



Dividing the Land: Legal Gaps in the Recognition of Customary Land in Indonesian Forest Areas

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ABSTRACT. On 30 December 2016, for the first time, the government of Indonesia recognized customary forests of nine indigenous communities. This recognition has proved the implementation of the 1945 Indonesian Constitution, as echoed by Constitutional Court Ruling 35/2012 that was released in May 2013, concerning the legal recognition of indigenous peoples' rights on land and forest. Ruling 35 took three years to be implemented. This paper discusses the factors that brought about the delay of that recognition. For decades before December 2016, the legal recognition of indigenous peoples' rights in Indonesia had not resulted in the successful reclaiming of indigenous peoples' customary land from "state forests." There were gaps between government commitments, laws, and development plans. Law, politics, and the economic interests of bureaucracy had created these gaps and had led to complex obstacles to the recognition of indigenous territories in Indonesia. Dualism of government authority over land tenure had prevented adequate protection of indigenous rights. Inconsistency of national laws and the absence of a clear national policy toward the recognition of indigenous peoples and their territories had induced local governments to play safe by not recognizing indigenous territories; rather, local governments continued granting licenses for mega projects for natural resource extraction. This paper also presents the dynamics of advocacy and lawmaking concerning customary forests in Indonesia, and it notes the relevance of the Philippines-Indonesia nexus for learning and sharing on behalf of indigenous peoples' advocacy. How the national law in different forms and at different levels has enabled and constrained the recognition of indigenous peoples and their claims to customary forests is the key theme discussed.

KEYWORDS. indigenous peoples · Indonesia · legal gaps · judicial reform · customary forest · land tenure

INTRODUCTION

Indigenous peoples have been recognized as key players in promoting sustainable natural resource management as well as climate change mitigation and adaptation (Kalafatic 2007; Maachi et al. 2008;

Wallbott 2014). Nevertheless, they are also vulnerable to human rights violations. International organizations are engaged in long term efforts to incorporate the issue of indigenous peoples' rights into several universal legal instruments and intergovernmental negotiations. The International Labour Organization Convention 169/1989 on Indigenous and Tribal Peoples in Independent Countries (ILO 1989) and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UN 2008) are some examples. Moreover, the human rights indicators of the UN Sustainable Development Goals 2015-2030 include the recognition and protection of indigenous peoples' rights. Then, the 2015 Paris Agreement of the United Nations Framework Convention on Climate Change emphasizes that actions to address climate change should respect, promote, and consider the rights of indigenous peoples.

In Indonesia, where indigenous peoples comprise an estimated 50 to 70 million people belonging to 2,244 indigenous communities, the government applies a set of legal frameworks to recognize and protect their rights. The constitutional rights of indigenous peoples concern their semi-autonomous authority, human rights protection, and the advancement of their local culture (Safitri and Uliyah 2014).

Unfortunately, the constitutional recognition of the land rights of indigenous peoples had not resulted in their successful reclaiming of customary land from state forests until the end of 2016. Constitutional Court Ruling 35/2012 that was released in May 2013 recharged the struggle for the recognition and protection of customary land. The ruling recognizes that customary forests are no longer part of state forest as previously stated by Indonesian Forestry Law of 1999. Nevertheless, more than three years after Constitutional Court Ruling 35 was released, the Indonesian government had not enacted any customary forests. The recognition of customary forest was only given by the government of Indonesia in December 2016 when President Joko Widodo, for the first time, delivered the government's recognition to nine customary forests. This paper discusses the factors that brought about the delay of that recognition.

Studies that analyzed the loopholes of Constitutional Court Ruling 35 and the obstacles to its implementation have noted several points. First, the state still has full authority to determine the procedure of customary forest recognition; in this respect, little power transfer has taken place in favor of indigenous people (Siscawati 2014; Savitri 2014; Rachman 2014). Second, most government officials avoid recognizing indigenous communities with the argument of

maintaining national integration. Indigenous peoples in Indonesia are very diverse in terms of their concept of territories, historical land claims, land tenure, mode of production, and political systems. Colonial policies and post-colonial dynamics (political and economic) contributed to a complex articulation of indigenous identity (von Benda-Beckmann and von Benda-Beckmann 2008; Li 2000; de Royer et al. 2015). Third, the central government also plays a significant role in the postponed recognition of customary forests. The absence of an indigenous peoples' rights law has been a common reason for many local governments to avoid making regulations that recognize indigenous territories.

