) 34.
50 Ibid.
output model, in which ‘facts of law’ are the sources and ‘living law’ is the final product,\textsuperscript{51} according to Ehrlich: ‘legal norms are those norms that flow from the facts of law’.\textsuperscript{52}

The second function of the law is to create the norms derived from judge-made decisions. From the standpoint of judges the decision becomes a legal rule, according to which the judge must decide the legal disputes brought before him or her. These norms are no more than derivative laws; abstract normative generalisations from decisions aimed at resolving disputes arising in social associations and relationships.\textsuperscript{53}

Despite the fact that Indonesian \textit{adat} law has fundamental similarities with living law theory, it has distinctive characteristics which divide into two categories of laws. First, \textit{adat yang berbuhul mati}, which literally means \textit{adat} that is tied to death. This is strict \textit{adat} law, neither negotiable nor adaptable to changes or context, and is dogmatic in nature. In this first category, \textit{adat} law has a strong connection with the concept of rule of conduct which has a natural law element.\textsuperscript{54} It is enforced by the ‘inner order of social association’.\textsuperscript{55} Natural law views the law from \textit{a priori} or meta-physical perspective, that is, from internal morality values.

The second category, \textit{adat yang bertali hidup} or \textit{adat pusaka}, means a flexible and fluid \textit{adat}, law that passes from one generation to the next and is subject to social change. This \textit{adat} is sociological in nature; a living law which grows and thrives within the community.\textsuperscript{56} According to Wignjosoebroto, a notable \textit{adat} scholar, \textit{adat} law differs noticeably from Dutch civil law: civil law is doctrinal and deductive in nature whereas \textit{adat} law is pragmatic, flexible, concrete and inductive in nature, bearing some slight similarities to the common law.\textsuperscript{57}

However, von Benda-Beckmann favours the term ‘living law’ rather than \textit{adat} law, because ‘it is not old but contemporary law, not law on paper but actually valid and practiced’.\textsuperscript{58} Even though these terms share many similarities and differences, this thesis uses living \textit{adat} law as its primary terminology, because nothing can accurately reflect and explain original Indonesian values better

\begin{footnotesize}
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\item \textsuperscript{51} Ehrlich, above 45, 11, 64, 501.
\item \textsuperscript{52} Ibid 64.
\item \textsuperscript{53} Ibid 121.
\item \textsuperscript{54} Ehrlich, above n 45, 26.
\item Koesnoee, ‘\textit{Dasar}’, above n 54, 45. Buana, ‘Living’, above n 3, 106.
\item \textsuperscript{55} Email from Soetandyo Wignjosoebroto to Mirza S Buana, 9 Maret 2013.
\item \textsuperscript{56} Franz and Keebet von Benda-Beckmann, \textit{The Social}, above n 43,177.
\end{itemize}
\end{footnotesize}
than our ‘own’ language and concepts. The term ‘living law’ is used in order to stress the element of contemporaneity in adat law.

B Indigenous Peoples of Indonesia

Both international and national institutions have provided contested definitions of indigenous peoples. *ILO Convention No 107* defined indigenous peoples through patronising language, based on assumptions of integration. This resulted in policies aimed at assimilating indigenous peoples into the majority, rather than recognising their distinctiveness and uniqueness. In the 1980s, *ILO Convention No 169* refined this definition making it more by distinguishing between ‘tribal people’ and ‘indigenous peoples’, though still recogniseing they are not mutually exclusive categories. As the Indonesian Government has not yet ratified *ILO 169*, it is not legally binding.

In 2007 the UN issued the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. However, like *ILO 169, UNDRIP* is not legally binding. This thesis argues that neither is sufficient to define indigenous peoples. However, the definition itself warrants less focus than how it is used to hinder or limit the sovereignty of indigenous peoples, and how the power of ‘defining’ is used by interest groups to achieve their ‘hidden agenda’.

At the national level, Indonesian indigenous communities are divided into two groups: a non-legal indigenous community, culturally based and independent from the State structure; and a legally-based indigenous community, politically-based and functioning within the State structure. Only the second group can be recognised by the State as a legal subject. This group is further divided into the subgroups of genealogical, territorial and a mixture of the two.

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60 *Constitution No 107, ILO* art 1 (3), and art 2 (1) (2).


62 *Constitution No 169, ILO* art 1 (a) and (b).


64 Buana, ‘Living’, above n 3, 106.


Abdurrahman, currently Justice of the Supreme Court, has stated that, there are no legally-based indigenous peoples in South Kalimantan.\(^68\) His argument was influenced by Ter Haar who stressed that in order to be granted legal status by the State, indigenous peoples must be legally rather than culturally constructed. In Indonesian law four requirements must be met to legally-based indigenous peoples. Their community must have: (1) well organised groups; (2) its own territory; (3) its own tribal institution (in particular a tribal court); and (4) posses both material and spiritual goods.\(^69\) However Asshiddiqie, a former Chief Justice of the Constitutional Court, considers that not all these requirements are necessary for proof of legally-based indigenous peoples.\(^70\)

Asshiddiqie stressed the dichotomy between culturally and legally based communities by specifying that a legal or organisational unit within the indigenous community is the essential element of the legally-based indigenous peoples; without a legal or organisational unit the indigenous community should not be considered a legal entity.\(^71\) Asshiddiqie maintains that the indigenous peoples must also have a strict division of labour,\(^72\) and gives an example in West Sumatera (Minangkabau) where the *adat* government is constructed hierarchically.\(^73\)

This thesis argues that indigenous peoples do not form semi- or modern communities where specialization of work and separation of powers are strictly employed. Instead, they are a communal society in which a strict division of labour is unlikely to be found.\(^74\) Durkheim’s concept of solidarity explains this as mechanic solidarity. In this setting, people are bound through similar ethics, beliefs, values and morals. This type of solidarity often manifests in tribal or traditional communities where kinship ties of familial networks play an important role. In contrast, modern and industrial communities where cultural-based ties have been abandoned offer a type of organic solidarity which stresses interdependence arising from the division of labour.\(^75\) Additionally, a generalisation drawn from an analysis of the Indonesian archipelago using only Minangkabau may not be relevant to the central and eastern side of Indonesia.

The current classification between culturally-based and politically or legally-based indigenous peoples, is rejected for the following reasons: first, it may lead to a false dichotomy. Indigenous

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\(^{68}\) Interview with Abdurrahman, Justice of the Supreme Court, (Banjarmasin, 3 January 2014).

\(^{69}\) Law No. 41 of 1999 on Forestry Law (Indonesia) elucidation of art 67(1).

\(^{70}\) Asshiddiqie, *Konstitusi*, above n 67, 1.

\(^{71}\) Ibid.

\(^{72}\) Ibid.


peoples, like any other society, must be constructed culturally; culture is the starting point for every social norm and law in the society. In fact, laws and norms are a reflection of culture. Second, the concept of the legally-based indigenous peoples (masyakarat ‘hukum’ adat) currently used by the 1945 Constitution and Acts may lead to discrimination because there will be some indigenous peoples whose cultures and traditions are respected, but not recognised as legal entities by the State; and others whose cultures and traditions are both respected and recognised as legal entities. The concept of indigenous peoples must be generally understood as a cultural, political and legal entity. This thesis uses the term ‘indigenous peoples’ (masyarakat adat), without the addition of the adjectives ‘culturally’ or ‘legally’-based.

C Traditional Dispute Resolution

The existing literature uses terminology such as Alternative Dispute Resolution (ADR), informal justice, community (neighbourhood) justice, popular justice, and tribal courts to refer to dispute resolution that occurs outside the State judicial sphere. These terms are problematic and paradoxical, as Traditional Dispute Resolution (TDR) is not necessarily an alternative to formal mechanisms; it is often only the first stage of dispute resolution. Black identifies a need to distinguish modern mediation from traditional mechanisms. However, she does not provide a comparison between TDR and the State Court and judges as her ADR research is limited to modern mediation. Further, TDR does not always aim to achieve ‘justice’ but rather to re-establish balanced relations post-conflict. ‘Justice’ projects are mostly artificial mechanisms created by NGOs responding to their perception of a lack of access to justice in rural communities. Lastly, the characteristics of TDR are not linked solely to adjudication (court) processes, but include a mixture of approaches and closely relate to people’s understanding of ‘justice’ and a harmonised life.

Ter Haar focused on what he called tribal adat courts (peradilan adat) as a fundamental prerequisite for legally-based indigenous peoples. However Ter Haar’s perspective on Indonesian indigenous

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82 Hilary Astor and Christine Chinkin, Dispute Resolution in Australia (Butterworths, 2nd ed, 2002) 5.
83 Black, above n 77, 7.
peoples was influenced by his civil law background. He suggested that recording of judicial decisions of the adat court would provide information on adat law in its natural environment. Based on this argument, the concepts of indigenous peoples and TDR are inseparable. As a result, Abdurrahman concludes that there are no legally-based indigenous peoples in South Kalimantan, because there are no adat courts there. While it is true that there is no adat court in South Kalimantan, and maybe in other parts of Indonesia, there is dispute resolution though its form does not resemble a ‘court’. TDR is a communal forum which aims to resolve disputes peacefully. The tribal chief is not a ‘judge’, rather, the tribal chief acts as a facilitator and communicator to stabilise the society. Ter Haar’s delineation of adat law and its judicial methods are insufficient in that the attribute of authority is only one among several which make up the concept of adat law.

The essence of TDR is not about how much or how severe the sanctions are. Its essence lies in the reconciliation agreement between the victim and the perpetrator mediated by the tribal chief. Through this agreement, the perpetrator admits fault and promises not to repeat the crime, while the victim wholeheartedly forgives the crime (with some requirements). This form of agreement is the core of adat law, and corresponds to the indigenous proverb: ‘agreement is older than adat law, law therefore is agreement’. Through this agreement, living adat law updates its validity within the society. Living adat law is a flexible natural law. Van Vollenhoven’s understanding of adat law may stem from the fact that he too could not free himself entirely from his western civil law background, leading him to think that sanctions are the only guarantee of order. Sanctions in indigenous communities are used not as a form of payback but to restore the cosmic order by remedying a disorder in the balance of nature.

The typical western concept of a ‘court’ being imposed on indigenous communities and their TDR must be reviewed. TDR is under much pressure to become more formalised, a tendency that should be rejected, because formalisation will disconnect TDR practice from adat law. It is true that some TDR carries out a ‘court’ or adjudication function, but it has a broader aim than just adjudication. Instead, TDR is a forum for dispute settlement, aiming not only to punish through sanctions but more importantly to strengthen harmony and re-establish cosmic relations between disputing parties.

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86 Ter Haar, above n 66, 41. See also, Koentjaraningrat, Villages in Indonesia (Cornell University Press, 1967) 21.
87 Interview with Abdurrahman, a Justice of the Supreme Court, (Banjarmasin, 3 January 2014).
89 Koentjaraningrat, above n 86, 21.
92 Ibid.
within its jurisdiction. This thesis uses TDR as its main terminology as opposes to tribal court because it is a more apt and inclusive concept.93

VI CHAPTER OVERVIEW

Chapter 2 reflects on theoretical and historical explanations regarding tension between legal formalism within State law and legal pluralism supporting adat law in Indonesia’s legal system. The chapter begins by examining the opposing theories: legal formalism and legal centralism vis-à-vis legal pluralism, aiming to set a ‘mapping of legal universe’. The aim of the description is to investigate the theoretical root of their disagreements and to set a conceptual framework for further analysis in the following chapters 3, 4, 5 and 6. The broad discussion of legal theory then moves forward a specific discussion of judicial approaches and reasoning. Lastly, Indonesia’s experiences in undergoing several legal traditions are also critically examined.

Chapter 3 provides a detailed description and analysis of several Acts that regulate natural resources management in general, and indigenous peoples’ rights in relation to natural resources. Legislation is the primary source of law in Indonesia, thus by examining the content and underlying background of the legislation, this thesis can investigate how legal pluralism and indigenous peoples’ issues are being developed by the legislature. This Chapter also exposes some interests that exacerbate the tension between indigenous peoples and the State.

Chapter 4 begins by elaborating some relevant theories on court system, including: evolution and functions of a court, the independence of judiciary and judicial review. Moreover, Chapter 4 examines two State institutions: the Supreme and the Constitutional Court. It provides an introduction to the State judicial system by examining normative legal doctrines and written legal sources in relation to the values and procedures of the State Court. The chapter examines the phenomena of the State Court as a prominent ‘formalistic’ institution, and why the legacy of formalism might be nurtured by the State Court and TDR for their mutual benefit to reflect values both affecting and emanating from the community.

Unlike Chapter 4 that mostly consists of theoretical and normative aspects of the Courts, Chapter 5 examines the Constitutional Court’s landmark decisions regarding indigenous peoples’ rights. The legal aspects that Chapter 5 elaborates are the legal standing of indigenous peoples, the relationship between indigenous peoples and their natural resources and access to justice for indigenous peoples. The analysis of the decisions aims to understand the perspective of the Constitutional Court on legal

pluralism, and to discuss plausible legal reform with a view to strengthening legal pluralism in the Indonesian legal system.

Chapter 6 examines both TDR and State Court practices in South Kalimantan. This chapter also discusses the dynamic interaction between indigenous peoples, State Courts, and local governments. The cardinal aim of this chapter is to answer questions regarding the practice of the State Courts and TDR in settling disputes involving adat law, indigenous peoples and interested parties within their respective jurisdictions. Evidence is drawn from empirical research including description of these practices. Conclusions are reached as to how, in TDR, tribal chiefs react to positive laws, and their policies and approaches to de-escalating disputes within their own jurisdiction. In relation to the State Court system, the chapter investigates how judges actually exercise their functions in a court room by dissecting their legal reasoning and the underlying factors that might influence their decisions. The chapter uncovers the relationship between indigenous peoples and TDR in South Kalimantan and the State Court’s responses to indigenous peoples and their property rights.

Finally Chapter 7 draws on the evidence, the major findings, and analysis in the previous chapters by providing an answer to the research questions set out in this introduction. The answers to the question are constructed by several sections, including: First, the questions that need theoretical and historical explanations are answered under the section of theoretical and historical overview. Second, the empirical questions are answered under the section of Practice of the Courts and Practice of TDR in South Kalimantan. Chapter 7 also makes a number of suggestions based on these findings to promote legal pluralism in Indonesia and thus contribute to empower the relationship between State and adat law. Chapter 7, however, does not cover detailed evidence and findings, as those are already included in the previous chapters.
CHAPTER 2 – INVESTIGATING THE TENSION BETWEEN LEGAL FORMALISM AND LEGAL PLURALISM IN INDONESIA THROUGH LEGAL THEORY

I INTRODUCTION

This chapter aims to act as an extension of the literature review, providing theoretical frameworks for further analysis for the next chapters. It examines the theoretical disagreement between legal formalism and legal pluralism, particularly with regard to the existence of living law in state structure. The aim is to seek legal reform to lessen the tension between legal formalism-centralism within State law and legal pluralism supporting adat law. The discussion is not only in the general sense of legal theory, but also in the specific context of Indonesia by examining the development of legal pluralism in Indonesia through its literature of adat law. This chapter can be considered as an attempt toward ‘mapping the legal universe’ in a ‘mental maps’ context.⁹⁴

The first section of this chapter presents three opposing theories: legal formalism, legal centralism and legal pluralism. Both legal formalism and legal centralism are inter-related. Legal formalism is the source of legal centralism. Therefore in order to understand legal centralism, the theories from legal formalism must be examined. To balance the discussion, legal pluralism, as an anti-thesis of legal centralism, is presented. Discourse on legal pluralism provides a framework of the discussion on adat law. The aim of this section is to investigate the core arguments of their disagreement. The second section of this chapter consists of an elaboration of the disagreement between legal centralism and legal pluralism which creates consequences in judicial approach and reasoning processes. In this section, some judicial approaches are presented; both those rooted in legal formalism and those which support legal pluralism.

The third section of this chapter presents the theoretical debate between legal formalism and legal pluralism in Indonesia’s legal system. The two opposing legal schools are presented: the adat law school of thought and that of modern-developmentalism. By elaborating on these opposing school of thoughts in Indonesia, the core of the tension between legal formalism and legal pluralism in Indonesia can be explained, and the thesis can propose the most feasible legal reform to soothe the tension.

⁹⁴ Santos, above n 28, 281.
Lastly, this chapter argues that by shifting from centralism to legal pluralism, legal reform is pivotal in widening the space for justice for the people, particularly those considered to be indigenous and marginalised.

II  OPPOSING THEORIES

A  Legal Formalism and Legal Centralism

The discussion of legal formalism and legal centralism cannot be separated because both share a theoretical and practical relationship. Legal centralism is the outcome of legal formalism as it provides control mechanisms to lessen peoples’ sovereignty while strengthening state’s powers over citizens. Legal centralism becomes the main credo of a modern nation-state, ‘it aims to unite the people subjected to its rule by means of homogenisation, constructing a unified culture, symbols, values, reviving traditions and sometime inventing them’.95

Nevertheless, legal formalism has several facets as a result of a diverse understanding of the main power and structure of the law. The first facet is analytical formalism; the second, normative formalism.

1  Analytical formalism

The analytical formalism represented by Austin begins its fundamental argument by referring to the sovereign’s authority of state. Austin affirmed that the law is objectively rational, rather than intuitive, political or irrational. It has its own dynamic that allows it to be self-supporting and self-developing, and is neutral from social controls.96 Analytical formalists depict the law as having a hierarchical structure, which derives its power from top to bottom, guided by political powers, sovereign, sanction and command, which deal with how the law flows from authority to subordinate actors and finally reaches the people.

The ‘authority’ is reduced into three types: first, a supreme political power; secondly, a subordinate political power that derives its power from the political power; lastly, a private legal entity who endures a legal right.97 In order to implement ‘sovereignty’, the rulers command and impose sanctions towards the community. However, a command in positive law should flow from a

97 Ibid 118.
determinate or official sources and legitimate ‘author’ (law-giver), and sanctions must also be annexed to a command.\textsuperscript{98}

2 \textit{Normative formalism}

Another formalist, so-called normative formalist, Kelsen has a different approach. Kelsen supplied a normative aspect into the notion of analytical formalism.\textsuperscript{99} Kelsen’s normative theory, in contrast to Austin’s, dealt with legal validity that starts at the bottom and rises to the pinnacle of the law. Subordinate laws must correspond to upper and supreme law, which is the constitution, and to abstract legal norm namely the \textit{Grundnorm}.\textsuperscript{100} To find its validity, the law must be traced from the bottom to the supreme law in the highest hierarchy.

Kelsen emphasised that the law has its own self-legitimation which corresponds to objectivity. Therefore, the law must be neutral from empirical sense data.\textsuperscript{101} It also contains an analytical objectivity, which means that the state and the law are an objectively logical-formal structure.\textsuperscript{102} In order to build objectivity, legal unification is required to guarantee legal certainty and simplified diversity. The only law is that which is created by the state via the legislature, and it should be reduced to the form of written law and a positive legal system. In other words, modern legal systems incline toward strengthening unification while reducing diversity.

Another theorist, Hart, proposed a more inclusive approach. Unlike Austin, who rejected the court as a law-making institution and strongly upheld a classical separation of power thesis,\textsuperscript{103} Hart re-opened the opportunity to strengthen the role of the court by encouraging judges to use their discretion in making new laws or filling the gaps if the written laws were too general, unclear or defective.\textsuperscript{104} The judges could then act as ‘negative legislators’ if there was ‘open texture’ in the written law. Hart’s perspective on the role of the court provides further insights for judicial reasoning.

Despite the fact that both analytical and normative formalists have different standpoints in how the law is/should be structured and conveyed, both theories are still considered legal formalism as they

\textsuperscript{98} Ibid 120.
\textsuperscript{101} Ibid 5.
\textsuperscript{102} Giorgio Bongiovanni, ‘Rechtsstaat and Grundnorm in the Kelsenian Theory’ in Legal System and Legal Science (ARSP, 1997) 65.
\textsuperscript{103} Christoph Moellers, \textit{The Three Branches: A Comparative Model of Separation of Powers} (Oxford University Press, 2013) 10-45.
emphasise the importance of the role of state as the main administrator while limiting pluralism. In other words, the State law is the only proper law: ‘the law is and should be the law of the state, uniform for all persons, exclusive of all other laws and administered by a single set of state institutions’. This is the main thesis of legal centralism.

B Formalist’s Perception on the Living Law

Legal formalism is critical of the idea of legal pluralism and living law. The maxim of formalism is the separation thesis, which rejects the existence and application of non-legal values in a legal system. This thesis means that law and morals are two completely independent systems and, as a result, moral and ethical values are considered to be external to the law. Formalists see the law only through the eyes of judges and lawyers and treat the law as sufficient unto itself. Another argument is presented by Weber, who views the living law as formally irrational in law-finding, because its processes cannot be confirmed by intellect. This can be seen in the example of tribal chiefs reconciling conflicts by consulting oracles, or acting in accordance with society’s spiritual or sociological demands.

The living law from a formalist stand point can be fully comprehended by describing Austin’s dichotomy of law. Austin categorises law into: laws properly so called, which are the state laws (written law); and laws improperly so called, which are customary laws (unwritten law). The written formal law is recognised as a proper law because it gains its power from an authorised ‘author’. This ‘author’ has a crucial role in law-making processes because he or she is the legitimate source of legal expression. This ‘author’ highlights why the law should be developed internally, namely that in order to understand the ‘author’s’ product, that is, the legal text, the reader must delve inside the mind of the creator.

On the other hand, living law is insufficient to be classified as ‘proper’ because it is unwritten and is imposed by general opinion. It also lacks an identifiable source or ‘author’. It cannot be held as a legitimate law, because the law must have a certain law-giver. Moral values as a cardinal source of

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105 Ehrlich, above n 45, 11.
110 Austin, above n 96, 119,122.
112 Austin, above n 96, 119-122.
living law are considered an indeterminate or uncertain aggregate of a person, and this may lead to subjectivity.\textsuperscript{113} Further, Austin also urges that living law should be tested as to, whether it is an applicable law or merely a ‘raw ingredient’ of law-making and law-finding. He considered living law to be merely a rule of positive morality.\textsuperscript{114}

Kelsen was one of the harshest critics of the living law proposed by Ehrlich’s controversial proposition. Ehrlich acknowledged that both state or public law and ‘juristic’ law are sources of law, and these are also accompanied by ‘fact of law’. As noted by Klink, Kelsen and Ehrlich’s confrontation escalated when Ehrlich transposed social facts into legal norms, or derived legal norms from social facts.\textsuperscript{115}

In Kelsen’s mind, Ehrlich was blurring the concepts of facts and norms. Kelsen reminded Ehrlich of the classical distinction of law between what is ‘ought’, which is the field of normative legal research, and law as reality or ‘is’, a question which falls within sociological expertise. Kelsen stressed that a combination of both perspectives is inadmissible and would lead to ‘methodological syncretism’.\textsuperscript{116} Kelsen’s criticism was mainly aimed at establishing the validity of the law not its legitimacy. Therefore the living law can still be an additional ingredient of the law. In other words, norms can still be a source of inspiration for state law officials, including judges. The living law can exist both in society and at the state level, because the living law is adaptable to new circumstances and changes in public opinion.

A more inclusive approach was presented by Hart who classified rules into two categories: (1) primary rules which are the genuine and traditional form of the law consisting both of interpretation and legal enforcement based on community consensus (law that is being accepted) and (2) so-called secondary rules used by officials to determine what the court considers a valid rule, to govern interpretation and change the rules.\textsuperscript{117} These officials have a set of criteria to allow them to determine which rules are part of the legal system and which are not. This policy is known as ‘the rule of recognition’.\textsuperscript{118} However, Hart did not strictly indicate that ‘official’ for this purpose must be state formal official; it could be the priests of a religious group or the tribal chiefs of a cultural or

\textsuperscript{113} Ibid 110.
\textsuperscript{114} Ibid 118.
\textsuperscript{117} Hart, above n 104, 89-96.
\textsuperscript{118} Ibid.
ethnic group. Hart’s inclusive approach, particularly his ‘the rule of recognition’ policy would connect the State law to living laws, and mediate the tension between those two laws.

However, both strict and inclusive approaches to legal formalism cannot disregard the fact that even within the State law system, the plurality of multiple bodies of law, with multiple reflections and multiple sources of legitimacy exist. Clearly, pluralism is inevitable in every aspect of human life.

C Legal Pluralism

This thesis explores the development of legal pluralism as a legal framework. Legal pluralism supports the living law, in that it is a descriptive theory that deals with the fact that within any given field, the law of various provenances may be operative. John Griffith was the first to provide categories of legal pluralism: between the so-called weak and strong legal pluralism.

Weak pluralism, or state law pluralism, is a condition when living laws have been embraced and contaminated by the formality of state law through formal recognition. By recognising the living law, the state conveys its authority and political power toward indigenous communities and living laws. State law pluralism is often justified as a technique of governance on pragmatic grounds. This approach is slightly similar to Hart’s inclusive approach of ‘the rule of recognition’ and Kelsen’s normative approach of the validity of law to emphasise that the state-law linkage is an inevitable consequence of the modern state. In this type of legal pluralism, there is no purity of law, only a diversity of legal sources. It is pluralism within state law.

The application of state law pluralism can be seen in Indonesia’s context in the definition and requirements of ‘indigenous peoples’ in the Constitution and the current laws. The state offers a limited scope for the recognition of indigenous peoples and their rights. This state-centred legal pluralism is often criticised for failing to take account of diverse aspects of the complex relationship between living laws and ‘semi-autonomous social fields’.

119 Roger Cotterall, Law, Culture and Society: Legal Ideas in the Mirror of Social Theory (Ashgate, 2006) 37.
120 Kleinhans and MacDonald, above n 31, 32.
121 Griffith, above n 20, 35.
122 Ibid 5.
123 Ibid 5.
124 Ibid 9-10.
125 The 1945 Constitution of Indonesia (Amended) (Indonesia) art 18B (2) and 28I (3).
On the other hand, strong legal pluralism is a situation in which not all of the law is state law, nor is all of it administrated by a single set of state legal institutions.\textsuperscript{127} Similar to state law pluralism, strong legal pluralism is also a socially observed fact. However, in this type of legal pluralism, there is strong separation between state law and living laws.\textsuperscript{128} This type of legal pluralism is more commonly practised amongst indigenous villages or, to use in Sally Falk Moore’s concept, ‘semi-autonomous social fields’.\textsuperscript{129} The indigenous peoples through their internal morality generate their own rules and settle disharmony in the village through TDR. However these rules are susceptible to interference from the State.

The differences between the type of legal pluralism is a result of theoretical combat between Austinian legal formalists who stressed the significance of state law to ‘organise’ pluralism through state law pluralism, and legal sociologists who defended the purity of socially-based laws independent from state law contamination. However, as a result of knowledge exchange, different perspectives do exist within these opposing groups. For instance, within legal sociologists, there were divergences regarding the type of legal pluralism. Gillissen, Vanderlinden and Hooker all accept state law pluralism as a part of legal pluralism. Griffith and later F. Benda-Beckmann acknowledge state law pluralism. However, they use the anthropological concept of legal pluralism for the purpose of comparison which is not dependent on state recognition.\textsuperscript{130} Furthermore, with regard to the constituent elements of legal pluralism which are ‘laws’, Tamanaha rebuts the concept of ‘laws’ as ambiguous because he argues that legal pluralism theories tend to conclude that all forms of social control are law which establishes the law as synonymous with social norms. He argues that the concept of law should only be reserved for state law.\textsuperscript{131} Tamanaha’s first assertion on legal pluralism was a strong statement from legal formalism’s stand point. However, Tamanaha then moved from this view to a multi-ethnocentric folk definition.\textsuperscript{132}

Hooker who closely examined ‘the system of legal pluralism’ as a consequence of colonialism stated that ex-colonial countries often encounter dilemmas in responding to legal pluralism.\textsuperscript{133} This is because the ‘old’ concept of legal pluralism was originally intended to understand the effect of the legal transplant policy of European law on the social context of indigenous peoples of the

\begin{itemize}
\item \textsuperscript{127} Griffith, above n 20, 8.
\item \textsuperscript{129} Moore, above n 126, 720.
\item \textsuperscript{131} Brian Tamanaha, ‘The Folly of the Social Scientific Concept of Legal Pluralism’ (1993) 34 Journal of Law and Society 192, 208.
\item \textsuperscript{132} Brian Tamanaha, ‘A Non-Essentialist version of Legal Pluralism’ (2000) 27 Journal of Law and Society 296, 313.
\item \textsuperscript{133} M.B. Hooker, Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws (Clarendon Press, 1975), 1.
\end{itemize}
colonised communities.  

Both arguments are relevant for Indonesia’s context, because the Indonesian government faces a dilemma in harmonising state law pluralism with strong legal pluralism. This dilemma leads to the tension between state law and living adat law, because there is an absence of legal protection for marginalised and indigenous peoples. This creates an unbalanced relationship between those laws.

There are advantages and disadvantages in each category of legal pluralism. Woodman sheds light on the ground of justice by arguing that state law pluralism could jeopardise the principle of equality before the law, because by definition a pluralistic state provides for different norms to be applied to different individuals in the same situation. However, this type of legal pluralism depicts the willingness of a state to recognise and respect living laws aspirations, although with some requirements and limitations. This strategy also aims to adapt living laws to modernisation through some affirmative action policies.

Living law must be positioned as an element of modernisation, not as a resistance to it. Through this strategy, the state may provide the glue between the two levels of laws: state law and living law by using responsive legal postulates to create a bridge from the values of living law to the state law and vice versa. Legal postulates, a concept introduced by Chiba, should be transmitted by policymakers to judges and legislators, so they can play an active role in promoting diversity and access to justice.

On the other hand, implementing strong legal pluralism can be a strategy to preserve and protect indigeneity. However, it could also infringe upon state sovereignty as the state has neither direct access to nor control over non-state or living laws. This strategy also could hinder modernisation processes because the living laws are fully separated from state law. Thus, the living laws cannot be used by the state as a medium to bridge the state to indigenous communities.

The debates above merely focus on the topic of the coexistence of the condition among legal traditions which eventually leads to a strict dichotomy between ‘state law’ and ‘non-state law’, and between ‘strong’ and ‘weak’ legal pluralism. This strict division is an attempt at ‘mapping the legal universe’. However, it is important to note that, the contemporary concept and the methodology of legal pluralism have been changed. Today, legal orders and traditions tend to overlap, be inter-

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135 Woodman, above n 128, 160.
dependent, and merge with each other. In this respect, it is impossible to keep adat law pure from other influences, particularly State law’s influences.

Legal pluralism is not merely describing the condition of coexistence and contrasting several legal orders and traditions. The focus is on how those legal orders and traditions are interacting, competing and mutually influencing the emergence and operation of each other’s rules, processes and institutions. The thesis adopts a hybrid approach by examining court decisions and looking closely at the real-life context of indigenous peoples.

In response to the choice of a legal pluralism strategy, Woodman proposes the strategy of selective legal pluralism which does not entail the abolition of either type of legal pluralism. This thesis agrees that both weak and strong legal pluralism can exist within a country. ‘Semi-autonomous social fields’, which still exist in indigenous villages must be preserved and protected by the government. On the other hand, indigenous peoples whose living adat law has been contaminated by State law can still be protected by the State, but within the authority of state law pluralism. The State can then selectively choose or forsake living laws by integrating them into the state law system. The strategy can be implemented through political decision, law-making process, and judicial decision. Therefore this thesis, in the next chapters, will investigate both legislation and court decisions which regulate and illustrate the State’s perception of legal pluralism in general and adat law in particular.

D Conclusion to this Section

Despite the fact that social sciences have enriched and contributed to this thesis, it is still a thesis from a lawyer’s perspective. Therefore this thesis avoids straying to an anthropological conclusion. This thesis argues that in regard to the implementation of legal pluralism, State linkage is needed to validate living laws via a ‘rule of recognition’, either through legislation or judicial decisions. State law pluralism becomes the more feasible and realistic option for post-colonial countries like Indonesia, because the State actively acts as a promoter as well as a regulator in preserving diversity in Indonesia. Particularly it is crucial for State courts to consider sociological insights in their judicial reasoning processes in order to soothe the tension between State law and living laws and benefit indigenous peoples in particular.

III CONSEQUENCES OF THE OPPOSING THEORIES FOR JUDICIAL APPROACH AND REASONING

137 Kleinhans and MacDonald, above n 31, 31.
138 Woodman, above n 128, 166.
This section discusses the opposing stance between judges who are strongly influenced by legal formalism-centralism and judges who support the notion of legal pluralism and disagree with the notion of legal formalism-centralism. The opposition is a result of the opposing theories discussed above. The former is identified as a formalistic judicial approach and the latter is known as a socio-legal judicial approach.

According to Lenhoff, there is no doubt that the tension between socio-legal judges who utilise the activism role of the interpreter and formalistic judges who oppose the activism role has gained more ground in the civil law than in the common law. The reason must be sought in the absence of the jury system in the civil law, resulting in rigidity in legal rules. The judge then becomes the only one who creates a balance between certain rules and the justice of the particular case.

A Formalistic Judicial Approach

Formalists claim that state law has an autonomy arising from an objective autonomous meaning of the written law. In a civil law setting, the statement is specified that there is no law except the codified one. Particularly, it grants unwritten law a minor role in judicial reasoning processes. A judge, through statutory interpretation reveals the true meaning of the law by firstly using plain analysis to strive for legal certainty and to respect the principle of parliamentary sovereignty. In this approach, judges not only consider that the law is a rule to be applied but also a principle, because both of these two elements are direct expressions of the general will of superior authority. This approach closely links to Austin’s analytical theory.

However, over-reliance on legislation could result in over-simplification, because legislation presents only a small part of the law; most legislation is rooted in the nature of social relations which change as social conditions change. Today, this approach is balanced by the minor doctrine of equity which is distinguishable from the rigidity of the laws. When the main object of legislation is unreasonable and unjust, judges are at liberty to expound the statute by equity to disregard it.

The civil law judges were influenced by the plain analysis approach which established the strict idea of separation of power, particularly in France where judges were merely said to be ‘the mouth of the law’ aiming to strengthen the standpoint of exclusiveness and completeness of the law. This approach is guided by legal technicalities which ascertain that every decision seemed to be a logical

140 Ibid 313.
141 Donald Gifford, Statutory Interpretation (The Law Book Company, 1990) 49.
143 Lenhoff, above n 139, 321, 326.
conclusion in a syllogism construction. The major premise is a rule, and the minor premise is the factual situation in the individual case. Through this approach, the demand for predictability and certainty in the law is accomplished. Nevertheless, if the court spots some mistake in drafting, or an ambiguity in the meaning of the language used, and the text would produce injustice, then the court should seek a construction or a modification of the legislation.

The construction and/or modification should start from an internal point of view, because a legal system is a closed logical system: the judge endeavouring to trace the legislative intent of the legislation. Legislative intent is synonymous with the civil law’s concept of ratio legis. Statutory interpretation, in the civil law tradition, is referred to as the law finding (rechtsvinding) process in which the judge endeavours to ‘find’ a hidden legal question within the internal system of the law. The judges should provide the sole basis for determining the essence of the enactment. Their purpose is to seek to investigate the ascertainment of the intent or purpose underlying the enactment in question.

However, finding legislative intent has a fundamental flaw. It divorces legislation from its contemporary context. By using legislative intent, the court applies a retrospective perspective, not a contemporary or prospective point of view. Furthermore, legislative intent is a myth because legislators have many intentions. The intention is not always wise, it may be political and pragmatical. Thus it is impossible to trace the true intention of legislation. Corcoran states that the discerning legislative intent approach in statutory interpretation is insufficient. There are areas of concern missing, including contextual problems, the indeterminacy of language, and the validity of extra-legal norms. Especially in the context of law in a pluralistic society, one could try to address these gaps by employing a socio-legal judicial approach.

### B Socio-Legal Judicial Approach

The notion of a socio-legal approach gathers many insights from several legal perspectives, particularly those that have opposing positions towards legal formalism. Socio-legal theories and practitioners are mostly legal scholars who utilise social insights to help answer ‘law in action’ questions and realise that courts have always adapted to fit contemporary social conditions. Sociologists also consider law as merely part of social phenomena. This section describes a socio-

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145 Lenhoff, above n 139, 325.
146 Ibid.
legal judicial approach, not only as the anti-thesis of a formalistic judicial approach, but also as a synthesis of realism, pragmatism and critical legal theories.

Realists considered court decisions to be the real law and believed that the law consists of the rules laid down by judges.\(^{148}\) The idea of judge-made law was also elaborated on by Gray who modified Austin’s theory by transferring the law-making processes from the legislature to members of the judiciary.\(^{149}\) Judges were the creators of law, whether they were positive or negative ‘legislators’. Furthermore, judges must uphold the principle of *non liquet*, meaning that a judge cannot avoid offering or reasoning through to a solution, even though there is a lack of clarity in the law.\(^ {150}\) As a result of this doctrine, justice is in the hands of the judge, as the wordings of the law are only labels and tools.

Instead of elaborating *ratio legis*, realists expand the judicial reasoning into *occasio legis*, a concept which posits both the political and social condition as the real reason of the enactment of the statute.\(^ {151}\) This approach utilises an objective perspective by considering the needs and conditions of the present society. In this respect, legal realism can be the appropriate partner for legal pluralism and living law discourse to transform its inner ordering into a concrete law or court decision by adopting an external approach in the judicial reasoning process.

A dialectical theory of legal realism has developed into policy-driven decision-making which was proposed and practiced by the American Pragmatists. Pragmatism rejects moral and pre-existing legal reasoning (based on principle). Instead, the judges can utilise their own political opinions or policy judgments, even their own idiosyncrasies.\(^ {152}\)

Legal pragmatism, as represented by Posner, involves positive inquiry, not normative analysis. However pragmatism uses social policy, facts, ‘consequences’ and ‘appropriateness’ as the main references. It is case-specific in nature, and rarely discusses the ‘ought’ issue. Under pragmatism, the judge has to be a creative counterpart of the legislator.\(^ {153}\) However, the pragmatist judge should


\(^{149}\) Ibid 103.


\(^{151}\) Lenhoff, above n 139, 325.


be a constrained pragmatist, operating under both internal and external constraints to avoid politicisation of the judiciary.\textsuperscript{154} Most importantly, judges must exercise self-restraint.\textsuperscript{155}

Utilising diverse extra-legal sources in the decision-making process is in line with Justice Michael Kirby’s insight. He asserts: ‘[i]n the future, the provision of multidisciplinary information on sociology, psychology, and economics, to assist the judges where they have policy choice, will become standard and normal in our court’.\textsuperscript{156}

The Realist and Pragmatist argument in general and Kirby’s argument in particular, may fit with Indonesia’s context because judges there, particularly within the Supreme Court system, are less familiar with the idea of policy-driven decision-making. The condition is worsened by antique, multi-interpreted and vested-interest legislation.\textsuperscript{157} In an age of reformation, judges must play active roles in interpreting the law and going beyond the textual aspect of the law.

Nevertheless Posner’s arguments still need refinement, particularly with regard to ‘everyday pragmatism’ which he described as ‘a disposition to ground policy judgements on facts and consequences rather than on conceptualism and generalities’.\textsuperscript{158} This is perhaps too practical and deficient in normativity and morality. It lacks a moral compass making pragmatism lose its noble purpose. Despite Posner often stating that his ‘everyday pragmatism’ is not derived from abstract values, in fact his pragmatism is a mere concretisation of abstract values which also include morality. Thus morality cannot be entirely alienated from judicial function. As Justice Holmes famously stated in 1897, ‘the law, if not part of morality, is limited by it’.\textsuperscript{159}

Unlike realists and pragmatists, who consider the law to have hidden meaning, critical theorists, such as Unger\textsuperscript{160} and Hunt\textsuperscript{161} believe there is no true or objective meaning of the law, because the law’s reference point is pragmatic rather than semantic. In other words, it depends on the interpreter’s interests, and the social results of its application. Since the law is pragmatic, there is no true objective meaning of it.

Similar to legal realism that is more consistent with legal pluralism and living law theory, critical theorists are sceptical of the idea of a legal objectivity, proposed by formalists who believe that the

\begin{footnotes}
\footnotetext{154}{Ibid.}
\footnotetext{156}{Michael Kirby, The Judges (Boyer Lectures, 1983) 40.}
\footnotetext{157}{Mahfud MD, Politik Hukum di Indonesia [Policy-Oriented in Indonesia] (Rajawali Press, 2009) 7.}
\footnotetext{159}{Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 110 5 Harvard Law Review 235, 241.}
\footnotetext{160}{Roberto Unger, The Critical Legal Studies Movement (Harvard University Press, 1986) 1-5.}
\footnotetext{161}{Hunt, above n 108, 45.}
\end{footnotes}
law consists only of formal state law. By contrast, critical theorists believe that the legal ontology of the law is constructed by social experiences, which are substantially subjective, intuitive and practical.\textsuperscript{162} Moreover, enacted legislation is not necessarily filled by positive values; it may be ill-intended, and political opportunistic.\textsuperscript{163} Law can be thus seen as an ideology compromised by the status of domination.

Concerning court decisions, critical theorists believe that a decision is a dialectical product containing subjective experiences of the judge.\textsuperscript{164} Therefore, a judicial decision is an inter-subjective law gaining its legality not only from objective, but also from subjective sources. The legalists’ claim that the only law is that produced by the state, can be rebutted by arguing that a state is created through a social-historical process. The process itself involves not only state law, but also other living laws.\textsuperscript{165} Through this theory, the idea of legal pluralism has found its theoretical justification.

Both realism, pragmatism and critical legal theories are fruitful for the progressive development of legal pluralism in general, and living law in particular because an external point of view can accommodate living law aspirations, not only through judicial decision-making, but also through legal doctrine by using critical theory to examine discrimination against and marginalisation of indigenous peoples.

**IV APPLICATION OF THE OPPOSING THEORIES TO THE LEGAL HISTORICAL CONTEXT OF INDONESIA**

A long history of doctrinally-based Dutch law may have contributed to the rigid character of the Indonesian legal system and practice which have produced discrimination against and marginalisation of indigenous peoples. It radically shifted peoples’ minds from a ‘fluid’ relationship to one of bureaucratic and formalistic cultures. This radical change influences the landscape of Indonesia’s legal pluralism, creating a contest between the State law system and living \textit{adat} law.

This next section presents, in chronological order, the application in Indonesia of those opposing theories discussed above. The first part is a description of the \textit{Adat} Law School of Thought. The development of the \textit{Adat} Law School started from the colonial era and continued in the post-

\textsuperscript{162} Luiz Fernando Coelho, A Contribution to a Critical Theory of Law’ in Michel Troper and Annalisa Verza (ed), \textit{Legal Philosophy: General Aspects: Concepts, Rights and Doctrines} (Steiner, 2002) 34.

\textsuperscript{163} Ibid.

\textsuperscript{164} Hunt, above n 108, 45.

\textsuperscript{165} Ibid.
colonial era and onward. The second part marks the establishment of the Developmentalism School of Thought which has assumed a significant role during post-colonial era to the present.

A Adat Law School of Thought

1 Adat Law in Colonial Era

In the colonial era there were two adat law theorists whose insights had a significant effect on the development of adat law and legal pluralism in Indonesia. They were Cornelis van Vollenhoven and Barend Ter Haar.

Van Vollenhoven opposed the Dutch colonial regime’s policy which imposed Dutch law on all Indonesians. The governmental cabinet of Kuyper drafted the Law of Unification which imposed the Dutch Civil Code on all Indonesians, but the draft was soon rebutted by van Vollenhoven.\cite{VanVollenhoven1997}

The debate provoked by van Vollenhoven was successful, and the Dutch colonial regime accepted his concept by exercising a dualistic legal system from 1927 until the end of the Dutch colonisation.\cite{Koesnooe2000}

However, this system had both advantages and disadvantages. Under the system, the Dutch preserved and formally recognised the adat law and its institutions. The negative impact of this policy on Indonesians was that neither Indonesians nor indigenous peoples had access to civil law, in particular to commercial and business law.\cite{Ibid}

Instead, they voluntarily accepted the Dutch law, which meant recognising the Dutch as ‘masters’ and Indonesians as ‘servants’. It was a discriminatory law and strengthened the Dutch hegemony over Indonesians, while excluding Indonesians from the process of modernisation.

However, it was not Van Vollenhoven who wanted to establish adat law jurisprudence, it was Ter Haar. Ter Haar’s version of adat law studies was specifically directed at finding the unwritten law in order to aid colonial judges and to develop adat law studies as a positive legal science, distinct from other legal sciences by the unwritten nature of its object, which had to be extracted out of social reality.\cite{TerHaar2000} His approach required a clear distinction between adat and adat law, which is a typical legal formalism category.

\begin{enumerate}
\item Van Vollenhoven, above n 43, 1.
\item Koesnoee, ‘Dusar’ above n 54, 45.
\item Ibid.
\item Ter Haar, above n 66, 228-233.
\end{enumerate}
Ter Haar stressed the importance of the process of the application of the law through judges in court procedures, because the *adat* could only become legal if the judge recognises them as such. He made *adat* law science into a branch of positive law. Ter Haar’s decision theory (*beslissingenleer*) highlighted legal decisions as the place where *adat* was to be found by the judge. Dutch *adat* law theories drew a distinction between *adat* law as it was interpreted and applied in village procedures and *adat* law as applied by the state institutions.