However, I argue that the main constraint to having realized Constitutional Court Ruling 35 was the inability of the Indonesian government to provide appropriate legal instruments. Based on my research and intensive involvement in policymaking from 2013 to 2015, I will show how and why legal gaps exist and how this has affected indigenous people's land rights.

ON THE LEGAL CONCEPT OF INDIGENOUS PEOPLE AND INDIGENOUS LAND TENURE

Indonesian laws use different terminologies, definitions, and criteria for indigenous peoples. The 1945 Indonesian Constitution, for example, uses two different terms: *kesatuan masyarakat hukum adat* (communities based on customary law) and "traditional communities." Other laws use the terms *masyarakat hukum adat* (customary-law based communities),¹ *masyarakat adat* (custom-based communities),² and *masyarakat asli* (native communities).³ These terms have their own definition and some laws also have different criteria to determine indigenous peoples.

According to the 1945 Constitution, in order to be recognized, indigenous peoples must be "in existence, have cultural practices that are in accordance with societal development and the principle of the Unitary State of the Republic of Indonesia, and shall be regulated by the law."⁴ In one of its rulings, the Constitutional Court elaborates five criteria to determine the existence of indigenous peoples. Indigenous groups must have a) in-group feelings as single communities, b) a traditional system of government, c) tangible and/or intangible properties, d) a system of customary law, and e) clear territorial boundaries, making for territorially-based indigenous communities.

The concept of territorially-based indigenous communities refers to groups whose members share the same residential land within one indigenous claimed territory. The classification of indigenous communities in Indonesia originates from the work of colonial socio-legal scholars, in particular Van Vollenhoven. Besides territorially based communities, Van Vollenhoven included the following types of communities as indigenous: a) communities based on genealogical ties of its members, b) communities that constituted a combination of genealogical and territorial communities, c) social groups of native Indonesians that formed voluntarily organizations such as farmer irrigation groups in Balinese villages or mutual help groups in Javanese villages (Holleman, 1981).

Most legal concepts of indigenous people in Indonesia, including the concept used in the 1945 Constitution, are based on Van Vollenhoven's work, in particular concerning the minimum requirements to define a people as "indigenous." Van Vollenhoven found a combination of private right and public power of indigenous peoples over their territories. *Beschikingsrecht* or right of disposal was the term he used to characterize native land tenure rights in the Netherlands East Indies. This right denotes a communal right to the whole indigenous territory and a public power to regulate, allocate, and control land and natural resources within the territory.

The Basic Agrarian Law of 1960 (BAL), the primary legal basis of land tenure in Indonesia, adopted the concept of *beschikingsrecht* in recognizing the indigenous form of land tenure called *hak ulayat* (customary communal right to land), a term used in the BAL as a generic term for an indigenous territorial right. The *ulayat* right as stated in the BAL is the basis for individual private land rights in the indigenous territories. Once the *ulayat* right is recognized, the state cannot grant any land rights without the indigenous peoples' consent.

Problems then emerged as few *ulayat* rights have been recognized. Indonesian laws stating that the authority should recognize *ulayat* rights is now with local governments. Yet, as of 2015, only 15,000 hectares of indigenous land has been legally recognized by local governments (Malik, Arizona, and Muhajir 2015), while the Indigenous Peoples Alliance of the Indonesian Archipelago (AMAN) mapped around 6.8 million hectares of indigenous territories. In the following sections we discuss the obstacles to that recognition, including recognition in forest areas.