2 *Adat Law in Post-Colonial Era and Onward*

Soon after Indonesia’s unilateral declaration of independence, Indonesian founding leaders designed the 1945 Constitution. This Constitution was the product of intense debate between nationalists and Islamists, and legal formalists, and *adat* law scholars. In order to avoid disintegration, the founding leaders agreed to accommodate all aspirations by enacting a neutral constitution. Indonesia was neither a secular nor a religious-based country. Indonesia has not fully adopted Western formalism ideology; rather it still defends its ‘traditional’ characteristics by respecting *adat* law and religious Islamic values.

Soepomo, one of the drafters of the Indonesian Constitution, was an important scholar whose insights and knowledge framed the Indonesian legal system. He favoured Indonesian *adat* values as a legal foundation for the Indonesian legal system, placing less emphasis on Western and individualistic values. Soepomo expressed his paradigm as: ‘The foundation of the nation must be based on its own legal experiences and its social structure and institutions’. He considered *adat* law a living law, one that was continually and actually living within the community and which reflected the legal conscience of the society.

Three discourses suggest that in the early years of independence *adat* law scholars were critical of Western concepts and policies. First, Soepomo and other founding leaders proposed a concept of Indonesian democracy which was not Western democracy: they advocated for a synthesis of political and economic democracy aimed at social welfare. Indonesia’s democracy should be

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170 Ibid.
172 The government of the Netherlands did not recognise Indonesia’s Independence Day on 17th August 1945. The valid Independence Day from the Netherlands government perspective was on 27th December 1949, when the Netherlands formally gave recognition to Indonesia’s independence. The reason why the Netherlands government disregards Indonesia’s Independence Day on 17th August 1945 is political, because the Netherlands supported by the Allies, conducted military aggression in Indonesia from 1945 to 1949.
rooted in the spirit of collectivism. These leaders referred to this concept as a social democracy influenced by Islamic teaching, and indigenous collectivism.\(^{176}\)

In Indonesian democracy there is no ‘majority takes all’, instead, all decisions are the result of a consensus, and through *musyawarah* or deliberative discussion.\(^{177}\) It is an alternative to mainstream Western democracy: the process of decision-making is based on *musyawarah* among state members, and it duplicates village justice or TDR practices within indigenous villages (*desa*). The *desa* was used as an organic model of the Indonesian modern republic.\(^{178}\)

Second, influential Indonesian *adat* law scholars such as Koesnoe rejected Western legal concepts typical of the civil law legacy such as separating law into objective and subjective law. Koesnoe suggested that classification was misleading, arguing that subjective law is the true meaning or spirit of the law (*rechtsidee*) which becomes the essence of positive law.\(^{179}\) In Indonesian law, the objective law is equivalent to state law, and subjective law is equivalent to ‘rights’. He also rebutted dogmatic inquiry and argued against legal language which, primarily influenced by Dutch terminology, include the separation between *wet* (regulation) and *recht* (law) and the superiority of the rule of regulation (*wetmatigheid van bestuur*).\(^{180}\)

However Koesnoe observed that a civil law tradition was still needed to modernise and create legal certainty, but its implementation should always be guided by *adat* law. In other words, civil law traditions must be able to adapt to Indonesia’s post-colonial context.\(^{181}\) Koesnoe argued that in order to find the true spirit of Indonesian law, the legislators and judges must look closely at the Preamble to the Constitution, as well as its Articles and explanatory documents. Meanwhile imported Western legal perspectives should be curtailed.\(^{182}\)

Lastly, *adat* law scholars were critical of Western legal policy. In the post-colonial era, Indonesia implemented two legal policies: legal transplant and judicial unification. Indonesia simply transplanted the Dutch colonial laws into its legal system in order to avoid a legal vacuum.

\(^{176}\) Bagir Manan, ‘*Menemukan Kembali UUD 1945*’ [*Re-finding the 1945 Constitution*] (Speech delivered at Faculty of Law, Padjajaran University on 6\(^{th}\) October 2011) 8. Buana, ‘Living’, above n 3,110.


\(^{178}\) Satjipto Rahardjo, ‘Between Two Worlds: Modern State and Traditional Society in Indonesia’ (1994) 28 Law & Society Review 495, 496.

\(^{179}\) Koesnoe, *Perumusan*, above n 177, 120.

\(^{180}\) Ibid. Buana, ‘Living’, above n 3, 111.


Transplantation was achieved by literally transferring both the Dutch Civil Code (*Burgerlijk Wetboek/BW*) and the Dutch Criminal Code (*Wetboek van Strafrecht/WvS*) into the Indonesian legal system. These Dutch legacies are still maintained today.  

Because the positive laws were a literal transfer, Dutch legal language was mandatory at the time. Judges had to know the meaning of the legal wording in both Dutch and Indonesian. Judges were obligated to apply positive laws to concrete conditions and were trained to be technical jurists, typical of civil law practice. Koesnoe was critical of this policy. He believed that a legal system that resulted from legal transplant of imported legal values would jeopardise the true and pure Indonesian legal system.  

The transplantation policy had its drawbacks. Even though the judges had a good understanding of Dutch, they lacked contextual insights into the legal text. With regard to agrarian law, *adat* law was radically different from modern law: the ownership of land and its properties are separate. For instance, indigenous peoples own the land, but it can still be borrowed or used by others. In modern law, the ownership of land is holistic, and owning the land also means owning its legal properties such as the rights of use and disposal, as well as the right to resources extracted from the land. In regard to the legal language problem, Soepomo proposed assimilating Western legal concepts into Indonesian legal terminology, thus ensuring that the legal words would correspond to Indonesian social structures.  

With regard to judicial unification, despite the fact that the government only recognised formal adjudication processes through State courts, Koesnoe encouraged judges to trace the internal morality of the law into legal reasoning processes on the basis that the written law is only one form of guidance, and judges should be free to use and draw on other sources of the law. From his description, it is clear that Koesnoe’s approach to *adat* law is not empirical, but normative. The discussion on judicial unification will be further elaborated in Chapter 4.

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183 Mohammad Koesnoe, *Azas Toleransi Yuridis dan Badan Peradilan Kita* [Judicial Tolerance in Our Legal System] (1994) 110 Varia Peradilan 31. The legalisation of the Dutch legacies was manifested in Transition Article 2 of Constitution (Before Amendments) and Government Regulation No 28 of 1945. These Laws were legally accepted, as long as did not contradict to the spirit of the Independence Declaration and Constitution. This policy is called judicial tolerance.  

184 Ibid.  


187 Mohammad Koesnoe, ‘*Ajaran Mahkamah Agung tentang bagaimana Seharusnya Menafsirkan, Kitab Undang-Undang dari Masa Kolonial*’ [‘An Experience from the Supreme Court’s Decision on How to Interpret Colonial Laws’] 126 65 Varia Peradilan 70.
Both Soepomo and Koesnoe’s perspectives are still relevant in today’s discussion of adat law and legal pluralism in Indonesia.

B The Developmentalism School of Thought

The legal system in Suharto’s developmental era was misleading, because the issues of development and state stability were conveyed through indoctrination. The law was considered a mere ‘legitimation’ of economic development. ‘Development’ soon became a much-used (and much misused) word at the time, with almost all governmental aspects being loaded with development jargon. The government stated that legal development played an important role in all governmental aspects.

It was Mochtar Kusumaatmadja, a former Minister of Justice (1974-1978) and Minister of Foreign Affairs (1978-1988), who played a significant role in establishing the ‘development’ notion. Kusumaatmadja strongly protested against Sukarno’s guided democracy and the socialist economics paradigm. Kusumaatmadja was influenced by structuralist and functionalist theories, particularly from Pound and Northrop, whose theories he modified to implement in the Indonesian context.

Kusumaatmadja was inclined to place the law at the core of social and political affairs. His theory of ‘law as a tool of developmental engineering’ was similar in many ways to Pound’s theory: Kusumaatmadja clearly drew on Pound’s sociological and pragmatism jurisprudence by favouring the state law as the main ‘tool’ to ensure social order. He considered it a patron-client relationship. However there were also differences: Kusumaatmadja’s theory reduced the law to mere legislation (rules) and favoured public (state) interests by giving authority to the legislature and executive body (the President) to legislate the law. Legislation was considered the most rational and effective way of law-making, compared to precedents and adat law. He believed the legislative body, with the backing of a strong executive power, was sufficient to reflect the people’s aspirations and grass-roots perspectives. Furthermore, Kusumaatmadja argued that in the name of ‘development’, the judicial system must uphold government policy. This was the formula of authoritarianism.

188 Buana, ‘Living’, above n 3, 112.
189 National Guidance (GBHN) 1973 and National Development Five Years Plan (Repelita) II (Indonesia).
Moreover, Kusumaatmadja’s structuralist paradigm was more radical than Pound’s because Pound in particular, still considered social interests as significant ingredients in the law-making process. Pound’s context was a common law tradition in which judges play a significant role in developing and re-newing the law. The supreme source of law was not legislation, but rather a legal principle that may be a custom or community value. This principle must be flexible depending on social interests; and social interests must override public (state) interests.\(^\text{193}\) Kusumaatmadja on the other hand, suggested that the State should not follow society’s aspirations, rather it should be positioned as the sole regulator and initiator, and society, like it or not, must obey the law of the State.\(^\text{194}\)

With regard to adat law, Kusumaatmadja dichotomised adat law and living law by contending that adat law was obsolete and a legacy of colonial law, irrelevant for Indonesia’s development; thus the cult of adat law must cease.\(^\text{195}\) On the other hand, the living law, which was customary law, should be positioned as guidance for state law. However as it was located outside the epicentre of government, it must be modified and used for the sake of state development. Unification must be supported because it would both guarantee legal certainty and support law and order. Pluralism from the Dutch legal dualistic era must be set aside because it was merely an anti-articulation policy aimed at alienating Indonesians from modernisation.\(^\text{196}\)

Under developmentalism, the Indonesian legal system had to support national stability. Therefore legislation had to address uncontroversial issues only, avoiding sensitive issues such as human rights and the protection of marginalised people. The first priorities of the State were to stimulate rapid economic development and promote State stability. The law became static as it was reduced to positive law; legislation was considered self-sufficient. This led the judiciary to a singular reliance on the legislature, an excessively formalist attitude. This was worsened by the notion that because Indonesia was a civil law country precedent was not binding and judges should be less concerned with it.\(^\text{197}\) In fact, Kusumaatmadja’s argument was inaccurate because, according to Bedner, there was no doubt that in all developed civil law systems, precedent was considered binding and case law is of major importance.\(^\text{198}\) However, Bedner’s statement needs clarification: precedent is considered persuasive and influential but not binding.


\(^{194}\) Kusumaatmadja, above n 191, 35.


The current trend in Indonesia where judges are encouraged to extensively interpret legislation is not really in line with the approach of the current judiciary in the Netherlands where judges are reluctant to interfere with the role of the legislature. However, it is important to note that every country provides a different context. In Indonesia's context, legislators are mostly incompetent and corrupt. This assertion is supported by a survey of the Global Corruption Barometer 2017 which places the DPR (the House of Representative) as the most corrupt state institution in Indonesia, while the judiciary was placed in seventh place on this list. 199 Thus, the role of judge as 'negative legislator' is crucially needed.

‘Negative legislator’ is a progressive attitude of judges that aims to convey ‘social justice’ while disregarding legal certainty. The ‘social justice’ path is chosen when legislation cannot provide access to justice, or lacks clarity (e.g. has a multitude of interpretations) or contains discriminatory provisions. However, ‘negative legislator’ is a last resort. The judge’s first approach is to apply the law. This issue will be further elaborated on the following chapters.

The ‘development’ strategy needs a state-centred approach to ensure law and order. Thus the linkage with the judiciary is pivotal. Discussion of this issue will be presented in Chapter 4 in the section on the Judiciary.

V CONCLUSION

This chapter is part of a conventional approach to legal pluralism which aims to map the two or more perspectives within the legal realm. The first group is legal formalism. Nevertheless legal formalism is too heterogeneous, meaning that there are many contradicting arguments from within, for instance: between analytical formalism and normative formalism. Despite having different standpoints, both groups employ an internal standpoint implemented by plain analysis and legislative intent approaches. Similarly, the second group, legal pluralism, also has different approaches which are the consequence of embracing socio-legal theories. It is clear that legal pluralism embraces an external standpoint.

The discourse on adat law in Indonesia is still dominated by the normative perspective of adat law proposed by Soepomo and Koesnoe. Despite both theories defending adat law and indigenous peoples’ aspirations, this thesis argues that the problem of legal pluralism in Indonesia cannot be solved solely by referring to the normative source of fundamental laws (Pancasila and the Preamble of the Constitution). This thesis will show that indigenous peoples would obtain greater protection

and benefit, if the judges considered legal pluralism discourse and use not only legal approach, but also a socio-cultural approach, because then they would consider _adat_ law. The attitude of anti-Western concepts should be discarded, because the current concept of legal pluralism is also equally important to enrich _adat_ law school of thought and the advocacy of indigenous peoples’ rights.

This thesis argues that a dynamic relationship between legal formalism/centralism and legal pluralism in Indonesia has a strong connection with a democratic political setting. The more repressive the government, the more likely legal formalism/centralism would have a strong role and influence within a state system. The authoritarian regime masked with development credo used the written law to oppress and discriminate marginalised people and strengthened unification policies. In contrast, post-authoritarian Indonesia has shown a different trend where the aspiration of _adat_ law and indigenous peoples are high. It can be concluded that legal pluralism only can be nurtured by democratic political setting. The more democratic the country is, the more like legal pluralism would be respected.

This chapter argues that shifting from centralism to legal pluralism is important, but not necessarily in such a radical way that it ignores state sovereignty. Thus, the idea of state law pluralism should be enforced. The government must be able to accommodate both the legal perspectives with fairness by employing a ‘selective legal pluralism’ strategy. Moreover, with regard to ‘development’ practice, the State in general, and judicial institutions in particular, must embrace the idea of human rights, thus development practice must be inclusive by appreciating legal pluralism. Inclusive development through culturally-responsive legal drafting of legislation is needed to lessen the tension between State law supremacy and _adat_ law aspiration.
CHAPTER 3 - LEGISLATION AND INDIGENOUS PEOPLES

I INTRODUCTION

The previous chapter provided a discussion, within the setting of the legal-historical context of Indonesia, which explained the tension between legal formalism and legal pluralism by reference to legal theory. The aim of this chapter is to examine the historical-doctrinal reasons which might explain the tension between legal formalism and the aspiration of legal pluralism found in legislation which aims to regulate, affect and protect the rights of indigenous people in Indonesia. The analysis of the Acts may clear the way for a proper and feasible reform strategy to promote and protect indigenous peoples’ rights.

Before starting an analysis of the legislation, the first section of this chapter briefly presents an introduction to the current political context of Indonesia. This is important because legislation is essentially a political outcome - the result of politically vested-interest negotiation between the executive and the legislative branches of government. The second section is the analysis of the legislation, starting with the most relevant to this thesis: the Basic Agrarian Law (BAL). This is crucial because the BAL is the over-arching legislation that regulates land rights in general, and indigenous land rights in particular. The legislative and historical background to the BAL is discussed as well as its implementation and drawbacks.

Furthermore, Acts which have supported the BAL, in particular Forestry Law and Plantation Law, are also examined. This is followed by a discussion of how the Village Law has become one of the most pivotal aspects of the legal reform agenda because it aims to develop the nation from the micro level, desa or village, up and change what was once considered peripheral, the legal regime at the village level, to a central position. The establishment of the new Village Law can be considered as a policy which can recognise and reinforce legal orders in a pluralistic society. Additionally, the idea of decentralisation is examined, a serious issue because it has had the effect of bringing the state authorities closer to the people and making the State more democratic and inclusive.

It is also important to note that in Indonesia, in theory, the supreme source of law is the written law. This is a product of the Dutch civil law tradition. Existing legislation, the 2011 Law, which regulates the structure of Indonesian legislation, states that the Indonesian legislation system is structured hierarchically, as follows:

200 Yilmaz, above n 22, 26-27.
(1) The 1945 Constitution;
(2) The Stipulation of The People’s Consultative Assembly (TAP MPR);
(3) Governmental Regulation concerning A Replacement of Legislation (Perppu);
(4) Legislation (UU);
(5) Implementing Regulation (PP);
(6) Presidential Regulation (Perpres); and
(7) Provincial Legislation, Regional/District and City/Municipal Legislation (Perda). 201

This chapter argues that the relevant Acts can only be beneficial for indigenous peoples if they consist of and consider the notion of legal pluralism, not only in their text but also in their implementation.

II CURRENT POLITICAL CONTEXT

Law and politics are inherently different. However, they are interrelated. A discussion of the legislation system is incomplete without referring to the current political condition of Indonesia.

The House of Representatives (DPR) is notoriously corrupt and opportunistic. 202 This affects the Indonesian legal system in general. This corrupt mentality was nurtured by Suharto who occupied the DPR for his own purposes and had, at the time, more power than the DPR. In the era of reforms, the amendments of the 1945 Constitution amplified the power of the DPR, thereby lessening the President’s authority, while giving the DPR three strategic functions: legal drafting, budgeting and control. 203

After the fall of Suharto, the Indonesian political system went through a different volatile period. The DPR demanded a stronger role, and Indonesians who had been oppressed by the regime, participated in the legislative election. However, the political system was not supported by a clean, fair and accountable electoral system. The practice of ‘money politics’ is still manifest today, making the DPR notorious for being Indonesia’s most corrupt state institution. 204

Indonesia is a presidential system. However, in practice, the DPR overly controls the government while undermining others functions. This controlling attitude is good for Indonesian democracy, as the DPR can force the Executive to rule competently and develop a culture of responsible

201 Law No 12 of 2011 on Structure of the Indonesian Laws (Indonesia) art 2 and 7.
203 The 1945 Constitution (Amended) (Indonesia) art 20, 20A and 21.
democracy in Indonesia.\textsuperscript{205} However, the attitude distances the DPR from its fundamental function of a legal drafting institution. To make matters worse, as one legislator noted, ‘making the law is all about interests, the bigger the interests, the faster the process, on the other hand, the smaller the interest, the slower the process’.\textsuperscript{206} Many important and vital bills concerning minority interests have been delayed. The DPR tends to prioritise the bills that have strategic interests and are often too busy controlling the government.

In the 2014 Presidential Election, the people of Indonesia were divided in two groups: the first group supported Joko Widodo known as Jokowi. He appears free from New Order Regime influences. The second group supported Prabowo, ex-military commander and son in-law of the previous president, Suharto. The 2014 election was crucial because it determined the future of Indonesia, whether the country would move forwards or backwards.

Jokowi won the election, meaning he and his coalition rule the Executive branch. On the other hand, Prabowo’s coalition, by a majority, rules the DPR while undermining minority parties. The opposition coalition, as a majority group, revised the Law of DPR Configuration, changing the mechanism into majority rule and voting, which could allow the opposition coalition to assume almost all strategic roles in the DPR. The Constitutional Court reviewed the legislation. However it declared the legislation to be constitutional.

Due to the intense competition between the Executive and the opposition coalition, the DPR was divided into two groups: opposition coalition and executive supporters. The executive coalition made its own DPR, namely the DPR-Perjuangan (struggle), in response to the opposition’s hegemony. The DPR-Struggle appointed its own leaders and claimed to be the legitimate DPR. Because of division within the ranks and the ensuing political havoc, the DPR faces a stalemate.\textsuperscript{207}

Even though the conflict between the Opposition and the Executive gradually lessened as both parties were keen to negotiate, it is hard to imagine this institution will ever properly execute its functions. While representative democracy is being tested in Indonesia, it may fail to provide reform. Thus the President and the judiciary must fill the gap caused by the fragmented DPR.

Despite political turmoil in the DPR, the previous DPR enacted legislation that significantly improved the rights of indigenous peoples. By examining Acts which relate to indigenous peoples’}

\textsuperscript{206} Interview with anonymous (Banjarmasin, 12 January 2014).
\textsuperscript{207} ‘DPR divided, Priyo disappointed’, CNN (Online), 30 October 2014 <http://www.cnnindonesia.com/politik/20141030194017-37-9010/dpr-terbelah-priyo-kecewa/>. 46
issues, this chapter provides some recommendations regarding legal reforms within the Indonesian legislation system. These deal with legal pluralism in general and the rights of indigenous peoples in particular.

III THE BASIC AGRARIAN LAW (BAL)

A The History

The brief story can be traced through the Dutch colonial era, the Old Order under Sukarno, and the New Order Regime under Suharto to the current era of reform. The main purpose of the Dutch colonisation was to monopolise and control the land. Despite the Dutch recognising indigenous land rights (*ulayat*), the colonial regime categorised indigenous lands as ‘free-state lands’ which meant the Dutch colonial regime had absolute power to transfer land title without consent from indigenous peoples. The colonial laws were pluralistic but vicious. The policy of *domein verklaring* worsened the situation. This policy asserted that the land which could not be proven to be private property was part of the state domain. The colonial regime monopolised the administration and registration of land, while discriminating against the basic rights of Indonesians.

When Indonesia proclaimed its independence in 1945, the Old Order under Sukarno radically changed the agrarian management. The BAL is the oldest existing legislation that regulates fundamental land rights in Indonesia. It was legislated when socialism had significant effects in the government and it reflected nationalist sentiment. The spirit of the BAL was to give the land to the tiller without absentee land ownership, enact equitable sharing between owner and tillers, and protect marginalised people.

The background of the BAL is threefold. First, Sukarno’s presidential decree brought an end to the parliamentary system, which consequently voided the 1949 Federal Constitution and reverted to the pre-amendment 1945 Constitution. Second, Sukarno issued a decree which aimed to bring back the spirit of the Indonesian revolution by unifying the legal system and abolishing colonial legacies. Historically, Sukarno provoked both these political circumstances. The Round Table

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208 Regerings Reglement (RR) [Colonial Government Regulation] (Dutch East Indies) 1854 art 64 par 3.
209 Interview with Ahmad Sodiki, A former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
214 Presidential Decree on 5th July 1960 (Indonesia).
215 Presidential Stipulation No 1 of 1960 (Indonesia).
Conference between Indonesia and the Netherlands in 1949 had disappointed Sukarno. One of the resolutions of the conference stated that the government of Indonesia must recognise the Dutch cultivation rights (onderneming) over Indonesian lands, which after independence, had been occupied by the people. Additionally, Sukarno disagreed with the Indo-Dutch federalist parliament which often ended in stalemate. The battle between Sukarno and parliament reached its end when Sukarno abolished the parliament and proclaimed himself as the sole leader of Indonesia. Sukarno called his administration a ‘guided democracy’ government.

The third reason was a legal one, inspired by art 33 (3) of the 1945 Constitution regarding natural resources management: ‘The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the benefit of the people (social welfare).’ 216 The ambiguous article 33 is the basis of the State’s acquisition right. It was inspired by a mix of leftist, nationalist, and anti-colonialist ideals. 217 The government (collaborating with companies) has often misused this article. 218 It acquires people’s lands, in particular indigenous/communal land. The government simply interprets the article for its own purpose (‘under the powers of the State’), while disregarding its noble purpose (‘to the benefit of the people’).

Land issues in Indonesia started in the early years of independence. Sukarno nationalised all Dutch companies which had occupied the land, and he temporarily mandated military units to manage the land. However, the Peasant Front and the Communist Party (PKI) supported people who occupied ex-Dutch land, and they soon confronted the military (anti-Communist).

Under Sukarno’s administration the State, for the sake of development and national interest, could use the lands whether they were under private or concessional rights. 219 However, the government passed a regulation for fair compensation for the land with appeal mechanisms for dissatisfied parties. 220 Sukarno established a land reform court that aimed to resolve all agrarian disputes. 221

\[\text{The Legislation abolished Agrarisch Wet [Agrarian Law] (Staatsblad [State Gazette] 1870 No. 55), Koninklijk Besluit [Royal Decision] on 16 April 1872 No. 29 (Staatsblad [State Gazette] 1872 No.117) and Chapter II of Civil Code regarding ownership. The Dutch used the doctrine of Domienverklaring to grab unoccupied indigenous lands. This doctrine is similar to Terra Nullius. See Daniel Fitzpatrick, ‘Dispute and Pluralism in Modern Indonesian Land Law’, (1997) 22 Yale Journal of International Law 172, 173.}\]
\[\text{216 The 1945 Constitution (before Amendments) (Indonesia) art 33 (3).}\]
\[\text{219 Law No 20 of 1961 on Revocation of Land Rights (Indonesia).}\]
\[\text{220 Implementing Regulation No 39 of 1973 on Appeal Mechanism for Land Revocation Compensation (Indonesia).}\]
\[\text{221 Law No 21 of 1964 on Land Reform Court (Indonesia).}\]
On the other hand, under Suharto’s regime the central government was corrupt and mismanaged the land. For the sake of judicial unification, Suharto abolished the land reform court.\textsuperscript{222} His regime based its land management on government-centred resources control and management, creating a patron-client relationship between the State and its people. The spirit of the land reform then faded; civil society movements were silent while the state power became too powerful.

The government issued a statement in the \textit{1979 Broad Outlines of State Policy} (GBHN) that ‘reorganisation of land use, land control and land ownership should be implemented.’\textsuperscript{223} However, the statement was only ‘lip-service’, aiming to temporarily soothe the tension with pro-reform activists.

After the fall of Suharto the discourse of land management and its relationship to human rights and the right of indigenous peoples has been seriously discussed. The \textit{BAL} was imbued with the spirit of reconciliation and anti-colonisation, and there is less political-economic interest.\textsuperscript{224} This legislation answered social demands, particularly at its inception and its early establishment.

\textbf{B The Scope}

The \textit{BAL} has both broad and narrow applications. In the broadest sense, the legislation covers not only land management, but also waters (excluding the ocean), and natural resources within. In its narrow scope, the legislation mainly focuses on land management and agriculture. Because of its vast scope the \textit{BAL}, both theoretically and practically, cannot simply be grouped within the exclusive legal regime: private or public law. Its implementation requires State intervention and management. For instance, in the case of land registration and the implementation of the State’s acquisition right, administrative law becomes pivotal. On the other hand, with regard to private rights and investment, private (business) law is equally important.

The \textit{BAL} blends \textit{adat} and western style titles, these rights are: right to own (\textit{hak milik}); right to use (\textit{hak pakai}); right to rent (\textit{hak sewa}); right to cultivate (\textit{hak guna usaha}) and right to build or develop (\textit{hak guna usaha}). However, the rights of indigenous peoples, in the sense of recognition of property rights, are absent from this legislation, as it only recognises private rights and other concessional rights which are capable of being registered, transferred or mortgaged.\textsuperscript{225} The legislation acknowledges the principle of horizontal separation between land and building or

\begin{footnotes}
\item[]\textsuperscript{222} Law No 7 of 1970 on Revocation of Land Reform Court (Indonesia).
\item[]\textsuperscript{224} Mahfud MD, above n 157, 7.
\item[]\textsuperscript{225} Butt, ‘Traditional’ above n 26, 66.
\end{footnotes}
resources above the land, a popular adat principle. The BAL aims to merge the concepts of adat law and modern law, while easing the tension between them. The adat law is fundamental to the legislation. Nevertheless it is not inhumane adat law, but renewed adat law which has reduced its negative (feudalism) concepts.226

Consequently, indigenous land cannot be registered and indigenous peoples have no enforceable legal right to it.227 The Land Agency (BPN) revisited this problem by regulating an internal regulation to recognise the rights of indigenous people as territorial, genealogical, and a mixture between territorial and genealogical. The recognition will be granted by the district or provincial government through regional legislation which should be based on empirical research.228 However, this regulation is not intended to give permanent rights to indigenous land, as the criteria set by the BAL for legally-based indigenous peoples are that the processes should be accomplished accumulatively.

C The Drawbacks

The BAL has vital shortcomings. It is too general and ambitious.229 The Law consists of a few articles which can often be misinterpreted by political power.230 As a result, the government has issued much legislation and many internal regulations which support investment and exploitation of the natural resources underneath the land, such as the Forestry Law and the Plantation Law which aim to fill the gap in the BAL’s general scope.

The State has a central and vital role as a regulator. Society (particularly where it comprises indigenous peoples) is merely considered as an object of that regulation.231 The government, particularly under Suharto’s administration, paid little attention to people’s participation and their involvement, although on paper, the legislation recognises that all Indonesian land has a social purpose.232 Moreover, the problem with the BAL has been over-emphasis on written evidence as a proof of ownership, which indigenous peoples do not have.233

228 Internal Regulation of Land Agency No 5 of 1999 (Indonesia).
229 Fitzpatrick, above n 21, 182.
230 Interview with Ahmad Sodiki, a former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
231 *Law No 5 of 1960 on BAL* (Indonesia) art 2 (2).
233 Lucas and Warren, above n 223, 234.
The **BAL** conditionally recognises indigenous peoples as a legal subject, as long as their rights correspond to the state or national interest and legislation.\(^{234}\) Clearly, it is a patron-client relationship, as the fate of indigenous peoples merely relies on government approval. However, to maintain the equilibrium between living law and state law, conditionality is needed under the rule of law and the principle of state legal pluralism. The state authority needs to preserve and provide affirmative policies for indigenous peoples.

The **BAL** recognises indigenous rights but does not clearly allow for their registration.\(^{235}\) The government, particularly under Suharto’s administration, abused this gap by promoting the Land Administration Project supported by the World Bank.\(^{236}\) The aim was to unify land title. Communal lands hinder the state in capitalising and commercialising land and natural resources. The government encouraged indigenous peoples to register their land, not as communal, but as private property. This policy caused many indigenous peoples to lose their communal land, because once the new land status was granted, its status was irrevocable in law. In order to guarantee legal certainty, the indigenous land that had been occupied and owned privately prior to the enforcement of the regional regulation could no longer be reclaimed.\(^{237}\)

With regard to civil society, the **BAL** has a purpose to combine and strengthen the movement to protect indigenous rights and the movement for agrarian reform. However, exploiting *adat* land as the vehicle for agrarian reform may be provoking future conflict between indigenous peoples, and non-indigenous peoples who are mostly immigrants. Some of the NGOs and elites exploit struggles over *adat* land to leverage their own political agendas and power positions. Access to land is highly affected by vested interests.\(^{238}\)

Oppportunistic NGOs often provoke confrontation, and sometimes violence, because they use indigenous status as a commodity that can be used and sold.\(^{239}\) Agrarian conflicts reflect these competing NGO strategies and tactics: radical versus moderate, land reform versus indigenous land, confrontation versus mediation.\(^{240}\) Ideally, advocacy of the rights of indigenous peoples should not be synonymous with an anti-migration mentality or discrimination. However, Indonesia’s transmigration program started in Suharto’s era, also needs to be criticised. It provokes problems

\(^{234}\) *Law No 5 of 1960 on BAL* (Indonesia) art 2 (2), and art 3 and 5.

\(^{235}\) Ibid.

\(^{236}\) *Government Regulation No 24 of 1997 on Land Registration* (Indonesia) art 3.

\(^{237}\) *Internal Regulation of Land Agency No 5 of 1999* (Indonesia) art 3 and 5.


\(^{239}\) Ibid 76.

\(^{240}\) IPAC, ‘Indigenous Rights vs Agrarian Reform in Indonesia: A Case Study from Jambi’ (Report No 9, IPAC, 15 April 2014) 1. Some of this influx was through the state-sponsored transmigration program in the 1980s. See also IPAC, ‘Mesuji: Anatomy of An Indonesian Land Conflict’ (Report No 1, IPAC, 13 August 2013) 11.
including deforestation in which the remaining rainforest was destroyed by transmigrants (mostly from Java Island), and the forced assimilation of indigenous peoples. Resettlement was political, aimed at removing the indigenous population from the outer islands.\textsuperscript{241}

Another vital shortcoming of the \textit{BAL} is that it is unsystematic. It needs to be holistically constructed, particularly in its implementation. With regard to other concessional rights, there are many overlapping layers of authority. Importantly, the \textit{BAL} must correspond to the \textit{Regional Autonomy Law} which was a crucial demand of the reform movement. The People’s Consultative Assembly (MPR) asserted that regional autonomy should be implemented in: ‘The framework of increasing the capacity of communities, economic, political, legal, religious, and \textit{adat} institutions as well as empowering civil society.’\textsuperscript{242}

Decentralisation is expected to lessen the shortcomings of Suharto’s top-down development approach. Initially, according to the \textit{Regional Autonomy Law}, authority over land tenure has to be decentralised. However as a concept, it has some conceptual and implementation drawbacks, because it is a highly contested political process.

Further, concessional rights also have their own legislation, and technical and regional regulations which often conflict with the \textit{BAL}. For instance, with regard to the Cultivation Title (HGU), both the \textit{BAL} and the \textit{Plantation Law} have stated that the maximum duration of land title is up to 35 years, with 25 years renewal.\textsuperscript{243} By contrast, the \textit{Foreign Investment Law} states that land title can be used up to 95 years and after that the title can be renewed for up to 35 and 60 years.\textsuperscript{244} Beside the \textit{Foreign Investment Law}, there are several specific pieces of legislation that significantly weaken the \textit{BAL}, particularly the 1967 \textit{Forest Law} and the \textit{Mining Law}, both initiated by Suharto’s administration.

The marginalised and indigenous peoples whose lands have been grabbed by a company still have bargaining power to protest the title while they occupy the land. The government, in this respect, the President, stated that title cannot be renewed if there is a dispute over the land, and the disputed land which is currently occupied by the people may be re-established as a village.\textsuperscript{245} However,

\textsuperscript{241} Alex Jackson, ‘Transmigration in Indonesia’ in Alex Jackson, \textit{Geography AS Notes} <https://geographyas.info/population/transmigration-in-indonesia/>.

\textsuperscript{242} Stipulation of MPR No IV/1999 on the State Planning Guidelines for The Next Five Years (1994-2004) (Indonesia) sec G.1.A.

\textsuperscript{243} Law No 5 of 1960 on BAL (Indonesia) art 29. Law No 18 of 2004 on Plantation (Indonesia) art 11.

\textsuperscript{244} Law No 25 of 2007 on Foreign Investment (Indonesia) art 22 (1) (a).

\textsuperscript{245} Presidential Injunction No 32 of 1979 on Basic Policies on Conservation of Land Rights (Indonesia) art 4. See also, Internal Regulation of Ministry of Internal Affairs No 3 of 1979 on Mechanism to Re-claiming the Land Rights (Indonesia).
legally speaking, the *Presidential Injunction* is weaker than the legislation. In practice, the bargaining position of the government and company are far stronger than the villagers.

Clearly the government prefers to prioritise investment and other interests such as mining, and plantations and often disregards people’s interests in their lands. According to the *BAL*, the right to manage the land can be transferred (*medebewind*) to the local government and to indigenous peoples, but in practice the right is delegated to another state agency, which undermines the rights of indigenous peoples. Thus, this policy expands the gap between the state and its people.

Further, the article on *medebewind* opens an opportunity for legal reform by devolving agrarian matters to the regional governments. Decentralisation has benefited indigenous peoples giving a right and method to assert control over land and natural resources. However, inconsistently, Abdurrahman Wahid’s administration had strengthened the central government’s authority on land issues. Following that, Megawati’s administration partly assigned regional governments to manage land matters. These contradictory policies have made a confusing bureaucracy between central and regional governments.

According to the *BAL*, the state agency which has the authority to manage land issues in Indonesia is the National Land Agency (BPN). The authorities have national, regional and sectoral jurisdictions. Nevertheless, because of decentralisation, the authorities have been divided and distributed to the provincial/regional/districts levels. Consequently, regional governments can establish a regional land agency which has the authority to offer services on land issues. Service on land issues is a mandatory activity (basic service) of the regional governments, which also includes the recognition of indigenous land.

Under the legislation, both central and regional governments have authority over land management and its public service. The central government through the BPN mostly focuses on national or

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246 *Law No 5 of 1960 on BAL* (Indonesia) art 2 (4).
249 *Presidential Injunction No 34 of 2003 on Regional Autonomy on Land Management* (Indonesia) art 2 (1).
250 *Presidential Injunction No 10 of 2006 on National Land Agency/BPN* (Indonesia) art 2.
251 *Presidential Injunction No 10 of 2006 on National Land Agency/BPN* (Indonesia) art 2.
252 *Law No 32 of 2004 on Regional Autonomy* (Indonesia) art 10, 13 and 14. See specifically *Internal Regulation of Land Agency No 5 of 1999* (Indonesia). *Presidential Injunction No 34 of 2003* (Indonesia) art 2 (1) and (2) (f).
macro policies. Meanwhile, the local (provincial and regional) governments are concerned with administrative matters.

This overlapping authority hampers legal certainty and efficiency because the two legal regimes have different scopes. The *Regional Autonomy Law* is designed as public law which cannot be effectively implemented in land issues because some of the land issues are private matters. Moreover, with regard to land registration, authority should be given to the central government only, not the regional government, because the regional government may prioritise regional rather than national interests. The ambiguous and unsystematised authority often creates inconsistency in practice, creating delay in the public service, which means justice delayed. Unlike a federal system where state governments can freely manage themselves, decentralisation is limited governance. The central government has strategic roles which interfere with regional matters.

Land disputes in Indonesia are extraordinarily complicated. However, disputes have to be understood positively not only as an outcome of change and mismanagement but also as triggers for further change. Solving Indonesian agrarian conflicts and their power relationship would be ineffective without a deep understanding of several pieces of specific legislation in general, and the Indonesian regional autonomy (decentralisation policy) and village government in particular.

IV SPECIFIC ACTS

There are specific Acts that support the *BAL* and regulates indigenous people’s rights; however, this thesis focuses on three Acts: *Forestry Law*, *Plantation Law*, and *Village Law*. These are the most significant piece of legislation, because their proposition can either hinder or strengthen the rights of indigenous peoples. This section also aims to be a framework for the next analysis of the Constitutional Court’s decisions.

A Forestry Law

1 The History

The first legislation that regulated forest management was the 1967 *Forestry Law*, enacted under Suharto’s administration. Based on this legislation, the forest was divided into two groups: first, the state forest which was managed by the government; the second concessional forest, was a forest to

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253 Governmental Legislation No 38 of 2007 on Work Division between Central Government (Indonesia) art 2 (4) (i).
254 Ibid 7 (2) (r).
which rights had been granted. This legislation did not regulate indigenous peoples’ rights and their lands.

A year after this legislation was enacted, Suharto’s administration issued the Implementation Regulation, which abolished districts’ authority, particularly in the eastern part of Indonesia, on forest management and transferred the authority to the provincial government. It can be assumed that before Suharto’s era, forest management in the eastern part of Indonesia was decentralised.

The 1967 Law asserted that forests were under the absolute control of the State. Article 5 did not mention the idealistic purpose of the state’s acquisition right, ‘to the benefit of the people’, as the Constitution asserted. It merely proclaimed that ‘all forests within the territory of the Republic, including the natural resources within, are to be controlled by the state’. Through this legislation, Suharto’s administration exploited forests and natural resources without paying any attention to people’s rights in general and the rights of indigenous peoples in particular. The 1967 Law classified 70% of Indonesian land area as state forest. It brought the forest under the sole control of the Ministry of Forestry.

2 The Existing Legislation

The 1999 Law recognised the rights of indigenous peoples and their indigenous forest. However, the indigenous forests were still part of the state forest. Thus, adat rights remained legally invisible within areas mapped as ‘forest estate’. However, the Constitutional Court changed this classification: the Court moved indigenous forest from state forest to concessional forest. This issue will be discussed further in the next chapter.

In the 1999 Law, the Ministry of Forestry categorised 143 million hectares of Indonesian land as forest estate, while completely disregarding the rights of the indigenous peoples on these lands. This legislation provided criteria for indigenous peoples in a strict sense. The indigenous peoples had to satisfy all requirements in order to be legally recognised by the State. Even though the legislation recognised the rights of indigenous peoples over their forest, it limited their activities.

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255 Law No 5 of 1967 on Forestry (Indonesia) art 2.
256 Implementing Regulation No 6 of 1968 (Indonesia).
257 Law No 5 of 1967 on Forestry (Indonesia) art 5 (1).
258 Ibid 5.
259 Beckert, above n 238, 85.
260 Law No 41 of 1999 on Forestry (Indonesia) art 4 (3) and 5 (2).
261 Beckert, above n 238, 85.
263 Beckert, above n 238, 86.
264 Law No 41 of 1999 on Forestry (Indonesia) elucidation of art 67 (1).
within the forest to daily needs only, and forbade them from commercialising their natural resources. Article 67, however, contradicted article 37 which states that indigenous peoples can commercialise the natural resources (profit oriented), as long as they have a legal permit.

3 The Drawbacks

As part of Indonesia’s decentralisation program, supervision of the forest shifted from the central government to the provinces and regional/districts. In this matter, there is disharmony between Forestry Law and Regional Autonomy Law, in that Forestry Law maintains the assumption of a hierarchical relationship between levels of government. The legislation failed to specify the specific government agencies or levels of government that had authority for particular administrative tasks. Consequently, it allowed the Ministry to retain decision-making powers over large-scale decisions concerning the forestry estate (HPH). For example, a division of the authority between central and regional power is still unclear in deciding which of the three statuses of a forest applies: protected, conservation or production forest.

Regional governments manage protected forest. The regional government may suggest the status of protected forest, but its enactment is subject to central government approval. Protected forest does not necessarily mean ‘virgin’ forest, because the central government still has the authority to issue a mining exploitation permit in that forest. Thus, a protected forest area can still be turned into a land with no trees. Production forest comes under the Ministry of Forestry authority, but the regional government can apply technical considerations for exploitation permits. Under the regime of ‘state forest’, the central government, through the Ministry of Forestry, has a stronger role in deciding the forest status. Clearly, the Ministry of Forestry has a vested interest in the centralised control of the country’s vast forestry estate.

Furthermore, regional governments have greater roles in forest management. The head of a district can issue several small-scale exploitation permits, including the Small-Scale Permit of Logging (IPK and IPPK), and the Small-Scale Permit of Forest Exploitation (HPHH). The small-

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265 Ibid 67.
266 Ibid 37.
267 Ibid 66.
269 Government Regulation No 24 of 2010 on Utilising of Forest Areas (Indonesia).
270 IPAC, Mesuji, above n 240, 3.
271 Implementing Regulation No 25 of 2000 on Central and Provincial Authorities on Regional Autonomy (Indonesia) art 2 (4).
scale permits cover 100 ha within the ‘forest esteem’. However, this policy provokes the
decentralisation of corruption. District officials suddenly found that it was politically beneficial for
them to assert far-reaching administrative authority over forest resources located within their
jurisdiction. This is the beginning of the cycle of corruption. Many small-scale concessions
(HPHH) were granted that often overlapped with large-scale concessions (HPH) or with national
parks and conservation areas issued by the central government. In the midst of both the central and
regional governments exploiting the forests, the rights of the indigenous peoples were suppressed.
The condition of the forests and indigenous peoples has undergone only minor changes since
Suharto’s regime.

B Plantation Law

1 The History

The history of the Indonesian Plantation Law is interrelated with the BAL. It began when the Dutch
colonial regime forced Indonesian peasants to cultivate only economically expensive crops. The
Governor General of East Indies, Van den Bosch, proposed this exploitative policy namely,
cultuurstelsel, which literally means ‘enforcement planting’, in 1830. The policy stated that 1/5 or
1/3 of all village land must be planted with sugarcane, indigo and coffee. This benefited the Dutch
financially, particularly because during the Java War the Dutch underwent massive military
expenditure. Clearly, cultuurstelsel discriminated against and violated the fundamental rights of
Indonesians in general and indigenous peoples in particular.

Cultuurstelsel was a state-centred policy. The liberal wing of the Netherlands Parliament opposed
this policy by proposing a privatisation policy to replace cultuurstelsel; this was accepted. The
Netherlands Parliament then issued the 1870 Agrarisch Wet, which was slightly different but even
worse than cultuurstelsel. Gie characterised this policy as ‘a free fight competition to exploit
Indonesians’. The policy allowed multi-national companies to exploit Indonesia’s soil, while
giving them a solid land rent right (erfpacht) for a maximum of 75 years. This policy intertwined
with the policy of domein verklaring, and as a result, by 1938, there were roughly 2,500,000
hectares of Indonesian land occupied by approximately 2,400 companies. Soon after
independence, Sukarno issued the 1945 Urgent Law, which was in the spirit of the BAL that had

272 Beckert, above n 238, 86.
273 ELSAM, Sawit Watch and PILNET, Undang-Undang Perkebunan: Wajah Baru Agrarisch Wet [The Plantation
275 ELSAM, above n 273, viii.
276 Urgent Law No 8 of 1945 (Indonesia).
abolished the 1870 Agrarisch Wet. It legally allowed Indonesians to re-occupy ex-Dutch cultivation areas.

After the fall of Sukarno, Suharto adopted a different policy. He extolled free-market ideology by accommodating foreign investment.277 This sparked the beginning of ‘the Suharto palm oil oligarchy’. Suharto’s administration introduced the cultivation system, namely ‘The Core and Plasma System’, which is still implemented today. In this system, the ‘core’ is a company, and the ‘plasmas’ are smallholders. Farmers are given two hectares of land on which to grow crops, as well as credit to plant it, which they must repay. The farmers are forced to buy fertiliser from the company and accept the company price for their harvested fruits. There is a complete absence of the participation of the people involved in this policy, and clearly there is collusion between the government and companies.

Currently, multi-national companies (MNC) control over 60% of the plantation sector, a situation that is referred to as the ‘post-Suharto palm oil oligarchy’.278 This system is no different to the colonial system under the 1870 Agrarisch Wet.