DUAL STATE AUTHORITY ON LAND TENURE

The primary regulation of land tenure and natural resource management in Indonesia, as stated above, is the Basic Agrarian Law (BAL) 5/1960. In this law, the term “agrarian” refers to land, water, air, and natural resources. Thus, the government must apply the BAL to all land and natural resource tenure. In practice, however, for its total land area of 190 million hectares, the Indonesian government uses the BAL only for 37 percent of the land whereas it uses Forestry Law 41/1999 for the 63 percent of land that is situated within *kawasan hutan* (forest areas). There is dual state authority over land tenure: the Ministry of Environment and Forestry (prior to 2014, the Ministry of Forestry) holds the authority to control the forest area and the National Land Agency has become the authoritative agency to register land rights in non-forest area. What has produced this dualism and what its implications are for the protection of citizens’ land rights is discussed in this section.

Before we start, we need to know how Indonesian Law defines “forest” and “forest area” and determines who owns the forest and who controls the forest area. The 1999 Forestry Law differentiates *hutan* (forest) from *kawasan hutan* (forest area). While “forest” refers to an ecological landscape “dominated by trees in their natural form and environment” (Article 1.2), “forest area” is “a certain area that is enacted by government to be retained as permanent forest” (Article 1.3). *Hutan tetap* (permanent forest) is forest that cannot be converted into other land uses. Until now, the Indonesian government has not been fully successful in making its permanent forest. According to the Forestry Law, a forest area exists if the Ministry of Forestry designates certain land to be indicative of a forest, conducts verification and validation of people’s land rights in that area, delineates the forest boundaries, maps the “clean and clear” land, and finally enacts that area as “permanent forest.” This process is called *pengukuhan kawasan hutan* (forest area gazettement). Such a permanent forest exists if the entire process of gazettement has been completed. This, however, has not been entirely done. As such, “forest area” is not always a forest in the ecological sense. In addition to this, so-called forest areas have been continuously spent on non-forestry uses.

Regarding the “ownership” of forest, the Forestry Law introduces two categories: *hutan negara* (state forest), that is, forest found on non-titled land; and *hutan hak* (title forest), that is, forest located on titled land. Indonesian law is complex regarding state forest or state land. The

law prohibits the state to “own” the land and the forest. Accordingly, state land/state forest is not land or forest owned by the state. Rather, the term “state forest” means forest that is directly controlled by the state. The term “control” refers to an exclusive authority of the state to allocate, grant licenses, and manage the forest. This authority comes from the constitutional doctrine of *hak menguasai negara* (the state’s right to control all land and natural resources). This doctrine was meant to replace the Colonial Domain Declaration that assumed that the (colonial) state could be the land owner in the Netherlands East Indies. However, the Indonesian founding fathers believed that the state was only a custodian of national ownership of land and natural resources. Consequently, it could not be the owner of the land but only hold the *menguasai* (authority to control).

Our question, then, is who controls the forest area? Should the state or the citizens be the forest controllers? In fact, the Ministry of Environment and Forestry controls all forest areas. It holds the authority to regulate land tenure in forest areas by applying the 1999 Forestry Law. However, in practice, Indonesian forest areas are not fully covered by natural forest. The government has recognized that forest areas may be only forest on paper. In these areas we can find degraded land, villages, provincial capitals, and community agroforest gardens. In contrast, areas designated as “non-forest areas” may still contain plenty of natural forest. Moreover, contested land claims leading to unresolved conflicts are found in many forest areas.

Most government officials tend to classify forest areas as “state forest.” They do not agree that any private land rights, including customary land rights, exist in forest areas. However, the Forestry Law recognizes title forests besides state forests, as mentioned earlier. Clearly, to assume that forest areas are state forest is a matter of government perception rather than legal provision. It is this perception that leads to the practice of dualism of land tenure authority in which the Ministry of Environment and Forestry administers land tenure in forest areas and the National Land Agency registers land rights in non-forest areas.

For decades, Indonesian government officials have been holding this misperception concerning the status of land tenure in forest area. The Ministry of Forestry was successful in developing a discourse that forest areas were zones free of private land rights. Obediently, the National Land Agency up to now accepts this argument and restrains itself from granting land rights to forest areas.