The mismanagement of natural resources, which causes severe human rights violations and injustices, cannot be separated from the history of colonialism, capitalism and modernism. In the era of colonisation, commodities were coffee, indigo and sugarcane. In the contemporary context, the trend has changed. Crude Palm Oil (CPO) has become the most crucial export commodity. As a result, it has converted Indonesia’s second largest rainforest into a palm oil ‘jungle’. Clearly, the practice of modernisation in Indonesia has caused false ‘development’.

2 The Existing Legislation

The aim of the 1998 reform movement was to lessen foreign investment in Indonesia. The Ministry of Forestry and Estate Crops responded to these reforms by limiting the size of plantation concessions operated by a single company.279 However, this policy was ineffective.

The current legislation is the 2004 Plantation Law, initiated by the Stipulation of the Ministry of Plantation.280 This legislation aims to fill the gaps in the BAL. While this legislation certainly offers better solutions for plantation management, the maximum term of 95 years for the Right of Use
(HGU) that a company can request, does not lessen the risks of deforestation and massive human rights violations.\textsuperscript{281}

This legislation recognises the fundamental rights of indigenous peoples over their ancestral land. Similar to the \textit{1999 Forestry Law}, it uses the definition and classification of indigenous peoples in its strictest sense.\textsuperscript{282} Indigenous peoples must meet all of the requirements, and if they fail in this regard, they will not be recognised as legally-based indigenous peoples, only culturally-based.

With regard to the land transfer process from indigenous land to cultivation rights (HGU), the legislation stresses the importance of a deliberative meeting (\textit{musyawarah}) between stakeholders and indigenous peoples. However, the legislation gives insufficient detail on how the land transfer mechanism is to take place. Clearly, there is no Free, Prior, Informed, Consent (FPIC) mechanism here. Thus this legislation continues to discriminate against indigenous peoples.

3 \textit{The Drawbacks}

The most significant shortcoming of this legislation is its criminal section which regulates criminal punishment for those who trespass, damage or occupy cultivation areas.\textsuperscript{283} Article 21 regulated the conduct, and article 47 detailed criminal punishments. While these articles may be expected from a formalistic perspective, from a socio-legal perspective, they have the potential to lessen the rights of peasants and indigenous peoples to demonstrate against the company, and worse, they can criminalise those rights. These articles were the product of a confidential agreement among the political and economic elite. However, the Constitutional Court reviewed the articles and declared them unconstitutional.\textsuperscript{284}

C \textit{Village Law}

1 \textit{The History}

The history of \textit{Village Law} is interrelated with the history of the \textit{Regional Autonomy Law}, because districts (\textit{kabupaten}) and villages are the core areas of decentralisation and society empowerment. However, villages provide several impediments. In short, villages are vital yet fragile.

During colonisation, the Dutch paradigm was centralistic and exploitative. However, the Netherlands legal and political system shifted from a monarchical to parliamentary system. This

\begin{footnotesize}
\textsuperscript{281} ELSAM, above n 273, xii.
\textsuperscript{282} \textit{Law No 18 of 2004 on Plantation} (Indonesia) elucidation of art 9 (1).
\textsuperscript{283} Ibid 21 and 47.
\textsuperscript{284} \textit{Plantation Law Case} (2010) 55, 26-27.
\end{footnotesize}
resulted in the colonial administration paying more attention to decentralised policy in the East Indies. The democratisation across Europe in the 19th century provoked this significant change. In 1903, the colonial government stipulated the first Decentralisatie Wet (Decentralisation Law). However, in practice decentralisation was not effective, because it was only about delegation of power.  

After independence, the pre-amendments 1945 Constitution had envisioned the idea of decentralisation. The Constitution divided special regions into two: first was zelfbesturende landschappen or so called swapraja or monarch areas which gained autonomy through political agreement with the Dutch colonial government. The second was volksgemeenschappen or so called indigenous communities. The concepts are distinct: monarch regions do not exist within indigenous communities and vice versa. Hierarchically, monarch regions are superior in protection by the law to indigenous communities.

The central government, through the 1945 Law, granted a decentralisation role to the village with self-determination to legally administer regional areas and accommodate village governance. However the 1957 Law replaced the 1945 Law. It accommodated special autonomy (monarch) regions. During this era, the policy of decentralisation encouraged local democracy. However under Sukarno’s Guided Democracy, the legislation had changed through presidential decree into more a centralistic and bureaucratic model. Sukarno assumed that Indonesia was not ready for local democracy which had created social instability and corrupt local leaders, and so the policy of public administration was selected as the main paradigm of decentralisation. Furthermore, the government divided regional autonomy into two areas: (basic) regional autonomy and praja (special) villages. Specifically, the legislation of praja villages merged indigenous communities into monarch regions. It was the first attempt at unification. Additionally, it was not designed to establish new praja villages, but to recognise pre-existing praja villages.

286 The 1945 Constitution (before Amendments) (Indonesia) art 18.
287 The recognition of monarch areas was based on Regerings Reglement (RR) [Colonial Government Regulation] (Dutch East Indies) art 44 and Indische Staatsregeling (IS) [Indies State Regulation] (Dutch East Indies) art 34.
288 The 1945 Constitution (before Amendments) (Indonesia) elucidation of art 18.
289 Law No 1 of 1945 on Regional National Committee (Indonesia).
290 Law No 22 of 1948 on Regional Autonomy (Indonesia). The Law then revised by Law No 1 of 1957 on Regional Autonomy (Indonesia).
291 Presidential Decree No 6 of 1959(Indonesia) and Presidential Decree No 5 of 1960 on Regional Autonomy (Indonesia). The Decrees then changed into Law No 18 of 1960 on Regional Autonomy (Indonesia).
292 Law No 18 of 1965 on Regional Autonomy (Indonesia).
293 Law No 19 of 1965 on Praja (Special) Village (Indonesia).
294 Ibid.
Suharto’s administration limited the pluralistic nature of Indonesian villages. The Regional Autonomy Law\(^{295}\) and the Village Law\(^{296}\) were centralistic, aiming to reach unification while ignoring pluralism. Consequently, the village, being peripheral to the city (central) in the modern capitalistic world, was discriminated against.\(^{297}\) This was the second and the most significant outcome of the unification process. Villages were merely considered as administrative regions without recognising their original social structure and adat law.

Suharto’s administration unified and re-integrated the village structure to become desa (village) which aimed to control regional areas and maintain stability while disregarding the authentic and original structure of the village in Indonesia.\(^{298}\) In village administration, the head of a village was appointed by the head of district.\(^{299}\) The authority and role of tribal chief and TDR were not recognised because every conflict and dispute which escalated within the village came under the management of higher government.\(^{300}\)

After the fall of Suharto, regional autonomy gradually changed. The People’s Consultative Assembly (MPR) passed two regulations to guide regional autonomy practice.\(^{301}\) The government merged the concept of local democracy and public administration. For instance, the 1999 Regional Autonomy Law aimed to delegate several key decision-making powers to the district/ regional and municipality administrations.\(^{302}\) This legislation was considered as a liberal law which aimed to transfer the concept of ‘democratic decentralisation’ entailing devolution of powers and accountability downward to local people. With regard to village administration, the Law gave more authority to the head of a village to manage law and order within the village. The role of TDR then gradually revitalised.\(^{303}\)

The 2004 Regional Autonomy Law replaced the 1999 Law as it was considered too liberal. The legislation recognised that adat law applied within the village. Particularly with regard to the village head election, the regional government had to respect the adat mechanism by referring to regional legislation (Perda).\(^{304}\) Regional legislation ought to respect and accommodate the rights of

\(^{295}\) Law No 5 of 1974 on Regional Autonomy (Indonesia).
\(^{296}\) Law No 5 of 1979 on Village (Indonesia).
\(^{297}\) Rahardjo, above n 178, 498.
\(^{298}\) Law No 5 of 1979 on Village (Indonesia) consideration b.
\(^{299}\) Ibid art 6.
\(^{300}\) Ibid art 32.
\(^{302}\) Law No 22 of 1999 on Regional Autonomy (Indonesia).
\(^{303}\) Ibid art 101 (e).
\(^{304}\) Law No 32 of 2004 on Regional Autonomy (Indonesia) art 203 (3).
originality and indigenous cultures. However, unlike the 1999 Law, the 2004 Law did not regulate the ‘judicial’ role of village head and tribal chief. Once again, the role of TDR was suppressed.

The 2005 Government Regulation overcame the disadvantage of the 2004 Law by giving recognition to adat law and indigenous peoples in electing their own head of village (who can act ex-officio as tribal chief). The recognition must be stipulated in regional legislation. Moreover, both provincial and regional governments must not obstruct indigenous peoples and their laws.

2 The Existing Legislation

New legislation, the 2014 Village Law was highly anticipated. Its crucial aim was to clearly recognise indigenous people’s rights within their village. Several Constitutional Court decisions that supported democratic regional autonomy in general, and recognised indigenous people’s rights in particular, endorsed this legislation. Constitutionally speaking, the legislation aims to answer constitutional issues concerning the recognition of indigenous people’s rights. Under this legislation, the provision for village government in the 2004 Regional Autonomy Law has ceased.

The first paragraph of the 2014 Village Law enshrines the principle which states that the State recognises the right of original possession and traditional rights within the village. As a result of this recognition policy, villages are re-categorised into two forms: (regular) villages and adat villages. The legislation merges two concepts of government: self-governing community through the adat village and local self-community in the (regular) village. The first is a manifestation of local democracy, the second is the implementation of public administration.

With regard to village administration in Indonesia, Koentjaraningrat reduces it to three patterns: (1) a village administration centred around a council; (2) a village administration based on dual leaderships; and (3) a village administration based on single leadership. Based on these social facts, it is impossible to unify the village structure. The government must use a pluralist-driven policy to accommodate this social condition.

305 Ibid art 216 (2).
306 Governmental Legislation No 72 of 2005 on Village (Indonesia) art 54 (1), (2) and (3).
307 Ibid art 100 (e) and 101 (k).
309 The 1945 Constitution (Amended) (Indonesia) art 18B (2).
310 Law No 6 of 2014 on Village (Indonesia) consideration a.
311 Ibid 6. The adat village is dealt with in arts 96 to 110.
312 Koentjaraningrat, above n 86, 401.
Specifically in relation to the *adat* village, the legislation allows a huge amount of public participation within the village to decide whether the villagers want their village to be recognised as an *adat* village or a (regular) village.\(^\text{313}\)

Similar to the wording of the Constitution and previous legislation, this legislation still uses the concept of legally-based indigenous peoples to depict indigenous peoples. However, the criteria for indigenous peoples are more flexible than Ter Haar’s arguments. The indigenous people must have territory and at least one of the facultative criteria.\(^\text{314}\) The method of recognition is bottom-up, and strongly considers public involvement and participation, although the role of regent or/and mayor is still vital in giving recognition through regional legislation.\(^\text{315}\)

Within the *adat* village villagers have privileges to manage their *adat* government by employing *adat* law, as long as the *adat* law is not in conflict with human rights principles, the principles of the unitary state, and the state legal system. This proposition was made to avoid separatism within the villages. Importantly, there is no conditionality on the ‘state’s interest’.\(^\text{316}\) With regard to the election of village head and the establishment of tribal institution, villagers can elect the head of village, or the tribal chief can fill the position through an *adat* mechanism. However, the regional government must firstly stipulate the structure of the *adat* institution and the *adat* village.\(^\text{317}\) The 2014 Law accommodates living *adat* law and preserves its tribal institutions.

Indonesian villages have two distinct mechanisms which are at the core of the village’s social order: *gotong-royong* and *musyawarah*.\(^\text{318}\) *Gotong-royong* means ‘rendering aid to the community for the common benefit’. However the legislation does not cover the preservation and use of this local wisdom in either regular villages or *adat* villages. Second is *musyawarah* which is deliberative discussion. These processes are considered as universal *adat* law principles and viewed as national characteristics.\(^\text{319}\)

Moreover, the founding fathers, particularly Soepomo envisioned the village (*desa*) as an organic construct of the republic. The ideal characteristics are: (1) the State exists to protect, nurture and serve the interest of society as a whole, not just individuals or interest groups; (2) the bond between the government and the people should be cemented by spiritual value, ‘*manunggaling kawulu lan

\(^{313}\) Law No 6 of 2014 on Village (Indonesia) art 100 (1).

\(^{314}\) Ibid art 97 (2).


\(^{316}\) Law No 6 of 2014 on Village (Indonesia) art 97 (4) (a) and (b) and 107.

\(^{317}\) Ibid art 109.

\(^{318}\) Koentjaraningrat, above n 86, 397.

\(^{319}\) Fitzpatrick, above n 215, 179.
gusti’ (the oneness of leader and people); (3) the State is a joint venture of the people based on the principle of gotong-royong; and (4) the State is based on the familial concept.320

The legislation covers musyawarah but it does not state the judicial function within the village through musyawarah,321 and there is an absence of gotong-royong. Additionally, the head of village must prioritise gender-based justice in his policy.322 However, in the adat village section, the legislation recognises that adat practitioners shall manage their adat areas, the villages shall preserve their local cultures and knowledge and resolve their social grievances through TDR on the basis of musyawarah, respect for human right principles, and correspondence with the state law.323

The Law aims to lessen any disadvantages of indigenous government by arranging checks and balances between the head of the village or tribal chief and the Village Musyawarah Council.324 Both village executive and Council must discuss strategic policy within the village musyawarah forum.325

3 The Drawbacks

The legislation still has drawbacks particularly with regard to the abolition of the village which can be based on ‘strategic national interests.’326 First of all, article 9 is a flexible provision that can be interpreted differently by the government for its own purpose. This provision would open opportunity for ‘development/economics in command’ to gain benefits, even though several Acts have explained the term ‘national interests’.327 The criteria of ‘national interest’ and its mechanism remain unclear. The legislation lacks FPIC. Thus the implementation of this legislation must always be done cautiously.

Secondly, the provincial and regional level local legislation must confirm the status of adat villages.328 Moreover, the Implementing Regulation states that the Ministerial Regulation is needed for establishing adat villages.329 These bureaucratic procedures make recognition ineffective.330 The implementation of Village Law relies on the good intentions of the national and local governments.

320 Rahardjo, above n 178, 495.
321 Law No 6 of 2014 on Village (Indonesia) art 54.
322 Ibid art 26 (4) (e).
323 Ibid art 103 (b), (c), (d) and (e).
324 Ibid art 55-65.
325 Ibid art 54.
326 Ibid art 9.
328 Law No 6 of 2014 on Village (Indonesia) art 14, 101 (2), 109 and 116 (2).
329 Implementing Regulation No 43 of 2014 on Adat Village (Indonesia) art 28 and 32.
330 Zakaria, Konstitutionalitas, above n 2, 2.
Several claims over indigenous lands and forests have been submitted by indigenous peoples in several regions. However, regional governments which have authority to formally recognise indigenous peoples through local legislation are still notoriously corrupt, making it hard for indigenous peoples to convince their regional government to issue regional legislation within a responsible time.  

Thirdly, the recognition of indigenous peoples and their land/forest is separated. Recognition of the people is through regional legislation issued by district or provincial government; whereas *adat* land/forest must be registered by the BPN. This separated process is ineffective. Recognition must be holistic, because when the indigenous peoples have been recognised, it will also mean that the State recognises their land/forest. Additionally, the Ministry of Internal Affairs has issued a Circular Letter which maps indigenous people’s areas. However, the Letter merged monarch regions with indigenous people’s areas. This Letter will create great uncertainty in its implementation.

Lastly, one of the most severe impacts of decentralisation is that corruption will be decentralised to village level. The legislation gives much authority for managing the village budget to the village government in general and to the head of the village in particular. Village income, state budget allocation or regional budget allocation are the sources of the village budget. Moreover, the legislation allows villagers to establish village-based proprietary limited companies. Giving this wide authority without sufficient (judicial) control may lead to massive corruption practices within the village.

**V CONCLUSION**

There are a number of possible approaches which could lessen the tension between legal formalism within State law and legal pluralism supporting *adat* law. The first is through legislation. As argued above, Acts specifically targeting indigenous issues have both advantages and disadvantages, thus reforms need to focus on the advantages while minimising the disadvantages. *Village Law* offers several opportunities for reform including the bottom-up process of recognition, and its consideration of social needs, public participation and the village’s original structure. Most importantly, its criteria of indigenous peoples are more flexible than other legislation, making it more inclusive and applicable to the diversity that exists in Indonesian villages. The new *Village Law* has accommodated the aspirations of legal pluralism, thus it will benefit indigenous peoples. However the government must bear the diversity of village life in mind. All Indonesia’s villages

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331 Butt, *Traditional*, above n 26, 73.
332 *The Circular Letter No 522/8900/SJ on The Mapping of Indigenous People’s Areas* (Indonesia).
have their own unique characteristics, thus it is impossible to unify them through rigid state-centred criteria.

The \textit{BAL} has survived for more than three generations without a single revision. This legislation is vital to marginalised and indigenous peoples yet it contains vested interests. Despite strong normative protection, indigenous rights remained marginal to expropriation with inadequate or no compensation.\textsuperscript{333} The previous legislature and the executive seemed reluctant to revise the legislation, perhaps because several gaps in the legislation allowed the government ‘land market business’ to extract and exploit natural resources. The legal reforms must thus start from the good political will of the government.

Legal and economic interests mutually intertwine in the implementation of the \textit{BAL}. The current land management paradigm is an investment regime which extols the principles of ‘development’ and free-market ideology. This paradigm allows people to profit while disadvantaging and marginalising communities. The ideal condition should be an exchange, where progress is achieved for all parties without discrimination or loss.\textsuperscript{334}

The \textit{BAL} and its implementation need to prioritise marginalised and indigenous peoples who have suffered from injustice and discrimination. In this respect, the law cannot be equally applied, because the social structure is not equal. Imposing an ‘equal’ law on an unequal social structure would create more social fractures and injustices. In other words, imposing a unified law on a pluralistic social structure is unfair, the same as imposing a discriminatory law on a homogenous social structure. In this respect, the social context must be the main reference for legal drafting and enforcement.

The government could initiate legal reforms to overcome agrarian conflicts; these need to be proactive rather than reactive. The \textit{BAL} must be amended to make the implementation of legal pluralism clearer and more effective, because at present there are no sensible lines of authority between the BPN which should have the authority to overcome land issues, and the agriculture and forestry ministries, let alone a synchronisation between the central and local governments.\textsuperscript{335}

\textit{Village Law} and the Constitutional Court’s decision regarding the change of \textit{adat} forest status should be enforced. The regional governments, both district and provincial, must work together with indigenous peoples and NGOs to identify indigenous areas, and verify the findings. However,

\textsuperscript{333} Butt and Lindsey, above n 217, 66.
\textsuperscript{334} Sodiki, above n 212, 45.
\textsuperscript{335} Samuel Clark (ed), \textit{More than just Ownership: Ten Land and Natural Resource Conflict Case Studies from East Java and Flores} (World Bank, 2004) 6.
these processes are dependent on the political goodwill of the regional government. As stated, the implementation of Village Law is challenging because there are too many procedures and a long line of bureaucracy. To make matters worse, state-centred and economic vested-interests still play a dominant role – this overrides the aspiration of legal pluralism.

The second approach is through government policies, which must be fairly and systematically carried out. As stated, the main problem with the Indonesian legislation system is the over-lapping authority between ministries and departments. The government needs to employ a ‘One Map Strategy’ to overcome this problem. Several ministries and departments could work within a single, measured and controlled system. Land issues are significant in Indonesia, thus the problems need collaboration and coordination among the ministries. The main focus of the government should be to balance development with the principles of human rights in general, and the protection of indigenous peoples in particular.
CHAPTER 4 - THE INDONESIAN COURT SYSTEM AND ITS JUDGES: ADAPTING THE LEGACY OF LEGAL PLURALISM

I INTRODUCTION

The judiciary has emerged as a major player in the discourse on Indonesian legal reforms. Indonesian courts in general, and the Constitutional Court in particular through its progressive and contextual decisions, have bypassed a vested-interest legislative body and its static legislation. The courts are vital, not only in settling disputes, but also in clarifying, and on some occasions, interpreting the legislation to make the law more dynamic and contextual.

There are some noteworthy improvements in the legal system in general and the judiciary in particular. First, there is a shifting legal paradigm from the civil law to the common law tradition, evidenced by the removal of the wording rechtsstaat from the 1945 Constitution. The former Chief Justice of the Constitutional Court, Mahfud MD, has clarified that not only is Indonesia’s current legal paradigm no longer identical to the civil law tradition, it is also significantly influenced by the common law.336

Second, constitutional amendment from 1999 to 2002, particularly the second stage has strengthened human rights norms.337 These have become the main normative guide for the Indonesian legal system. This shift has also changed the main purpose of the law, so that substantive justice and legal morality must now be balanced against procedural justice and legal certainty in order to alleviate the rigidity of law. This balance must be maintained by the equal accommodation of both human rights principles and formal separation of power.

Third, the demand that others appreciate indigenous peoples’ adat law and land has become increasingly insistent over the last 10 years. It reached a high point when the Constitutional Court made several landmark decisions regarding indigenous peoples and their rights. These decisions alerted the House of Representatives (DPR) and other stakeholders to the need to seriously take indigenous peoples’ rights and adat law into consideration. The Supreme Court system, in particular its District Courts, must now also seriously consider this development because the

337 The amendment of the 1945 Constitution (Indonesia) underwent four stages: first was on 19 October 1999, the second was on 18 August 2000, the third was on 9 November 2001, and the last stage was on 10 August 2002.
District Courts are the nearest access point to justice for communities, and the Courts’ role of formal dispute resolution should be strengthened so that it can deliver justice to people.

This chapter further develops the legal pluralism discourse that was covered in Chapter 3 in the discussion on significant legislation. This chapter aims to uncover theoretical and doctrinal-historical reasons which can lessen the rigidity of legal formalism within the State court system, with the eventual aim of soothing the tension between the objectives of state law and the aspiration of living adat law. This chapter merges two approaches: ‘mental maps’ and ‘cartography maps’. The first section of this chapter consists of the ‘mental maps’. This section aims to be extension of the theoretical discussion and framework in Chapter 2. It discusses several theories and arguments concerning the establishment of the modern court system. This section encompasses the court evolution, functions, the principle of the independence of the judiciary, and judicial (constitutional) review. These theories are relevant in revealing the underlying foundation of the state courts and in evaluating the implementation of the state court system. These theories are useful as they can be applied for further analysis of judicial decisions.

The second and the third sections elaborate the ‘cartography maps’. The second section turns attention to the history of legal pluralism within the Indonesian court system. The aim is to trace and investigate the development of legal pluralism discourse in the judiciary. The third section sheds light on doctrinal-historical aspects of the current Indonesian court system through its two branches, the Supreme Court and the Constitutional Court. This section elaborates on the court structure and procedure through their relevant legislation and regulations. It offers normative guidance based on legislation on judicial court procedure. To sharpen the analysis of the relevant legislation on the court system, the thesis presents commentary from interviews with judges is presented. The discussion also provides a framework for the further analysis of court decisions in the next chapter.

The chapter argues that beside relevant legislation, the courts also play a pivotal role in guiding and protecting the legacy of Indonesian legal pluralism in general and the protection of indigenous peoples’ rights in particular. In order to do so, the notion of legal pluralism should be adopted in court procedures. The judiciary should also seriously consider socio-legal aspects in cases involving adat law and indigenous peoples.

II THEORETICAL PERSPECTIVES ON THE COURT SYSTEM

338 Santos, above n 28, 281.
A Evolution of A Court

According to Shapiro, at the beginning of its evolution, the court starts with a social interaction involving disputants whose dispute cannot be readily resolved by themselves and so a neutral party is needed to assist them. The evolutionary interaction, which is called the socio-logic approach constructs the form of the modern court which emphasises that the core of legal structure is social logic. In other words, the court system historically evolved from other social dispute resolution mechanisms, including negotiation through a ‘go-between’, mediation, arbitration, to finally reach to adjudication.339

However, the social logic approach has its shortcomings, particularly in its assumption that the third party may be biased and so would create a situation where one party’s interests may be suppressed.340 A state authority redresses the social logic approach by changing consent into pre-existing legal norms that have a hierarchical order to limit this disadvantage.341 The state authority can also proclaim a credo of an independent judiciary and court proceedings to achieve a dichotomous decision. Shapiro states that the modern court has four elements: (1) an independent judge; (2) it applies pre-existing norms; (3) it follows adversary or inquisitorial procedure; and (4) The outcome is dichotomous.342

Nevertheless, the characteristics of a court can be different depending on local legal traditions. For instance, civil law is inquisitorial, meaning the judges conduct a rigid enquiry into the facts behind the legal issues in dispute. The judge has authority to control and dominate both the proceedings and the hearing by directly questioning witnesses. The system sometimes ignores lawyers and prosecutors who are left with few questions to ask. An inquisitorial court gathers evidence for itself, without discarding unfavourable evidence. It is centralised in nature. On the other hand, common law is an adversarial system which has been criticised for the tendency of claimants to report only favourable evidence. It is decentralised in nature. The judges act as neutral or passive referees, and exercise limited initiative in the process while the claimants argue their own perspectives to convince a jury or the judge. Lawyers are given a large role in the conduct of litigation.343

340 Cotterall, Law, above n 119, 221.
341 Shapiro, above n 339, 15.
The thesis argues that despite the fact that current modern court has evolved into formalistic institution, the social logic thesis of the court also cannot be disregarded. The Court not only aims to decide dichotomous decision, but importantly to achieve and deliver justice to disputants.

B Functions of A Court

The court in general has two pivotal functions. First, a technical function, as it has duties to sustain and deduce legal propositions. It must apply, define or reinforce rules or doctrines, which eventually contribute to strengthening the structures of the social order. Second, the court’s ideological function which, involves the maintenance of currents of ideology which legal doctrine maintains, implements and serves to legalise government and empower the social order. Both adversarial and inquisitorial systems have the same functions.

Both functions are inseparable from each other because they contribute to the empowerment of the state’s sovereignty. The state governs and transmits its ideology to the people through the court decisions by applying law to the cases. The basis of this concept is instrumentalism or a state-centred paradigm aiming to achieve state neutrality and autonomy. However, the idealist perspective above is often contradicted by reality as vested interests often co-opt the state law, particularly if the court making the law and the social structure (in practice) are unequal.

Clearly neither notion is satisfactory because choosing and implementing one over the other may lead to unjust conditions. In the first notion the State may be more powerful than the community, while in the second, the notion of legal objectivity and neutrality, would be jeopardised. The State, particularly the court, must be actively involved in bridging the gap between legal justice and social justice in order to reach a balanced relationship. This is a balance between applying the law objectively, while at the same time overcoming a judge’s subjective values in decision-making.

Thus it can be argued that the court and its judges must culturally adapt to their surroundings while conveying affirmative action decision-making. It can be also be argued that judges should be neutral. However, remaining neutral in unjust and discriminatory circumstances can be naïve and which lead to further injustice and discrimination.

C The Independence of Judiciary

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344 Shapiro, above n 339, 228.
345 Ibid.
The essence of judicial power’s legitimacy lies in its independence, meaning the institution must be independent from the government, particularly in the narrow sense of executive power. In the broader sense, there are influential bodies including political groups within the state system and interest and pressure groups outside it.

According to Shetreet, there are four pre-requisites for the independence of the judiciary: “First, substantive independence which manifests itself when deciding cases, second, personal independence legally guaranteed for the term of office and tenure; third, internal independence is essential to bring freedom from colleagues’ influences; and lastly, collective independence allows independence to participate and regulate the court’s budgeting.”346 Based on Shetreet’s argument, the independence of the judiciary is an expression of ‘freedom from’, a freedom that the state must actively promote, protect and guarantee. It is not an expression of a right that judges inherently possess.

There are several reasons why independence of the judiciary is so crucial. First, it limits executive power. To limit power it must be separated from and distributed to other branches of government. Second, it is a requirement for the rule of law. There will be no legal supremacy without the independence of the judiciary. Third, it is a guarantee of the judiciary’s fairness and impartiality. Fourth, it promotes equality before the law as there will be no special privileges within the courtroom.

The independence of the judiciary is enriched by the idea of judicial activism which envisages judges as dynamic actors, meaning in certain conditions they can act both as ‘negative legislators’347 and ‘positive legislators’ or as either.348 These principles are not contradictory, because the independence of judiciary is an expression of ‘freedom of’. On the other hand, judicial activism is a manifestation of a ‘right to’ which is an expression of freedom of the judge.

In this respect, it is important to draw a line between ‘the independence of the judiciary’ and ‘the freedom of judges’.349 As stated, the first concept is an expression of ‘freedom from’ in which the government must actively keep the institution free from internal and external influences. It also

relates to institutional matters, rather than to the individual. On the other hand, the second concept is an expression of an inherent ‘right’ which judge has to express their perspectives on when conditions are unbalanced or if the legislation blatantly discriminates against marginalised parties. The activism approach does not breach the ethics of the court and the impartiality of judges in court proceedings because judges only adopt such a position and transcend their perspectives after objectively assessing the facts. At that point in their legal reasoning, judges may use their subjective values to consider socio-cultural aspects and to impose policy-driven and affirmative action decision-making.

Further, if a judge’s legal conscience contradicts the legislation, he or she may modify the law through judicial review or may exercise judicial discretion. However, the Indonesian court system cannot simply interpret the legislation that underlies the dispute because there is a separation between the adjudication process and judicial review.

This judicial approach, however, does not surpass or negate the separation of powers principles. Instead it allows judges, on certain occasions, to independently decide the case by using a broad source of law and legal consideration. By advocating this approach, this thesis passes beyond the classical theory of the separation of powers: if the legislation produces injustice and discrimination, the court should exercise judicial activism and discretion. The idea of judicial activism is then further augmented by the practice of judicial (constitutional) review.

D Judicial (Constitutional) Review

The idea of constitutional review, as a legal reform option, can be traced back to the practice of the common law in the United Kingdom, particularly expressed in *Bonham’s case*. In this context, the touchstone was not a constitution, because the United Kingdom has no written constitution. Instead, the touchstone was the common law. In those days judges made the law. However, law-making by courts has diminished with the rise of parliamentary sovereignty. Parliament exerts a stronger law-making power than the judiciary because theoretically it represents the will of the people as a whole. The idea conveyed from the French legal system, would have the highest court reporting annually to parliament and to the President. This is similar to the Netherlands and Indonesian context under the *1950 Temporary Constitution*.

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350 *Dr Bonham’s Case* (1610) 8 Co. Rep. 114.
351 Kirby, above n 156, 58.
353 Kirby, above n 156, 67.
354 The *1950 Temporary Constitution* (Indonesia) art 95 (2).
In the United States, the case of *Marbury v Madison*[^355] is considered to be a landmark decision concerning constitutional review. It was the first time in US legal history that, the judiciary clarified the relationship between legislation and the written constitution. The case, a dispute between William Marbury, Justice of Peace and James Madison, Secretary of State, was adjudicated in 1803. The US Supreme Court settled not only the dispute in favour of the Constitution but also declared that the existing law, the *Judiciary Act 1789*, contradicted the *US Constitution* art 3(2) concerning Judiciary Power.

The reasons for judicial (constitutional) review can be classified into legal and political reasons. First, the judge has taken an oath to respect and uphold the constitution, thus, the judge has an obligation under the constitution to defend it from encroachment and the misleading law-making processes of legislators. Second, the constitution is the supreme and fundamental norm of the land. Legislation must be in line with the spirit of the constitution, otherwise the legislation ceases to be valid law. Third, the rule of law principle must surpass the principle of democracy, in this sense, legislation as a manifestation of the ‘people’s voice’ is inferior to legal supremacy, represented by the judiciary. It is contended that majority rule is denied in principle by judicial review.[^356] Fourth, politically speaking, legislation is merely a product of politics, because it is not purely derived from the people’s aspirations. Instead, it can be based on compromised and vested interests in the legislative body.[^357] Lastly, legislation is static, often out-of-date with current and progressive social and political changes. The judiciary must step forward to interpret, review and contextualise the legislation to fill in any gaps in the law. Thus judicial review could be an effective strategy of reform, especially in conditions where legislation is both discriminatory and represents vested interests.

However, the above theories and arguments only draw a general picture of the functions and roles of the judiciary. They need to be contextualised in the specific condition of Indonesia’s judicial system. A long history of doctrinally-based Dutch law may have contributed to the rigid character of the Indonesian legal system and practice. It radically shifted peoples’ minds from a ‘fluid’ relationship to one of bureaucratic and legalistic cultures. This radical change continues to influence the judicial landscape of Indonesia’s legal pluralism by creating a contest between *adat* law aspiration, judicial unification and legal formalism. The next section will expand on the historical-doctrinal aspects of the Indonesian court system.

### III THE HISTORY OF LEGAL PLURALISM WITHIN THE INDONESIAN COURT SYSTEM

[^355]: *Marbury v Madison* (1803) 5 U.S (1 Cranch) 137, 163.
[^356]: Ibid 182.
[^357]: Mahfud MD, above n 157, 22.
This section consists of two parts. First is an examination of the colonial era through to the New Order regime which encompasses the progressive anti-colonial movement of the Old Order era, as a predecessor to the New Order regime. Second is an analysis of changes within the judiciary after the fall of Suharto.

A Colonial Era to the New Order Regime

In 1814 the monarch of the Netherlands declared that the Netherlands owned all colonies including Nusantara (the Indonesian archipelago). It was the first proclamation regarding the Dutch colonisation of Nusantara. Moreover, because of political turmoil between the monarch and parliament in the Netherlands, the Constitution was changed in 1848 resulting in the monarch having less authority in the colonies.

The Government of the Netherlands then promulgated Regerings Reglement (RR 1854), which can be considered as the East Indies Constitution. This colonial law gave authority in the first instance (landraad) to judges to use adat law (including religious law) for Indonesians in general and indigenous peoples in particular in private cases only. The authority was limited by the principles of humanity and natural justice.

The RR 1854 was then replaced by the Indische Staatsregeling (IS). Unlike the RR 1845 that focused on judges, the IS aimed for the legislators to strengthen their codification policy for living laws. However, it did not mean the judges lost their authority to seriously consider adat law. Rechterlijke Organisatie (RO) ruled that the (village) ‘judges’ must seriously consider adat law within the Indonesian archipelago. The judges had an obligation to add to and refine the use of adat law within the community. If there was a lack of pre-existing laws, the judges had to utilise ‘social justice’ as their first reference.

Under IS, Europeans were still entitled to use European law (particularly private law), through the principle of concordance. Meanwhile, IS grouped people into three: Europeans, Indonesians and indigenous peoples (both called Bumiputera), and Far Eastern people including Arabs, Chinese and other Asian ethnicities. IS laid the foundation for the Dutch anti-acculturation policy. It aimed to protect European interests and to isolate Indonesians and indigenous peoples from modern laws and bureaucracy.

358 The 1814 Netherlands Constitution (Netherlands) art 36.
359 Regerings Reglement (RR) [Colonial Government Regulation] (Dutch East Indies) art 75 (3) and (6).
360 Rechterlijke Organisatie (RO) [Judicial Organisation Regulation] (Dutch East Indies) art 3 (a).
361 Indische Staatsregeling (IS) [Indies State Regulation] (Dutch East Indies) art 131 (1) (a).
As a result of IS implementation the Dutch segregated the judicial system: courts had different jurisdictions according to the ethnic background of the parties. For Europeans, the hierarchy of the courts was in the order as follows: the District Court (Residentie Gerecht), the Appeal Court (Raad van Justitie), and the Supreme Court (Hooggerechtshof). On the other hand, Bumiputra could settle disputes in the District or first instance Court (Districtsgerecht, Regentschapsgerecht and Landraad). Additionally, there was also ‘a moving court’ or Rechtbank van Ommegang. For ‘petty cases’ which were not under jurisdiction of Landraad and Rechtbank van Ommegang, natives Bumiputera could settle their disputes in Rechtspraak ter Politierol.  

The Dutch colonial regime divided judicial power into five forms:

1. Gubernemen court, which had formal judges who were appointed by the King or Queen of the Netherland Kingdom. It applied European civil law both procedural and substantive.
2. Tribal court (peradilan adat), which had both Dutch and Indonesian judges. However, European civil law was not applied by the judges, instead, they utilised the living adat law. The Court’s jurisdiction was only for Indonesians or indigenous peoples living in their territory.
3. Swapraja court established to settle disputes within the monarch (sultan) system. This court mainly operated in Java and Madura.
4. Religious (Islamic) court, which was a specialist family law and inheritance court for Muslims. It still exists today.
5. Village court (dorpsjustitie), similar to the tribal court but only operated outside Java and Madura.  

In the early years of independence, the judicial system has evolved several times to meet the demand of the people to have better access to justice and equality before the law. The changes are important milestones for achieving a more effective judicial system. However, constitutionally speaking, two previous constitutions, the 1949 Federal Constitution and the 1950 Temporary Constitution, used the term ‘court’ only to refer to the judiciary. It can be argued that previous constitutions paid less attention to the judiciary in general, and independence of the judiciary in particular.

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363 Abdurrahman, ‘Peradilan Adat di Indonesia’ ['Tribal Courts in Indonesia'] (Presented at KMAN Conference, 21 September 2003) 83
364 Ibid.
365 The 1949 Federal Constitution (Indonesia) chap 5 s 3.
366 The 1950 Temporary Constitution (Indonesia) chap 3 s 3.
Several pieces of legislation were promulgated in the last years of foreign occupation and during the early years of independence. The Japanese colonial government passed Law No 14 of 1942 which was replaced by Law No 34 of 1942. In the earliest years of independence, Law No 23 of 1947 abolished the monarch (swapraja) court in Java and Sumatra. However, Law No 23 of 1947 and Law No 19 of 1948 still recognised TDR practice while structuring the court system into three tiers: the District Court, the High Court and the Supreme Court. It is also important to note that the Judicial Power Law distinguishes between court jurisdiction and hierarchy: Peradilan expresses the jurisdiction of the court; Pengadilan expresses the hierarchy of the court.

Further, the 1948 Law was changed by Urgent Law No 1 of 1951 which unified the judicial system. This legislation stated that only the state court or one legalised by state authority could settle disputes between the people and the State. Consequently, to strengthen state sovereignty all TDR had to be abolished and replaced by national courts. The tribal courts were abolished gradually by several decrees. The Decree of Ministry of Justice No J.B.4/3/2 at 21 June 1954 and the Decree of Ministry of Justice No J.B.4/4/20 at 18 August 1954 officially abolished the tribal courts in the Kalimantan region.

However, this Law did not necessarily abolish the role of the village ‘peacemaker judges’ (dorpsrechter) in settling disputes at the village level, and the essential substance of adat law was transmitted into judicial reasoning. The Urgent Law art 5 (3) b should be interpreted contextually; the written laws should not be the only legal source for the judge to consider. This thesis argues that the essence of judicial independence does not just rely on a constitutional provision for a formally separate and independent judicial branch of government; it demands that judges have the freedom to develop law and use judicial discretion. This is necessarily saying that a judge is more important than a legislator, thus the judge should be intellectually independent and free from dogmatic legislative pressure.

The government still maintained a formalistic paradigm when it converted the Judicial Power Law into Law No 19 of 1964 and Law No 14 of 1970. Neither Act recognised TDR forums. Despite its drawbacks, this legislation has made a significant contribution to the adat law by asserting that a judge’s duty is to always consider, understand and follow adat law values within the society (village). This proposition has been maintained by subsequent legislation, including the Law No

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367 Law No 19 of 1948 on Judiciary (Indonesia) art 10 (1).
369 Urgent Law No 1 of 1951 on Temporary Policies to Unify and Implement Judicial Bodies (Indonesia) art 1 (3).
370 Ibid art 5 (3) b.
371 Law No 19 of 1964 on Judiciary (Indonesia) art 20 (1).
14 of 1970 which was enacted in the Suharto era. Law No 14 of 1970 stated that if there is no written law that could be used as a legal guide, then the judge must expand on existing adat law.\textsuperscript{372} Importantly, this legislation, for the first time, rendered the Supreme Court an authority to review regulations to the legislation (judicial review).\textsuperscript{373}

B The 1998 Reformation Era and Onward

In the Reformation Era, the government enacted Law No 35 of 1999 to overturn Law No 14 of 1970. Meanwhile, indirect changes within the judicial system had occurred several times as a response to human rights advocacy and political competition between central and regional areas, for instance, the introduction of the Human Right Courts,\textsuperscript{374} and the recognition of the Aceh Darussalam Special (Sharia) Autonomy.\textsuperscript{375}

The government promulgated Law No. 4 of 2004 to replaced Law No 35 of 1999. The first article of this Law states that the main purpose of the judicial body is to enact the supremacy of the law and access to justice. Nevertheless, the state unification paradigm was still to be maintained. The law affirmed that all courts in Indonesian territory are state courts and their establishment must be based on state legislation.\textsuperscript{376}

As with the previous legislation, the judge also must consider and elaborate on living laws and values within society.\textsuperscript{377} However, the 2004 proposition on ‘living laws’ was less explicit than the previous 1970 Law. The 2004 Law had not explained the terms and conditions of how and when judges must refer to the adat laws. The table below briefly compiles the history of the Indonesian court system.

Table 1

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<th>Legislation</th>
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<td>Law No 14 of 1942</td>
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<tr>
<td>Law No 23 of 1947</td>
<td>The legislation abolished the monarch (swapraja) court in Java and</td>
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\textsuperscript{372} Law No 14 of 1970 on Judiciary (Indonesia) elucidation of art 14 (1) and 27 (1).
\textsuperscript{373} Ibid art 26 (1).
\textsuperscript{374} Law No 26 of 2000 on Human Rights Court (Indonesia).
\textsuperscript{375} Law No 18 of 2001 on Aceh Darussalam Special (Sharia) Autonomy (Indonesia).
\textsuperscript{376} Law No 4 of 2004 on Judiciary (Indonesia) art 3.
\textsuperscript{377} Ibid art 28 (1).
Sumatra. However, it still recognised TDR practice.

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Law No 19 of 1948</td>
<td>The legislation continued to recognise TDR practice.</td>
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<tr>
<td>Urgent Law No 1 of 1951</td>
<td>The legislation unified the judicial system and abolished TDR, but not the role of the peacemaker judge.</td>
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<tr>
<td>Law No 19 of 1964</td>
<td>The legislation unified the judicial system. The judiciary was under the President.</td>
</tr>
<tr>
<td>Law No 14 of 1970</td>
<td>The legislation unified the judicial system. The independence of the judiciary was guaranteed, but the judiciary was under the purview of the Department of Justice.</td>
</tr>
<tr>
<td>Law No 4 of 2004</td>
<td>The legislation unified the judicial system. The independence of the judiciary and freedom of judges were guaranteed.</td>
</tr>
</tbody>
</table>

The current positive law positioned as a *lex generalis* for judicial matters, is *Law No 48 of 2009*. It overturned *Law No 4 of 2004*. This Law differs less than previous Acts legislated in the Reformation Era: it encourages judges both in the Supreme Court and the Constitutional Court systems to understand and elaborate on *adat* law.\(^{378}\) Further, the court cannot reject a case brought by disputants even where the law is absent, unspecific or vague.\(^{379}\) This principle is rooted in the legal doctrine *ius curia novit*.\(^{380}\) This principle obliges the judges to know all about legal aspects of legislation. This principle opens possibilities for judges to be more creative in constructing their legal reasoning.

Specifically in relation to judicial reasoning, the legislation states that judges and justices can rely on unwritten legal sources, including *adat* law.\(^{381}\) These articles need to be understood comprehensively rather than separately. The articles should be considered as legal principles guiding judges to not only decide cases according to the law (legislation), but to maximise all materials both written and unwritten, legally, sociologically and even politically.

A legalist would disagree with this proposition, because there is also a legal doctrine which says ‘the judge must decide the case according to the law.’\(^{382}\) The principle in *Law No 48 of 2009* depicts ‘law’ in a broad sense, which also includes unwritten laws. This contrasts with the colonial law, *Algemene Bepalingen* (AB) [General Provision] art 20 which stated that ‘the judge must decide the

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\(^{378}\) Law No 48 of 2009 on Judiciary (Indonesia) art 5 (1).

\(^{379}\) Ibid art 10 (1).

\(^{380}\) Bagir Manan, *Kekuasaan*, above n 349, 8.

\(^{381}\) Law No 48 of 2009 on Judiciary (Indonesia) art 5 (1) and 50 (1).

\(^{382}\) Ibid art 4 (1).
case according to the legislation’. Even though the Dutch legislation is no longer valid, the majority of judges often consider ‘law’ to be merely legislation. This attitude occurs because the legislation does not explicitly explain the meaning of ‘law’ in that article. This condition has deteriorated because of the corruption and collusion practices of some judges particularly at the Supreme Court level.

Judicial corruption became endemic principally in Soeharto's era when the Supreme Court was positioned below the Ministry of Justice. During the reformasi era, judicial bodies have been reformed by dividing the Court into two institutions: the Supreme Court and the Constitutional Court, and by establishing the Judicial Commission. Despite this, there are still many corrupt and incompetent judges. However, reform is in progress there. The judiciary is still considered the more appropriate institution to convey ‘social justice’. The reasons are as follows: first, the control mechanisms over the judiciary have been relatively successful, both internally by formal mechanism through the Judicial Commission's control, and externally by informal mechanism through the press and civil society.

Second, court decisions are considered to be concrete laws. ‘Concrete’ is in the sense of its implementation. Court decisions can be directly implemented, despite there being possibilities for appeals to a higher court. All disputants must accept and obey the decision as the actual law (in concreto). By contrast, legislation cannot directly be implemented because it consists of general legal norms (in abstracto). The government firstly must regulate the executive order (government regulation or president decree) to give more concrete and technical guidance for implementing the legislation. Moreover, the process of legal drafting is highly political. Thus, the judiciary and their decisions are more effective mediums to convey ‘social justice’.

From this brief history, the thesis can draw the conclusion that while the policy of judicial unification in Indonesia may have had the effect of abolishing TDR for indigenous peoples, the application of the policy obligates judges to always consider adat law when deciding cases involving indigenous peoples’ matters. However, despite several amendments, the Law of Judicial Power has not provided an explicit proposition concerning the role of judges in using policy-driven decision making. The only exception is the practice of the Constitutional Court’s judges who often act as ‘positive legislators’.


IV  THE CURRENT ROLE OF THE INDONESIAN COURT SYSTEM

This section analyses relevant legislation and regulations relating to the Supreme Court and the Constitutional Court systems. The areas of interest are the courts’ perceptions of indigenous peoples and their adat law, the courts’ proceedings and the role of judges.

A  The Supreme Court System

This section covers not only the Supreme Court in a narrow sense, but also considers the Supreme Court as a system that encompasses other subordinate courts. The Supreme Court system has two main aims: adjudicating disputes and clarifying the law. First, judges resolve specific disputes on the basis of existing law or based on legal interpretation. The court has three crucial powers in adjudication: as a court of last resort; to examine and decide conflicting jurisdiction between courts; and to re-examine a case that has an enforceable decision, referred to as the Extraordinary Review (PK). The second aim is for judges to review the law by examining and assessing consistency between government regulations, and local regulations and legislation.

Law No 48 of 2009 divides judicial oversight into several jurisdictions: general, religious, military and administrative, and ad hoc courts. Organisation within each jurisdiction is constructed hierarchically, where the lowest court level is the District Court. Appeals from the District Court are heard in the Appeal Court and there is recourse to a final appeal of lower court decisions to the Supreme Court. The Supreme Court has absolute authority to overturn the previous decisions from District and Appeal courts in circumstances where for example the lower court had no authority or exceeded its authority, wrongly applied or breached the positive laws, or acted negligently in contradiction to the prerequisite set of regulations. If the judges of the Supreme Court cannot reach consensus before deciding the case, the dissenting opinion must be provided in the decision.

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385 Law of the Supreme Court is a lex specialis to the Judicial Power Law. The essence of Supreme Court management was stated in Law No 14 of 1985 on Supreme Court (Indonesia). Some of the articles of the Law was changed and added by Law No 5 of 2004 on Changes of Law No 14 of 1985 on Supreme Court (Indonesia) in order to respond to legal reform. The Law was further changed and augmented by Law No 3 of 2009 on Second Changes of Law No 14 of 1985 on Supreme Court (Indonesia). These Laws must be read together.

386 Law No 14 of 1985 on Supreme Court (Indonesia) art 28 (1) (a). Law No 5 of 2004 on Changes of Law No 14 of 1985 on Supreme Court (Indonesia) art 30 (1).

387 Ibid art 28 (1) (b).

388 Ibid art 28 (1) (c).

389 Law No 5 of 2004 on Changes of Law No 14 of 1985 on Supreme Court (Indonesia) art 31.


391 Law No 5 of 2004 on Changes of Law No 14 of 1985 on Supreme Court (Indonesia) art 30.

392 Ibid art 30 (3).
The authority of the District and the Appeal Courts, and their respective judges is stated in the *Law of General Courts*. Further, the Law states that the main aim of the judicial system is to support and facilitate those who seek justice to reach their goal and the fair opportunities of the law. Internal regulations set out judges’ conduct through a mutual agreement between the Supreme Court and the Judicial Commission.

With regard to indigenous people’s legal standing, the legislation accepts indigenous peoples to be a legal entity. Being a legal entity allows indigenous peoples to settle their disputes with companies and local government through the State’s formal mechanisms.

1 *The Supreme Court’s Procedure*

Within the Supreme Court system, courts function as a civil law inquisitorial system. With regard to the judicial system, there are three outcomes of court proceedings. First, the application is granted meaning the claimant’s claim is successfully proven. A claimant needs to establish a legal basis in order to succeed. The application may be granted wholly or partially. Second, the application is denied meaning the claimant’s claim cannot be proven by the evidence. Third, the lawsuit is declared inadmissible, due to the following reasons: lack of legal foundation, lawsuit errors *in persona*, disqualified litigants, lack of legal standing, the lawsuit is unclear or uncertain, or the court has no legal jurisdiction to settle the dispute.

Specifically referring to legal proof the *Indonesian Civil Law of Procedure*, mostly a translation of the Dutch civil procedure, states that the first priority of legal proof or evidence is written documents; these are divided into certificates and non-certificate documents. Certificates are then divided into authentic certificates, which are legalised by a notary and non-authentic certificates, which are not. Other legal proof includes witness testimonies, presupposition, confession, and oaths taken in front of judges.

The civil procedure aims to reach formal justice and legal certainty, which means that judges are not allowed to use their internal morality and personal judgement. In this respect, judges then face
the normative contradiction, as written evidence is prioritised over unwritten evidence in the civil procedure. This proposition normatively contradicts the legal principle that the: ‘judge must consider and elaborate the living law within community.’

Moreover, judges in civil cases are passive, meaning he or she is mostly concerned with the facts that have been presented by the disputants. In this respect the civil case proceeding is closer to the adversarial than the inquisitorial system. However, in the first examination session, the chief of court can advise disputants regarding the mechanisms of complaint. In addition, a judge hearing in civil case is prohibited from granting a decision beyond the claimant’s requests and claims (ultrapetita). Additionally, the Criminal Code does recognise both written legal and unwritten legal sources. The code is Wetboek van Strafrecht voor Nederlandsch Indië (WvS), a legacy of Dutch colonialism. Despite the 1951 Urgent Law formally abolishing all swapraja and TDR, the legislation regulates crime which according to adat law is a criminal offence, even though the Code itself has not regulated that offence. The offence is still recognised as a criminal offence, with the penalty no more than three months in prison and Rp.500.000 (around AUD $50) fine. This punishment is equal to a minor criminal offence. With regard to adat sanctions, the legislation provides that if the perpetrator disregards the adat sanction, then state criminal law replaces the sanction.

Unlike Civil Procedure, Criminal Procedure prioritises witness and expert testimonies as the first priority of legal proof or evidence, followed by written documents, other indications, and the defendant’s testimony. Criminal Procedure aims to reach material or substantive justice. Judges are allowed to be active in gathering facts and not merely rely on facts presented by the prosecutor and lawyer. Most importantly, judges can draw on their own internal morality and personal judgment.

2 The Role of Judges

In comparison with the Constitutional Court, the Supreme Court system can be seen as conservative. It has been through several political changes and turmoil. The conservative pattern and the practice of judicial corruption have become a major concern for both academics and

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400 Ibid art 130 and Rechtsreglement Buitengwesten (RBg) [Code of Civil Procedure for outside Java] (Indonesia) art 154.
401 Ibid art 119 and 132.
402 Ibid art 178 (2) and (3) and Rechtsreglement Buitengwesten (RBg) [Code of Civil Procedure for outside Java] (Indonesia) art 189 (2).
403 Urgent Law No 1 of 1951 on Judicial Unification (Indonesia) art 5 (3) b.
404 Criminal Procedure Code (Indonesia) art 184.
judges.\footnote{Sebastian Pompe, ‘Judicial Reforms in Indonesia: Transparency, Accountability and Fighting Corruption’ (Paper presented at the International Conference and Showcase on Judicial Reforms, Makati City, the Philippines, 28-20 November 2005) 15.} Moreover, the court is still notoriously known as a formalist ‘headquarter’ which depicts judicial function as ‘essentially syllogistic’. Nevertheless, the court has gradually undergone reforms, and in its current condition it is far more effective than before.

The discussion of the role of the judge should start from its fundamental tenet, the independence of judiciary in general and the freedom of the judge in particular, because it is the starting point which determines whether a judge is ‘neutral’ or progressive. Justice Kamil sheds light on how Indonesian judges perceive themselves in his empirical study on judges’ perception of their freedom to judge.

Judges were asked about their independence; the majority answered doctrinally rather than empirically by referring to the \textit{Judicial Power Law} and legal doctrines, and by stating that freedom of judges, particularly in respect to legal interpretation, must be restrained by the words of legislation and procedural codes. The judges claimed their decisions would be objective and fair by upholding the words of the legislation.\footnote{Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).}

Clearly, this is a rather ambiguous proposition because there will be no legal interpretation and discretion without an intention to interpret and trace the essence of the law both philosophically and sociologically. Judges are not free unless they are willing to express their own perspectives, albeit their perspectives may breach the wording of the law. Submission to the text of the legislation while disregarding other potential extra-legal sources is not an expression of the freedom of the judge.

According to Justice Kamil, ‘the limit of the freedom of the judge posits a duty to reach justice.’\footnote{Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).} Thus the background to the freedom of the judge is more philosophical than doctrinal. However, freedom is itself not omnipotent, meaning there should be a control mechanism, such as judicial restraint to avoid arbitrariness in decision-making.

A person whose ideas and insight changed the performance of the Supreme Court in general, and judges in particular, is Bagir Manan, a former Chief Justice of the Supreme Court. Manan CJ was rather conservative compared to his colleague, Mahfud CJ, a former Chief Justice of the Constitutional Court. Manan CJ disliked the Constitutional Court’s practice and performance during Mahfud’s tenure because he felt that the Court had become very political. Manan CJ believed that
the Constitutional Court, as the guardian of the Constitution, must focus only on legal and constitutional issues.\footnote{408 Interview with Bagir Manan, Former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).}

It is a universal ethical saying that a judge holds a silent legal position (\textit{zwijgende officier}), meaning that judges are not allowed to discuss and defend their decisions publicly.\footnote{409 Interview with Bagir Manan, Former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).} Manan CJ reminded the judges and justices to work only in their jurisdiction by upholding the separation of powers principle, without interfering with the legislature’s field. He emphasised that today’s trend of the Constitutional Court towards being a negative legislator imbued by the doctrine of judicial activism must be rejected.\footnote{410 Bagir Manan, \textit{Beberapa Persoalan Paradigma Setelah atau Akibat Perubahan UUD 1945} [Some Paradigmatic Problems Resulted from 1945 Constitution’s Amendments] (Constitutional Court Video Conference on 31 May 2010) 26.}

Manan CJ was stamped as a conservative-legalistic jurist by some activists. However he rejected this criticism by stating that the law is not merely words, but also understanding. This does not necessarily mean that he only considered formal written evidence in court proceedings; the judge’s tool is his reason, using law-finding processes to construct, sublimate, interpret and make the law. These processes are inherent in judicial discretion.\footnote{411 Bagir Manan, \textit{Kekuasaan} above n 349, 2. See Buana, ‘Living’, above n 3, 115.} However, he opposed the over-use of sociology in legal reasoning processes, stating that sociological facts must negate legal consideration.\footnote{412 Interview with Bagir Manan, Former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).} Such facts are just one of the tools used by judges to understand and confirm their decisions.

With regard to pluralism, Manan considered it a universal phenomenon, not only manifest in a cultural setting, but also in social and economic settings.\footnote{413 Interview with Bagir Manan, Former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).} The State in general, and the judiciary in particular, should respond to pluralism by exercising affirmative action policy, a responsive policy aimed at balancing the bargaining power between a marginalised and superior groups. Judges also have an obligation to exercise this policy, because normatively affirmative action is a manifestation of the social justice principle, explicitly stated in the Constitution.\footnote{414 Bagir Manan, \textit{Kekuasaan} above n 349, 2. See Buana, ‘Living’, above n 3, 115.} However, the difficulty in implementing this policy within the judiciary was outlined by Manan in interview: ‘Indonesian judges are doctrinally educated by a strict dichotomy between public laws, which include constitutional law, and criminal law, and private laws. Judges who specialise in either criminal or
private law rarely connect legal issues with constitutional issues, which is why the courts’ decisions are mostly poor in constitutional reasoning.\textsuperscript{415}

3 The Court’s Decision

The Court’s decision must be according to the law in a broad sense. This also includes unwritten law. This is because it is a concrete manifestation of the rule of law and supremacy of the law, whereby everyone, including citizens and state officers, is subject to the law. The decision can be used as a barometer of legal certainty. Once the judgment is delivered, it is considered to be true and correct, before it is appealed to the higher court. The Supreme Court has instructed its subordinate chief of the court to deny all lawsuits aiming to question the court and its judges. Judges should be exempted from civil liability for acts committed in the exercise of a judicial function.\textsuperscript{416} Moreover, consistency should be maintained in each decision. The more consistent information given by the court, the less uncertain the law is, and the more easily future judges can predict the outcome of adjudication and disputants can settle.\textsuperscript{417} Precedent aims to trace legal predictability and thus certainty. However, precedent is secondary to legislation as a legal source in the Indonesian judicial system.\textsuperscript{418}

The Judicial Power Law provides that the court’s decision can be declared ‘legally void’ in two conditions: (1) hearing and examination which were not open to public, unless other legislation states differently, and (2) the decision was read by the judges in a meeting closed to the public.\textsuperscript{419} The Criminal Code specifically regulates ‘legally void’. One of its requirements is that: the decision must explicitly insert the article which is used as the basis of judgment.\textsuperscript{420} This proposition derives from formalist legal principle and it hinders judges in their creative and progressive legal reasoning, because they are not free to develop living law and must strictly uphold the articles of the relevant Law. This proposition contradicts the legal principle: the judge must elaborate living law, and also contradict the noble purpose of criminal law- substantive justice.

Lastly, a court’s decisions have a legal purpose to maintain law and order in society.\textsuperscript{421} However, a court decision may not settle the dispute, let alone create law and order in the context of an unequal social structure. Instead, it can be a trigger for further disputes. This condition happens because, according to Justice Kamil, ‘judges are less concerned with philosophical justice and merely rely on

\textsuperscript{415} Interview with Bagir Manan, Former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).
\textsuperscript{416} Internal Regulation of the Supreme Court (SEMA) No 9 of 1976 (Indonesia).
\textsuperscript{418} Ahmad Kamil and M Fauzan, Kaidah-Kaidah Hakum Yurisprudensi [The Rule of Precedent] (Kencana, 2004), 10.
\textsuperscript{419} Law No 48 of 2009 on Judiciary (Indonesia) art 13 (1), (2) and (3).
\textsuperscript{420} Law No 8 of 1981 on The Indonesian Criminal Code (Indonesia) art 197 (f).
\textsuperscript{421} Manan, Kekuasaan above n 349, 10.
legal including procedural justice. Judges must consider the spirit of the law rather than its textual form. The Principles of *Pancasila*, as a fundamental norm of Indonesia, must be the first touchstone in settling the dispute and clarifying the legislation where there is ambiguity.422

This chapter emphasises that both ideas are overly normative and to some extent their concepts may conflict with each other. It appears that the more realistic judicial approach is to use policy as the last resort. Judges endeavour to apply the law and legal principles, but when the legislation lacks a normative answer or if there is an answer but it may breach social reasonableness, judges occasionally ‘make’ law based on policy.

B *The Constitutional Court System*

The Indonesian Constitutional Court is the institution concerned with the idea of legal pluralism in general and access to justice in particular. Its significant contributions are to review the unjust and exploitative legislation that often discriminates against and criminalises marginalised indigenous peoples. The Court through its legislation, *Constitutional Court Law* art 51 (1) permits both NGOs and indigenous peoples to bring class actions.423 However in order to succeed in a claim, the applicants must show that (1) they have rights under the Constitution; (2) that those rights have been or may be breached by the legislation under review; (3) they have suffered damage which is specific, actual or potential; (4) can demonstrate causality between the interference with the right and/or obligation and the legislation for which review is sought; and (5) there is a possibility that if the claim is granted, the damage to the constitutional right and/or obligation would not occur again.424

The bench consists of nine justices. The President, legislative bodies and the Supreme Court have the privilege of nominating three justices each. Its institutional structure is similar to the Korean Constitutional Court.425 Unlike the Supreme Court, the Constitutional Court mainly focuses on clarifying and reviewing legislation to conform to the supreme legal touchstone, the *1945 Constitution*. However it has other mandates: to rule on disputes between state institutions, to order the dissolution of political parties found in violation of the Constitution, to issue binding verdicts on contested election results, and to evaluate whether the President and Vice-President have acted in contravention of certain laws and thus qualify for impeachment by the People’s Consultative

422 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
424 Butt, *Traditional*, above n 26, 61.
Assembly (MPR). The Court cannot review other types of laws below the level of legislation, as these laws fall within the review jurisdiction of Supreme Court. This thesis, however, is only concerned with the Constitutional Court’s constitutional review authority, because it has a pivotal role in promoting and advocating the idea of legal pluralism and indigenous people’s rights in Indonesia.

By establishing this Court, Indonesia has moved to a contemporary legal paradigm: judicialisation. In this respect, the Court plays a significant role in addressing moral predicaments, and controlling the legislature’s products and the executive’s conduct. It also covers the more tangible presence of judicial process and court rulings in the political spectrum. The judiciary can lead this important yet sensitive role because, compared to other branches of government, it is less political. Establishing a new court system rather than utilising the old one was a very significant advance.

However, the idea of the establishment of the Constitutional Court and its role in constitutional review gives rise to several criticisms. These include its incompatibility with the classical notion of separation of powers, usurpation of the ‘people’s voice’ and the possibility of sliding toward ‘juristocracy’ as happened in the ‘Old Court’ of the American Supreme Court before 1937, which has been described as having no limit of wisdom and discretion.

The establishment of the Constitutional Court ignited a strong nexus between the judiciary and politics which created a new concept: judicial politics. Dressel conceived the notion of the typology of judicial politics in Asia. One of the courts he examined was the Indonesian Constitutional Court. The Constitutional Court, as an example of judicial activism in Asia, enjoys a high degree of judicial independence and involvement in the political arena. As result, the Court and its judges often act as ‘positive legislators’ provoking conflict with the legislative body and legislators.

This approach taken by the Court may yet be needed in the Indonesian context because political parties (as a ‘factory’ of legislators) and the political situation are seen as corrupt. Thus the Court needs to step forward to review legislation. However, separation of powers should be exercised in both formal and substantive ways by lessening political intervention in both the recruitment of
justices (in order to avoid politicisation of the judiciary) and encroachment (from within) by the judiciary.431

1 The Constitutional Court’s Procedure

This section provides a framework for further analysis of the Constitutional Court’s decisions regarding indigenous peoples. The Constitutional Court combines two approaches to judicial review. The judges can conduct either a material or substantial review, or a formal review. A substantial review covers theoretical and philosophical aspects of the legislation and traces congruency of the legislators’ intention regarding the Constitution. On the other hand, a formal review can be divided into two aspects: an examination of both the legislature’s legal authority and of its procedural aspects.432

The Court can request testimonies and/or reports from both legislative bodies in particular the DPR and the executive. The DPR can be represented by the member of the commission which discussed the legislation. The executive, in this respect the President, can be represented by the Minister of Justice or other Ministers whose department oversees the legislation. The hearing and cross-examination sessions are conducted in public.433

However, a Deliberative Meeting which aims to interpret the decision is held privately. The meeting is chaired by either the Chief Justice or the Vice or senior judge. Each of the judges has the right to express their perspectives and considerations regarding the case. If the deliberative meeting fails to reach consensus, then the decision will be based on majority vote; if the majority vote fails, the last argument of the chairperson will be the final decision.434

Furthermore, the evidentiary burden lies on the applicant.435 The legal proof required includes: letters or written documents, witnesses’ testimonies (either oral or written), experts’ testimonies, parties’ testimonies, circumstantial evidence and other information, including electronic or cyber-data and records.436

433 *Law No 24 of 2003 on Constitutional Court* (Indonesia) art 54.
434 Ibid 45.
435 Ibid 45.
436 *Internal Regulation of the Constitutional Court* (Indonesia) art 36 (1).
437 *Law No 24 of 2003 on Constitutional Court* (Indonesia) art 36 (1).
The Court’s procedure is derived from and modified by Civil Procedure. Thus its outcomes generally are granted, rejected or inadmissible. In its development, however, the Court’s outcomes can be classified as follows:

(1) the submission is granted. This means the legislation is unconstitutional;
(2) the submission is granted partially. This means not all submissions are granted;
(3) the submission is granted conditionally, that is the legislation is conditionally unconstitutional. The Court declares the legislation unconstitutional, but allows the executive and legislature to revise the legislation based on the requirements and interpretation of the Court.
(4) the review is rejected, that is, the legislation under review is constitutional;
(5) the review is rejected conditionally, meaning the legislation under review is conditionally constitutional. The Court raises questions about the constitutionality of the legislation, but refuses to invalidate it. Instead, the Court provides both the executive and legislature with some requirements and interpretation of the Court. The future constitutionality of the legislation depends on how it is enforced; and
(6) the application of review cannot be accepted by the Court, is inadmissible, due to the lack of legal standing.

The rationale of ‘conditionality’ in the Constitutional Court is to make its decision more politically palatable. The Court tries to limit its power to interfere with the legal drafting process and attempts to emphasise its role only as a ‘negative legislature’.

With regard to the ‘conditionally’ outcome, the legislation that had been reviewed can be reviewed again if either the executive or the legislative powers do not follow the Court’s requirements and interpretation. In this respect, the Court has an exception to the nebis in idem principle: the applicants can re-submit their review application concerning the same legislation that had already been decided by the Court. However the claimant must use as a touchstone a different constitutional article as a reason to review the legislation.

437 Ibid 56 (1), (2) (3), (4) and (5).
438 Simon Butt, ‘Conditional Constitutionality, Pragmatism and the Rule of Law’ (Legal Studies Research Paper No 09 28, the University of Sydney, 2009), 1.
440 Butt, ‘Conditional’ above n 438, 1.
441 Internal Regulation of the Constitutional Court No 6 of 2005 (Indonesia) art 42. This regulation is an exception of Law No 24 of 2003 (Indonesia) art 60.
Specifically, as noted earlier, the Court has recognised indigenous peoples as legal entities which means they have a constitutional right to demand access to the court if their rights are being, or will be, breached by legislation. During the past three years the court has made significant advances on legal pluralism discourse in Indonesia by changing legislation that arguably infringed indigenous people’s rights. The Court has made several landmark decisions and in the next chapter these are analysed.

2 The Role of Judges

The Court has set a positive tone for Indonesian legal reforms. In the Court’s first term from 2003 to 2008, the court was chaired by Justice Jimly Asshiddiqie who has a background as a constitutional law professor. The second Chief Justice was Justice Mahfud MD from 2008 to 2013. He is a former politician who served as a Minister of Defence; also a constitutional law professor. The Court made a significant contribution in supporting Indonesian rule of law and democracy during those ten years since its establishment. As the court has nine members, the role of Chief Justice is highly influential.

Two differences can be seen between the roles played by the first and the second Chief Justices of the Court. Judging from decisions that he chaired rarely did the decisions of the first Chief Prof Dr Jimly Asshiddiqie change or surpass the legislative intention. The Court acted cautiously in changing or re-fashioning the legislation. Thus the legislative body was rarely in conflict with the Court. However despite being stamped as a formalistic court by civil society groups, its decision invalidated the Truth and Reconciliation Commission in 2006. The Court also entirely abolished the Law of State Electricity as it considered the legislation too liberal and in breach of national interest. In this decision the Court used ‘state ideology’-Pancasila -as its dominant reasoning. Thus the Court under Professor Asshiddiqie cannot be stereotyped as a formalistic court. Chief Justice Asshiddiqie dichotomised the Indonesian court system: the Supreme Court is the court of law; and the Constitutional Court the court of justice. This dichotomy depicts the Constitutional Court’s role as more flexible than that of the Supreme Court.

442 Law No 24 of 2003 on Constitutional Court (Indonesia) art 51 (1) b
445 Mietzner, above n 425, 414.
Chief Justice Mahfud MD took different approach to Asshiddiqie. During his period the Court seemed more progressive. It declared void several pieces of vested interest legislation.\footnote{448} It even changed the meaning of the words of legislation. The result was the legislative body often expressed its disagreement with the Court’s decisions. There are arguments for and against Mahfud’s leadership. Supporters argue that the Court must be critical when it reviews legislation. Most Indonesians are sceptical about politicians, political parties and legislative bodies, both local and central.\footnote{449} Some supporters of change believe the Constitutional Court must be prepared to critically review any legislation it deems corrupt and manipulative. This position is represented by the judicial presumption of unconstitutionality and embraces the idea of the exercise of judicial discretion. It comes with the advantage that justice may be satisfied, but has the disadvantage of uncertainty and inconsistency.\footnote{450}

On the other hand, are the detractors, mostly lawyers, who maintain the view that it is highly unacceptable for judges to act as ‘negative-legislators’, or worse ‘positive legislators.’ In their view judges should respect the spirit of parliamentary sovereignty.\footnote{451} This judicial position is represented by the judicial presumption of the constitutionality of legislation. It embraces the idea of strict interpretation which has the advantage of certainty and predictability but with the possible disadvantage of injustice.\footnote{452} Despite these differences, both Chief Justices have provided a good benchmark for the Indonesian legal system. The Court became relatively clear of politicisation and judicial corruption. Nevertheless, appointing and selecting Akil Mochtar, a former politician to be a Justice and the third Chief Justice in early 2013 was ultimately a mistake: the Court was not immune from politicisation. Akil was arrested over bribery charges.\footnote{453} The court suddenly lost public confidence. Akil’s involvement within the court system has been considered a ‘Trojan Horse’ strategy to weaken judicial power from within.\footnote{454} Akil’s bribery case provides a lesson to remedy and empower the Court. Thus further discussion is needed of the Court’s decision-making processes.

3 The Court’s Decision

\footnote{448} Some of decisions were: Legislative Election Law Case 22-24 (2009), Polling and Quick Count Survey Law Case 9 (2009) and Election of District/Provincial Head Law Case 4 (2009).
\footnote{449} Andrew Thornley, ‘Enthusiasm high, but voter info needs remain’, The Jakarta Post (Jakarta), 8 January 2014.
\footnote{450} Kirby, above n 156, 61.
\footnote{451} Buana, Hubungan, above n 336, 45.
\footnote{452} Kirby, above n 156, 61.
\footnote{454} Fery Amsari, ‘Kuda Troya bagi MK’ [‘Troy’s Horse strategy for demising the Constitutional Court] Kompas (Jakarta), 4 April 2013.
With regard to its decisions, the Court adopts a similar approach to that of Anglo-American judgements which allow judges to express their own perspectives and reasoning through either a concurring or dissenting opinion.\(^{455}\) This American based-tradition and its pragmatic judicial philosophy have influenced the Indonesian legal system since the Reformation Era. Pragmatism allows judges to consider and express societal facts underlying the existing law and to consider policy direction in the law’s development. The Court’s judges have enriched the Indonesian legal system, while abandoning the historical Dutch law in which the court only delivered a single and *per curiam* opinion in each case. Therefore this thesis suggests that the Court can be considered an example of a pragmatist court as envisioned by Posner and other American pragmatists.

**IV CONCLUSION**

This thesis argues that despite the fact that the judiciary does not recognise TDR within indigenous villages, the current positive laws on the judiciary and its procedures have accommodated unwritten living *adat* law and acknowledged indigenous peoples as a legal entity. This is the proof that the judiciary has adopted a more human rights perspective: legal pluralism. However, there are still many contradictions in the legislation that compel judges to ignore the existence of living *adat* law. As discussed above, one of these hurdles is civil procedure. Additionally, it would seem that precedent is less appreciated than handing down court decisions which cannot be easily predicted or applied.

According to the interviews, judges, particularly at the District and Appeal Court levels, are often overly reliant on legal principles,\(^{456}\) and may lack constitutional insights, thus rarely do judges cite constitutional norms as the basis for their legal reasoning.\(^{457}\) Furthermore, a judge’s approach has been indoctrinated by the strict Dutch civil law tradition. Even some within the Supreme Court system may be reluctant to use constitutional norms because if they do so, it may breach the dichotomy between public and private law. In actual fact there are often private cases that contain public elements, and some cases do need both public and constitutional insights. In this kind of milieu, it is hard to envisage that Indonesia’s judges can creatively utilise socio-cultural reasoning in their decisions, let alone appreciating and applying unwritten *adat* law in their judicial reasoning.

This thesis argues that there is a need for a progressive judicial institution, particularly its judges, in order to interpret, modify and mould the state-centred legislation in the broad social context that is Indonesia. Over-reliance on the wording of legislation could hamper the dynamic of legal pluralism

\(^{456}\) Interview with Harjono, a former Justice of the Constitutional Court (Jakarta, 22 March 2014).
\(^{457}\) Interview with Bagir Manan, a former Chief Justice of the Supreme Court (Jakarta, 20 March 2014).
and jeopardise indigenous peoples’ rights and their unwritten *adat* law. In this setting, judges must act as reformers. The principle of parliamentary sovereignty must be balanced by the judicial activism approach. Judges must occasionally act as legislators when legislators act against human rights principles. However judicial restraint must be exercised to balance this freedom.

Lastly, it is important to argue that Indonesian judges must be cast adrift from the calm harbour of ‘strict and complete formalism’ in order to unfurl the sails of judicial activism under the banner of legal pluralism.
CHAPTER 5 - THE CONSTITUTIONAL COURT AND THE RIGHTS OF INDIGENOUS PEOPLE

I INTRODUCTION

Previous chapters have discussed doctrinal aspects of the pluralistic Indonesian legal system, including its legislation and judiciary. This chapter analyses the practice of the Constitutional Court in interpreting centralistic-formalistic Acts. The analysis is important because these Acts were the product of national-central elites, but imposed in a local-indigenous context. The elites are members of the DPR. Despite the fact they are elected democratically, they are notorious for having vested interests. The Indonesian electoral system continues to be corrupt and unreliable.\(^{458}\) These Acts under review in this thesis are often used as national benchmarks, because the majority of the influential members of DPR are from non-indigenous areas, meaning they are less concerned about indigenous rights.\(^{459}\) As a result, the Acts are not always relevant in the local and indigenous contexts. Being a product of national-central elites, the Acts have little appreciation of the social and cultural aspects of indigenous peoples. Thus, they have been claimed by indigenous groups to be unjust and to have breached the constitutional rights of indigenous peoples.

The analysis is presented in case notes. These assist in determining the policies and approaches that the Constitutional Court used to find and disseminate the rights of indigenous peoples. These cases provide an analysis of the current legal policy of Indonesian legal pluralism, particularly with regard to the rights of indigenous peoples. The analysis consists not only of legal-normative issues, but is also conducted with a view to social and ecological justice. Three important judges of the Constitutional Court who chaired and heard the cases were interviewed. The aim was to add further perspective to the case law analysis.

This chapter examines only those decisions that were decided after the reformasi. Previous decisions of the Supreme Court were relatively out-of-date and mostly focused on private law disputes.\(^{460}\) This chapter examines only decisions that have influence in the public sphere. The aim is to help determine the Constitutional Court’s perspective on legal pluralism so that future reform strategies can be formed based on those decisions.


\(^{459}\) See Chapter 3 on Specific Legislation.

The selected case notes are organised into two categories. The first contains decisions relating to the issue of natural resources exploitation on indigenous land. Within this category, two cases will be examined. The first is the landmark decision, Indigenous Forest Law Case (2012) 35, which fundamentally changed the centralistic concept of ‘state forest’ into the more moderate concept of indigenous adat forest. The second is the Coastal and Small Islands Law Case (2011) 3. This case re-affirmed the definition of state acquisition rights, and respected sustainable development and the rights of indigenous peoples living in coastal areas and small islands.

The second category deals with a decision that contains a dimension of access to justice, particularly for the protection of marginalised and indigenous peoples. This case, Plantation Law Case (2010) 55, interpreted the wording in the 2004 Plantation Law of the prohibition against trespassing in plantation areas.\(^{461}\)

The thesis argues that these cases emphasise the need for a legal pluralism perspective and policy-driven decisions when the Court has to deal with indigenous peoples’ issues, and delves into the issue, including that of ‘social justice’. They reveal that when it comes to ‘justice’ issues, mere positive law is insufficient; other socio-legal aspects and a legal pluralism perspective are needed to remedy society’s injustices.

II INDIGENOUS PEOPLES AND NATURAL RESOURCES

Natural resources are vital for indigenous peoples, not only because they are fully dependent on them, but also because they have nurtured and preserved nature since time immemorial.\(^{462}\) However, because of rapid modernisation and industrialisation, the government has marginalised indigenous peoples.\(^{463}\) This has occurred because the ancestral-communal lands that indigenous peoples own were needed by a government with a vested interest in extracting natural resources and undergoing government ‘development’ projects. In general the government considers indigenous peoples as obstacles to development.\(^{464}\)

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\(^{461}\) Law No 18 of 2004 on Plantation (Indonesia).
\(^{462}\) IPAC, Indigenous above n 240, 1.
\(^{463}\) McCarthy, Shifting above n 218, 101
The Constitutional Court has interpreted the wording of two key Acts regulating natural resources management and affecting indigenous peoples, the *1999 Forestry Law*\(^{465}\) and the *2009 Coastal Areas Management Law*.\(^{466}\)

### A  Indigenous Forest Law Case (2012) 35

**Date of judgment:** 16 March 2013

The Constitutional Court has reviewed the *1999 Forestry Law* several times, however, Case (2012) 35 was the most crucial review. The analysis of this case shows that the Court’s decision opened opportunities for recognition of indigenous forest in Indonesia by providing a decisive interpretation of ‘indigenous forest’. The Court application was submitted to the Court on 19 March 2012 by three parties: (1) the national NGO, AMAN which stands for *Aliansi Masyarakat Adat Nusantara* (Indigenous Peoples Alliance of the Archipelago); (2) the indigenous group *Kenegerian Kuntu* from the Riau Province; and (3) the indigenous group *Kesepuhan Citusutu* from the Banten Province.

#### 1  Relevant Facts

The inclusion of indigenous forest in the definition of state forest in the *1999 Forestry Law* provoked disputes in some indigenous areas. For instance, the indigenous group of *Kenegerian Kuntu* had disputed with *Andalan Pulped Paper*, which had been given government approval to occupy approximately 235,140 hectares of their indigenous forests. The company had exploited the forest since 1999.\(^{467}\) The indigenous group of *Kesepuhan Citusutu* had a similar issue in that a mining company, *Aneka Tambang* occupied their lands, and the *Halimun Salak* National Park, with permits issued by the national government. The government extended the National Park from 40,000 hectares to approximately 113,357 hectares without exercising the Free, Prior, Informed Consent (FPIC) procedure.\(^{468}\) Due to their lands being occupied, the groups of indigenous peoples made a claim against both the mining company and the government arguing that they were unable to manage, extract from, or preserve their indigenous forest because the government had absolute power over dividing the land titles and managing the contract. The case raised three important legal issues: the relationship between indigenous peoples and their land/forest, the right of self-

\(^{465}\) *Law No 41 of 1999 on Forestry* (Indonesia).

\(^{466}\) *Law No 27 of 2007 on Coastal Areas Management* (Indonesia).


\(^{468}\) Ibid 10.
determination of indigenous peoples to manage their lands/forests, and the identification of indigenous peoples.\footnote{Ibid 11.}

2 The Applicants’ Claims

The applicants asked the Court to review art 1 (6),\footnote{Law No 41 of 1999 on Forestry (Indonesia) art 1 (6) ‘Indigenous forest means state’s forest situated in indigenous people’s area’.} art 4 (3),\footnote{Ibid art 4 (3) ‘Forest controlled by the State shall remain taking into account rights of indigenous peoples if any and their existence is acknowledged and not contradictory to national interest’.} art 5 (1), (2), (3) and (4)\footnote{Ibid art 5 (1), (2), (3) and (4)} and art 67 (1) and (2) of the Law No 41 of 1999 on Forestry.\footnote{Ibid art 67 (1) and (2).} These articles, particularly art 3\footnote{Ibid art 3, ‘forest management shall be aimed to provide maximum prosperity for the people based on justice and sustainability’.} were contradictory. The applicants contended that the inclusion of indigenous forest within the state forest area was unconstitutional. Relying on art 1 (6) and art 5 (1) and (2), the applicants requested a review of the meaning of the word ‘state’ in ‘state’s forest’ as the article was unclear and placed indigenous forest in an obscure position.

The applicants further argued that the articles contradicted several articles of the Constitution including, art 1 (3),\footnote{The 1945 Indonesian Constitution (Amended) (Indonesia) art 1 (3) ‘The State of Indonesia shall be a state based on the rule of law’.} art 28C (1),\footnote{Ibid art 28C (1) ‘Every person shall have the right to develop him/herself through the fulfilment of his/her basic needs, the right to get education and to benefit from science and technology, arts and culture for the purpose of improving the quality of his/her life and for the welfare of the human race’.} art 28D (1),\footnote{Ibid art 28D (1) ‘Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law’.} art 28G (1)\footnote{Ibid art 28G (1) ‘Every person shall have the right to protection of his/her, family, honour, dignity, and property, and shall have the right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right’.} and art 33 (3).\footnote{Ibid art 33 (3) ‘The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people’.} They stated that Art 18 of the 1945 Constitution (Before Amendments) explicitly provided for the recognition of indigenous peoples who live within remote areas in Indonesia. However, the 1999 Forestry Law recognised only two types of forests, state-owned forest and concessional forest, and made indigenous forest part of state-owned forest. The state-owned forest was under the absolute...
authority of the government. There are neither private nor concessional rights in state forest, as the
state ‘owns’ the forest. On the other hand, concessional forest was a forest over which rights have
been granted.\footnote{\textit{Law No 41 of 1999 on Forestry} (Indonesia) art 5 (1) and (2).} The applicants asserted that ‘by placing indigenous forests within the state-owned
forest criteria, the articles hindered the rights of fair development, self-determination and the

The parties demanded a review of the meaning of the phrases: ‘if any and their existence is
acknowledged and not contradictory to national interest, and shall be regulated by local legislation
in art 4 (3) and art 67 (1) and (2)’.\footnote{Ibid 26.} The applicants argued that these articles contradicted other
articles of the Constitution, such as: art 1 (3),\footnote{The 1945 Indonesian Constitution (Amended) (Indonesia) art 1 (3).} art 28D (1),\footnote{Ibid art 28D (1).} art 18B (2),\footnote{Ibid art 18B (2).} and art 28I (3).\footnote{Ibid art 28I (3).} The applicants argued:

\begin{quote}
The articles under review, particularly the phrase ‘national interest’ and formal recognition through
‘local legislation’, indirectly undermined the self-determination of indigenous peoples; and that the
Constitutional touchstones provided recognition of the indigenous peoples’ rights, particularly the
right to self-determination.\footnote{\textit{Indigenous Forest Law Case} (2012) 35, 46.}
\end{quote}

The applicants argued that ‘the words “state’s forest” and “if any and their existence is
acknowledged and not contradictory to national interest” were often used by the government to
eliminate and disregard the rights of indigenous peoples and their lands’.\footnote{Ibid 46.} In particular, the
applicants demanded a break-down of the forest classification in art 5 (1) so that indigenous forest
would be separate from state forest and made into a single and independent concept. They thus
envisioned a classification containing three forests: state-owned, \textit{adat} and concessional forest.

The applicants asserted that ‘the articles under review were discriminatory, open to multiple
interpretations, too general, unpredictable and disregarded the principles of people participation.
Further, the articles under review contradicted the original intent of the \textit{1945 Constitution - social
justice}’.\footnote{Ibid 47. See generally \textit{The 1945 Indonesian Constitution} (Amended) (Indonesia) Preamble para IV. ‘The independence of Indonesia shall be formulated into a constitution of the Republic of Indonesia which shall be built into a sovereign state based on … social justice for all the people of Indonesia’.}
The articles under review, it was argued, ‘may widen the gap and provoke future conflict between living adat law and state law, because the state authority can become too powerful, and this can lead to arbitrary conduct’. 490

3 The Government and DPR’s Defences

The Government and DPR submitted separate defences. The essence of these defences was similar and can therefore be discussed together. Firstly, the respondents questioned the legal standing of the applicants. The respondents argued:

There was neither causality nor predictable damage resulting from enforcement of the legislation towards the applicants themselves, because the conflicts experienced by both applicants were administrative issues, dealing with forest permits granted by national and local governments. Thus, there was no constitutional issue to be addressed. 491

Second, the respondents argued:

The legislation explicitly recognises and respects the rights of indigenous peoples, their living laws and communal lands. However, this is both conditional on, and important in enforcing, conveying and strengthening the influences of state law. Thus the state policy of legal pluralism does not conflict with the rule of law principle. 492

Third, the respondents argued:

Giving too much power to indigenous peoples could result in long-term and detrimental effects to the State’s sovereignty. The indigenous peoples may take exclusive control of their forests and reject outsiders living or staying on the land. The government apparatus would also lose the power to control the people and to enforce development agendas. Thus the indigenous forest must be fully controlled by the state. 493

Lastly, the defence argued that ‘the wording of the conditional requirement in the legislation is in line both with the wording of the Constitution art 18B (2) and the 1960 BAL, therefore, all articles under review should be declared constitutional’. 494

4 The Judgment

490 Ibid 57.
491 Ibid 129. This argument can be simply rebutted by referring to the provision of indigenous peoples’s legal standing, see, Chapter 4 on Legal Standing of Indigenous Peoples.
492 Ibid 130.
493 Ibid 131.
494 Ibid 135.
In relation to the current legal position of the Court found that:

The 1999 Forestry Law (had) ambiguously stated and recognised indigenous people’s rights, but with regard to the rights on their land/forest, the Law merely considered indigenous peoples as ‘objects’, and not as ‘active and legitimise legal subjects’ by stressing that indigenous forest/land shall be fully administrated by the government. Additionally, state forest was not used in the sense that state “owned” the forest, but that the state only has managerial rights over the forest.\textsuperscript{495}

Based on its interpretation of the relevant legislation the Court was unanimous in its judgment in favour of the indigenous applicants. The Court re-interpreted the word ‘State’s forest’ in art 1 (6) to include indigenous forest as forest that is situated within indigenous areas. The Court also reviewed the sentence ‘if any and their existence is acknowledged and not contradictory to national interest’ in art 4 (3). The Court declared:

This article to be conditionally unconstitutional which means the legislation under review is unconstitutional unless interpreted in line with conditions and requirements imposed by the Court. The article must be interpreted as ‘forest controlled by the State shall remain taking into account the rights of indigenous peoples’.\textsuperscript{496}

Further, the Court changed the classification of forest in art 5 (1). While the Court did not grant the applicants’ demands to make three separate groups of forest, it reclassified indigenous forest as concessional forest. The concessional forest then is subject to two legal rights: concessional rights and indigenous rights. The Court declared ‘art 5 (2) to be conditionally unconstitutional, stating that the article should be interpreted to mean that the State forest as referred in sec (1) is not State forest’.\textsuperscript{497} Additionally, the Court examined the Explanation of art 5 (1), which further explained the subordination of indigenous forest within state forest. The Court held that ‘the Explanation should not contain a legal norm.’\textsuperscript{498} Even though the applicant did not ask for a review of the Explanation, the Court declared ‘the Explanation to be unconstitutional’.\textsuperscript{499} As art 5 (1) and (2) were interrelated, the Court declared both articles unconstitutional.

With regard to the sentence ‘if any and its existence acknowledged’ in art 5 (3), the Court rejected ‘the applicants demand to declare the article unconstitutional’. However the further articles under review, art 5 (4) and art 67 (1), (2) and (3), which asserted that recognition of indigenous peoples’ rights must be given in regional legislation, were declared by the Court to be constitutional.

\textsuperscript{495} Ibid 169.
\textsuperscript{496} Ibid 185.
\textsuperscript{497} Ibid.
\textsuperscript{498} Ibid.
\textsuperscript{499} Ibid 186.
Analysis

This case was the most anticipated decision for the forest/land reform movement and advocacy of indigenous peoples because it discredited the conventional legal concept of forest management in Indonesia, and at the same time it acknowledged indigenous peoples as a legal entity as well as their right to manage indigenous forest/land. However the decision left several important issues that need to be addressed.

The first is the negotiation of sovereignty between State law and living adat law through state law pluralism. The Court asserted that ‘the indigenous peoples of Indonesia must be recognised as a legal entity, especially as indigenous peoples who have been occupying their indigenous forest/lands also have a constitutional (self-determination) right over the forest and the natural resources within’.

The Court then divorced indigenous forest from the state forest category, stating that ‘the Forest Law was inherently centralistic and its norms do not correspond to the reality of indigenous peoples’. In responding to this policy, Justice Sodiki who chaired the case, drew attention to the tendency of the central government to ‘impose a unified or centralised law on a pluralistic social structure which creates unfairness and more social fractures’. This was an indication that the Court accepted the concept of legal pluralism where any social setting of law from various provenances may be operative.

However, this raises questions about the right of self-determination of indigenous peoples. Can they professionally manage their own natural resources and areas? Without social and economic empowerment, support and supervision from local government, the indigenous people are likely to be dependent on other vested-interest parties who may use them merely as their ‘puppets’. This thesis suggests that in order to determine the existence of indigenous peoples and their areas, indigenous peoples need to self-identify, as a manifestation of their self-determination right. However, local government may further assess and verify their identification. The issue of marginalised and indigenous peoples’ rights cannot be solved by a single perspective, but will require more thorough comprehensive point of views, including the reform of the decentralisation system and the eradication of corruption in regional areas.

The Court, instead of providing an independent and separate concept of indigenous forest, categorised indigenous forest as concessional forest. The reasoning underlying this decision was

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501 Ibid.
502 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
503 Griffith, above n 20, 35.
that indigenous forest can then be regarded as a forest with a ‘right’.\(^{504}\) On the other hand, in the state forest, there is no ‘right’ because the government controls and manages the forest completely.\(^{505}\) The Court held that ‘indigenous forest has a different aspect and nature to state forest.’\(^{506}\) Its view was that ‘indigenous forests were not totally independent, the government retained control of the forest, which is in line with the spirit of art 33 (2) - the greatest benefit for [all] the people’.\(^{507}\) The Court considered state sovereignty as a reason to reject the applicants’ demand to invalidate art 5 (4) and art 67 (1). When asked in interview about the ideal relationship between the state and indigenous peoples, Justice Sodiki responded that ‘the role of state toward community should be like old Javanese advice - “tut wuri handayani” - meaning the state leads the way to protect its followers (communities)’.\(^{508}\) This statement was clearly a manifestation of state law pluralism in which the government can still use its authority to lead indigenous peoples. The aim is to protect indigenous peoples from vested-interest parties and to provide a way for indigenous peoples to adapt to modernisation. This thesis argues that through this policy, the government can still indirectly control indigenous forests, the government acts as a state administrator, in which the law used is public, rather than private.\(^{509}\) The essence of this assessment is derived from the \textit{ratio decidendi} of the \textit{Coastal and Small Islands Law Case} (2010) 3 discussed below.

This issue also relates to the recognition of indigenous peoples through local legislation, as the Court rejected the applicants’ demand to render invalid art 5 (4) and art 67 (1), (2) and (3), which state that recognition must be given to regional legislation. In this context, Justice Sodiki asserted that ‘indigenous rights derive from the policy of recognition, not from centralism, decentralisation or state delegation’.\(^{510}\) He aimed to balance the aspirations of radical pluralism and legal centralism with a harmonization of \textit{adat} law and state law through democratic and inclusive legal recognition.

The thesis agrees with the Court’s reasoning that local legislation is still needed to legitimise indigenous peoples’ status and to represent the State’s sovereignty. State control and approval of indigenous forest are necessary to strengthen state power over its citizens and to avoid separatism in regional areas. The indigenous peoples’ rights to their indigenous forest are still legally guaranteed while keeping nationalism intact.


\(^{505}\) \textit{Law No 41 of 1999 on Forestry} (Indonesia) art 1 (4).


\(^{507}\) Ibid.

\(^{508}\) Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).

\(^{509}\) \textit{Interview with Ahmad Sodiki, Former Justice of the Constitutional Court} (Malang, East Java, 5 January 2014).
Nevertheless, this policy is not without problems, for example, in implementation. The process of recognition of indigenous forests seems too bureaucratic and time-consuming. This thesis argues that while the decision represented a breakthrough in concept, it lacked detailed descriptions of how indigenous peoples should be respected and recognised. This makes the judgment hard to implement as it provides no formal powers of enforcement.\(^{511}\) As a result, the implementation of Village Law and Case (2012) 35 relies on the good intentions of the national and local governments. To make it even worse, local governments which have authority to formally recognise indigenous peoples through local legislation are still notoriously corrupt, making it hard for indigenous peoples to convince their regional government to issue appropriate regional legislation within a responsible time.\(^{512}\) Legal and administrative procedures will delay the assertion of indigenous peoples’ rights. Due to this ‘legal vacuum’, discriminations will still continue.

The second issue resolves round the issue of national development. More moderate requirements for proof of indigeneity are needed to support inclusion by balancing development practice with indigenous peoples’ rights. The Court asserted that ‘all forms of development must uphold the principle of social justice and respect the ancient maxim of Indonesia, Bhinneka Tunggal Ika (Unity in Diversity), both of which are contained in the articles of the 1945 Constitution.'\(^{513}\) As a result, the Court considered more societal factors when identifying indigenous peoples, making the status of indigenous peoples more sociologically palatable than before. Defining indigenous peoples and their law is elusive.\(^{514}\) It is impossible to unify them under generic criteria. More moderate requirements were later adopted by the new Village Law.\(^{515}\) However, the constitutional concept of indigenous peoples still requires reference to the legalistic concept of masyarakat ‘hukum’ adat (‘legally-based indigenous peoples’).

The third issue is regarding the participation of indigenous peoples in maintaining their indigenous forest/land. The core argument of the decision was the fact that art 4 (3) was declared conditionally unconstitutional. Because of the review, the 1999 Forestry Law has changed its basic paradigm from elite-vested interest to public participation. The Court asserted that ‘declaring “forest estate” in indigenous areas cannot be accomplished arbitrarily, instead, the process must be inclusive of all affected parties and stakeholders.’\(^{516}\) The Court stated that ‘the norm of art 33 (2) of the Constitution, “…shall be used to the greatest benefit of the people” must be the key for

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\(^{511}\) Butt, Traditional, above n 26, 60.
\(^{512}\) Ibid 73.
\(^{514}\) Fitzpatrick, above n 215, 176.
\(^{515}\) See Chapter 3 on Village Law.
development on Indonesian soil’. The Court thus inserted the following condition into art 4 (3) of the Constitution: ‘the government has an obligation to protect and fulfil the rights of indigenous peoples’.

This decision is clearly beneficial for indigenous peoples, as it explicitly stresses the importance of the FPIC procedures prior to the exploitation of mining or plantation projects within indigenous areas. The Court referred to Mining Law Case (2010) 32 as a precedent. The key outcomes of FPIC are equality between the government and indigenous people, the recognition of indigenous peoples, the appreciation of public participation and, last but not least an affirmation of process-based development. Because of this decision, the self-confidence and bargaining positions of indigenous peoples in relation to local government and extractive companies has increased immeasurably.

However, until recently there were still many extractive companies that occupied and exploited indigenous land/forest without going through FPIC procedures. That happened because local governments failed to protect indigenous peoples’ rights, as many of them are dependent on vested-interest parties. This dependency happens because almost all heads of regional government are both politicians and mining or palm oil plantation businessmen. This ‘evil collaboration’ between local politics and business interest, results in a massive destruction of the environment and eventually discriminates against indigenous peoples. This practice occurs in almost all natural resources-rich regionals in Indonesia, including the Province of South Kalimantan. Clearly the issues of indigenous peoples’ rights are too complex, thus the judiciary alone cannot comprehensively solve the problem.

The fourth issue is regarding the appreciation of living adat law. The Court acknowledged ‘adat law as the core of indigenous peoples’. In other words, adat law is the law that is accepted and enforced by people within indigenous areas. Nevertheless, the Court rejected the applicants’ request to invalidate art 5 (4): ‘if in its development indigenous peoples and their adat law no longer exist, the indigenous forest managerial right shall return to the Government’; ‘If any and still acknowledged’ (art 67 (1)); and ‘either the existence or extinction of indigenous peoples shall be regulated by local legislation’. These articles were held to be constitutional.

The Court’s reasoning was that it considered living adat law as a flexible legal system, which it may still be enforced or which may terminate due to modernisation. The government had to respect

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517 Ibid.
518 Ibid.
519 Ibid.
519 Ibid.
520 Ibid.
and consider the existence of *adat* laws within indigenous areas, as long as they are still ‘living’. However, if *adat* law has already ceased then state law will prevail. In interview, Justice Harjono expanded on the notion: ‘indigenous advocacy also needs to be considered as many people merely use indigenous peoples’ advocacy as a political vehicle, as some candidates for head of the region tend to showcase their ethnicity as political capital, so we (judges) need to be critical of their claims, this kind of phenomenon can be called ‘romantisme budaya yang merusak’ (a destructive cultural romanticism).’

The thesis agrees with this statement and the Court’s ruling, and supports a gradual modernisation of indigenous peoples and their laws. With significant modernisation, *adat* law can change over time, either horizontally by blending and mingling with other religions or perspectives, or vertically, through both legislation and court decisions. This thesis also argues that local government should only verify the processes and the results of self-identification already put forward by indigenous peoples. The verification and field research must be done before passing regional legislation to recognise their existence. Reform should be focused on the integrity and the effectiveness of local government in administrating the recognition of indigenous peoples and their forest/lands.

In this respect, the Court has brought Ehrlich’s living law into the state level. Living *adat* law not only relies on recognition by people in their everyday lives, but also requires formal recognition by the state. This is an indication of state law pluralism. However, in the judgment there is no explicit statement that the indigenous peoples can use their own TDR to settle disputes within their villages. Therefore the legitimacy of TDR is still unclear.

The fifth issue is about judicial approach. The Court, particularly in this case, used diverse methods of judicial reasoning. The Court closely considered the legislative intent of the legislation under review by tracing the historical background of art 18 in the pre-amendment Constitution to discern the abstract value of regional autonomy. According to Justice Indrati, ‘the Court did so in order to trace the “spirit” of the law which could then be used as the basis of its finding’. On the other hand, the Court also took into account several international law instruments regarding indigenous peoples’ rights, such as the UNDRIP and the Rio Earth Summit Declaration on Environment and Development. In responding to this, Justice Harjono emphasised that ‘in order to be a modern court, it is very important for Indonesia’s judges to stop over reliance on legal principles. Instead they

521 Interview with Harjono, Former Justice of the Constitutional Court (Jakarta, 22 March 2014).
This phenomenon does happen in some regions in Indonesia, for instance in Central Kalimantan where the Governor was also a chief of indigenous peoples’ alliance. Similar conditions happened in Banjar Region, South Kalimantan, where the head of the regional area (bupati) proclaimed himself as a descendant of the late Banjar Sultanse. This phenomenon blurs the boundaries between the modern state and traditional entities.

522 Interview with Maria Farida Indrati, Justice of the Constitutional Court (Jakarta, 24 March 2014).
should be more open-minded in utilising other sources of legal reasoning, including international human rights instruments.”

In adding more perspectives, Justice Sodiki was of the opinion that empirical facts should ‘play more a significant role in judicial reasoning, because the Court must also consider the context and implementation of legislation in society’. This approach implies that the Court should view social facts as an important aspect to ensure justice and the effective realisation of the state law.

It would seem that the judges not only used retro perspective ratio legis to trace legislative intent, but also expanded their judicial reasoning into a contemporary perspective occasio legis to enrich the reasoning with socio-political backgrounds. In this case, the judges employed diverse methods of judicial reasoning by connecting the past to the contemporary social context, and the national to the global context.

As Indonesian law is no longer identical with the civil law tradition, the Court was also keen to draw on several ‘precedents’ to sustain its argument. The term ‘precedent’ here is not the same as the common law context. The concept emerges from the idea of freedom of judiciary in which judges have an inherent ‘right’ to express their ‘policies’ when they consider conditions are unbalanced or if the legislation blatantly discriminates against marginalised parties.

In this respect, even the BAL has drawbacks as it does not explicitly state the rights of indigenous peoples and it over-emphasises written evidence as a proof of land ownership. Thus the Court filled the ‘gap’ by employing a policy-driven decision.

Moreover, concerning the precedent, Justice Harjono added in interview: ‘the Court is independent: able to adopt precedent not only from Indonesia, but also from other countries, and to search for the living law in society’. This broad-minded doctrine of precedent is beneficial for the Court in contributing to diversity and justice. However, it is noted that the Court did not use any Supreme Court precedents regarding indigenous peoples, the addition of which would have strengthened the links between the judiciary.

The judicial approach in this case has become an institutional issue for the Constitutional Court. The Court’s greater discretionary power as evidenced by inserting conditionality into the

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523 Interview with Harjono, Former Justice of the Constitutional Court (Jakarta, 22 March 2014).
524 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
525 Lenhoff, above n 139, 325.
527 See Chapter 4 on the Independence of Judiciary.
528 Beckert, above n 238, 84.
529 Interview with Harjono, Former Justice of the Constitutional Court (Jakarta, 22 March 2014).
constitutionality or unconstitutionality of legislation, and utilising diverse judicial approaches, can surpass that of the legislature. It allows the Court to practice judicial activism when the wording of legislation negates the principle of social justice. With this in mind, some of the Constitutional Court’s decisions handed down on ‘justice’ could be seen as ‘positive’ judicial lawmaking. Some of these decisions have added new interpretations to the articles under review and provide conditionality to the interpretation of whether legislation might be unconstitutional. In this case, the Court’s binding legal opinions and recommendations (conditionality) substantially function as ad hoc legislation.

B Coastal and Small Islands Law Case (2010) 3

Date of Judgment: 9 June 2011

In 2011 NGOs concerned with fisheries, as well as indigenous and economically marginalised peoples, submitted a request for a review of the 2007 Coastal Areas Management Law. The applicants were the Peoples Coalition for Fishery Justice (KIARA), the Indonesian Human Rights Committee for Social Justice (IHCS), the Centre for Fishery Development and Maritime Civilisation (PK2PM), the Consortium for Agrarian Reform (KPA), the Indonesian Peasants Committee (SPI), Bina Desa Sadajiwa (BDS), the Indonesian Legal Aid Association (YLBHI), Friends of the Earth Indonesia (WALHI), and the Indonesian Peasants Alliance (API). Additionally, there were 26 individual applicants from marginalised and indigenous fishing communities.

1 Relevant Facts

Under the 2007 Coastal Areas Management Law, the central government and a local government granted a company a concession right in coastal areas (Hak Pengusahaan Perairan Pesisir/HP-3). HP-3 opened opportunities for companies to invest in and extract natural resources from coastal and small island areas. The company occupied the catchment areas of indigenous fishermen. This significantly reduced the productivity of these fishermen. The affected indigenous fishermen brought a case to the Constitutional Court. In addition, the role and involvement of indigenous

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530 Mietzner, above n 425, 411.
532 Law No 27 of 2007 on Coastal Areas Management (Indonesia).
peoples in the concession right was minimal, while the role of the companies wanting to exploit not only the surface of the coastal areas, and small islands, but also the seabed, was significant.  

2 The Applicants’ Claims

The applicants requested that ‘the Court review arts 1 (4), (7) and (18) which defined coastal areas, and small islands, and the scope of the natural resources that could be exploited by the government’. Section (18) of Law No 27 of 2007 outlined the definition of HP-3 as a concessional right that covered sea exploitation and fisheries, and which enjoyed a scope which was almost unlimited. The applicants argued that ‘above articles contradicted the 1945 Constitution, art 28D (1), and art 33 (2), and (3)’. The object of HP-3 was to nationalise water, thus giving huge power to companies because obtaining an HP-3 would lead to privatisation. HP-3 could potentially jeopardise the rights of indigenous peoples and also affect the coastal environments due to over-exploitation, over-fishing, and water pollution.

The legislation under review asserted that ‘planning of HP-3 was to be conducted by the government and private parties’. The applicants argued that ‘this article contradicted art 1 (3), art 28A, art 28D (1) and art 28I (2), and art 33 (3) of the 1945 Constitution’. The Constitution stated that the government must uphold the rule of law principle, which provides that there is equality before the law and equal treatment. Lack of public participation in the planning of HP-3 could be categorised as rebuttal of the rule of law and the principle of social justice. Additionally, the applicants quoted:

The provision in art 7 of the Universal Declaration of Human Rights regarding equality before the law and argued that, as an international norm, the government must seriously consider public participation.

The planning of HP-3 also negated the right of self-determination, freedom from discriminatory

534 Ibid 10.
535 Ibid 43.
536 The 1945 Constitution (Amendment) (Indonesia) art 28D (1) ‘Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.’
537 Ibid art 33 (2) and (3).
(2) ‘Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State’.
(3) ‘The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people’.
539 Law No 27 of 2007 on Coastal Areas Management (Indonesia) art 14 (1).
540 The 1945 Constitution (Amendment) (Indonesia) art 1 (3) ‘The State of Indonesia shall be a state based on the rule of law. The State of Indonesia shall be a state based on the rule of law’.
541 Ibid art 28A ‘Every person shall have the right to live and to defend his/her life and existence’.
542 Ibid art 28D (1).
543 Ibid art 28I (2) ‘Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment’.
544 Coastal and Small Island Management Law Case (2010) 3, 43.
treatment, and the local wisdom of indigenous peoples as they had tribal institutions that needed to be involved in the planning. 545

The legislation under review asserted that ‘HP-3 was a mandatory “permit” for utilisation of coastal areas and small islands’. 546 Art 16 (2) proclaimed that ‘the scope of HP-3 covered the water surface to the seabed’. 547 The applicant argued that ‘this provision breached art 18B sec (2), 548 art 28A, 549 art 33 (1) and (3) 550 of the 1945 Constitution’, 551 in that:

HP-3 negated the existence of indigenous peoples, as the exploitation of the water surface and its seabed would jeopardise the economics and ecological aspects of indigenous peoples’ lives. HP-3 was exclusive in the sense that the permit could only be obtained by companies that have economic capital. If only companies could obtain HP-3, then the noble aim of the greatest benefit to the people would not be accomplished. This practice contradicted the principles of the family system. 552

The legislation under review asserted that ‘a HP-3 could be obtained by an individual who was an Indonesian citizen, a company established under Indonesian law, or by indigenous peoples’. 553 However, in practice, due to lack of capital, indigenous peoples had no chance of obtaining a HP-3. Moreover, art 20 stated that ‘the HP-3 could be transferred as a mortgage’. 554 These articles contradicted art 33 (3). 555

Art 23 (2) and (4) asserted that ‘HP-3 should be used for the following activities: conservation, education and training, research, tourism, fishery industries, organic planting and livestock’. 556 Moreover, section (4), (5) and (6) asserted ‘the authority of both the central and regional governments to issue HP-3s, and also asserted the importance of public participation in the process of granting it’. 557 However, ‘the legislation itself was unclear on who must facilitate this public

545 Ibid 46.
546 Law No 27 of 2007 on Coastal Areas Management (Indonesia) art 16 (1) (2).
547 Ibid art 16 (2).
548 The 1945 Constitution (Amendment) (Indonesia) art 18B (2) ‘The State recognises and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law’.
549 Ibid art 28A.
550 Ibid art 33 (1) and (3).
551 (1) ‘The economy shall be organised as a common endeavour based upon the principles of the family system.’
552 Coastal and Small Island Management Law Case (2010) 3, 47.
553 Law No 27 of 2007 on Coastal Areas Management (Indonesia) art 18.
554 Ibid 20.
555 Ibid.
556 The 1945 Constitution (Amendment) (Indonesia) art 33 (1) and (3).
557 Law No 27 of 2007 on Coastal Areas Management (Indonesia) art 23 (2) (4).
558 Ibid s (4) (5) (6).
participation - the regional government, or the head of the district, the regent, or the mayor, further, in practice, public participation was rarely carried out and tended to be manipulated'. These provisions contradicted art 18B (2), art 28C (2) and art 28H (2).

Art 60 (1) (b) asserted ‘the right of indigenous peoples to compensation if they lost access to their natural resources’. This provision was unclear and ambiguous, as in practice ‘compensation was a strategy used to evict indigenous peoples from their areas and land’. The applicants argued that art 60 (1) (b) contradicted art 28A, art 28E (1) and (2), and art 28G (1) in that:

In the article there was no provision that allowed indigenous peoples to reject development practice, only a right of complaint. Therefore, they were vulnerable to eviction. Moreover, because of massive exploitation in coastal areas, the spiritual aspect of indigenous waters was eroded. The indigenous peoples lost not only their economic, but also their spiritual capital.

Additionally, with regard to the usage of land and water, ‘the legislation overlapped with the 1960 BAL and the 2004 Water Resources Law’.

3 The Government and DPR’s Defences

The executive government and DPR filled separate defences, but the essence of these was the same. First, they rejected the applicants’ demand on the basis that the legislation was imbued with the spirit of privatisation. The respondents argued:

The term ‘global-minded’ does not necessarily lead to privatisation. In fact, the legislation considered the sea, coastal areas and small islands as an unseparated entity, the management of which must be framed globally rather than partially. ‘Global-minded’ could also be interpreted as a comprehensive

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559 The 1945 Constitution (Amendment) (Indonesia) art 18B (2).
560 Ibid art 28C (2), ‘Every person shall have the right to improve him/herself through collective struggle for his/her rights to develop his/her society, nation and state’.
561 Ibid art 28H (2), ‘Every person shall have the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness’.
562 Law No 27 of 2007 on Coastal Areas Management (Indonesia) art 60 (1) (b).
564 The 1945 Constitution (Amendment) (Indonesia) art 28A.
565 Ibid art 28E (1) and (2).
566 Ibid art 28G (1) and (2).
568 Ibid 58.
planning scheme for those independent entities. Moreover, the establishment of HP-3 was limited only to general usage areas. It did not establish conservation and national strategic areas.  

Second, the applicants’ assertion that ‘the legislation opens opportunities for the marginalisation of indigenous peoples was a mere assumption, because the government had provided the Law with comprehensive planning powers’. Lastly, the overlap between the challenged legislation and other legislation was not a constitutional issue, thus the applicants had no legal standing.

4 The Judgment

The Court held that:

Based on the interpretation of the principle of state acquisition rights in art 33 (3) of the Constitution, the state does not ‘own’ the land, the water or the natural resources within, instead, the state only had the authority to formulate policies, to regulate, to manage and to supervise the development project. Additionally, all development projects situated near traditional community settlements must consider the ‘social justice’ principle.

Further, the Court unanimously held that ‘art 1 (18), art 16, art 17, art 18, art 20, art 21, art 22, art 23 (4) and (5), art 50, art 51, art 60 (1), art 71 and art 75 of the Law No 27 of 2007 on Coastal Areas Management were unconstitutional, consequently it declared that the HP-3 was invalid.’

5 Analysis

A number of important issues arise from this decision.

The first and most crucial is the constitutionality of HP-3. HP-3 had been inserted into the legislation as a concessional right. The legislature had designed HP-3 as a ‘right’ rather than a ‘permit’, and this condition could surely lead to privatisation of the resources. The Court stated that ‘the consequences of this concept were massive and detrimental, as the “right” not only had absolute power but it could be granted for a long period (20 years), renewed several times, transferred and used as a mortgage.’ Additionally, the ‘right’ could also be accompanied by a

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569 Ibid 102.
570 Ibid 103.
571 Ibid.
572 Ibid 140.
573 Ibid 113.
certificate of right, which, in this respect, would end the validity of traditional and communal property.  

In order to determine the constitutionality of HP-3, the principle of state acquisition rights as stated in art 33 (3) of the 1945 Constitution was used as a touchstone. The Court held that ‘the wording “to the greatest benefit of the people (social justice)” must be the key for all natural resources projects on Indonesian soil’. The Court found that:

HP-3 contradicted the spirit of art 33 (3) of the Constitution, as the interpretation of state acquisition right did not mean that the state ‘owned’ the land, the water and natural resources within. Instead, the state only had the authority to formulate policies, to regulate, to manage and to supervise the development project.

The Court also contrasted the HP-3 with the ‘principle of the family system’ as stated in art 33 (1). In explaining this issue in interview, Justice Sodiki emphasised that ‘the nature of the family principle was drawn from Indonesia’s communal values where ‘family’ is the core of social organisation, thus the HP-3 model of privatisation was not compatible in Indonesia’s society’. Therefore, the Court held that ‘the HP-3 should be considered a private right only, with relative power, and bound to an agreement’. This made HP-3 merely a ‘permit’, not a ‘right’. This Court’s ruling was contradictory to the legislature’s intention and opinions. Clearly the Court disagreed with the privatisation promised by the legislature, as instead of benefiting communities which live near the project, it was highly probable that it would breach the social and ecological rights of the communities.

The second issue concerned the nexus between ‘development’ and indigenous peoples’ rights. This issue can be analysed further by linking public participation to the planning procedures of the HP-3. The Court examined the opportunity for public participation as one of parameter to attain ‘social justice’. It found that ‘the legislation did not state this clearly’. This defect meant that it could not be guaranteed that development projects were in line with human rights principles, and the social justice principle in particular. Ideally, all ‘development practices’ must be in line with human rights principles, because the development project is not merely a private agreement between companies and the state authority. It also involves people and the environment. The Court stated that ‘the

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575 Butt and Lindsey, above n 217, 222.
577 Ibid 140.
578 Ibid 140.
579 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
581 Ibid.
development project must distribute its benefits fairly to the people near the area to reach “social justice”, and must encourage public participation, and respect indigenous people’s rights. 581 This thesis argues that public participation is the backbone of democracy and the rule of law, therefore legislation that lacks public participation must be declared unconstitutional. The argument presented in this thesis are congruent with the Court’s ruling, despite the fact that the implementation of the policy stated by the Court relies on the integrity of local government and the effectiveness of the system of decentralisation in local context.

Furthermore, the Court rejected the government and DPR’s defence that ‘HP-3 was expressed only in general usage areas, thus it would not have any effect on indigenous peoples’. 582 The Court held that ‘the limits and percentage of the area were not clear, and consequently, HP-3 could indirectly discriminate against indigenous peoples as it would adversely impact on them perhaps more than other people’. 583 In this judgment, the Court considered legal certainty in determining the limit and percentage of the area of HP-3. This reasoning both ascertains and protects the indigenous peoples’ rights over their indigenous areas. This decision shows that legal certainty also can be used to protect indigenous peoples’ rights.

The third issue is the Court’s judicial approach. In this case, the Court often referred to art 33 which is known as ‘an economic-constitutional ideology’ of Indonesia. It is hard to deny that art 33 was originally inspired by leftist, nationalist and anti-colonial ideas. 584 However in this case there was a tangible ideological contest, between neo-liberalism and nationalism-socialism, where the Court apparently became the mediator and tended to favour the emphasis on nationalism in art 33. Art 33 derives from the ‘social justice’ principle and is therefore a mandatory ideological postulate for all development practice in Indonesia. Legal formalism would deny this fact, but State law can never be detached from extra-legal influences. This case also shows that the Court was acting as an interpreter of state ideology.

Despite the Court’s decision to invalidate HP-3, the questions of the meaning of the term ‘social justice’ must be examined as it is ambiguous. The term ‘justice’ is a priori in nature or an abstract source of law; ‘social’ is a posteriori in nature. Justice Sodiki when responding in interview to the dichotomy above, emphasised that the ‘social justice principle is closer to sociological justice than normative justice, thus the Court should not disregard parties/victims’ testimonies and the

581 Ibid.
582 Ibid 79.
583 Ibid 118.
584 Butt and Lindsey, above n 217, 242.
implementation of legislation in society’. He added that ‘the judges must not only consider “social justice” as an idealistic purpose, but also as a method’. The thesis then articulates the meaning of ‘social justice’ as a method is more than just a political and legal phrase. Instead, it is an attitude of activism in which the judges have independence to defend less unfortunate and marginalised people against the oppressor. Acting ‘neutral’ in unjust and unbalanced social and political conditions, is not a virtue, it is naïve. Judicial activism should be promoted to reach fairness and justice.

Lastly, the decision still has its drawbacks, particularly with regard to prospective judgments (ex nunc). HP-3s that had been granted before the decision remain valid. Thus indigenous peoples are likely to continue to be discriminated against when protecting their natural resources until those concessional rights expire in decades’ time. In this respect, the thesis realises that the Court faced a dilemma. In interview Justice Indrati emphasised this issue by stating, ‘if all HP-3s were invalidated, the decision would breach the principles of legal certainty, we (the judges) simply cannot please everyone’. In their reasoning some of the judges seemed to uphold the legalistic paradigm, as in this case they negated social justice principles. The thesis argues that the Court should have also guaranteed the rights of indigenous peoples whose lands and resources had been exploited by HP-3. For the sake of social justice and equity, the Court must dare to decide retroactively (ex tunc), even though it may jeopardise legal certainty. The Constitutional Court has an obligation to settle disputes without provoking future disputes and conflicts. Therefore the Court through its policy-based decisions, should have prioritised the people’s perspective of justice, as justice and equality can only be achieved by policy.

III INDIGENOUS PEOPLES AND ACCESS TO JUSTICE

One of the demands of advocacy of indigenous peoples is access to justice because in practice the relationship between State authority and indigenous peoples is often unbalanced; further, State authority tends to discriminate against indigenous peoples, whether directly or indirectly. In this section, only one decision is analysed: Case 55 (2010), one of the landmark decisions of the Constitutional Court.

A Plantation Law Case (2010) 55

Date of judgment: 6 September 2011.

585 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
586 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
587 Butt, Traditional, above n 26, 72.
588 Interview with Maria Farida Indrati, Justice of the Constitutional Court (Jakarta, 24 March 2014).
1 Relevant Facts

All applicants, including the indigenous peoples, shared the same problem: in the process of claiming their lands by means of different approaches, such as demonstrations, class actions and reporting the companies’ acts to regional governments, they were subject to criminal sanctions set out in the 2004 Plantation Law. The indigenous peoples in Ketapang, West Kalimantan had a land dispute with companies that intended to claim their communal land and relocate them away from their land. In Blitar, East Java, marginalised farmers had a similar dispute with the company. In North Sumatra, a group of farmers also had a land dispute with the same company.

In addition, law enforcers overly adhered to the letter of the law, had no empathy towards marginalised peoples, and were prejudiced: they criminalised the poor and marginalised. Importantly, people living near the project were fully dependent on the companies. Over-exploitation and criminalisation were occurring and indigenous peoples were losing their access to their lands.

2 The Applicants’ Claims

The applicants argued:

Their rights as indigenous peoples, guaranteed by the Constitution, were jeopardised by art 21\(^{589}\) and art 47 (1) and (2) of Law No 18 of 2004 on Plantation.\(^{590}\) The provisions of the legislation were overly broad, it could be interpreted to encompass almost any activity and thus could be used to discriminate against indigenous peoples. These articles breached the rule of law principle, which states that rules must be clear, well-understood and fairly enforced (lex certa). The articles also created fear, insecurity, unequal treatment, legal uncertainty, and hindered the marginalised peoples’ right to self-determination.\(^{591}\)

To review the articles of the Plantation Law, the applicants relied on several articles of the 1945 Constitution as their constitutional touchstones: art 1 (3),\(^{592}\) art 28C (1),\(^{593}\) art 28D (1),\(^{594}\) art 28G

\(^{589}\) Law No 18 of 2004 on Plantation (Indonesia) art 21 ‘Every person is prohibited from performing acts that affect the damage of plantations and its assets, illegal land use and/or other assets, using plantation land without permission and/or any other activity that cause impediments to plantation project’. The elucidation of art 21 defines ‘using plantation land’ as ‘using plantation land or occupying it without the permission of the rightful owner in accordance with the law’.

\(^{590}\) Ibid art 47 (1) (2)

(1) ‘A person who is deliberately acts as stated in Art 21 can be imprisoned for maximum 5 years and fined Rp. 5,000,000,000,- (five billion rupiah)’.

(2) ‘A person who accidently acts as stated in Art 21 can be imprisoned for maximum 2 years and 6 months and fined for Rp. 2,500,000,000,- (two billion five hundred million rupiah)’.


\(^{592}\) The 1945 Constitution (Amendment) (Indonesia) art 1 (3).
and art 18B (2). These embodied the principles of the rule of law and human rights. Aside from the Constitution, the applicants also drew on several reports from international bodies particularly the Recommendation of the Committee on the Elimination of Racial Discrimination\(^{597}\) aimed at Indonesia, which stated that ‘the state must review the *Plantation Law* in order to give more guarantee of indigenous peoples rights and protection over their communal lands’ \(^{598}\)

3  *The Government and DPR’s Defences*

The Government and DPR defended the claim on the following grounds:

First, arts 21 and 41 (1) and (2) were constructed systematically. The first was the norm which described the relevant legal subject and acts. The second was the sanction as a consequence of the acts. Both articles were clear, certain and assertive. Therefore, they corresponded to the principle of legality and *lex certa*. Second, it was true that the articles aimed to protect the rights of the company and the permit holders, because it is not just citizens who have rights. The state must also protect and guarantee the company’s rights in order to enhance investment. Trespassing and occupation seriously breach the right holder’s rights which are protected by the *1960 Agrarian Law*, the *Government Regulation No 40 of 1996* concerning right of use (HGU), and *Government Regulation No 24 of 1997* concerning Land Regulation. \(^{599}\)

Second, ‘the historical background of the articles was illegal occupation on plantation projects which slowed down production and eventually caused the companies to lose profits. Therefore, the articles did not contradict art 28D (1) of the *1945 Constitution*’ \(^{600}\)

Third, with regard to indigenous rights, the legislation clearly stated the recognition of indigenous peoples. The criteria for indigenous people were strictly regulated based on art 9 and the *Internal Regulation of Ministry of Agrarian No 5 of 1999* art 2 and 3. However, indigenous *adat* rights cannot be claimed over land which has existing legally recognised property rights, or land that has been released by the government. Additionally, the context of art 21 was not to delineate indigenous lands,

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\(^{593}\) Ibid art 28C (1).
\(^{594}\) Ibid art 28D (1).
\(^{595}\) Ibid art 28G (1).
\(^{596}\) *The 1945 Constitution* (Amendment) (Indonesia) art 18B (2).
\(^{597}\) *The Recommendation of the Committee on the Elimination of Racial Discrimination* CERD/C/IDN/CO/315 issued in the Seventy First Meeting in Geneva from 30 July to August 2007.
\(^{599}\) Ibid 60.
\(^{600}\) Ibid 63.
only regulate the tortious acts of trespass. Dispute resolution for land conflicts must follow the
*Internal Regulation of Ministry of Agrarian No 5 of 1999.*

4 The Judgment

The Court held in favour of the applicants and declared arts 21 and 41 (1) and (2) of the *Plantation Law* unconstitutional, the Court found that:

There were no clear limitations on art 21 of the *Plantation Law*. The words of art 21: ‘acts that affect the damage of the plantation and its asset’, and acts which were designed as illegal land use, lacked clarity and certainty. Therefore the articles under review were against the *lex certa* principle in art 28D (1) of the Constitution … Uncertain acts cannot be used to criminalise marginalised and indigenous peoples in the process of claiming their lands.

5 Analysis

A number of relevant points arise from the decision.

First, specifically to indigenous peoples’ rights, the Court stated:

Indigenous peoples living near plantation projects must be considered as ‘legal entities’ whose communal rights emerge *ipso facto*, their connection with lands is inseparable, and the State shall protect and guarantee these rights. In contrast, the property rights argued by the companies (art 21) that contains criminal sanctions (art 41 (1) (2)) only arise from law (*ipso jure*), therefore, the standard of *ipso jure* cannot be used blatantly against indigenous rights.

In this case, the Court drew a dichotomy between *ipso facto* and *ipso jure* where both derive from different ‘legitimacies.’ The first derives from social facts, and the later derives from state sovereignty. It is uncertain from a reading of the case whether the Court intentionally recognised the concept of strong legal pluralism in which there is strong separation between state law and living laws. However, the hegemony of state’s sovereignty over indigenous peoples is hard to understated, especially when it comes to economic interests for both local government and commerce.

Additionally, The Court indicated in its reasons for judgment that the injustice occurring in indigenous areas was one of the consequences of the colonial legacy. The Court examined the

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601 Ibid.
602 Ibid 101.
604 Woodman, above n 128, 159.
Elucidation of art 21. This article defined the usage of plantation area without a permit as ‘illegal occupation’, which goes against state legislation. The Court stated that ‘the notion of “illegal occupation” in the Act needs a historical overview, particularly from colonial history’. This Court’s statement can be linked to Woodman’s statement that the system of legal pluralism has links to colonialism. This issue was also discussed in the analysis of the Plantation Law in the previous chapter.

The Court asserted:

Historically speaking, the Dutch used their unlimited concessional rights (erfpacht) to grab indigenous lands and dislocate indigenous peoples from their soil. These indigenous peoples then lost their land without compensation. Following this, Japanese occupation allowed people to re-claim their land, and some of the land was used as farming areas in order to sustain Japanese’s interests in World War II. After the Japanese were defeated in the war, the Dutch, through Allied troops, tried to re-claim their erfpacht land. In this analysis, ‘illegal occupation’ must be understood in today’s context and today, most illegal occupations on plantation areas are caused by unclear borders between individual property rights and indigenous rights.

In interview, Justice Sodiki elaborated on why he mentioned the historical background in the judgment: the reason was not to ‘blame the past’, but ‘as a reminder that history can repeat itself, the Plantation Law really became a threat for indigenous peoples, it resembles erfpacht’. Ironically today, the government, together with other vested-interest parties, works hand-in-hand to ‘colonise’ and ‘discriminate’ against indigenous peoples by passing a ‘business-friendly’ legislation. The case is significant as it acts to withstand the dominance of the state corporatism practice in indigenous peoples’ areas.

Second, concerning judicial approaches, the thesis notes some approaches that the Court used, as follows: the judges used the literal interpretation by establishing the lex certa principle as a benchmark, aiming to ascertain the legal text and expose the drawback of the wording of legislation. The lex certa principle positions itself as the direct expression of the general will of superior authority, aiming to strengthen the state’s authority and legal certainty: a principle of legal formalism.

The Court asserted that:

606 Woodman, above n 128, 160.
608 Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).
609 Pound, above n 142, 385.
Art 21, which stated that ‘acts that affect the damage of the plantation and its asset, illegal land use and or…’ was considered too broad. There were no clear limitations on this article. What would happen if the company committed the acts and accused the people of doing so? The article lacked clarity and certainty. Thus, it was against the *lex certa* principle.\(^\text{610}\)

The Court added ‘the wording “others acts that can disturb the plantation” in art 21 was also too wide and had no limit, this provision could be interpreted differently depending on the parties’ interests’.\(^\text{611}\) Furthermore, the Court stated that ‘art 4 contained criminal sanctions that were not necessary because land disputes can be settled through mediation and civil adjudication’.\(^\text{612}\)

Furthermore, the Court also considered the implementation of legislation in affected societies. In doing so, the Court heard all the testimonies for the victims of the plantation project. Justice Sodiki added: ‘the testimonies were equally important … in the legal reasoning processes, all aspects, including legal (particularly legal certainty), socio-cultural, economic and political aspects should be seriously considered’.\(^\text{613}\) In this respect, the wording of the legislation was examined contextually by looking at socio-political and economics nuances.

The articles might seem acceptable if viewed from a mere textual standpoint, as the articles guaranteed legal certainty and security for plantation companies. However, looking at the question of whether or not the articles created equal treatment and justice for indigenous peoples, a deep understanding of the idealistic and social aims of the law is needed. The theory of governmentality proposed by Foucault,\(^\text{614}\) finds its context in this decision because the *Plantation Law* was created by ‘knowledge’ constructed from legislators’ opinions about what is legally right and wrong. However, what is being imposed as a legal right is not always the truth. In other words, the legislation was constructed by ‘subjects’ who have interests. The ‘subjects’ then affirmed that the law was correct and objective. In this respect, the judges were not distracted by the ‘correctness of law’. Instead, the Court endeavoured to reach the truth while ignoring the artificial ‘correctness’ presented by the legislation.

The Court also employed a socio-political perspective to construct a reasonable and just decision. By doing so, societal facts demonstrated that the legislation, as part of positive law, was not an objective entity. Instead, it was inter-subjective and sometime merely a false consciousness. Thus,

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\(^{610}\) *Plantation Law Case* (2010) 55, 73.

\(^{611}\) Ibid.

\(^{612}\) Ibid.

\(^{613}\) Interview with Ahmad Sodiki, Former Justice of the Constitutional Court (Malang, East Java, 5 January 2014).

\(^{614}\) Michel Foucault, *The Foucault Effect: Studies in Governmentality: with Two Lectures by and an Interview with Michel Foucault* (University of Chicago Press, 1991) 87.
the Court could simply discern that the bargaining position between the companies and the applicants in the legislation was unbalanced. This was revealed as a mere conflict between criminalisation and claim of rights; the marginalised versus the ‘haves’. In order to balance the relationship, Justice Harjono commented ‘the Court shall provide “equity” to let marginalised and indigenous peoples having opportunities to face modernisation’. Most importantly, it is clear that the legislation under review was not established under neutral conditions. Instead, the conditions were often unfair, unbalanced, discriminatory and politically biased. This evidence confirms that State law itself is not objective, it is pragmatic and political in nature.

This decision proved that despite the fact that both semantic *lex certa* and socio-political perspectives are often considered to be contradictory, they could be merged and employed to reach a fair decision. To approach this decision in a so-called ‘neutral’ and dispassionate way while the background conditions were blatantly unfair and unbalanced would be naive. The decision was enriched by ‘policies’ rather than legal norms because the legal norms in the legislation were fundamentally unjust.

IV CONCLUSION

This chapter has shown that the Constitutional Court has actively supported the notion of legal pluralism and the advocacy of indigenous peoples. Its decisions can be categorised as policy-driven decisions which strengthened indigenous peoples’ rights. These decisions proved that both plain analysis and socio-legal perspectives could be merged and employed to reach a fair decision. The interpretation started from the text, then moved to the spirit of the law and societal facts.

The judges considered the legislators’ intention for the legislation, as well as the legislation’s scope, limitations and underlying purpose. Most importantly, the judges focused on the implementation of the legislation rather than be distracted by mere procedural matters and technicalities. In this respect, sociological inquiry was employed to understand the underlying principles of legislation, as legislation should aim to solve social grievances and fill gaps in legal vacuums in society.

The Court strongly questioned whether the Acts were or were not compatible with society’s needs and State ideology. Thus it was arguably beneficial to focus on the implementation of the legislation in framing, structuring, and maintaining discourse and behaviour. Moreover, the Court’s ideological function, particularly with regard to Art 33, involves the maintenance of currents of ideology, which legal doctrine sustains and implements, and serves to legalise government and empower social

615 Interview with Harjono, Former Justice of the Constitutional Court (Jakarta, 22 March 2014).
616 See Chapter 3 on Relevant Legislation.
The Court employed and merged an instrumentalism approach and sociological insights by using its justices’ political opinions, ‘consequences’ and ‘appropriateness’. In this respect, the justices of the Constitutional Court can be occasional legislators, making the law as well as interpreting it. The Court’s decisions reflect concrete law as the Court interpreted legislation in order to meet the values of the Constitution and current socio-political conditions.

The judges proposed the principle of social justice or social reasonableness. This principle is a synthesis of doctrinal and sociological legal paradigms. However the Court does not consider it as the only source of their reasoning. Instead, the judges often combine diverse perspectives in their reasoning. They tend to be pragmatists, because they use legal perspectives that fit with the legal, social and political context of the case. This moderate attitude corresponds with Justice Kirby’s insight, which envisioned ‘the court employing diverse perspectives in its reasoning, making the court more responsive’.

It is true that an attitude of judicial activism can lead to a ‘positive legislator’. Through the progressive legal reasoning by its judges, the Court has sometimes crossed the limits of its authority. However it has done so in order to establish itself as a guardian of democratic and human rights, principles enshrined in the Constitution the Court is there to uphold.

Lastly, with regard to the nexus between development and indigenous people’s rights, the decided cases have shown that current Indonesian development is still based on the overriding concept of economic growth; this undermines the people’s interests and their fundamental rights. Both central and local governments often disregard the importance of public participation, local democracy and wisdom. As a result, development is considered the benchmark of a culture in which, for the sake of modernisation, development projects must prevail. In this way, development has become ahistorical and lost its cultural significance. The next chapter will elaborate the nexus between indigenous peoples’ rights and development aspirations in the Province of South Kalimantan.

617 See Chapter 4 on Court Function.
618 Kirby, above n 156, 12.
619 Mietzner, above n 425, 418.
CHAPTER 6 - CULTURAL AND HISTORICAL CONTEXTS TO A CASE STUDY IN SOUTH KALIMANTAN

I INTRODUCTION

Chapter 5 analysed decisions from the Constitutional Court. However, unlike the Constitutional Court which deals with judicial review, the Supreme Court deals with adjudication processes involving claimants. This chapter examines the judicial reasoning processes, the policies and the approaches used both by State Courts and the TDR process in settling disputes involving indigenous peoples in the Province of South Kalimantan. This chapter aims to seek evidence as to whether State Courts merely employ legal analysis in cases involving indigenous peoples or whether they are willing to consider socio-cultural aspects in reaching their decisions. The latter approach would provide significant clues linking the State to society. This chapter examines the effectiveness of TDR in deciding vested-interest cases, as indigenous peoples are under constant pressure from private vested interests. It also looks at how tribal chiefs settle disputes involving adat laws, and their policies and approaches to de-escalating disputes within their jurisdictions. In addition, the thesis also reviews perspectives gathered from local government officers.

This chapter flows from the general to the specific, describing the cultural and historical contexts of the indigenous peoples, starting from South Kalimantan and its relevant districts, through to the specific contexts of the indigenous peoples of Kotabaru and the HST districts. In addition, the chapter analyses two cameo cases where the description of indigenous peoples and their TDR, and the adjudication processes in the State Courts will be developed in further detail. These cases demonstrate a dynamic interaction between indigenous peoples and State courts which surpasses legal and traditional boundaries. As a cultural and historical background is needed to fully understand the disputes that are presented in the next section, a socio-legal paradigm is employed, with the research comprehensively considering the characteristics of indigenous peoples within the Meratus Mountains areas in South Kalimantan.

This chapter aims to provide an intermediary view between the sociological and the legal perspectives of adat law. According to the sociological perspective, living law and TDR serve to settle disputes within indigenous areas, and to preserve a village’s inner ordering. In that view the State’s positive laws play only minor roles in those communities. Additionally, State Courts can hinder the development of adat law by ignoring the significance of adat laws as legal proof and a basis for judicial reasoning. Moreover, indigenous culture is often considered as the nemesis of the
State’s development projects, and vice versa. On the other hand, from a formalistic perspective, the efficacy and validity of adat law and TDR are doubtful, because there are no legal guarantees connected to the tribal chiefs’ conduct and decisions. A legal perspective would thus view adat law as irrational and an unmeasurable legal tradition.

However this thesis takes a more moderate stance. It argues that the State Courts could play a pivotal role by appreciating the value of unwritten adat law and delivering a policy of affirmative action to indigenous peoples. By doing so, the State Courts could preserve and maintain legal pluralism in the Province of South Kalimantan.

II CULTURAL AND HISTORICAL CONTEXT

Indigenous Dayak communities in South Kalimantan differ in several ways from their relatives in Central, East and West Kalimantan. Social and cultural issues are determining factors for TDR practices because TDR and indigenous peoples are inseparable, and the mechanisms of TDR may vary between areas.

A The Indigenous Peoples of South Kalimantan

South Kalimantan indigenous peoples fall into three anthropological groups: the Dayak Meratus, originally from the Alai region within the Meratus Mountains areas; the Dayak Tumbang who originally came from Central Kalimantan but subsequently migrated and blended with the Dayak Meratus; and lastly, the Dayak Paser who are culturally influenced by the Kingdom of Paser in East Kalimantan. Indigenous peoples living in the Meratus Mountains used to be called Dayak Bukit, which has the derogatory meaning of a primitive, uneducated, pagan and uncivilised community. The name Dayak Meratus is now used instead to refer to the Meratus Mountains indigenous peoples living in South Kalimantan Province.

The history of the Dayak Meratus and their strong relationship with the Banjar (Muslim Malay) in South Kalimantan is mostly based on myth. Whilst myths do not have a scientific basis, they play a cardinal role within the traditional communities, connecting people, nature and their spiritual worlds. The myth concerns Dayuhan and his younger brother Intingan of the indigenous peoples.

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621 Weber, above n 109, 656.
who lived in the Meratus Mountains. When Islam came to their village, Intingan became interested in that new religion, and decided to convert. He became a pious Muslim, and decided to spread the light of Islam to other communities by establishing a mosque, namely Al-Mukarramah. On the other hand, Dayuhan wanted to keep his traditional beliefs. He decided to leave the village and head to the Meratus Mountains. Intingan is said to be the ancestor of the Banjar, the non-indigenous and Muslim believers who mostly live on the river bank and in coastal areas. Dayuhan, the older brother, is the ancestor of the Dayaks Meratus, whose indigenous peoples are currently living on the Meratus Mountains. Even though they were separated, their bonding as brothers was still strong, and their descendants often visited each other. The mosque became a holy place for both Banjar Muslims and Dayak Meratus. Based on this story, there are strong bonds between Dayaks Meratus and Banjars, even though they have different religions and beliefs. Dayak Meratus and Banjars are still regarded as siblings (bedua bedingsanak) to this day.

The brothers’ story may be based on truth. Historical research shows that Dayak is a Proto-Malay or Old Malay whereas Banjar is Deutero-Malay or Young Malay. The Banjar was a Dayak before accepting Islam and blending with others’ cultures including Arabic, Javanese and Malay from Sumatra (and some parts of Malaysia). Dayak Meratus call their younger brothers’ descendants ‘halo people’ (Muslim), and Banjars still call their older brothers Dayaks, which notoriously means non-Muslim (pagan) peoples.

With regard to religion, Dayaks’ local beliefs may fail to be legally classified in Indonesia as a religion because in the New Order Suharto Regime, the government only recognised six religions: Islam, Catholicism, Protestantism, Hinduism, Buddhism, and Confucianism. Today, Baha’i is accepted as the seventh. The government-defined characteristics of a religion are said to be: monotheistic, possessing manuscripts and prophets, part of an international community, and most importantly, it has to have the spirit of development.

Dayaks are often discriminated against and insulted as an uncivilised pagan community. However, their beliefs are based on universal values and teachings about how peoples and nature live harmoniously. The belief practices of the inland population of Kalimantan are a mixture of belief or

626 Hairus Salim, Masyarakat Dayak Meratus, Agama Resmi dan Emansipasi [Dayak Meratus Community, Their Religion and Emancipation] (PSPB, 2001) 11. Around 90 percent of Banjar, is a Dayak who converted into Islam and blended with Malay tradition.
religion and superstition, or what is often referred to as a religio-magical mentality.\textsuperscript{628} Dayaks believe that nature will not bother humans if humans adapt to nature. According to that view, there is a dependency between humans and nature. Dayaks do not need imported religions to inform their scriptures, because their scripture is already within their deepest conscience and as practised through rituals and ceremonies.\textsuperscript{629}

Dayak Meratus spiritual values regarding nature are manifested in their forest conservation activities and in everyday life. The forest is a ‘meeting point’ for humans, animals, plants and nature itself. Forest is the beginning of harmonious life. Dayak Meratus forbid the cutting down of trees arbitrarily without a specific purpose and the consent of the tribal chief.

There is a strong connection between Dayak Meratus traditional rituals and their universal values. For example: \textit{bamula}, a ceremony conducted before planting the rice paddy, asks for good fortune and forgiveness from the Almighty; \textit{manyangga banua}, is a ceremony to ask for good fortune and security from the Almighty; and the \textit{aruh ganal}, is a ceremony to thank the Almighty for all blessings and good fortune. Dayak Meratus believe in three ancestor spirits: \textit{stasia banua, bubuhan aing} and \textit{kariau}. Strangely, these ancestor spirits come from the river bank areas, which are now occupied by Banjar. There is a hypothesis that Dayak Meratus originally came from the river banks and coastal areas, but then they moved to the mountain to avoid Banjar and other outsiders.\textsuperscript{630}

What Dayak Meratus inherently practise through the year is more like a spiritual than a religious tenet. Dayaks are generally regarded as having greater spiritual and genealogical superiority to the Banjar or Malay. However, with regard to socio-economic life, the Dayak Meratus are regarded as inferior to Banjars. Dayaks have a traditional agrarian culture (\textit{behuma}), with their livelihood mostly dependent on hunting wild animals and farming rice paddies by shifting cultivation. They engage in a mixture of hunter-gatherer community activities and cultivation. The spirit of their lives is communalism which leads to less capital accumulation. On the other hand, Banjars have a strong trading culture. They live on a river banks and in coastal areas, which made it easier to mingle with outsiders and traders from Java, the Arab world, and Persia. The Banjars are devout Muslims, and Islam recognises private property. Consequently Banjars have greater capital accumulation than Dayaks. Banjars also have greater political power than Dayaks, because the spread of Islam in Indonesia was brought and supported by strong Islamic Kingdoms from Java, Sumatra, and Persia.

\textsuperscript{628} Koentjaraningrat, above n 86, 3.
\textsuperscript{629} Interview with Kawi, the tribal chief of the Balai of Datu Galung (Batu Kambar village, 9 January 2014).
\textsuperscript{630} Salim, above n 626, 7.
The Banjar, through Islamic connections, assumed the enviable role of the sole political leadership of South Kalimantan.  

There are stereotypes used to describe the Dayaks Meratus and the Banjars. The Dayak Meratus, as indigenous non-Muslim people, are known as people who ‘wake up after the dawn’, whereas the Muslim Banjars, are people who ‘always wake up before the dawn’. These stereotypes infer that the Dayak Meratus have less discipline than the Banjars, because they are spoiled by nature, whereas the Banjars are characterised as hard workers who always wake up early morning, because as Muslim they have an obligation to conduct their prayers at dawn (besubuh). Thus they commence work earlier than the Dayak Meratus. Banjars believe that a greater fortune is to be made if someone wakes up earlier in the morning. Banjars may have fewer privileges over natural resources in their areas than Dayaks, but that condition makes Banjars keen to work and conduct business.

This thesis only examines the Dayak Meratus and Dayak Paser’s areas, because the cases selected are from those areas. Specific cultural settings of those sub-tribes strongly determine how their traditional values are applied in TDR within their villages, and how those values are conveyed and respected at a national level and vice versa.

1 The Indigenous Peoples of Kotabaru Regency

Generally, the Kotabaru Regency is known as a cultural stronghold for indigenous peoples. Yet in Kotabaru, the cultural characteristics of indigenous peoples have merged, creating equal influences of the Dayak Meratus, and Dayak Tumbang from Central Kalimantan and from East Kalimantan. With regard to the State administration, the mountainous mainland area is divided into six sub-districts, most of them inhabited by indigenous peoples. However, only the Kelumpang Hulu sub-district, which has ten villages, will be investigated. The most significant village to be examined is the Bangkalaan Dayak village. As the name implies, the village is indigenous, a mixture of both Dayak Meratus and Paser. The significance of the village of Bangkalaan Dayak to this research topic is its indigenous peoples’ struggle to regain their ancestor’s cave from commercial exploitation.

The indigenous people of Bangkalaan Dayak in Kotabaru Regency have been traditionally extracting natural resources within their territory since the era of their ancestors. One of the greatest

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631 Wajidi, above n 625, 42.
632 Salim, above n 626, 17.
resources is a swallow cave that produces expensive and valuable swallow bird nests.\textsuperscript{633} The indigenous people are dependent on these nests as their main source of income. The cave itself has been preserved and harvested communally since the era of the elders of the indigenous peoples and during the Kingdom of Paser’s administration.

The Temuluang cave issue cannot be clearly understood without knowing that the characteristics of the indigenous peoples and their TDR practice in Bangkalaan Dayak are different from those of the indigenous peoples in other places within Kalimantan, because there are many external influences that affect indigenous peoples and the way they settle a dispute.

While most indigenous peoples living in mountainous areas rarely have contact with non-indigenous people living on river banks (the Banjar and the Malay), the people of Bangkalaan Dayak have long experienced a close relationship with the people of the Kingdom of Paser in East Kalimantan, one of the largest Islamic kingdoms in Kalimantan. The indigenous areas were voluntarily co-opted by the Kingdom of Paser, but the Kingdom’s occupation was not intended to lessen the role of indigenous laws and their institutions. Instead, King Agung\textsuperscript{634} of the Kingdom of Bangkalaan a sub-Kingdom of the Kingdom of Paser, preserved and promoted indigenous laws and customs by keeping two indigenous warriors, or Temenggung,\textsuperscript{635} as the Kingdom’s allies. These warriors were Temenggung Gayapak and Temenggung Dandai. The King used the Temenggungs to strengthen the Kingdom’s influence within indigenous communities and to tackle a massive invasion of head-hunters (Dayak Mudang) from Central Kalimantan.\textsuperscript{636} This tribal war happened long before the Tumbang Anoi agreement held in Central Kalimantan in 1894 which was a landmark for Dayak communities in Kalimantan because it put an end to a barbaric tradition of the Dayak, known as mengayau (beheading/decapitation).

After the head-hunters were defeated and expelled, the King appointed Temenggung Gayapak to rule the five river areas: Salilau, Bangkalaan, Cantung, Samihin and Sampanahan. However, his control of these river areas was only for a short period because he was defeated in battle by other indigenous warriors, the Datu\textsuperscript{637} Layu and Datu Melati from Alai (an indigenous area located in Central Headwater/HST Regency). With the King’s approval, they divided rule of the five river

\textsuperscript{633} The swallow bird nests in Bangkalaan Dayak are mostly sold to intermediary traders. The price is around Rp, 2,000,000/AUD $200 – Rp, 3,000,000/AUD $300 per kilogram. The intermediary traders sell it for approximately Rp, 5,000,000/AUD $500 per kilogram depending on its quality. In a year, the cave can be harvested 3–4 times. In a single harvest, the profit is approximately Rp, 1, 2 billion/AUD $120,000.

\textsuperscript{634} King Agung then married with Queen Intan I, a noble princess from the Kingdom of Banjar.

\textsuperscript{635} Temenggung is an ancient Malay title of nobility, usually given to the chief of public security.

\textsuperscript{636} Interview with Dariatman, Chief of village (Bangkalaan Dayak village, 17 February 2014).

\textsuperscript{637} Datu similar to Temenggung is an ancient Malay title of nobility, usually given to a shaman or spiritual leader.
areas between themselves: Datu Layu took Salilau, Cantung and Bangkalaan and Datu Melati ruled Sampahan and Samihin.\textsuperscript{638}

To respect their ancestors and to express thankfulness for a successful harvest, once a year when the biggest swallow bird nest harvest is conducted, the indigenous peoples of Bangkalaan Dayak hold a traditional thanksgiving ritual (\textit{pemujaan balian}). In order to respect the King who is a Muslim, the animals that are sacrificed are mostly chickens, lambs and cows. Neither pigs nor alcoholic beverages are allowed to be sacrificed or presented in the ceremony as they are considered to be unholy foods (\textit{haram}) for Muslims. The butcher must also be a Muslim. This ritual would be rare in other Dayak communities, because they are known as pig breeders, and often eat pork as their main meal. They also enjoy alcohol. The traditional thanksgiving ritual (\textit{pemujaan balian}) has a three-year cycle. In the first year the ceremony is conducted for two days and two nights, and seventeen chickens are sacrificed to feed the community. After the shaman (\textit{balian}) prays, the heads of the chickens are placed in front of the cave. In the second year, the ceremony is held for four days and four nights. One female goat and one male goat are sacrificed to feed the community. After the shaman prays, the heads of the goats are placed in front of the cave. Finally, in the third year, the ceremony is held over six days and six nights. A cow is sacrificed to feed the community, and similarly to the previous years, its head is placed in front of the cave. After the third year, the three years ceremony cycle is repeated.\textsuperscript{639}

The King and his family frequently attended the ceremony, because there is a syncretism between Islam and indigenous values in the ritual. The main event of this ritual is \textit{badudus} which literally means to wash and bathe the holy goods such as ancient swords, javelins, and antique vases which are the heritage of the Kingdom.\textsuperscript{640} That traditional ritual is still practised today, and may be the reason why religious tolerance between Muslim Banjar and the indigenous Dayak peoples is very strong in Bangkalaan Dayak.

Temuluang Cave is located right in the middle of the Bangkalaan Dayak village which was under Datu Layu’s administration. Under his control, the indigenous peoples of Bangkalaan Dayak preserved and extracted the bird nests traditionally and the profits were shared fairly between all people within the community. There was no conflict between the peoples of Bangkalaan Dayak.

\textsuperscript{638} Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
\textsuperscript{639} Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
\textsuperscript{640} Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014). Muslims are a minority in Bangkalaan Dayak. The majority are of indigenous Kaharingan belief or Christian. The highest population of Kaharingan believers is in Bangkalaan Dayak village (886 persons).
Even the Dutch were reluctant to enter the village and interfere with Datu Layu’s administration. He was the first charismatic tribal chief of Bangkalaan Dayak. 641

2 The Indigenous Peoples of HST Regency

HST Regency has 11 sub-districts and 161 villages. Two of the sub-districts, Hantakan and Batang Alai Timur (BAT), are located within the Meratus Mountain areas, and are relatively traditional compared to other sub-districts. They are known as strongholds of Dayak Meratus indigenous peoples in South Kalimantan. The inhabitants are heterogeneous in terms of their culture and religion. Indigenous people have tribal chiefs who are ex-officio religious leaders in all State administrative areas including the Regencies, sub-districts, villages, and the smallest areas called Balai. TDR is often held in the Balai areas. The Balai has religious, social and legal functions. In the Hantakan sub-district there are 29 Balais; and the BAT District has 22. The Balai within those sub-districts are still operating and have their own tribal chiefs.

Unlike the Kotabaru Regency, the genealogical characteristic of indigenous peoples in HST Regency is homogenous. The areas are mostly inhabited by Dayak Meratus or Dayak Alai. Neither Dayaks Tumbang from Central Kalimantan nor Paser influences can be found in this region. However, they share their areas with Muslim Banjars.

Due to a massive modernisation program in the Suharto era, the indigenous peoples of HST Regency no longer live in their communal long houses within the indigenous villages. Since the 1980s the longhouses have gradually vanished from the indigenous villages. 642 Further, the socio-political aspects of the long house are disappearing now that the people in the HST Regency mostly live in private houses. However the Balais within the villages are still preserved.

To reach mountain villages, Dayak Meratus must pass the Banjar villages, and similarly when going to the city. It is easy to differentiate between Banjar and Dayak Meratus villages. Once dogs are seen on the road one is heading into an indigenous peoples’ village. Dayak Meratus people use dogs both as pets and as hunting partners. In contrast, Banjar villages are inhabited by Muslims for whom dogs are considered to be unholy (unclean) animals.

This research examines the BAT sub-district within the HST Regency in general, and the Atiran village in particular, because there was a land dispute between indigenous peoples and non-indigenous peoples (Banjar) in that area. The BAT sub-district is a heterogeneous area. It is divided

641 Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
642 Interview with Norsewan, Secretary Office of Hinas Kiri village (Hinas Kiri village, 25 January 2014).
into two areas: the downhill areas mostly inhabited by the non-indigenous peoples, namely the Banjars who are Muslim and live in a modern community; and mountain areas settled by the indigenous peoples, the Dayak Meratus who are non-Muslim and Kaharingan believers, and who live in a communal community. While within this area Banjar and Dayak Meratus peoples may be related, there are significant distinctions due to modernisation and the massive spread of Islamic teaching. However there is a shared history of cultural tolerance between these tribes.

III CASE STUDY: THE TEMULUANG CAVE DISPUTE IN BANGKALAAN DAYAK VILLAGE, KOTABARU REGENCY

A The Practice of TDR

Currently, indigenous peoples’ institutions for dispute resolution still exist, as evidenced by the existence of Balais. Balais are the places where ceremonies, local gatherings and TDR are held. Within the Bangkalaan Dayak village, there are eight active Balais. Each Balai has one tribal chief. However in the Bangkalaan Dayak village, tribal chiefs are less involved in leadership or dispute resolution, and more involved with traditional treatment and witchcraft. Leadership and dispute resolution were previously in the hands of a late tribal chief of the Bangkalaan Dayak village, Panglima Plitur, who was replaced by other chiefs. The current tribal chief is Hinggan, however he is less influential than previous tribal chiefs. This may be because Hinggan is a secular leader, without the mystical ability associated with deep understanding of Kaharingan wisdoms. Hinggan, therefore, cannot lead the traditional thanksgiving ritual, carry out traditional treatments, or practice witchcraft. However, he is still a legitimate tribal chief. If there are family or matrimonial problems, Hinggan is often invited to give suggestions. The tribal chief is ‘primus inter pares’, acting like a ‘father’ for all residents, a chief to whom the residents can complain with their grievances, and from whom they ask favours.

Hinggan has often failed to settle serious disputes, including the Temuluang cave dispute, whereas previous tribal chiefs, including Panglima Plitur, had been successful in dispute resolution. In serious cases the tribal chief calls the disputing parties to his Balai. The parties, which could be two or more (a dispute which may be multifaceted), are then given an opportunity to express their grievances before the tribal chief. After listening, he first gives advice to all disputing parties and the audience, and then asks other village administrators and the audience for their opinions on the matters heard. Thus the decision of TDR is not dominated by the tribal chief. Instead a TDR decision consensus is reached by consulting all the residents of the village. After it is agreed who is

643 Interview with Hinggan, Tribal Chief of Bangkalaan Dayak (Bangkalaan Dayak, 18 February 2014).
at fault and how much the tribal fine will be for the perpetrator, the tribal chief leads a closing ceremony called *sapu hirang* which literally means ‘black broom’, symbolising that all the faults are swept away.\textsuperscript{644}

Despite TDR in Bangkalaan Dayak being led by Hinggan, it is more effective in settling small cases rather than larger ones. The spiritual values of *adat* law still exist: traditional rituals demonstrate that those values aim to find equilibrium between humans and nature. The communities are not anthropocentric or homocentric: they still seriously consider nature and environmental conservation. Indigenous peoples consider themselves part of nature. Humans cannot be separated from the organism which is made up of nature and their community. Destroying nature would therefore mean destroying humans, and vice versa. It is a holistic attitude acknowledging a mutually dependent system of life. This attitude is ‘a silent guardian’ of indigenous life, and must be considered the main tenet of indigenous peoples.

Lack of leadership cannot be a reason to devalue Dayak Meratus rights as indigenous peoples. Ter Haar tends to combine the concept of adjudication with dispute settlement. However it is a fallacy to transpose civil law experiences into a tribal community’s context. Formal adjudication is guided by pre-existing or formal law which should be strictly obeyed by the judges. In contrast to State law, TDR has no formal law; the only guidance is a community’s living laws that are amplified by the internal morality of the tribal chief. Moreover, the current government tends to only consider the formal or tangible aspects of indigenous living law and neglect its intangible or spiritual aspects such as the principles of flexibility, togetherness, accordance with common practice in concepts and attitude, collective choice, and public discussion based on a deliberative process.\textsuperscript{645}

The TDR in Bangkalaan Dayak is quite similar to the TDR called Runggun in Karo (the Highland of North Sumatra). This is because the Bangkalaan Dayak TDR is not only a process for the settlement of disputes, but TDR can also be applied in many other non-conflict social relations including the conclusion of marriage, childbirth, death and funeral events.\textsuperscript{646} For instance, when village residents decide to get married, Hinggan performs a ceremony called *palas adat* to validate the marriage.\textsuperscript{647} In addition, power succession is not hereditary but through a village election.

\textsuperscript{644} Interview with Muhammad Jayadi, Secretary of village (Bangkalaan Dayak village, 19 February 2014).
\textsuperscript{645} See Chapter 1 on Indigenous Peoples of Indonesia and their TDR.
\textsuperscript{646} Herman Slaats and Portier, *Traditional Decision-making and Law, Institutions and Processes in an Indonesian Context* (Gadjah Mada University Press, 1992) 34.
\textsuperscript{647} Interview with Hinggan, Tribal Chief of Bangkalaan Dayak (Bangkalaan Dayak, 18 February 2014).
Hingga was chosen merely because he is a senior resident of the Bangkalaan Dayak village. He is also a former chief of the village. He was replaced by Dariatman.\footnote{Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).}

In everyday life, the residents of Bangkalaan Dayak still uphold their adat law, even though some of them do not actively practise it anymore. Due to modernisation, some of the peoples tend to settle their disputes in State courts. However, TDR and other tribal institutions are still maintained. The Kotabaru government has given formal recognition to the indigenous peoples of Kotabaru in general, and Bangkalaan Dayak in particular, by enacting Regional Legislation.\footnote{Regional Legislation of Kotabaru Regency No 10 of 2010 on Tribal Institutions.} This legislation aims to strengthen village government and to preserve indigenous laws and traditions.

With regard to procedure, TDR in Bangkalaan Dayak is distinctly different from the State judicial system. There are no prosecutors, lawyers, or judges. Nor is there a dichotomy between civil and criminal cases. The TDR forum is chaired by the tribal chief, and consists of other village administrators including the chief of the village, and the secretary of the village, the head of the village council and the village elders. Both petty and serious cases, ranging from brawling and, adultery to homicide, can be settled by TDR. To settle petty cases, the tribal chief and other village administrators are usually invited by the disputing parties or their families. However before that the tribal chief always advises the parties to settle the dispute internally, otherwise disputants will suffer ‘social punishments’ such as being ignored by others, and all village residents being shamed and cursed by holy ancestors (membari supan). If the dispute cannot be resolved internally, the disputing parties can invite elders to further mediate. If none of these approaches succeed, then the disputing parties can invite the tribal chief to mediate. There is no strict procedure like in a State Court; TDR runs informally.

With regard to penalties, the tribal fine for petty cases can vary between 5 and 20 tahils. For serious cases, the tribal fine may vary between 20 and 100 tahils. A tahl is a solid white plate. There is a philosophical meaning to its colour. White means pure or innocent and is a reconciliation symbol. The conversion rate of tahil to Indonesian currency is unclear, some people say 1 tahl is equivalent to Rp, 100,000,- (AUD$10), others, that it is equivalent to Rp,75,000,- (AUD$7.50).

B History of the Temuluang Cave Dispute

The local governments of South Kalimantan Province and Kotabaru Regency were under direct surveillance by the central government. Consequently all resources extracted in those areas belonged to the central government. The central government used the military to coercively
pressure the indigenous peoples, offering the spectre of violent force. As a result, swallow nest production and trading were fully managed by the government.\(^{650}\)

The dispute of the Temuluang cave escalated in 1999, an early year of the Reformation period, when the Kotabaru government was granted full authority to regulate and extract natural resources within its territory.\(^{651}\) As regulator, the local government had the right to appoint a company to extract the natural resources from that cave. The first company granted an exploitation permit by the Kotabaru Regency was Timur Jaya Abadi (TJA). TJA’s permit period was short because the indigenous peoples protested the arbitrariness of its conduct: TJA had claimed the cave and the land nearby as its private property. The Kotabaru government soon repealed its permit.\(^{652}\)

Prada Dandai, a respected person in the Bangkalaan Dayak village, and a descendant of the indigenous warrior Temenggung Dandai initiated the establishment of a trading union, Batu Pusaka (BP), run by the people of Bangkalaan Dayak. However, because of its financial problems, the union needed to find a new investor. Around that time Suriansyah, a wealthy businessman, entered the union and changed it into a company called Seven Brothers (SB). Prada Dandai, Suriansyah and Gusti Bahrudin sat as the executive board of SB.\(^{653}\)

However, in the middle of its contract, SB had an internal dispute.\(^{654}\) During that time (2006-2007) conditions in the village were unsettled, because the people divided into two groups: supporters of Prada Dandai, and supporters of Suriansyah. Hinggan, the tribal chief, was not able to settle the tension, and TDR failed to achieve consensus, because some of the tribal council members were opportunistic. The last resort was to approach the court system. Dariatman and other village representatives submitted a lawsuit to the Kotabaru District Court. While waiting for that Court’s decision, there were several brawls and riots in the Bangkalaan Dayak village, because Suriansyah, who is an outsider, brought several ‘bodyguards’ to the village to secure his business. To worsen the dispute, the sub-district police officers were partial: they often patrolled the village and arrested local people.\(^{655}\) The criminalisation of indigenous peoples continued with the police maintaining

\(^{650}\) Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
\(^{651}\) Law No. 22 of 1999 on Regional Autonomy (Indonesia).
\(^{652}\) Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
\(^{653}\) Interview with Agha, Local government officer (Kotabaru, 10 February 2014).
\(^{654}\) Interview with Agha, Local government officer (Kotabaru, 10 February 2014). Prada Dandai borrowed a huge amount of money from Suriansyah, and he could not repay it. Suriansyah used his debt as pressure to control the company.
\(^{655}\) Interview with Agha, Local government officer (Kotabaru, 10 February 2014).
that the cave was within a production forest therefore that every act of suspicious conduct, including trespassing and harvesting of bird nests within that area, was subject to prosecution.\textsuperscript{656}

The legal dispute was won by Suriansyah. The District Court of Kotabaru confirmed that Suriansyah had a legal right to run the company and the authority to organise, preserve, and harvest the resources of the Temuluang cave (Decision No 11).\textsuperscript{657} However, according to Agha, a local government officer, the Decision No 11 was not related to the subject matter of who owns the cave, but was more about who breached the contract or who failed to perform a relevant obligation.\textsuperscript{658}

The court’s decision did not resolve the problem; instead, it became a trigger of future disputes because the nature of the District Court’s decision was condemnatory, meaning that the court had the authority to execute the outcome of the dispute which was possession of the cave. The triumph of Suriansyah, and the execution of the Temuluang cave, provoked both the Kotabaru government and the indigenous Dayak peoples to commence legal proceedings in the State court, the Kotabaru District Court.\textsuperscript{659}

\section*{C Dispute Adjudication in State Courts}

1 \textit{Mataja (Regent of Kotabaru) v Suriansyah (2008) 13 District Court}

Date of judgment: 1 July 2009

\subsection*{(a) Relevant Facts}

Decision No 11 was handed down by the District Court. This decision held that the Temuluang cave was the private property of SB Company. As a result, the company could exploit the cave, and indigenous peoples living nearby were unable to harvest the bird nests there. The indigenous peoples complained to the local government, but the decision meant that the local government of Kotabaru could no longer exercise its authority over the cave, and had no right to control the company’s exploitation.\textsuperscript{660}

\subsection*{(b) The Claimant’s Claims}

\textsuperscript{656} Interview with Dariatman, Chief of Bangkalaan Dayak village, (Bangkalaan Dayak village, 17 February 2014).
\textsuperscript{657} \textit{Suriansyah v Prada Dandai} (2007) 11.
\textsuperscript{658} Interview with Agha, Local government officer (Kotabaru, 10 February 2014). Prada Dandai borrowed money from Suriansyah and failed to pay it back. Suriansyah used this weakness to pressure him and people of Bangkalaan.
\textsuperscript{659} \textit{Execution Letter 02/Pdt.Eks/2008} (Indonesia).
\textsuperscript{660} \textit{Mataja (Regent of Kotabaru) v Suriansyah} (2008) 13, 3.
On behalf of the Kotabaru Regency, Mataja the Regentsued Suriansyah, the owner of company SB. The Regent asserted that ‘the company had no legal ownership of the cave. He demanded the court void Decision No 11 that had confirmed the company’s occupation of the cave.’ The Regent presented four arguments:

First, the Internal Decision of Ministry of Forestry in 2003 had confirmed that the Temuluang cave was located in protected forest. Under that regulation, the cave could not be owned by a private company. Second, the Ministry, through its the Director of Forest Protection and Conservation in 2007, had issued a Licence Revocation Letter in which it appointed the local government as the sole regulator to manage and appoint companies or local people who are willing to manage the cave. The Letter had voided the exploitation permit of the SB Company which was started in 2000. The Licence Revocation Letter had been issued long before Court Decision No 11 named Suriansyah as the legal permit holder of the Temuluang cave. At that point, the cave arguably should have been governed by the Kotabaru government. Third, the Indonesian Constitution art 33 (3) states that ‘natural resources in Indonesian soil and water should be regulated by the State and used to promote social welfare.’ His final argument was the BAL applied as it had a similar concept to the provision of the Constitution with regard to natural resources management.

(c) The Defendant’s Defences

The SB Company rebutted the claimant’s claims as follows:

First, with regard to the Court’s jurisdiction to hear the case, it contended that the District Court had no jurisdiction to hear the case, because the subject matter was the legality of the company’s exploitation permit over the cave. Second, the company SB had been legally established as evidenced by Notary Certificate in 1999 and awarded the exploitation permit in 2000. Therefore its exploitation activities in the cave were legal. Third, the company rejected the License Revocation Letter issued by the Director of Forest Protection and Conservation in 2007 arguing it was based on an alleged unreliable empirical evaluation made up by the evaluation team. The allegation that the company failed to conserve the environment by polluting the cave was, the defendant argued, untrue. Fourth, in order to invalidate the License Revocation Letter, the company attempted to sue the Minister of Forestry in the Administrative Court, but the lawsuit was declared inadmissible.

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661 Ibid 21.
662 Internal Decision of Ministry of Forestry No 100/Kpts-II/2003 (Indonesia).
666 Law No 5 of 1960 on Agrarian Law (Indonesia) art 2 (2).

With regard to the division of authority between central and local governments, Government Regulation 82 of 2007 (Indonesia) has favored local government over the company. In addition, the Kotabaru Regent has handed down Regent Decision No 15 of 2007 concerning Permit on Swift Nests.
Finally, the defendant argued that local government must respect Decision No 11 which held that Suriansyah was legally the owner of the company and the legitimate regulator of the cave.668

(d) The Judgment

The Court stated:

According to the positive law, including the Constitution, a private company cannot ‘own’ natural resources, especially in protected forest areas; the local government has a pivotal role as a regulator, companies are merely permit holders, and last but not least, Decision No 11 was a private internal conflict concerning ownership of the company, so it could not be used as a foundation for asserting right.669

The Court favoured the Kotabaru government (claimant) over the defendant company. Therefore, the District Court ‘voided Decision No 11 and cancelled the implementation of SB’s (Suriansyah’s) ownership right of occupation of the Temuluang Cave.’670

(e) Analysis

This case is relevant to this thesis in two important aspects.

First, it concerns the Court’s interpretation of the principles governing state acquisition rights as stated in art 33 (3) of the Constitution. The Court stated: ‘art 33 (3) and the BAL were the touchstones for this case: the State shall not be intimidated by the company, instead the local government shall execute its roles and authorities toward the company and protect indigenous peoples … the wording “to the greatest benefit of the people (social justice)” should be key’.671

Based on the judgment, it is clear that the Court paid attention to indigenous peoples’ rights and the role of local government in asserting pluralism and governing natural resources. Taking the analysis further in interview, Judge Suyadi, who had chaired said ‘we (the judges) realised that the cave has both cultural and economic significance for the people of Bangkalaan Dayak village, therefore handing the cave over to the care of an irresponsible company would be a wrong decision to make,

669 Ibid 120.
670 Ibid 123.
671 Ibid 140.
because the company had vested-interests over the cave. However, the Court also realised that the indigenous peoples were not able to manage the cave by themselves because there were too many interest groups within the village.

Therefore, the Court was of the view that the local government must step in to mediate contending interests, regulate the cave and protect indigenous peoples for vested-interest parties. Judge Suyadi added in interview that ‘favouring local government does not necessarily mean abandoning indigenous peoples’ rights, in fact, it provides opportunities for indigenous peoples to develop and it protects them from vested-interest parties’. From this case, the thesis concludes that the Court established a policy of state law pluralism, where the local government was recognised as having a right as a regulator and indigenous peoples were recognised as legitimate legal entities. This judicial ‘policy’ corresponded to the policy of medebewind stated in the BAL, as the Court intentionally transferred the right to manage the indigenous cave to the local government. However, in order to internalise the decision, the local government needed to provide a legal mechanism (power vested in local government) to help indigenous peoples adapt to modernisation.

The second important aspect of the case was the judicial approaches adopted in reaching the decision. The Court considered the following relevant legal facts before deciding the case:

First, legal documents had been issued by the Ministry of Forestry stating that the company was neglecting environmental aspects when harvesting bird nests from the cave. Second, the Court considered the Regency Regulation of Kotabaru Regency and the Decision of the Administrative Court. The License Revocation Letter issued by the Director of Forest Protection and Conservation remained legal because Suriansyah’s lawsuit at the Administrative Court had not been accepted as a legally recognisable claim. Third, the Court Decision No. 11 decided a purely private internal conflict concerning ownership of the company. Occupation of the Temuluang cave was not an aspect of the bundle of rights involved with SB’s dispute. The Decision had no legal consequences as to the nature of the entitlement to occupy the cave. Lastly, based on witness testimonies, the first witness, Sukhrawardi said that the Revocation Letter was based on a trustworthy evaluation, and was not unreliable as the SB Company had alleged.

From the judgment, it is clear that the Court firstly considered legal documents as its reasoning. The aim was to determine whether or not the applicant’s claim was valid. Judge Suyadi explained in

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672 Interview with Suyadi, a former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).
673 Interview with Suyadi, a former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).
674 Law No 5 of 1960 on Basic Principle of Agrarian Law (Indonesia) art 2(4).
675 Mataja (Regent of Kotabaru) v Suriyansyah (2008) 13, 55.
documents for both sides were examined to determine whose documents were valid and more reliable. However, the Court not only consider legal documents, but also went further and put more weight on the way in which the company’s exploitation permit over the cave was implemented by examining witnesses’ and victims’ testimonies. In this respect, Judge Suyadi gave the opinion that ‘to reach a fair decision, social facts are collected from witness testimonies aiming to capture “a sense of justice” in this dispute. Therefore it would appear that the Court had taken into account social aspects of the case by giving weight to witness testimonies. In this decision, it is clear that the judges used social justice as the main criterion. Nevertheless, the notion of ‘a sense of justice’ is quite subjective. This certainly suggests that the court decision was not entirely free from subjectivity. Those ‘subjectivities’ were counter balanced by the examination of legal documents, by doing so, the Court could assess the comparative value of the elements of its reasoning. The Court also employed a policy-driven decision by appointing local government as a sole regulator of indigenous property.

Additionally, the Court attempted to settle the uncertainty with regard to the legal status of the Bangkalaan Dayak’s forest, including its ancestral cave. In its decision, the Court held that ‘Bangkalaan Dayak forest is a protected forest, in which local government has authority to manage and issue exploitation licenses.’ However, according to villagers, up until today the status and function of the forest is still uncertain. Regardless of the legal status of both protected and production forests, they still fall into the state forest category. The status of the Bangkalaan Dayak’s forest, therefore, must be renegotiated based on Indigenous Forest Law Case (2012) 35.

2 Suriansyah v Mataja (Regent of Kotabar) (2009) 45 High Court

Date of judgment: 18 May 2010

(a) Relevant Facts

Decision No 13 invalidated Decision No 11 holding that Suriansyah and its company had no right to exploit the cave. As a result, the productivity of the company decreased because the company had stopped exploiting the cave.

(b) The Claimant’s Claims

676 Interview with Suyadi, Former judge at Kotabar District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).
677 Interview with Suyadi, Former judge at Kotabar District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).
679 Interview with anonymous (Bangkalaan Dayak Village, 9 February 2014).
Suriansyah claimed that ‘Decision No 13 had violated his property rights and that he suffered economic loss’. Suriansyah had legitimate proof of establishment of his company as evidenced by the Notary Certificate of 1999 and the exploitation permit awarded in 2000. Therefore its exploitation activities in the cave were legal.

Suriansyah questioned the letter of authority signed by Mataja alleging it was an illegal document. Because there was no Regency stamp on the letter, Mataja’s legal standing to effect legal relations was in question. Therefore, the claimant argued ‘District Court’s Decision No 13 should be overturned.’

(c) The Defendant’s Defences

Mataja’s lawyers rejected the company’s claim as irrelevant, because even though Mataja omitted to place a Regency stamp on the letter, the contents of the letter implied, or were a necessary incident of, his position as a Regent of Kotabaru. Mataja’s lawyer rebutted Suriansyah’s claims arguing that ‘a technicality cannot overrule the substantial matter of the case’.

(d) The Judgment

The Court stated: ‘the formality details of the letter were crucial in determining the legal standing of the party. Without strong and certain legal standing, the case was also void … furthermore, the legal certainty of the exploitation permit issued in 2000 should be maintained’.

The High Court over turned District Court’s Decision No 13 that had vindicated the Kotabaru government. As a consequence the court restored Decision No 11.

(e) Analysis

The High Court asserted that ‘the technicality (Regency stamp) was important to reach legal certainty, because it implied the Mataja’s position as a disputing party, without the stamp, the Mataja’s standing was uncertain’. In this case, none of the parties were asked to deliver their testimony, the Court decided the case at the first stage - documentary examination - and the Court did not intend to suggest that the Defendant re-issue his letter of authority.

681 Ibid.
682 Ibid 45.
683 Ibid 47.
684 Ibid 49.
685 Ibid 45.
The High Court’s reasons for the judgment were based on a technicality and procedures. It aimed to reach legal certainty rather than deal with substantive matters of justice regarding the legal rights central to the dispute over the Temuluang Cave. This High Court decision provides evidence that some Indonesian judges are still strongly influenced by a formalistic approach, and appear unaware of the involvement of substantive justice and equity in modern Indonesian law. This thesis argues that courts need to balance procedural issues and technicalities against sociological facts and social urgencies which underlie the cases.

Unfortunately, interviews could not be held with the judge who decided this case, because, according to Justice Abdurrahman who is originally from South Kalimantan Province, the Chair Judge had been transferred to another High Court in the eastern part of Indonesia’s archipelago and had been replaced by Justice Mustafa.

3 Mataja (Regent of Kotabaru) v Suriansyah (2011) 273 Supreme Court

Date of judgment: 29 September 2011

(a) Relevant Facts

As a consequence of the High Court decision, the Kotabaru government’s officers who wanted to inspect the cave and who exercised administrative duties were evicted from the village. The condition of the village became uncertain and chaotic because the Company started to re-occupy the cave. The indigenous peoples demonstrated in front of the Regency office asking for a restoration of their communal rights.

(b) The Claimant’s Claims

The Kotabaru government appealed to the Supreme Court in 2010 on the ground that ‘the High Court decision was based on irrelevant and overly technical considerations … The Regent Mataja asked that the Supreme Court overturn the High Court decision, and restore the decision of the District Court’.

(c) The Defendant’s Defences

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686 Interview with Abdurrahman, Justice of the Supreme Court, (Banjarmasin, 3 January 2014).
687 Mataja (Regent of Kotabaru) v Suriansyah (2011) 273, 3.
688 Ibid 11.
Suriansyah responded ‘by defending his company’s exploitation and ownership of the Temuluang Cave, arguing that the exploitation was guaranteed by the BAL.\textsuperscript{689} Moreover, he claimed that Decision No 11 had been legally recognised as a precedent, thus its validity was irrevocable’.\textsuperscript{690}

\textit{(d) The Judgment}

The Court stated: ‘technicality cannot be considered as legal reasoning, the Court shall weigh the facts and laws’.\textsuperscript{691}

The Supreme Court held that ‘the High Court’s reasoning was flawed and therefore its decision should not be applied, and the District Court’s decision would stand’.\textsuperscript{692} Throughout these long legal processes, the Kotabaru government had remained the legal regulator of the cave, with the right to appoint companies to exploit the cave. Decision No. 11 and its implementation was rendered null and void.

\textit{(e) Analysis}

The judgment stated:

The Supreme Court adopted the District Court’s reasoning. With regard to the High Court decision that had overruled the District Court decision, the Supreme Court declared the High Court decision a failure because it did not appropriately manage the disparity between the essence of justice and procedural law. It was not acceptable for Court to disregard the essential elements of justice by placing too much consideration on procedural matters. The lack of the Regency’s stamp on the letter of authority was a technical mistake made by Mataja, and it should not result in the true subject matter of the case being dismissed. Therefore in the name of substantial justice, the Supreme Court voided the High Court decision.\textsuperscript{693}

To shed more light on the decision, Justice Kamil who chaired the case was interviewed. He admitted that ‘the case involved many vested-interest parties, therefore we (the judges) were convinced that it was necessary to expel the company from the village, because according to the plaintiffs’ testimonies and the District Court decision, it was not benefiting the people, and was causing actual harm’.\textsuperscript{694} He added ‘the Court should protect and preserve indigenous peoples and

\textsuperscript{689} Law No 5 of 1960 on BAL (Indonesia) art 21.
\textsuperscript{690} Mataja (Regent of Kotabaru) v Suriansyah (2011) 273, 28.
\textsuperscript{691} Ibid 56.
\textsuperscript{692} Ibid 60.
\textsuperscript{693} Ibid 78.
\textsuperscript{694} Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
their laws from vested interest parties; state law should be on the side of indigenous peoples’. Concerning the Regency stamp, he stated ‘the judiciary must be critical of legal (formal) documents, because the truth cannot be deduced simply from legal documents alone … in fact the judge has an obligation to reveal the truth by referring both to valid legal documents and to empirical facts’.

The Supreme Court applied similar reasoning to that of Judge Suyadi in the District Court. It is clear that this final decision of the Supreme Court truly reflects the spirit of substantive justice because that Court disregarded an irrelevant technical mistake made by Mataja on his letter of authority. Implicitly, the Court confirmed the status and function of the Bangkalaan Dayak’s forest as a protected, not a production, forest in which local government has the authority to manage and regulate the forest based on the needs of indigenous peoples. Once again, the Court strengthened the policy of state law pluralism by giving indigenous peoples opportunities to adapt to modernisation.

4 Indigenous Peoples of Bangkalaan Dayak v Suriyansyah (2008) 14 District Court

Date of judgment: 28 December 2009

(a) Relevant Facts

Before the Mataja (Regent of Kotabaru) v Suriyansyah (2011) decision was handed down, the indigenous peoples of Bangkalaan Dayak also sued SB in the Kotabaru District Court in response to Decision No 11 and the implementation of the decision. Having been taunted and threatened by the Company’s bodyguards, indigenous peoples were under despotic rule, meaning the indigenous peoples had no rights to communally harvest the bird nests and were forced to accept the dividend which the Company had decided. The village’s condition was hostile because the villagers were divided: some supported the Company; others were opposed to the occupation.

(b) The Claimants’ Claims

Decision 11 had found that Company SB was a legitimate owner of Temuluang Cave with a legal basis to exploit the cave. The indigenous peoples asserted:

The Temuluang Cave was their indigenous property: it had been nurtured by their ancestors, and managed on behalf of all peoples of Bangkalaan Dayak to whom the cave’s produce had been

695 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
696 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
distributed. Recent developments in local government regulated the cave for the benefit of the indigenous peoples. 698

The claimants presented empirical proof that evidenced the presence of indigenous peoples and their institutions within Bangkalaan Dayak village for an unbroken period up to the present.

The indigenous peoples of Bangkalaan Dayak were still harvesting the cave around three or four times a year. The cave produces roughly 300-400 kilograms of swallow bird nests and the profit from selling that product was then fairly distributed to all residents of the village. Moreover, the indigenous peoples were still upholding their living adat law: the evidence was that they conducted a traditional thanksgiving ritual (pemujaan balian) every year as an expression of happiness and thankfulness for a successful harvest. 699

Moreover, the claimants stated:

Even though indigenous peoples of Bangkalaan Dayak village have no written document, or legal certificate as a foundation for their right to the cave, Indonesian legislation guaranteed indigenous rights. The Indonesian Constitution states that: ‘the State recognises and respects indigenous peoples. Their customs and traditions should be preserved as long as they are not an impediment to development or breach the Unitarian principles’. 700 Additionally, the Law of Human Rights and the Law of Regional Autonomy also expressed a similar concept. 703

(c) The Defendant’s Defences

In response to the indigenous people’s legal reasoning, similar to that in Decision No. 13, the company countered the claimants’ allegations by asking ‘why both parties (local government and indigenous peoples) had not submitted an intervention lawsuit when the District Court was hearing the company’s internal dispute (Decision No. 11).’ 704 The defendant company claimed:

It was suspicious that both parties only sued the company after the Court already had decided the case. The company had rejected the License Revocation Letter issued by the Director of Forest Protection and Conservation in 2007, because the Letter was based on an allegedly unreliable empirical

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698 Ibid.
699 Ibid 17.
700 The 1945 Indonesian Constitution (Indonesia) art 18B (2).
701 Law No 39 of 1999 on Human Right (Indonesia) art 6 (2).
702 Law No 32 of 2004 on Regional Autonomy (Indonesia) art 2 (9).
704 Ibid 34.
evaluation. It asserted that the allegation that it failed to conserve the environment by polluting the cave was untrue.705

The company rebutted the claimants’ legal reasoning with regard to the recognition of indigenous peoples’ rights in several Laws and Internal Regulations, arguing it was not clearly stated, for example, BAL art 16(1) and (2) only provided a short recognition of indigenous communal land, with no further elaboration of the implications for ownership disputes involving indigenous communal land.706 The company also relied on the broad phrase ‘national interest’, applicable in several Acts, as the main reason for not fulfilling indigenous peoples’ land rights claims. The company argued:

Accommodating traditional rights could be an impediment to Indonesian development and investment. In addition, practising adat law by conducting a thanksgiving ceremony cannot be used as a foundation of rights, because the foundation of rights must emanate from authentically legal written documents. On that basis, a thanksgiving ceremony could not amount to legal proof.707

(d) The Judgment

The Court held that: ‘the implementation of adat law and the protection of indigenous peoples’ rights are the “spirit of the BAL”, therefore, they are not contradictory … the existence of indigenous peoples in Bangkalaan Dayak village was confirmed through a viewing and social facts gathered from testimonies’.708

The District Court of Kotabaru granted ‘the indigenous peoples legal status as traditional owners with associated legal rights to Temuluang Cave’.709

(e) Analysis

The thesis analyses this case from two aspects, as follows:

First, the Court appreciated the existence of living adat law and indigenous peoples’ rights. Regarding the subject matter, the Court was convinced that ‘indigenous peoples rights are the spirit

705 Ibid.
706 Ibid.
707 Ibid.
708 Ibid 35.
709 Ibid 55, 56.
709 Ibid 87.
of the BAL, therefore, the Court must respect and appreciate these rights as long as they are not contrary to the national interest.\footnote{710}{Ibid 55.}

Judge Suyadi who chaired the case, exercised his right to a view of the Bangkalaan Dayak village. From this view, he concluded ‘the adat law is a valid living law: the real and functional law in the village … one aspect of the evidence of it is the existence of Balais and thanksgiving ceremony (pemujaan balian).’\footnote{711}{Interview with Suyadi, Former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).} This suggests that this judgment can be understood as an intention to consolidate and protect indigenous peoples from vested-interest parties by recognising their property rights. It also legitimises the existence of the indigenous peoples of Bangkalaan Dayak village as ‘semi-autonomous social fields’,\footnote{712}{Moore, above n 126,719.} in which indigenous peoples generate their own rules, sanctions and customs internally through their balais and TDR forums.

The second point is relevant to the judicial approach. Despite the fact that the Court weighed more social facts in the balance, examination of legal documents also made a significant contribution to this case. Judge Suyadi elucidated this point: ‘if the judge faces a choice between substantive justice and legal certainty, then substantive justice must be prioritised as “the ultimate certainty”, although other aspects of legal certainty must also be considered.’\footnote{713}{Interview with Suyadi, Former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).} In this case, the Court gave great weight to the License Revocation Letter issued by the Director of Forest Protection and Conservation in order to reach legal certainty. The Court also interpreted the social aim of the BAL as being to strengthen the judgment in favour of indigenous peoples.

Due to the paucity of written evidence, the Claimants relied on oral testimonies by five witnesses. The Court accepted and considered these testimonies. In its consideration, the Court gave great weight to oral testimony: unwritten, rather than written proofs. Those witnesses said that ‘the Temuluang Cave had never been exploited privately by the indigenous community … all effort in the cave was communal.’\footnote{714}{Indigenous Peoples of Bangkalaan Dayak v Suriatsyah (2008) 14, 55.} The approach taken by the Court might be considered as inconsistent with the overarching purpose of the civil procedural code. However, the thesis argues that the Court did implement the appropriate approach, as both the past and the current legislation relating to the judiciary opens the possibility for judges to ‘consider living adat’ when deciding cases involving

\footnotesize{710} Ibid 55.\footnotesize{711} Interview with Suyadi, Former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).\footnotesize{712} Moore, above n 126,719.\footnotesize{713} Interview with Suyadi, Former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).\footnotesize{714} Indigenous Peoples of Bangkalaan Dayak v Suriatsyah (2008) 14, 55.
indigenous peoples. In this respect, the Court used the social justice principle as the main criterion to decide which law is to be applied in this case.

The court also conducted a viewing of the Temuluang Cave. This should be appreciated in the sense that the judge was willing to observe the real life context of indigenous peoples and to examine the socio-cultural facts and empirical conditions of the location fundamental to the ownership dispute. In referring to the positive procedural law, a viewing is not evidence, it is only an instrument used to ascertain the location of the subject matter where ownership is in dispute. Confronted by these procedural laws, Judges Suyadi responded in interview that ‘a field view can be used to assess, ascertain and complete the evidence in the setting of indigenous village’. This kind of judicial approach could also be categorised as an exercise of explicit judicial discretion because the *Judiciary Power Law* permits Indonesian judges to take into account *adat* law, and its social context and surroundings.

This thesis relates the cave viewing approach to the writing of Ter Haar who encourages judges go into the village (*desa*), this being the only way for any judge to test precedents in accordance with *adat* law and to be able to deliver localised decisions in a responsible way. The viewing was crucial to determining an outcome by ascertaining the legal and social facts in the case. Through these processes, the District Court granted the indigenous peoples legal rights to utilise and preserve their indigenous property, the Temuluang Cave. Clearly, the Court had favoured legal and societal facts and legal pluralism over the formality of Decision No. 11.

Very importantly, the court applied the doctrine of precedent by following the precedents that had granted indigenous peoples legal rights in *Supreme Court Decision No 3328/Pdt/1984* and *Supreme Court Decision No 2898 K/Pdt/1989*. Applying a precedent requires the court to assess what constitutes sufficient evidence that a particular event took place, and to decide that latter cases involving the same essential or material facts must be decided in the same way. It was a rare discretion exercised by Indonesian judges. In the Indonesian legal system, the first and primary source of law is legislation. Precedent from cases is only considered as a supplementary source of law. In this case, the Court adopted an activist attitude by departing from the rigid rules of the Civil Law tradition. This activism attitude aimed to provide legal protection and substantive justice

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715 See Chapter 4 on Supreme Court’s Proceeding.
716 Civil Law Procedure (Indonesia) art 1866 and Rechtsreglement voor de Buitengewesten (Rbg), art 264.
717 Herziene Inlandsch Reglement (HIR) art 153. Rechtsreglement voor de Buitengewesten (Rbg) art 180.
718 Interview with Suyadi, Former judge at Kotabaru District Court currently judge at Semarang (Central Java) District Court, Semarang District Court (Semarang, 12 March 2014).
719 Law No 48 of 2009 on Judiciary (Indonesia) art 5 (2).
720 Ter Haar, above n 66, 231.
721 See Chapter 3 on Legislation.
for indigenous peoples. Additionally, in both cases (Decisions No 13 and 14) Judge Suyadi showed great leadership and authority. As a chair of the judges’ committee, he seems successful in influencing and directing his fellow judges to agree with his perspective.

5  Suriansyah v Indigenous Peoples of Bangkalaan Dayak (2010) 53 High Court

Date of judgment: 16 November 2010

(a) Relevant Facts

Due to the District Court decision No 14, Suriansyah and his company lost the legitimacy and respect that they had previously enjoyed in the village.\(^{722}\) The indigenous peoples demonstrated in front of SB Company’s office and local police narrowly averted a brawl. The uncertain and chaotic legal and social conditions meant the Company could no longer exploit the natural resources within the cave, and as a result the company suffered huge economic losses. The indigenous peoples, and local government did not respect the Court’s decision that the Company’s property right had been legally granted by the State.

(b) The Applicant’s Claims

The Company appealed to the High Court on the following grounds:

The first argument was that, Decision No 14 and Decision No 13 were contradictory: there was alleged uncertainty as to the correct ‘owner’ of the Temuluang Cave. Second, the District Court made a fundamental mistake by accepting indigenous rituals, the thanksgiving ceremony, and witness testimonies as main considerations in the case. In fact, Suriansyah argued, non-written evidence in civil cases is inferior to written evidence; the indigenous peoples had no land certificate or other written document as the legal basis for their claim; thus their claim over the cave should be disregarded. Third, the company claimed that indigenous communal rights can be a serious impediment to Indonesia’s development policy.\(^ {723}\)

(c) The Defendant’s Defences

The indigenous peoples rejected all of Suriansyah’s claims by referring to their own previous arguments.\(^ {724}\)


\(^{723}\) Ibid 32.

\(^{724}\) Ibid 47.
(d) The Judgment

The Court found that ‘the practice of the thanksgiving ceremony in the village was legal proof … adat law and indigenous peoples’ rights are the “spirit” of the BAL, thus the indigenous property shall be protected and cannot be owned by private parties … the District Court’s decision was legally correct’.

The validity of District Court decision No 14 was affirmed by the High Court decision.\textsuperscript{725}

(e) Analysis

There are several important aspects of the High Court decision:

First, the Court preserved indigenous peoples’ rights over private commercialisation. The Court rejected the company’s defence in which it claimed ‘to have a legal right to extract the natural resources of the cave in that its practice was part of investment that supported the Indonesian national interest.’\textsuperscript{726} Justice Mustafa who chaired the case, elaborated the term of ‘national interest’ in interview. She said: ‘the term is rather ambiguous as there is no further explanation in the legislation, but we (judges) concluded that it means a social or community-based interest’.\textsuperscript{727} Clearly, her reasoning was based on human rights principles, inclusive development and contextual appreciation of justice. Thus the extraction of natural resources was not in the national interest in this case, but for private vested interests, and that this exclusively privatised commercialisation breached the rights of the indigenous peoples.

The Court also disagreed with the Company’s interpretation of the unification policy enshrined in the Acts that it justified its occupation and negated the indigenous peoples’ rights. The Court stated: ‘unification, which is one logical consequence of modernisation, aims to transform pre-modern (agrarian) societies into modern (industrial) societies on a national scale … It can be a trigger for communal conflicts … unification cannot be rushed, because the pre-modern communities take a long time to adapt.’\textsuperscript{728} In this judgment, it is clear that the Court favoured indigenous peoples’ rights over any legitimacy of the Company’s operations. In the debate between ‘development’ and human rights, the Court considered human rights principles and state law pluralism. The High Court

\textsuperscript{725} Ibid 55.
\textsuperscript{726} Ibid.
\textsuperscript{727} Interview with Marni Emmy Mustafa, Former Chief Justice of High Court of South Kalimantan. Currently, Chief Justice of High Court of West Java (Bandung, 21 March 2014).
decision is based on the notion of affirmative action by giving indigenous peoples a chance to adapt to modernisation at their own pace.

The second point concerns the High Court’s judicial approach. The High Court approved the District Court’s field view to familiarise itself with the sociological ambience within the village. It also approved the District Court’s reasoning, by stating that ‘the thanksgiving ceremony was legal proof, even though it could not be considered as a foundation of right’. The High Court thus drew on a more inclusive understanding of the term of ‘national interest’ and utilised an activist judicial reasoning approach by accepting unwritten oral testimonies of indigenous peoples and considering indigenous traditions.

Moreover, there had been an interesting judicial debate as background to the High Court’s decision. As Justice Mustafa elaborated in interview, the other member judges tended to discount the legal standing of the indigenous peoples of Bangkalaan Dayak. The letter of authority signed by Dariatman and other representatives was considered illegal because their position or role in the village was still questionable; therefore they may not have been legally eligible to represent the indigenous people of Bangkalaan Dayak. The representatives should have signed a special letter of authority. The two other judges were convinced the case should be declared inadmissible (niet ontvankelijk verklaard/ N.O). Their argument is based on Herziene Inlandsch Reglement art 123 (1) and Decision of Supreme Court No 296 K/Sip/1970 on 9 December 1970. Both Acts and precedent highlighted the importance of the Letter of Attorney. This suggests that within the Supreme Court system, there are judges with overly-formalistic approaches. Their reasoning could hinder the protection of indigenous peoples and increase the tension between State law and adat law.

Justice Mustafa disagreed with the other judges on the grounds that a judge must seriously consider the indigenous peoples and their living adat law. She emphasized that ‘it is not just the procedural law that matters; judges must also be able to absorb the essential values of justice’. Moreover, in order to understand indigenous peoples and their law, she asserts that judges cannot simply rely on their legalistic perspective. A sociological perspective should be included, such as that ascertained from the field view done by the District Court judges. Justice Mustafa assertively led the panel of judges to reach consensus. The case was then able to continue.

The thesis argues that this decision relied to a great extent on Justice Mustafa’s personal perspective. In interview, Justice Mustafa admitted that she is of Minangkabau (West Highland of

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729 Ibid 54.
730 Interview with Marni Emmy Mustafa, Former Chief Justice of High Court of South Kalimantan. Currently, Chief Justice of High Court of West Java (Bandung, 21 March 2014).
Sumatra) descent. Minangkabau is a region that has a strong tradition of living *adat* law. Her background may explain why she has a strong understanding of the Temuluang Cave case. She added: ‘there are no trivial or small cases, all cases should be dealt with seriously and guided by the judge’s internal morality (*keyakinan hakim*)’. While Justice Mustafa is not necessarily saying that a judge is subjective, she does recognise that being totally objective is also impossible. The thesis argues that a judge as a human being must have an internal morality or empathy that should be considered and developed from his or her experiences.

6 *Suriansyah v Indigenous Peoples of Bangkalaan Dayak 1566 (2011) Supreme Court*

Date of judgment: 28 November 2011

(a) *Relevant Facts*

The Company perceived a conspiracy between the indigenous peoples, local government, and another company which was keen to take over the SB Company’s exploitation permit in Bangkalaan Dayak village. The allegation of conspiracy was based on the mediation meeting between indigenous peoples, local government officers and Suriansyah. The indigenous peoples and local government were insistent on proceeding to adjudication processes, even though Suriansyah was willing to negotiate. Because of the uncertain and chaotic conditions in the village, his Company could not exploit the cave efficiently.

(b) *The Claimant’s Claims*

A further appeal to the Supreme Court was lodged by SB Company. It argued two legal errors which it alleged had occurred in both the District Court of Kotabaru and the High Court of South Kalimantan.

First, the company claimed the letter of authority signed by claimants (Dariatman and other representatives) both in the first instance court and the Appeal Court, were illegal because the position or role in the village of Dariatman and the other representatives in the village was still questionable. Therefore, Dariatman’s legal standing was uncertain. The company claimed this procedural error should be declared inadmissible by the court. Second, SB alleged the District Court of Kotabaru created contradictory decisions and legal uncertainty by deciding three different outcomes regarding the Temuluang Cave: Decision No 11 awarded Suriansyah rights to the cave, Decision No 13 awarded

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731 Interview with Marni Emmy Mustafa, Former Chief Justice of High Court of South Kalimantan. Currently, Chief Justice of High Court of West Java (Bandung, 21 March 2014).

rights to the local government (Mataja, a Regent of Kotabaru) and Decision No 14 awarded rights to the indigenous peoples of Bangkalaan Dayak.733

(c) The Defendant’s Defences

The indigenous peoples rejected all of Suriansyah’s claims by referring to their own previous arguments.734

(d) The Judgment

The Court found that: ‘both Courts had used correct legal reasoning and made correct decisions … the cave belongs to the indigenous peoples as their indigenous property’.

The Supreme Court rejected the company’s reasoning and acknowledged that indigenous peoples have a solid legal right to their ancestors’ cave.735

(e) Analysis

Several important findings flow from this decision:

First, the Court clarified the inconsistencies between the previous decisions. With regard to the contradiction between Decision No 13 and Decision No 14, the Court clearly stated that ‘the indigenous peoples of Bangkalaan Dayak are the legal owners of Temuluang Cave as decided by Decision No. 14.’736 However, the Court clarified the issue with regard to the role of local government ‘the Kotabaru Government also has a regulatory right over the cave, to regulate and appoint investment with the indigenous people’s approval as decided by Decision No. 13’.737 In this respect, the Supreme Court strengthened the policy of medebewind in Decision No. 13.738 In deepening the judgement, Justice Kamil who chaired the two cases (Decision No 1566 and Decision No 273) stated: ‘we (the judges) realised that in this triangular dispute, indigenous peoples were the most marginalised compared to the other parties, thus the Court must create “policy” to overcome this issue’.739

733 Ibid 17.
734 Ibid 19.
735 Ibid 34.
736 Ibid 42.
737 Ibid 43.
738 Law No 5 of 1956 on Basic Principle of Agrarian Law (Indonesia) art 2 (4).
739 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
This thesis argues that the decision clearly manifests and strengthens the role of state law pluralism, in a situation where both parties had obtained rights over the cave. The Court provided a ‘policy’ to soothe the tension between indigenous peoples and the local government when the local government was acting as a regulator and policy maker. The indigenous peoples of Bangkalaan Dayak village and their adat law and traditions still needed the government protection and public policy to cope with their adaptation to inclusive modernisation.

Second, concerning judicial reasoning, the court did not find any errors regarding the letter of authority signed by indigenous representatives who were the legitimate representatives of the indigenous peoples of Bangkalaan Dayak. Therefore, they had legal standing. Justice Kamil added: ‘the real issue was the social conflict happening in the village, not the legality of the letter of authority.’ This thesis argues that this observation also indicated that the judges were giving more consideration to contextual facts that to textual matters and technicalities. This judicial approach helps to consolidate and protect indigenous peoples and their unwritten law from the hegemony of formalistic-written law. By doing so, the Court promotes legal pluralism in the local context.

In interview with Justice Kamil it was clear, he tended to have great sympathy for the indigenous peoples of Bangkalaan Dayak. He expounded on his past experiences, a long time ago, as junior judge in a State Religious (Islamic) Court. He often encountered family and matrimonial cases that could not be solved by positive law. He said: ‘sometimes positive laws are not applicable at the grassroots level, and in the worst cases, people ignore and resist the law. In that case, positive law loses its sociological significance. In such grassroots cases the role of the judge is to interpret the positive laws so they can fit into the community’s approach to life.’ This practice of legal interpretation can also form a ‘policy’ when the norms in the legislation are insufficient to answer the legal and social problems in society. The judge then has a freedom to decide the case based on their inter-subjective reasoning.

The thesis argues that whatever view is taken of judicial objectivity, Justice Kamil’s experiences influence his judgments, as he has expressly acknowledged. His judgments are based on experience, and experience is interpreted in terms of his own enculturation. This condition may confirm a famous statement of Justice Oliver W Holmes: ‘the life of law has not been logic, but experience’. Justice Kamil also added that ‘the cardinal aim of law is to settle and soften conflict between people, rather than judging and punishing them.’

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740 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
741 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
742 Holmes, above n 159, 241.
743 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
with Ter Haar’s advice to judges to use Indonesian mediation (\textit{rukunan}) practice\textsuperscript{744} and to align themselves with Shapiro’s social logic thesis.\textsuperscript{745}

D \textit{Internal Strife in Bangkalaan Dayak Village}

The Temuluang Cave dispute is much more complicated than it seems on the surface. A protagonist lies behind the legal dispute and community conflict. In 2006-2008 when the conflict between indigenous peoples and SB was at its height, the indigenous peoples of Bangkalaan Dayak were stirred up by a Chinese bird nest businessman, Anwar (this is not his true name) from East Kalimantan.

Anwar promised to help indigenous peoples to reclaim their ancestors’ cave back and force the SB company out of the village.\textsuperscript{746} At that time, the indigenous peoples were suffering difficult conditions. The village was not safe because the company’s ‘bodyguards’ and sub-district policemen were intimidating the residents. The most practical decision was to agree with Anwar’s offer. Lipan, a priest and senior resident, reflecting on that time, called the decision a mistake. He recalled an incident where some of the indigenous peoples harvesting bird nests were trapped in a cave; 528 kilograms of bird nests decayed and were lost because policemen besieged the cave. The policemen then detained some of the indigenous peoples on allegations of theft.\textsuperscript{747} Anwar offered strong backup from local indigenous solidarity groups with sufficient numbers to compete with SB’s ‘bodyguards’. Through Anwar’s strong connections with the police, the detainees and bird nests (held as evidence) were released by the police. However before the lawsuit was submitted to the District Court in 2008, delegates of the indigenous peoples borrowed some money from Anwar for the purposes of lobbying the Ministry of Forestry to issue the License Revocation Letter and to defray all expenses including lawyers’ fees in Court. An acknowledgement of debt was then used by Anwar to pressure the indigenous peoples of Bangkalaan Dayak village.\textsuperscript{748}

Being aware that the indigenous village peoples were being used by Anwar for his own purposes, Dariatman withdrew as a representative, when the case was brought to the High Court. He was accused of being a traitor and a corruptor, and was ostracised by the village, while the other representatives kept pursuing their mission to tackle SB. After SB lost in the Supreme Court and its permit was voided by the government, Anwar started a new strategy. With an acknowledgement of

\textsuperscript{744}Ter Haar, above n 66, 231.
\textsuperscript{745}Shapiro, above n 339, 15.
\textsuperscript{746}Interview with anonymous (Bangkalaan Dayak Village, 9 February 2014).
\textsuperscript{747}Interview with Rully Lipan, Priest and senior resident (Bangkalaan Dayak, 9 February 2014).
\textsuperscript{748}The Acknowledgement of Debt contains some fallacies: first, the amount of money (Rp, 7,500,000,000, equivalent to AUD$ 7,500,000) is exaggerated. Second, as part of the debt, then Anwar had a lifelong entitlement to the cave. The indigenous peoples could not sell the bird nests to other sellers and could not freely manage the cave.
the debt in his hand, he ruled the village by using his ‘bodyguards’, believed to be local NGO workers, to guard the cave from the residents of Bangkalaan Dayak. The people of Bangkalaan Dayak once again divided and there were several brawls between Anwar’s ‘bodyguards’ and the rest of the indigenous people at that time. The village was very unsafe.  

The Kotabaru government, together with Kotabaru’s tribal chief Rustam, wanted to ease the tension by inviting all local leaders of Bangkalaan Dayak to Rustam’s office. The meeting seemed under control, but when the people returned to their village, the hostile conditions were unchanged. The government and legislature had passed Regional Legislation concerning the management of the Temuluang Cave in Bangkalaan Dayak, and appointed another company, Wallesta, to manage the cave. Wallesta is chaired by Habib Aman, a businessman of Arabic descent. The group of indigenous peoples who supported Anwar rejected the appointment letter by demonstrating in front of the Regency office. From 2008 to 2011 Anwar was behind all demonstrations that were conducted by the indigenous peoples to reject SB, Wallesta, and the interference of the Kotabaru government. In 2012, Junghit, one of the indigenous peoples’ representatives, with financial assistance from Anwar, sued both the Kotabaru Regency and Wallesta through the Administrative Court of South Kalimantan in Banjarmasin City. However, the Administrative Court declared the lawsuit inadmissible.

At least Wallesta’s exploitation of the indigenous peoples’ Temuluang Cave was better at acknowledging communal interests than that of the SB Company. Wallesta divided the profit from selling the bird nests fairly with the community, and the company performed good acts of corporate social responsibility (CSR) including rebuilding the school, and buying a new ambulance vehicle. However, Anwar and his supporters kept intimidating the people of Bangkalaan Dayak. They were also spreading rumours saying that the tribal chief, Hinggan and the chief of the village, Dariatman were being bribed by Wallesta. Trust has vanished in Bangkalaan Dayak village.

The village conditions worsened when the police took Anwar’s side in the dispute. The new chief of the South Kalimantan Police allegedly supported Anwar’s ‘occupation’ of the cave. After Wallesta’s contract ended in early 2013 and the cave was in a non-aligned position, police often patrolled the village, and arrested indigenous people who were harvesting in the cave. In September 2013, there were 518 kilograms of bird nest ready for sale that were taken arbitrarily by Anwar’s bodyguards. The police claimed ignorance of the act. The indigenous peoples are fighting

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749 Interview with anonymous (Bangkalaan Dayak Village, 9 February 2014).
750 Interview with Rustam Acong, Kotabaru’s tribal chief (Kotabaru, 8 January 2014).
751 Interview with anonymous (Bangkalaan Dayak Village, 9 February 2014).
752 Interview with M. Jayadi, Secretary of the village (Bangkalaan Dayak, 19 February 2014).
alone, because the Kotabaru’s Regent who replaced Mataja seems afraid of the police, and has less charisma than Mataja.

These tense conditions are ongoing at the time of writing. However Dariatman, previously ignored by the indigenous peoples, has gradually regained their trust, and some of the representatives, such as the priest Lipan, who had supported Anwar, have now admitted Anwar was at fault. The reconciliation processes are ongoing in Bangkalaan Dayak, and the national NGO AMAN is also helping the villagers to regain sovereignty over their ancestors’ cave. If the indigenous people are found to be incapable of resolving their differences about the cave, then the most realistic step would be to find a reliable and trustworthy investor to extract the resources while giving prosperity and justice to the people of the village.

IV CASE STUDY: COMMUNAL LAND DISPUTE IN ATIRAN VILLAGE, BAT SUB-DISTRICT, HST REGENCY

A The Practice of TDR

This land dispute was taken both to TDR within the village and to the District Court of HST Regency, but neither TDR nor court mediation succeeded in settling the dispute. The claimants were indigenous peoples from Atiran village led by A’ar, an old yet charismatic tribal chief, versus the non-indigenous Banjar people of Tandilang village. The indigenous peoples of Atiran village claimed that the people of Tandilang village had occupied their land.

Within the BAT sub-district, there are three villages that are examined: Hinas Kiri or Batu Kambar village which has three Balais; Atiran village with four Balais; and Kiyu Village with one Balai.753 However this thesis will not examine all Balais in the sub-district because some of them are located far away from the issue in dispute, and have less emotional involvement with the issue. This research examines only three Balais within these three villages. The tribal chiefs of the three relevant Balais are located close to the area of dispute and have strong ties with the issue.

The first Balai is the Balai of Banyu Panas, led by A’ar. His role as leader, includes secular and religious (balian) leadership. A’ar was appointed as a tribal chief by a traditional consensus among his people. No hereditary factor is required to be a leader. However, in order to be a shaman (balian), the person first needs to learn, practice and contemplate the Kaharingan’s wisdoms.

753 Interview with Norsewan, Secretary Office of Hinas Kiri village (Hinas Kiri village, 25 January 2014).
With regard to the communal land dispute, the Tandilang and Atiran people are neighbours and some of them are even close relatives. A’ar did not want this dispute to escalate into a riot or a latent conflict. Unfortunately, since the case escalated in 2006, several brawls have occurred.\(^{754}\) To show his good intention, the tribal chief A’ar visited Tandilang village three times asking for clarification regarding their occupation on Atiran’s communal land, but the Tandilang people did not respond and ignored him. He then invited the Tandilang people and village officers, as representatives of the HST government, to his Balai to discuss the issue in a friendly way. Although there was a hot debate among the parties, it did not escalate into a brawl. However the meeting failed to reach consensus.\(^{755}\)

A’ar initiated steps to settle the dispute by conducting a TDR forum within his indigenous groups. The result of TDR was to convict the Tandilang people, demand an apology and impose a tribal fine of Rp. 2,000,000 (around AUD$200) as compensation for their illegal occupation. However the Tandilang people denied the existence of an agreement between their ancestors and Atiran’s ancestors. According to the Tandilang, there was no agreement to breach. Further, the Tandilang ignored the tribal fine decided in TDR, arguing it did not apply as they only obey the State’s positive law and their religious (Islamic) law.\(^{756}\) The outcome of TDR was disheartening because it failed to reach consensus, and both parties were unwilling to cooperate. Disappointed with the Tandilang response, A’ar, together with 91 others Atiran people, sued the Tandilang people in the District Court of HST Regency in Barabai City on June 11, 2008. The adjudication processes will be presented in the next section.

TDR as a dispute settlement forum is imbued with the local indigenous values. TDR conducted in a Balai is a forum designed to find positive and acceptable outcomes; it is not a forum to reveal others’ misfortunes and disgraces. Bad memories and grievances must be excluded. TDR is a socially refined mechanism to keep good values in their place while banishing negative values and influences. Aa’r adds:

> Settling the disputes in a Balai should be practised as stated in the old indigenous proverb: ‘pulling out gently pest weeds from a rice paddy’. By analogy, the tribal chief is a farmer who would like to remove pest weeds from the rice paddy. The farmer must carefully pull them out without damaging

\(^{754}\) Interview with Fitri, Lawyer for indigenous peoples (Banjarmasin, 21 February 2014).
\(^{755}\) Interview with A’ar, Former tribal chief of Balai of Banyu Panas (Batu Kambar village, 9 January 2014).
\(^{756}\) Interview with anonymous (Atiran Village, 11 January 2014).
the rice paddy. Pest weeds are the grievances and hatred between disputing parties, while the rice paddy is the village or community. The tribal chief must act gently to mediate and ease the dispute. Unfortunately, this sound indigenous wisdom is only applied within the village; it is often ignored by non-indigenous people and outsiders.

In TDR at the Balai of Banyu Panas there is no dichotomy between criminal and civil cases. Cases that can be settled in this Balai are generally limited to private and family cases. However some criminal cases have been settled in this Balai, and the police, enforcing state authority, have respected the TDR decisions. Gradually however the indigenous peoples under the Balai of Banyu Panas have preferred to consult the District policemen and use judicial adjudication for criminal cases.

The other neighbouring village is Hinas Kiri village. Its Balai, the Balai of Datu Galung, is led by Kawi, another old yet charismatic tribal chief. He was elected as a tribal chief by general consensus. There is not any requisite hereditary requirement for leader, and he is both a secular leader and a shaman (balian). Because Kawi was one of the witnesses to the agreement in 1964, he was familiar with the dispute between the Atiran and Tandilang people, and the unwritten agreement between their ancestors. Kawi supported the Atiran’s people to regain their ancestors’ land.

However, Kawi’s village and Balai are quite different to the Balai of Banyu Panas. The village is more heterogeneous than Atiran. The number of believers of Kaharingan is decreasing. Presently, the percentage of Muslims has nearly reached the same percentage of Kaharingan believers – around 50%; the remainder are Christians. Even though many indigenous peoples have converted to Islam and Christianity, they are still respected by Kaharingan believers and live harmoniously with each other. The living adat law is still obeyed by all religions. Non-Kaharingan indigenous peoples are still subject to the Balai’s authority. Kaharingan beliefs and values act as a guardian of the village, protecting and accommodating all residents whatever their religions and beliefs. However the indigenous peoples who have converted to either Islam or Christianity cannot be elected as a tribal chief and balian, because in order to be a balian, they must wholeheartedly accept the Kaharingan’s beliefs. Outsiders also lived in the village. They are mostly from the city, or from Java Island. The indigenous peoples welcome them warmly as long as they respect the inner ordering of the village and the Balai.

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757 Interview with A’ar, Former tribal chief of Balai of Banyu Panas (Batu Kambar village, 9 January 2014).
758 Interview with Kawi, The tribal chief of the Balai of Datu Galung (Batu Kambar village, 10 January 2014).
759 Interview with Norsewan, Secretary Office of Hinas Kiri village (Hinas Kiri village, 25 January 2014).
The living *adat* law is still practiced in the village, and particularly in the Balai, by holding a thanksgiving ceremony and ritual at the end of the harvest season. Indigenous peoples who have converted either to Islam or Christianity are invited and can join the ceremony. However in the ritual led by the shaman (*balian*) they are not obligated to participate. The purpose of the ceremony and ritual is to respect nature and to reconnect with their ancestors. After the harvest season ends, the participants prepare for the next planting season by firstly praying at the Balai.\(^\text{760}\)

There are few communal lands left in Hinas Kiri village because some of the indigenous peoples have departed from Kaharingan’s collectivism. Some of the land is now owned privately and used only for rice paddy farming. Kawi has expressed his disappointment to the local government in that it ignores his people’s existence and needs. There are many bumpy and broken roads within Hinas Kiri village, and the economic life of village residents can be classified as poor. Kawi has challenged the local government that if it remains absent and disinterested he will support the mining industry and palm oil plantation in his area, even though he obviously knows their establishment within his village may lessen the inner normative ordering among his people.\(^\text{761}\)

With regard to TDR, the Balai of Datu Galung is still effectively operating and the people, both indigenous and non-indigenous, respect the TDR mechanism. In settling a dispute, the tribal chief will invite *pembakal*, the chief of the village, and the village secretary to the meeting. The decision is based on *musyawarah* (deliberative consensus). The role of the tribal chief is merely as a facilitator or mediator. The Balai of Datu Galung has often settled disputes in family law and also criminal law. The tribal fine ranges from 1 *tahil* (around Rp. 1,000,000/AUD$ 100) to 12 *tahil* (around Rp, 12,000,000/AUD$ 1200). The highest punishment is 24 tahil for a homicide case. If the perpetrator has already been condemned in the Balai, the state officers cannot further prosecute him. Fraternity and good relationships among the people are the first priority of the Balai. However an exception to this practice is if the perpetrator is a member of a robbers’ gang and is not a resident of Hinas Kiri village. In such cases, the people of the village will let the state officer or police prosecute for them. The indigenous people of Hinas Kiri village respect the state positive law, but they consider the positive law only as a ‘web’, or second opinion safety net, if TDR fails to settle a dispute.\(^\text{762}\)

The method of the TDR in the Balai of Datu Galung is not based on strict proceedings like the formal court system, but is more akin to an informal discussion based on solidarity and friendship. TDR takes evidence seriously: for a case to be proved rationally the testimonies from the victim, the

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\(^\text{760}\) Interview with Kawi, Tribal chief of the Balai of Datu Galung (Batu Kambar village, 10 January 2014).

\(^\text{761}\) Interview with Kawi, Tribal chief of the Balai of Datu Galung (Batu Kambar village, 10 January 2014).

\(^\text{762}\) Interview with Kawi, Tribal chief of the Balai of Datu Galung (Batu Kambar village, 10 January 2014).
perpetrator and the witnesses are essential. However, in settling a case that lacks rational proofs, the tribal chief can ask the disputing parties to take an oath on their life. The person who lies on their oath will receive punishment from the Almighty. Even though it may appear irrational, some people who lied under oath have reportedly endured misfortune.

The last neighbouring village, the Kiyu Village, is located at the top of the mountain, and is considered as the one of the most remote indigenous communities in South Kalimantan. The tribal chief Maribut is an old, but charismatic man. He was appointed as a tribal chief in the 1980s, elected by general consensus, again with no heredity factor necessary to be a chief. Maribut is also both a secular and religious leader (balian). The Kiyu village is relatively free from industrialisation, albeit back in 1983 a logging company, Daya Sakti (DS) operated in Kiyu’s forest. However its exploitation was soon protested against by the people of Kiyu in general, and Maribut in particular. Within three months the company was expelled from the village and the indigenous peoples of Kiyu Village were able to regain their communal land and forest. One of the factors in this success story may be Maribut’s personality: he is a strong tribal chief, and his position as village elder also makes him more politically superior to younger people.

With regard to the Atiran people’s dispute with the Tandilang people, Maribut strongly supports the Balai of Banyu Panas led by A’ar. Maribut supports the Atiran people’s claim. The universal law of harmony that must be kept by future generations within the Meratus Mountain areas states that the Banjar people must respect Dayak Meratus people because they are considered to be like a ‘younger sibling’. And the younger people must respect their older sibling. Learning from their neighbour’s dispute, Maribut warned the villagers to be more careful about lending their ancestors’ land to non-indigenous peoples or outsiders. Though ancestors’ land can still be borrowed, but there must be adherence to the strict conditions of consent from the people of Kiyu village and their tribal chief.

Despite the close geographical distance between the other heterogeneous villages and Kiyu village, Kiyu village remains homogenous. It seems to be insulated from external influences. Neither Muslims nor Christians can be found in this village. All its residents still strongly embrace their ancestors’ belief, Kaharingan, although they still maintain good relations with their relatives who have converted to either Islam or Christianity.

Kiyu village, and its Balai, still preserves its ancestors’ land and forest strictly. The forest is fairly divided among the residents of the village, and the traditional method of shifting cultivation is still

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763 Interview with Kawi, Tribal chief of the Balai of Datu Galung (Batu Kambar village, 10 January 2014).
764 Interview with Maribut, Tribal chief of the Balai of Kiyu (Kiyu Village, 12 January 2014).
practised. Although most residents of the village do not have a high level of education, they are actively aware of the national progress on indigenous peoples’ rights. The national NGO, AMAN, has circulated news of its victory in the Constitutional Court regarding indigenous forests, and the peoples of Kiyu village have already measured and registered their ancestors’ land and forest.

With regard to TDR in the Kiyu village, Maribut gives priority to peaceful settlement (bedamai) where any conflicts and disputes must be settled within the family or village. Letting other villages know or inviting outsiders (police) to settle a dispute, is considered a failure of the village’s inner-ordering which would bring shame to the villagers and their ancestors. TDR runs effectively not only for petty and matrimonial cases, and also for major or serious cases including homicide and adultery. Major cases rarely happen because the inner-ordering of the village is so stable. Indigenous values are still practised within the village. However if the conflicts or disputes have been settled three times in TDR, and the perpetrators deliberately repeat their wrongful conduct, the tribal chief will then allow the police to prosecute the perpetrators. Positive law plays only a minor role in the village, as a ‘web’ or second opinion. Similar to other Balais, the Balai of Kiyu also has a tribal fine scheme which varies from 1 tahil (around Rp. 1,000,000/AUD$ 100) to 12 tahil (around Rp, 12,000,000/AUD$ 1200). TDR runs effectively not only for petty and matrimonial cases, and also for major or serious cases including homicide and adultery. Major cases rarely happen because the inner-ordering of the village is so stable. Indigenous values are still practised within the village. However if the conflicts or disputes have been settled three times in TDR, and the perpetrators deliberately repeat their wrongful conduct, the tribal chief will then allow the police to prosecute the perpetrators. Positive law plays only a minor role in the village, as a ‘web’ or second opinion. Similar to other Balais, the Balai of Kiyu also has a tribal fine scheme which varies from 1 tahil (around Rp. 1,000,000/AUD$ 100) to 12 tahil (around Rp, 12,000,000/AUD$ 1200).

The proceedings of TDR run informally compared to the strict procedure of the State Court. TDR is led by Maribut, who is accompanied by other elders from the village. Seniority is taken seriously: the first person to talk and open the forum must be Maribut. He asks the disputing parties to express their complaints and grievances. The audience can talk and comment on the subject matter, but the process for giving comment runs from the oldest to the youngest member of the audience. The younger members must respect the older ones’ right to talk first, unless the tribal chief asks them to comment. Nevertheless despite his seniority, the tribal chief does not act like a despot; instead, he is a genuine facilitator. The outcome of TDR is a result of consensus: all residents’ opinions and comments have been considered, regardless of the residents’ age or gender. This indigenous wisdom might be the reason why the inner normative ordering of the village is relatively stable. The old people and the tribal chief still inspire strong charismatic leadership within the village. Because of his experiences and expertise in Kaharingan’s beliefs, the tribal chief has the role of ‘father’ towards all the residents of the villages who can ask him for favours, advice and protection.

B Dispute Adjudication in State Court

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765 Interview with Maribut, Tribal chief of the Balai of Kiyu (Kiyu Village, 12 January 2014).
766 Interview with Maribut, Tribal chief of the Balai of Kiyu (Kiyu Village, 12 January 2014).
(a) Relevant Facts

In 1964 a former tribal chief and forest guard of the Balai of Banyu Panas, Pembakal Suni, lent land to the Tandilang people under an oral agreement, a condition of which was that the land could only be used for farming. However the farming could not include ‘hard plants’ such as rubber plants. The aim of that limitation was to avoid over-extraction and over-exploitation of the land. This approach is part of indigenous local wisdom that should be preserved. The land was held as communal property by the people of Atiran village, meaning it could not be owned privately. All the peoples of Atiran village have a duty to guard their land and preserve the environment near it. There is no exact measurement of the land. Unlike modern land boundaries, ancestral land boundaries are based on natural boundaries such as large trees, mountains and rivers. The natural boundary of Atiran land is a river that separates Atiran from other villages. Neither a land certificate regarding the communal land nor any written agreement between village chiefs was presented in the court case as legal proof of possession. 767

(b) The Claimant’s Claims

The claimants, the indigenous peoples of Atiran village, asserted that the land was their communal land which had been borrowed by the Tandilang people. The claimants demanded the Tandilang people admit their faults in continuing occupation, respect the agreement between their ancestors, and return the communal land to the Atiran people. 768

(c) The Defendant’s Defences

The Tandilang people as defendants rejected the claimants’ arguments on four grounds:

First, the position and boundaries of the land were not clearly stated by the claimants. The agreement, the basis of the claimants’ arguments, was unwritten, therefore it could not be used as a legal proof, because priority of legal proof in civil procedure is given to written documents (Herziene Inlandsch Reglement art 164 and Burgerlijk Wetboek art 1866). Second, the defendants argued there was uncertainty regarding the agreement, for example, the content and substance of the oral agreement as expressed by the tribal chiefs was unclear. Third, the defendants argued the land was legally occupied

767 Indigenous Peoples of Atiran Village v People of Tandilang Village (2008) 1, 3. The length and width of the land is uncertain. The indigenous peoples of Atiran had never measured their land.

768 Ibid 11.
and owned based on private rights, because the Tandilang people are not indigenous peoples and consist of diverse tribes (mostly Banjar and Javanese) who are not bonded to collective rights like the indigenous peoples of Atiran village who are under the authority of the Balai of Banyu Panas authority. Lastly, the Tandilang people had evidence consisting of written documents regarding the status of the disputed land. These written documents however, were not land certificates but were letters of bequest.  

**(d) The Judgment**

The District Court held: ‘the claimants failed to produce sufficient formal requirements necessary for a lawsuit. Moreover the ownership of indigenous land cannot be granted based on an oral agreement and a subjective claim’.  

The District Court found there were uncertainties *(obscuru libel)* in the claimants’ lawsuit. Consequently, the Court declared the case inadmissible.  

**(e) Analysis**

A number of important issues arise from this decision:

First, the Court negated the existence of indigenous peoples’ property rights (communal land). The Court held that ‘the claimants had neither written documentation nor a land certificate to use as their legal proof, moreover to claim a communal or ancestor’s land, indigenous peoples must first determine the land’s boundaries and register their land at the BPN.’ This bureaucratic process was based on the Agrarian Minister Decree in 1995. However, the Court seemed not be up to date with the legislation, because in 2000 and 2005 legislation was passed stating that prior to the process of land registration, the existence of indigenous peoples on the land must firstly be acknowledged by local government through local legislation.

Due to the long and bureaucratic processes involved in the recognition and registration of land, it is suggested that the Court should have formulated a ‘policy’ to protect indigenous peoples’ rights by ignoring the lack of written documentation and a land certificate, and giving a right to indigenous peoples.

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769 Ibid 32.  
770 Ibid 46  
771 Ibid.  
772 Ibid 51.  
774 Letter of Director of Production Forestry and Plantation No 922/VI-PHT/2000 on Dispute Settlement for Indigenous Land Claims. See also Government Legislation No 72 of 2005 on Village art 54 (1), (2), (3), art 100 (e) and 101 (k).
peoples over their communal land. The BAL does have a flaw in that it does not explicitly explain the status of indigenous rights and is over-reliant on written evidence as proof of ownership. Nevertheless, the Court should have interpreted art 33 of the Constitution and the BAL’s idealistic purpose: ‘to the benefit of the people’, aiming to protect indigenous peoples and their lands. Furthermore, the indigenous peoples’ claim for their communal lands was based on their living adat law, not on state law, particularly the Civil Procedure Code. Clearly, it is unfair to assess indigenous communal property rights by merely using State law and its procedures. The Court should have considered adat law which was being applied in the village.

The second issue is the judicial approach taken by the Court. The District Court was overly-reliant on the Civil Procedure Code with regard to the formal requirements of a lawsuit. The Court held that 'the claimant must have both the legal foundation which firmly states the legal connection between the claimants and the object of dispute or between the claimants and defendants, and also the foundation of fact which further explains those legal connections.' Additionally, the Court held that: ‘the claimants had merged breach of contract with a case of trespass: this case was purely a breach of contract, with a separate claim to be raised in tort.’

When asked about the decision in interview Judge Pakpahan, the chairperson of the case, was convinced that his decision had been correct. He said: ‘we (the judges) had already implemented the principle of audio et alteram partem which means the judge must accommodate disputing parties equally and impartially.’ In other words the Court was applying formal rather than substantive equality. The claimants had been given an opportunity to develop their claim but their legal reasoning, in Judge Pakpahan’s view, did not reach the level of proof sufficient to be decided by the District Court. Judge Pakpahan had suggested that ‘the claimant’s lawyer improve the claimants’ reasoning, but nevertheless both the legal foundation and the foundation of fact were deficient’. Judge Pakpahan appears to take his role as a civil case judge seriously, with formal procedure as the first priority of judicial activity. The reason why formal procedure should prevail over substantive justice, in Judge Pakpahan’s view, was because ‘the validity of the substantive justice of a case

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775 Beckert, above n 238, 6.
776 Ibid 48.
778 Interview with Makmur Pakpahan, Former judge at the District Court of Barabai City, HST Regency, currently a judge at the District Court of Rembang, Central Java, (Rembang, 27 March 2014). His argument was based on Herziene Inlandsch Reglement (HIR) art 137. Rechtsreglement voor de Buitengewesten (Rbg) art 163.
779 Interview with Makmur Pakpahan, Former judge at the District Court of Barabai City, HST Regency, currently a judge at the District Court of Rembang, Central Java, (Rembang, 27 March 2014).
comes from formal procedure. In other words, substantive or true justice becomes whatever formal procedure dictates it to be; a position blind to the flexibility of Equity granted to judges by the written law.

Based on Judge Pakpahan’s understanding of civil procedure, if the formal requirement of a case have not been fulfilled then the judge can do nothing: the judge in a civil case must remain passive (lijdelijkeheid van de rehter) with his or her role limited to that of an umpire, similar to the common law approach. Judge Pakpahan added: ‘if the parties fail to present the legal foundation of their case, then the case must be discontinued’.

It is interesting to examine Judge Pakpahan’s standpoint and question why he did not use his discretion to conduct a field view in order to ascertain legal facts and other empirical information. A field view can be conducted either based on a disputing party’s request or the judge’s discretion, and it also can be conducted either before or after proof. Normatively, a field view is not part of legal proof or evidence. However, Judge Pakpahan firmly declared that ‘a field view was unnecessary’.

Clearly Judge Pakpahan is a judge who textually obeys and respects the Civil Procedure. Unfortunately, the claimants’ lawyer seemed to lack experience both in civil procedure and in the area of indigenous peoples’ rights. Nevertheless judges of the District Court should have a willingness or curiosity regarding the legal existence of indigenous peoples within their villages. By conducting a field view, judges would have found out more about the real conditions of the dispute, so their decision would not only have coherent legal reasoning but also sociological insights. Contrary to Ter Haar’s recommendations, Judge Pakpahan did not take the culture of the indigenous peoples and the oral agreement as points of legitimate departure from civil procedure in cases involving indigenous peoples’ rights. As Ehrlich argues, an oral agreement can be considered as a societal law, in which the oral agreement establishes the ‘facts of law’, or the input of living adat law. Instead, Judge Pakpahan weighted his attention toward written law and formal evidence. This decision obstructed the protection and recognition of indigenous peoples in the HST Regency while exacerbating the tension between State law and adat law.

780 Interview with Makmur Pakpahan, Former judge at the District Court of Barabai City, HST Regency, currently a judge at the District Court of Rembang, Central Java, (Rembang, 27 March 2014).
781 Herziene Inlandsch Reglement (HIR) (Indonesia) art 153 and Rechtsreglement voor de Buitengewesten (Rbg) (Indonesia) art 180.
782 Interview with Makmur Pakpahan, Former judge at the District Court of Barabai City, HST Regency, currently a judge at the District Court of Rembang, Central Java, (Rembang, 27 March 2014).
783 See Chapter 1 on Ehrlich’s Living Law Theory.
C Current Condition of the Atiran Land

Despite the District Court rejecting their lawsuit, the indigenous peoples of Atiran village regained their ancestors’ land by unilaterally occupying the land. The Tandilang people were reluctant to lodge a complaint, and so allowed the Atiran people to re-occupy the land. Some of the Tandilang people hesitated to engage in a prolonged dispute with their neighbour and ‘older sibling’. Currently, the Atiran people are the de facto owners of the land, even though they have no land certificate for it.

The relationship between the Atiran and Tandilang peoples is gradually improving. There is no more open conflict between them. Indigenous Atiran peoples can safely pass the Banjar village, and vice versa. However, some of younger generation of Tandilang still feel inconvenienced by the fact that the land they once solely occupied is now occupied again by the Atiran people. This grievance may not be expressed verbally, but it may be a trigger for future conflict.

V CONCLUSION

Indigenous peoples depend on their tribal chief’s authority and leadership, as evidenced by the two cases above. If the authority and leadership of the tribal chief is exceptional, then the inner-ordering of the village will be relatively safe and stable. However, if the leadership qualities are declining, the village may lose its stability. The indigenous village has no succession mechanism such as in modern state law. This weakness may be the reason why living adat law is fading within the village.

In the Bangkalaan Dayak village, the encroachment of corporate activity on living adat law is manifest, because economic interest overwhelms the idealistic aim of adat law to reach reconciliation. The main causes of this paradigm shift are the internal factor of weak leadership practised by the tribal chiefs, and the external factor of outsiders masked as local indigenous solidarity groups but backed by corporations. The State in general, and the Kotabaru government in particular, seem incapable of ensuring that the commercial practices of companies under their jurisdiction are confined within the limits of the law. The role of the State is diminishing, and the role of living adat law and its tribal chiefs is slowly dissolving. TDR fails to achieve consensual justice, and it is mainly effective in settling petty cases. This condition confirms the thesis statements stated in the previous chapter, namely that the effectiveness of adat law and TDR,

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785 Interview with Fitri, Lawyer for indigenous peoples (Banjarmasin, 21 February 2014).
786 Interview with anonymous (Barabai, 12 January 2014).
especially in the settling of vested-interest cases is decreasing due to pressure from vested-interest parties.

The villagers must seriously reform their village and tribal institutions, and the Kotabaru government must be willing to empower the village institutions, not only through legislation, but more importantly through a participatory development approach. The villagers must be able to not only participate in all development projects but also consent to those projects, particularly the one which relate to their indigenous rights. The method of participation can follow a FPIC procedure. Moreover, the people of Bangkalaan Dayak village must remedy their village’s inner ordering system by re-consolidating their voluntary and supported observance of living *adat* law and preventing its decline, while filtering out external influences. Most importantly, companies apparently backed by local indigenous solidarity groups must be challenged by both the indigenous peoples of Bangkalaan Dayak and the Kotabaru government.

In Atiran village and other neighbouring villages, tribal chiefs are relatively neutral with respect to external influences, consequently their villages’ inner ordering are quite stable. However, the challenges are obvious. Living *adat* law is less appreciated by non-indigenous peoples and it has no binding power over them. This condition may lead to future conflicts and disputes. To prevent future disputes, local government must take these cultural issues very seriously. Prevention is not exclusively a legal concept, it is more sociological and cultural: the cultural linkage between Dayak Meratus and Banjars must always be advocated for and supported.

On the other hand, many judges of Indonesian State Courts, particularly those judges in the District Court of Kotabaru, have demonstrated a broad-minded judicial activism by appreciating and applying legal pluralism and the sociological facts within indigenous peoples’ communities. They have taken indigenous human rights issues very seriously.\(^{787}\) In addition, they tend to veer away from the strict principle of civil procedure that sets up written documents as cardinal evidence by enabling witness testimonies, and have reflected on and acknowledged their own sense of right and wrong. In these cases, the judges and justices independently decided the cases by using their internal consciences, empathy and sense of justice. This is a breakthrough for the Indonesian legal system, because the legal system is not only exercised by rules and principles, but most importantly by judges who have an outstanding understanding of both social and philosophical justice. In other words, the judges use cultural and social insights as criteria to determine which law is to be applied and which is to be discarded as invalid. This kind of judge can be defined as a legal pluralist whose

\(^{787}\) *Indigenous Peoples of Bangkalaan Dayak v Suriansyah* (2008) 14 District Court.
Legal considerations are not only constructed by a systematic and coherent legal reasoning, but are also complemented by sociological and moral considerations.

There is an interesting trend for Indonesian judges in general, and judges in civil cases in particular, to be more flexible than before and gradually leave behind rigid individualistic aspects of civil law. There is a process of ‘collectivism’ which makes law more ‘fluid’, pragmatic and less doctrinal. Progressive adjudication by State Courts, as an alternative to TDR can be improved, resulting in a greater role for law and the State. An effective judicial system that people trust for the resolution of their disputes is essential to the rule of law. This trend could be a justification for arguing that the principle of judicial independence should not only be guaranteed in a narrow sense through constitutional recognition of a formally separate and independent judicial branch of government, but also through an inherent freedom of its judges to utilise and develop their own discretion and internal morality.

However going against this trend is the different process in the District Court of Barabai where the court declined to conduct a field view to ascertain the legal and social facts within the object of the dispute, and also rejected oral testimony. This type of judicial approach prioritises procedural justice by only assessing the strengths and weaknesses of the parties’ case in accordance with the written law. It disregards other non-legal aspects and social and substantive justice. This approach may lessen the progress of indigenous people’s rights in particular, and human right issues in general, because truth or justice cannot be simply deduced from a procedural code and written laws.

Natural resource disputes occurring within the villages of South Kalimantan provide tangible proof that the State positive law and its law enforcement fail to secure law and order. The State positive law tends to enforce the law in a partial manner, criminalising indigenous peoples, while privileging ‘development’ projects. Ideally, State law must play preventive, curative and facilitative roles. Preventive, in a sense, means the State law must encourage social initiatives which prevent cultural harm by cooperating with indigenous peoples and non-state law, in this case living adat law. The law should be constructed by appreciating the grassroots perspective while disregarding opportunistic interest groups. Curative means the law must mediate and restore justice to the community. The reconciliation processes must be initiated and guided by the State. Lastly, facilitative means the law must actively be involved in nurturing society’s inner ordering, so the people can feel the ‘existence’ of the law within their community. In the end, law is not merely a word, but action implemented by legal practitioners. The Indonesian legal reform project cannot be

fully conveyed by reforming only legislation and legal institutions. Reforming the mentality of law enforcers and strengthening legal culture is far more important.
CHAPTER 7 - CONCLUSION

I  INTRODUCTION

This thesis has examined the tension between legal formalism within State law and legal pluralism supporting adat law through the legal-historical analysis of literature, national legislation and case analysis. This concluding chapter provides a summary of the research findings and recommendations to address the research questions. Firstly, the chapter summarises the underlying reasons for the tension in three related aspects of law: theoretical, historical, and doctrinal. This is done in an effort to ‘map the legal universe’. More general conclusions can be drawn from the application of legal theory and specific discussion of the legislation, legal concepts and the role of judiciary. Lastly, the practice of both State courts and the TDR forum will be presented by focusing on their policies, approaches and reasoning. The aim is to illustrate and confirm the major proposition of this thesis, namely that: indigenous peoples’ rights and living adat law would be better protected, if there were specific beneficial legislation for them and if judiciary engaged in a more reflective legal pluralism discourse, not only employing a legal approach but also a socio-cultural approach which takes, adat law into account.

II  A ‘DIALOGUE’ AS REFORM STRATEGY: THEORETICAL AND HISTORICAL-DOCTRINAL OVERVIEW

In response to the research question as to how the tension between legal formalism within State law and legal pluralism supporting adat law can be addressed, this thesis proposes a ‘dialogue’ as a possible reform. The ‘dialogue’ should be implemented in both ‘mental maps’ (within legal theory) and ‘cartographic maps’ (within legislation, judiciary and court decisions).\footnote{Santos, above n 28, 281.} Theoretical and historical-doctrinal discussion and possible reform strategies are presented below.

A  Theoretical Overview of Legal Theory

The theoretical discourse between legal formalism-centralism and legal pluralism starts from the need for command and state sovereignty; and reaches the stage where extra-legal entities finally penetrate legal science. However, this is unlike Kuhn’s theory, which states that normal science will encounter anomalies, and then fade through scientific revolution.\footnote{Thomas Kuhn, The Structure of Scientific Revolution (The University of Chicago Press, 2nd ed, 1970).} Legal perspectives do not negate one another. Notions of state sovereignty and legal objectivity are still acceptable and
workable, even though they have been rebutted by post-modernists. In today’s world, jurisprudence must engage in dialogue in order to synthesise a more responsive legal paradigm.

The mutual dialogue between the State of Indonesia and its indigenous communities must begin from the state legal perspective in order to be effective. A strict legal formalism-centralism perspective is not ipso facto concept, as it aims merely to unify and control the communities. This thesis argues that in regard to the implementation of legal pluralism, there must be linkage with the State in order to validate living laws via the ‘rule of recognition’, either through legislation or court decisions. State law pluralism is the more feasible and realistic option for post-colonial countries like Indonesia. In this respect, State law must act responsively by absorbing and appreciating the aspirations of adat law. The reasoning and findings in this thesis confirm Woodman’s argument on selective legal pluralism. State law must selectively choose living adat laws which are still being implemented and upheld by indigenous peoples in order to fill the gaps that the State law fails to fill. The relationship is reciprocal; where the adat law has faded in the community, State law can prevail. There should be a mutual dialogue between the two. This issue was developed in Chapter 2.

With regard to the judiciary and its approach, this thesis demonstrates that Shapiro’s social logic theory is relevant. The court evolved from persuasive approaches, to dispute resolution to a more rigid and procedural adjudication. However when a court reaches its modern form, it does not mean the previous forms are irrelevant. Instead, the previous forms enrich the final forms of the court, and fill those gaps which the court fails to settle, particularly in regard to the question of access to justice and affirmative action. The Dutch had implemented this theory by recognising TDR and exercising a sociological judicial approach within the area of the East Indies. The theory articulates the important lesson that the court must internally reform itself, before remedying others, by remembering that its purpose is not only to adjudicate, but also to mediate and settle disputes amicably.

The judiciary as ‘a second layer of legislature’ must apply, interpret and match the norms to the contemporary context. This thesis argued that the notion of the freedom of the judge should be advocated. The freedom of the judge is an expression of an inherent ‘right’ through which judges have to express their perspective when conditions are unbalanced or if the legislation blatantly discriminates against marginalised parties. This activism approach does not breach the ethics of the court and the impartiality of judges in court proceedings because judges only adopt such a position and transcend their perspectives after objectively assessing the facts. At that point in their legal

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Woodman, above n 128, 164.

Rechterlijke Organisatie (RO) (Dutch East Indies) art 3 (a).
reasoning, judges may use their own subjective values to consider socio-cultural aspects of the issue and to impose policy-driven decisions.

Moreover, Posner’s theory on policy-driven decisions and Ehrlich’s theory on living law are suitable to be implemented in Indonesia, with some modifications. A policy-driven decision is based on sociological insights, making it compatible with the idea of living law and legal pluralism. However, moral considerations are also pivotal in balancing the empirical argument. A decision is a dialectical product, which contains the subjective experiences of the judge. Thus, in this respect, a judicial decision is an inter-subjective law gaining its authority not only from objective, but also from subjective sources. This argument does not negate the role of doctrinal inquiry, which should be exercised first by the judges in deciding the case; the freedom of judges must also be retained.

In addition, judges in Indonesia are educated in the civil law tradition, which extols a strict division between public and private law. This division is useful for classifying and identifying legal problems. This practice is also accompanied by the hierarchical ladder theory warning the judges to view higher norms and principles systematically. However an over-reliance on these paradigms results in judges adopting an overly doctrinal approach. The concept of legal division and hierarchy should be revisited. Because most Acts contain political influences which can hinder access to justice, the judges can, and should, in their core legal arguments, consider the constitution’s norms, as well as the State’s ideology. This will lessen their dependency on the hierarchy and division of the law. Moreover, the Constitution’s norms should be the first reference point for judges because the Constitution contains the principled aims of the country and is considered the fundamental law of the land.

B Reform in Legislation

The Indonesian legal system has undergone diverse change, mostly due to the effects of colonialism and authoritarianism. Therefore, in order to precisely map the development of legislation in Indonesia’s legal pluralism context, this thesis calls for an historical overview of relevant legislation, state policies and legal concepts.

The formalistic paradigm has been manipulated by both the colonial powers and the authoritarian regimes for their own benefit. The colonial powers, particularly the Dutch, conveyed their

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794 Hunt, above n 108, 45.
795 Putro, above n 7, 45.
796 Klink, above n 115, 132.
modernised legal system to Indonesia with the aim of dictating the law to Indonesians and their rural societies. The Dutch applied a formal segregation policy, which resulted in the relationship becoming one of patron-client. The policy had both advantages and disadvantages. When faced with the cultural diversity of Indonesia, the colonial power tended to compromise rather than impose its legal system. However, the formal segregation policy denied Indonesians and indigenous peoples the opportunity to develop.

The Dutch made two divisions of the legislation (ordonantie) regarding the village: they stipulated that the Inlandsche Gemeente Ordonantie Java en Modoera legislation (IGO) applied to villages located within Java and Madura Island, and Inlandsche Gemeente Ordonantie Buitengewesten (IGOB) applied to villages outside Java. This policy suggests that the Dutch’s decentralisation policy was more inclusive and pluralistic than today’s policies because it treated the village as a legal unit. The lesson learned from this is that legislation should be enacted within a social and cultural context.

This thesis highlights both the advantages and the weaknesses of Indonesia’s current legislative system regarding indigenous peoples, particularly the BAL and specific Acts such as the Forestry Law and the Plantation Law which filled the gaps in the BAL. Moreover, as the regime changed, Suharto’s administration prioritised unity over diversity by enacting a centralistic legislation, the Regional Governance Law. The issue of indigenous peoples has become inter-sectoral, because the definition, criteria and the procedure regarding the recognition of indigenous peoples are regulated by several Acts.

The BAL is insufficient to deal with more complicated problems. However, it will not be replaced, because the BAL is considered a legal-historical document which contains the basic Indonesian paradigm: kerakyatan (people-oriented democracy). Nevertheless, its amendment should be advocated by indigenous peoples through legislative review. The analysis of the legislation in Chapter 3 concluded that the enactment of these Acts is fully determined by their political setting: The BAL was enacted within socialist influences; the Forest Law, the Plantation Law, and the Regional Governance Law were enacted and enforced within the ambit of rapid economic growth under the developmentalism paradigm.

798 Day, above n 285, 43.
800 Law No 5 of 1974 on Regional Autonomy (Indonesia). Law No 5 of 1979 on Village (Indonesia).
On a positive note, the 2014 Village Law, inspired by the Constitutional Court’s decision in the Indigenous Forest Case (Case 35), has been found to be beneficial for indigenous peoples. The legislation has divided village administration in two: State and adat village, and provided more inclusive criteria for defining indigenous peoples, although it still uses the definition of masyarakat ‘hukum’ adat. The legislation asserts that in order to be recognised, indigenous peoples must have communal territory and have at least one of the stipulated criteria.\(^{801}\)

The Village Law could be the potential instrument for reform as it mediates both interest groups: the State interest and indigenous peoples’ aspirations. However there are still possible aspects that hinder the application of the legislation. First, the recognition of indigenous peoples is processed separately from the recognition of their land/forest. The first occurs through regional legislation issued by district or provincial governments, whereas adat land/forest must be registered by the Land Agency (Badan Pertanahan Nasional). This process is ineffective: it should be merged because the peoples and their land/forest are one inseparable entity. Second, the Village Law needs a further piece of legislation to strengthen its implementation, because, by default, the Village Law is a lex specialis of regional autonomy law. Thus, it should be supported by a lex specialis of human rights law. A Bill of Indigenous Peoples’ Rights should be enacted. Third, there is still a confusing and long line of bureaucratic processes, most notably between ministries and agencies, and local and central government, which means that a satisfactory result may be hard to achieve in the near future. To overcome this, the government should implement its policy with a ‘one map strategy’. Fourth, some local Acts which have given formal recognition to indigenous peoples within their administrative jurisdiction are still using the old criteria relating to recognising indigenous peoples. Local government seems to ignore changes at the national level.\(^{802}\) The most realistic step is to pressure the head of the district and local legislature to clearly state that local legislation recognises the rights of indigenous peoples in the relevant districts in South Kalimantan. The process of recognition, however, takes time because in order to precisely determine the indigenous areas, intensive field research is needed.

In order to be respected in the State law system, indigenous values applied in South Kalimantan should be validated through the enactment of local legislation. This thesis suggests some substantial elements that need to be addressed in drafting the Local Legislation on the Recognition and Protection of Indigenous Peoples in South Kalimantan. First, the criteria relating to indigenous peoples must correspond with the Village Law and Case (2012) 35. The stricter the criteria, the

\(^{801}\) Law No 6 of 2014 on Village (Indonesia) art 97 (2).

\(^{802}\) For instance, Local Legislation No 3 of 2004 on Communal (Ulayat) Rights of Indigenous Peoples in Paser Regency, East Kalimantan (Indonesia) art 3 (1) and (2).
more likely it is that the indigenous peoples in South Kalimantan will be discriminated against. Therefore the out-of-date and formalistic criteria set out in the 1999 Forest Law should be discarded. Second, the material objects of indigenous peoples should not be limited to lands (soil), but should also include rivers, lakes, seas, caves and the natural resources within. In order to determine exact borders, indigenous peoples and the government must agree to use a modern land mapping process. Lastly, functioning TDR within the villages should be promoted as the first resort for dispute resolution with State law as the last resort. If the effectiveness of TDRs and living laws has gradually lessened and failed to settle cases, then the State Court can take over the role and deal with the cases.

Nevertheless, legislation is static and often out of step, and even behind current and progressive social and political changes. Therefore, in order to make sure the legislation is politically palatable for indigenous peoples, government policy, consultation with indigenous peoples, and a progressive judiciary are needed to articulate affirmative action or reverse discrimination.

C Reform in Judiciary

Colonial judges strongly embraced the credo of social justice. This thesis adopts the sociological approach used by colonial judges who mediated between adat law and the state formal law. While this judicial approach should be appreciated, the policy of formal segregation under the Dutch must be rejected. The later authoritarian regimes used the State’s sovereignty to repressively control political opposition and the citizens, while establishing and strengthening their inner corrupt groups. The institutionalised unification policy began in the early years of independence, and worsened under the hegemony of rapid development.

The discussion in Chapter 4 has shown that many of today’s judges are less concerned with the notions of social and philosophical justice, and more reliant on formalistic approaches and procedural fairness. The contest between the legal perspectives of formalism and socio-legal aspiration has manifested itself in the Basic Principle of Judiciary Law. This positive law has widened the opportunities for legal interpretation stating that the judges must consider ‘law’ in their reasoning. However, ‘law’ is often restricted to legislation. This practice occurs because of the inferior status of judicial power under Suharto’s administration which continues until today. The structure of the Indonesian judiciary is bureaucratic, and the judicial structure has too long been

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803 Soepomo, above n 49, 34. *Regerings Reglement* (RR) art 75 (3) and (6).
804 Interview with Ahmad Kamil, Justice of Supreme Court, Supreme Court of Indonesia (Jakarta, 20 March 2014).
805 Law No 48 of 2009 on Judiciary (Indonesia).
806 Law No 48 of 2009 on Judiciary (Indonesia) art 5 (1), 10 (1) and 50 (1).
807 Butarbutar, above n 383, 70.
preserved by an authoritarian regime which used the bureaucracy as a tool to make the judiciary and judges subservient, making judges less inclusive and allowing them to continue to enjoy the status quo. This practice also occurs because the Basic Principle of Judiciary Law does not explicitly explain the meaning of ‘law’. This thesis argues that the term ‘law’ should be understood in a wide and general sense to include living and unwritten laws.

D Possible Changes in Legal Concepts

The legal concepts and definitions being used by the governments (both national and local) reflect the current paradigm of the Indonesian legal system: legal formalism. As a result, the legal definition and criteria of indigenous peoples have been affected. This thesis argues that the western-formalistic definition being used to depict the characteristics of indigenous peoples needs refinement. The definition of indigenous peoples as stated in the 1945 Constitution still uses the Dutch concept of rechtsgemeenschappen, translated into Indonesian as kesatuan masyarakat ‘hukum’ adat or legally-based indigenous peoples. The Dutch divided indigenous peoples into two groups. The first group consists of culturally-based indigenous peoples who have a weak organisational unit within their community; therefore they should not be considered as a legal entity. The second is legally or politically-based indigenous peoples who have within their community a strong organisational unit and a strict division of labour. These formalistic definitions and criteria for indigenous peoples have been used as barriers against their recognition. If recognition is delayed, the government is able to expedite developmental projects within indigenous areas.

The concept of masyarakat ‘hukum’ adat culturally fits in West Sumatra (Minangkabau) and in other Sumatran communities where the adat government is constructed hierarchically. However it is not necessarily appropriate for other regions. This thesis rejects the definition and dichotomy into legally-based and culturally-based indigenous peoples for several reasons. First, indigenous peoples, like any other community, must be constructed culturally; culture is the starting point for every social norm and law in the community. In fact, laws and norms are a reflection of culture. Using a formalistic or state-centred perspective to determine indigenous peoples is inadequate. Sociological perspectives should be the first entry-point. Second, the dichotomy may lead to discrimination, because it would determine legal status. There will be indigenous peoples whose cultures and traditions are appreciated, but not recognised as legal entities by the State, and there

808 Pompe, Judicial, above n 405, 12.
809 The 1945 Constitution art 18B (2).
810 Asshiddiqie, above n 67, 1.
811 See discussion in Chapter 1 on Indigenous Peoples of Indonesia.
Indigenous peoples in Indonesia themselves are diverse. Indigenous peoples in Sumatra (particularly in the Minangkabau community) who are influenced by Islamic-Malay traditions have their own distinctive characteristics which are more legally or politically-based. This is evidenced by a more strict division of labour. On the other hand, the animistic-influenced traditions of the indigenous peoples in the eastern part of Indonesia (including in South Kalimantan) are culturally-based and demonstrate a weaker division of labour. Using one specific concept to determine diverse communities in Indonesia is too broad. The current definition views indigenous peoples from a state-centred perspective. This approach is not satisfactory because the core and stand point of indigenous life is adat law which, is both culturally-based and contemporary. This thesis suggests a more general and inclusive concept of indigenous peoples.

The issue of definition is further complicated by the concept of peradilan adat or adat court because, the government characterises the adat court as the main element of the organisational unit of legally and politically-based indigenous peoples. However, based on findings in South Kalimantan, the ‘court’ is not merely focused on the adjudication process and a dichotomous outcome, but aims to reach a more amicable decision through mediation and negotiation. There are fewer legal aspects and a more ‘fluid’ mechanism in the resolution. Instead of using peradilan adat, a more moderate concept of Traditional Dispute Resolution (TDR) is recommended because its functions are more diverse than peradilan adat. Moreover, TDR not only embraces a ‘judicial’ role, but an executive role as well. This finding is supported by previous research by Slaats.813

III THE PRACTICE OF THE COURTS

This section aims to summarise the judicial reasoning processes and the policies or approaches which judges consider when deciding cases involving the adat law and the indigenous peoples. The Constitutional Court’s approach and reasoning, unlike that of the Supreme Court, tends to be more progressive, by default, as the Constitutional Court was designed to settle and determine political interests expressed in the form of legislation. Thus, political influence over the judiciary and, its processes was almost inevitable.814 The Constitutional Court enjoys a high degree of judicial

812 Lecturers of the Faculty of Law, above n 622, 7.
813 Slaats, above n 646, 34.
814 Dressel, above n 425, 260. See also, Mietzner, above n 425, 378.
independence and, necessarily involvement in the political arena, making it strategic yet susceptible to political influence. Even though all judges have equal rights and obligations, in practice, the Chief Justice plays the most significant role in developing the final decision of the Court. As a result of diverse legal discussion between the judges, the Court is known for its assertive stance in supporting legal pluralism and accommodating the rights of indigenous peoples.

The most influential case was Case (2012) 35 which reviewed the 1999 Forestry Law. The case analysis in Chapter 5 showed that the Constitutional Court took into consideration indigenous peoples’ aspirations regarding the status of their communal forest land. The case was an exemplar of the Court’s legal paradigm regarding indigenous peoples’ rights. Nevertheless, the Court could only partially support indigenous aspirations, as it was still obligated to consider the role of state sovereignty. Through its decision in Case 35 the Court was able to emphasise the need for equilibrium between State and living adat law. The ‘policy’ that the Court exercised was that indigenous peoples should not be segregated from development. Further, the policy-driven decision aimed to provide indigenous peoples with time, possibilities and opportunities to cope with development. The practice of development itself should not be implemented by relying on the principle of extractive development. Instead, it should be in accordance with human rights principles including those set out in the UNDRIP.

Previous chapters have examined policy-driven decisions from the Constitutional Court, particularly in Case 35, the Court substituted the legislation’s text, their aim being to give indigenous peoples a legitimate right over their forest/land. This decision is controversial, yet beneficial for indigenous peoples. In this respect, the Court’s decision interpreted the legislation. Second, the Court practised the doctrine of precedent. Third, in Case 35 and Case 55, the Court emphasised that the state acquisition right is not entirely based in private law, but, more importantly, it falls under the domain of public (administrative) law. The Court called into question the strict division of law constructed by civil lawyers who argue that natural resources dispute are about private, rather than public interests. Especially in these two cases the Court advocated a more flexible division of law. Fourth, in reaching their decisions, the Court used diverse sources as constitutional touchstones: not just the 1945 Constitution, but also the State’s fundamental norms and ideology - Pancasila. This approach is acceptable because the Judiciary Law has provided a broad scope for interpretation. In this respect, the Court is not just the interpreter of the Constitution, but also the guardian of the Constitution and Pancasila.


Some literature in Indonesia emphasises that land and natural resources issues are within the domain of private law, for instance: Maria S. W Sumardjono, Tanah dalam Perspektif Hak Ekonomi, Sosial dan Budaya [Land: Perspective of Economic, Social and Cultural Rights] (Kompas, 2008).
The Constitutional Court exercised its policy-driven decisions-making approach when the text was insufficient to answer contemporary legal and social problems, including the imbalance between political and discriminatory social conditions. Policy then filled the gaps in the law. The policy contained both paradigmatic and theoretical insights. The notions of legal pluralism, affirmative action, social and ecological justice, legal certainty and access to justice were elaborated on with the aim of obtaining a balance between the aspirations of justice and legal certainty. The Court maintained state sovereignty in Case 35, prospective judgment in Case 3, and the principle of *lex certa* in Case 55.

Therefore, the case studies support the argument that neither the court’s structure, nor pre-existing law, are definitively persuasive. Instead, judges’ understanding of legal pluralism and *adat* law can be of more significance. The case studies revealed judges who were keen to exercise ‘policy’ in their decisions. On the other hand, there were also judges who felt it unnecessary to do so and preferred to uphold procedural justice.

The policy-driven decisions taken by courts below the Supreme Court were explained through a case study in Chapter 6. In a triangular dispute between indigenous peoples, a company, and the local government in the *Temuluang Cave Case*, Judge Suyadi at first instance decided that the local government and indigenous peoples should maintain their cave over the company’s interest. He accepted an empirical fact (the thanksgiving ritual) as legal proof, while ignoring legislation that hindered the rights of the indigenous peoples. Additionally, before deciding the case, Judge Suyadi used his discretion to conduct a view of the cave. On appeal, Justice Mustafa considered substantive justice over procedural law by ignoring a technicality in the case. At the Supreme Court level Justice Kamil ignored a technicality in reasoning and considered social justice over procedural law. In general, the courts mediated between the interests of local government and indigenous peoples by applying state legal pluralism and stressing the division of the parties’ duties. The local government was held to have a regulatory right over the cave, to regulate and decide investment options with the approval of the indigenous peoples. Through these responsive decisions, the traditional values of indigenous peoples in South Kalimantan could be conveyed to being accepted at the national level. On the other hand, national law can gradually fill any gaps that the *adat* law fails to settle.

On a negative note, not all examined cases relating to indigenous peoples were concluded satisfactorily. In the 2008 case of the *Indigenous Peoples of Atiran Village v People of Tandilang*...

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819 *Suriansyah v Indigenous Peoples of Bangkalaan Dayak* (2011) 1566 Supreme Court.
Village Judge Pakpahan of the District Court rejected the empirical facts presented by the indigenous peoples. The judge held that court requires written documents as legal proof: they will not accept the culture of the indigenous peoples and oral agreements. Thus, the evidence was ruled inadmissible.\textsuperscript{820}

The courts in the Supreme Court system exercised their policy when the social and political conditions of the parties were imbalanced and discriminatory. However a neutral legal text will not be effective when the condition under examination is itself discriminatory. Judges and justices must be able to decide cases beyond the text by proposing affirmative action policy,\textsuperscript{821} for example by referring to the Constitution. The judiciary must be able to leave behind its old focal point that: ‘people are for the law’ and strive for a new paradigm - ‘the law is for the people’.\textsuperscript{822}

\section*{IV TDR IN SOUTH KALIMANTAN}

In response to the research questions directed at uncovering how TDR settles disputes within indigenous villages involving indigenous peoples and vested-interest parties, this research revealed that TDR was not successful in settling disputes either in Bangkalaan Dayak or in the Atiran village. It was found in both South Kalimantan case studies that, consultation and mediation through TDR had been ineffective, and that the State Courts had only settled disputes on the ‘surface’. The triangular relationship between the governments (both national and local), the companies, and indigenous peoples was proven to have vested interests. Of note was, the three-way contest occurred at many levels - within the villages, and within the district, provincial and national legal spectrum. The findings suggested that none of the interested parties were principled.

As supported by previous research,\textsuperscript{823} the thesis found that over-reliance on tribal chiefs, may be a crucial impediment for indigenous peoples, as not all tribal chiefs are principled. There were several significant factors that contributed to this finding, including weak leadership of the tribal chiefs; internal encroachment on \textit{adat} law with its inner normative ordering; and economic motives. TDR only seemed effective in matrimonial cases. On the other hand, the mentality of governments, particularly the local government in the age of decentralisation, has been known to be corrupt. The developmentalism paradigm, nurtured since Suharto’s administration, has resulted in policies that aim only to extract natural resources without a sufficient understanding of social and ecological

\footnotesize{\textsuperscript{820} Indigenous Peoples of Atiran Village v People of Tandilang Village (2008) 1 District Court.  
\textsuperscript{821} Law No 48 of 2009 on Judiciary (Indonesia) art 2 (1), and 5 (1).  
\textsuperscript{823} Tsing, above n 624, 109. World Bank, above n 9, 34.}
justice. Reform in bureaucracy seems to have been ineffective in hindering corruption and collusion.

Taking the Temuluang Cave Case, as an example, the adjudication process was costly, making the bargaining position of the indigenous peoples inferior. This situation can be used by opportunistic parties to intimidate indigenous peoples. Further, as the two hearings showed, over-reliance on the tribal chief can cause disadvantage to the indigenous peoples in South Kalimantan. The inner ordering of the living law was diminished by economic interests. Despite the fact that the Kotabaru government has passed regional legislation concerning the management of the Temuluang Cave the dispute is still ongoing because the law only settled the dispute on a superficial level.

A further complication is that shown in Atiran’s Indigenous Land Case: the application of indigenous wisdom and TDRs were only applicable within the village. These are often ignored by non-indigenous people and outsiders, making TDRs ineffective when one of the parties is non-indigenous. In the HST Regency, Atiran and Kiyu villages are adat villages, however with regard to the Bangkalaan Dayak village the indigenous people there have gradually lost their inner-ordering living law, and adat law is used only for ritual matters. Nevertheless, the Temuluang Cave must be considered the spiritual property of the indigenous peoples, and to protect it, local government must include the cave within the category of indigenous forest. This can now be done because the 2014 Village Law has given opportunities for indigenous peoples to register their communal land and properties.

Despite the fact that this thesis has shown that the use of adat law and TDR is decreasing, this does not mean that the Indonesian government can ignore the existence of indigenous peoples in South Kalimantan. In fact, the government must find the root of the decline of adat law within adat villages, and remedy the inner-ordering within these villages, because without eradicating the fundamental cause, reform would be ineffective. Adat law which is still applicable within the villages should be empowered, because it is the most relevant and acceptable law for indigenous peoples. State law should only be offered as a secondary law.
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## APPENDIX 1

### List of Interview Participants

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<td>Jakarta, 20 March 2014</td>
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<tr>
<td>Dr. Achmad Sodiki (Former Justice of the Constitutional Court)</td>
<td>Malang, East Java, 5 January 2014</td>
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<td>Dr. Abdurrahman (Justice of the Supreme Court)</td>
<td>Banjarmasin, 3 January 2014</td>
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<tr>
<td>Maskur (Chief judge of the District Court of Barabai City, HST Regional)</td>
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</tr>
<tr>
<td>Dr. H. Marni Emmy Mustafa (Justice of the High Court)</td>
<td>Bandung, 21 March 2014</td>
</tr>
<tr>
<td>Maksur Pakpahan (Judge of the District Court)</td>
<td>Rembang, 27 March 2014</td>
</tr>
<tr>
<td>Suyadi (Judge of the District Court)</td>
<td>Semarang, 12 March 2014</td>
</tr>
<tr>
<td>Rully Lipan (Priest and senior resident of the Bangkalaan Dayak Village)</td>
<td>Bangkalaan Dayak, 9 February 2014</td>
</tr>
<tr>
<td>Rustam Acong (Kotabaru’s tribal chief (<em>damang</em>))</td>
<td>Kotabaru, 8 January 2014</td>
</tr>
<tr>
<td>M. Jayadi (Secretary of the Bangkalaan Dayak Village)</td>
<td>Bangkalaan Dayak, 19 February 2014</td>
</tr>
<tr>
<td>Hinggan (Tribal chief of Bangkalaan Dayak)</td>
<td>Bangkalaan Dayak, 18 February 2014</td>
</tr>
<tr>
<td>Dariatman (Chief of village)</td>
<td>Bangkalaan Dayak village, 17 February 2014</td>
</tr>
<tr>
<td>Norsewan (Secretary officer of Hinas Kiri Village)</td>
<td>Hinas Kiri village, 25 January 2014</td>
</tr>
<tr>
<td>Fitri (Lawyer from indigenous peoples)</td>
<td>Banjarmasin, 21 February 2014</td>
</tr>
<tr>
<td>A’ar (Former tribal chief of Balai of Banyu Panas)</td>
<td>Batu Kambar village, 9 January 2014</td>
</tr>
<tr>
<td>Kawi (Tribal chief of the Balai of Datu Galung)</td>
<td>Batu Kambar village, 10 January 2014</td>
</tr>
<tr>
<td>Maribut (Tribal chief of the Balai of Kiyu)</td>
<td>Kiyu Village, 12 January 2014</td>
</tr>
<tr>
<td>Hadi Irawan (AMAN Officer)</td>
<td>Banjarmasin, 8 January 2014</td>
</tr>
<tr>
<td>Agha (Local government officer)</td>
<td>Kotabaru, 10 February 2014</td>
</tr>
<tr>
<td>Anonymous</td>
<td>Bangkalaan Dayak Village, 9 February 2014</td>
</tr>
<tr>
<td>Anonymous</td>
<td>Bangkalaan Dayak Village, 9 February 2014</td>
</tr>
<tr>
<td>Anonymous</td>
<td>Atiran Village, 11 January 2014</td>
</tr>
<tr>
<td>Anonymous</td>
<td>Barabai, 12 January 2014</td>
</tr>
<tr>
<td>Anonymous</td>
<td>Banjarmasin, 12 January 2014</td>
</tr>
</tbody>
</table>
Participant Information Form

Research Project:
State (District) Courts and Traditional Dispute Resolution (TDR) in South Kalimantan: A Comparative Study

Researcher:
Mirza Satria Buana (PhD Candidate, School of Law, The University of Queensland)

We are seeking your participation in a research study examining the legal (reasoning) processes both in State (District) court and Traditional Dispute Resolution (TDR) in South Kalimantan, Indonesia. This study deeply examines how judges and local leaders in both legal systems exercise their authority in regard to public interests cases and natural resources cases. The strong influence of legal formalism and centralism in the Indonesian legal and judicial systems may hinder access to justice for marginalised and indigenous peoples of South Kalimantan, as the judges may utilise a textual interpretation rather than exercise more sociological and moral-based interpretations. On the other hand, TDR spirited by living ‘adat’ law (customary law) provides an alternative method of reconciliation and peaceful settlement. This research aims to provide a practical and significant contribution by evaluating the level of shared legal understanding between the State court and TDR. Disadvantages of TDR may be remedied and covered by the advantages of the State court system, and vice versa. This mutual reform is crucial to enhance the level of satisfaction of justice seekers in both institutions. In order to do so, intensive empirical research is needed.

This project is being undertaken as a PhD research project at The University of Queensland. This research project will first study relevant theories and legal documents for both institutions and their legal paradigms in order to understand the historical background and the nature of both institutions and practitioners. The researchers will then interview the key judges and local leaders, past and present, who hold or held cases relating to customary or living ‘adat’ law in six Regions in South Kalimantan Province.

We would be pleased if you would agree to be involved in an in-depth interview that may take approximately 1 hour. The interview will be focused on your understanding of legal pluralism and legal reasoning issues. The researchers may have read and critically examine the court’s decisions before undertaking the interview. Your participation is entirely voluntary and any information you reveal will be confidential. You may withdraw your participation from the research process at any time without penalty or prejudice. If you choose to withdraw after interview, your data will be omitted from the analysis and destroyed. Confidentiality of the interview process as well as the data record will be maintained for the protection of the participants. Interview responses will be recorded with notes complemented by voice recording, subject to your permission. Results of the interview will be reported collectively, without identification of individual names. Only summarised results
will be made available publicly, and these results will not attribute particular points to individual contributors. Nevertheless the identities of institutions may be distinguished subject to your agreement. This information is crucial to understand and illustrate the choices of each participating institutions. The researcher will ensure a final report is available to all participants.

In agreeing to participate in this research project, you will be asked to sign the consent form (attached). We will provide you with the option of your name and/or the name of your institution appearing in the acknowledgements section of reports, as having contributed.

This study adheres to the guideline of the ethical review process of The University of Queensland. You are free to discuss your participation in this study with the researcher: Mirza Satria Buana. You may contact him via email: mirza.buana@uq.net.au and mobile phone: +61426821588 (Australia) or +6281351471008 (Indonesia). If you would like to speak to an officer of the university not involved in the study, you may contact the Ethics Coordinator.

Many thanks for your assistance.

Mirza Satria Buana
PhD Candidate
School of Law, The University of Queensland, Australia
I am willing to take part in the research project being conducted by Mirza Satria Buana (PhD Candidate, School of Law, The University of Queensland).

I have read and understood the information provided. The nature of the project and my involvement have been outlined and informed to me and I am willing to participate. Any questions I have asked have been answered to my satisfaction.

I understand that my involvement will be in the form of an in-depth interview and that my involvement is likely to last 1-1.5 hours. I am aware that my participation in this project is entirely voluntary. I also understand that I can withdraw my involvement in this project at any time without penalty and prejudice.

I understand that all information I reveal will be confidential except if I am willing for the name of my institution to be distinguished in the text and/or any information, my name and/or the name of my institution to be acknowledged in reports.

In agreeing to participate in this research project, if I am acting formally as a representative of an institution, I confirm my authority and capacity to represent the institution.

Full name : ______________________________________________________________
Signed : ______________________________________________________________
Address : ______________________________________________________________
Email : ______________________________________________________________

- I do/do not agree that the name of my institution may be distinguished in the text of report. (Circle your preference)
- I would/would not like my name/my institution to be acknowledged in the thesis. (Circle your preference)
APPENDIX 3

Interview Questions to Judges and Justices

1. Indonesia has experienced both cultural segregation in colonial era and legal centralism in post-colonial era. Do you think Indonesia must defend the notion of legal pluralism?
2. As both the Constitution and legislation have recognised the rights of indigenous peoples and their laws, what is your personal perspective about adat law and indigenous peoples’ rights? Do their rights have limit?
3. Concerning cases involving indigenous peoples being brought to the State Court, do you think Indonesian judges must always consider unwritten adat law, indigenous traditions and social facts?
4. What is your opinion about TDR held in indigenous villages? Is it reliable as a dispute settlement process?
5. Adat law is regarded as ‘the socially-acceptable law of Indonesia’. Do you think adat law is substantially effective, or does it also contain drawbacks for communities?
6. When positive law (legislation, principles and doctrines) contradict with unwritten and living adat law, which one should be favoured?
7. Which one is more pivotal, legal certainty or ‘social justice’?
8. What is your perception of the ideal relationship between State and living adat law?
9. Do you think that the Court’s decision is always objective? If not, what are both internal and external factors that influence court decisions?
10. When interpreting legislation, what is your main reference? Can the judge’s internal morality, experiences and social conditions influence court decisions?
APPENDIX 4

Interview Questions to Tribal Chiefs and Indigenous Villagers

1. What is the history of this indigenous village?
2. Are adat law and TDR still effectively implemented in this village?
3. What are the significant influences of adat law, TDR and indigenous traditions in this village?
4. Do the younger generation still uphold adat law, TDR and indigenous traditions?
5. Can you explain the ‘procedures’ of TDR held in your villages?
6. How do villagers interact with State officers (particularly with police, and local government and Land Agency officers)?
7. Are you satisfied with the State law in general and local government’s policies in particular? What are some effects of government policies on indigenous peoples?
8. Are you satisfied with the adjudication processes in State Courts?
9. Do you think villagers are independent enough to manage natural resources and indigenous properties within their indigenous villages?
10. What is the background of the dispute?