The government confirmed this dualism by enacting a Land Use Regulation in 2004 that prohibits the granting of land title to forest areas (Government Regulation 16/2004). The 2007 Spatial Planning Law strengthens this division (Law 26/2007). This law provides penal and administrative sanctions for government officials who grant licenses in areas that have different spatial functions. This provision is often used to strengthen the prohibition of granting land rights in forest areas. Obviously, the intent of this argument is to make forest areas zones free of private land rights. As a result of this dualism in land administration, there is little protection of individual and communal land rights in forest areas.

Two policy initiatives have been taken to end this dualism. The first is a regulation of the Ministry of Environment and Forestry that provides procedures to recognize title forest within forest areas (Regulation 32/2015). The second is a joint ministerial regulation to administer people's land claims in forest areas, which promotes cooperation between the Ministry of Environment and Forestry, Ministry of Agrarian and Spatial Planning Affairs/National Land Agency, and local governments. These regulations will be discussed further in the next section.

Unfortunately, only few policymakers in the ministries involved support those policies. Many still indicate their unwillingness to accept a single land administration policy in forest areas. Clearly, the red tape in the recognition of title forest is mainly due to this bureaucratic perception rather than legal obstacles. In the next section, we can see that this perception is basically against the constitution.

THE CONSTITUTIONAL COURT RULING 35

A landmark decision of the Indonesian Constitutional Court on 16 May 2013 (Ruling 35) revised the misconception of forest tenure in two respects. The first one concerns the status of indigenous peoples as the rights holders of customary forest. The second concerns the single land administration.

Before this ruling, the 1999 Forestry Law had unclear regulation concerning the status of citizens' land rights in forest areas. As discussed above, the original concept of "forest area" refers to an area designated by the government which should not be converted into non-forestry land use, but there is no provision in the Forestry Law that stipulates that forest areas should be controlled by the state. Whereas the Forestry Law declared that forest area can be either state forest or title

forest, it placed *hutan adat* (customary forest) under the category of state forest (Article 1.6). A customary forest, according to this Article, was state forest situated in indigenous territories. This provision denied the right of indigenous communities to forest areas despite many indigenous land claims inside these areas. It also confirmed that the Forestry Law did not, in practice, allow for private land rights in forest areas and that it kept the state in full control of forest areas.

Article 1.6 of the Forestry Law contradicted the constitution which respects the rights of indigenous peoples. Accordingly, the Constitutional Court Ruling 35 recognizes the indigenous peoples as legal subjects, right-holders, and duty-bearers like other individuals and legal entities. Therefore, the land where the customary forest is located is land of the indigenous peoples, not state land. The court made a correction to Article 1.6 of the Forestry Law by declassifying customary forest from state forest and reclassifying it under the category of title forest. Constitutional Ruling 35 then confirms the earlier distinction between state forest and title forest but stipulates that title forest consists of customary forests of indigenous peoples as well as private land rights of individual citizens or legal entities. But even though Ruling 35 separates customary forest from state forest, the procedure of obtaining legal recognition to customary forest still follows the procedure required by the Forestry Law. To be able to manage the forest, indigenous communities should be recognized by district or provincial governments (Article 67). When indigenous territories are situated in the administrative area of a district, they should be recognized by district governments. If their territories are located in two or more districts, they should be recognized by provincial governments. The recognition must be in the form of a *peraturan daerah* or *perda* (district or provincial regulation).

In practice, this provision constrains the recognition of customary forest since many local governments are unwilling to recognize indigenous territories. Of 124 local regulations concerning indigenous peoples enacted from 1979 to early 2015, few relate to the recognition of indigenous territories (Malik, Arizona, and Muhajir 2015).

The majority of local governments prefer recognizing the political institutions of indigenous people rather than their territories. This has to do with political transactions between local governments and indigenous leaders. When a local government recognizes (or even establishes new) indigenous institutions and provides financial and other support to these institutions, the indigenous leaders then pay their loyalty to the government, particularly to the district head and the

governor. Due to such transactions, only 15,000 hectares of customary forests (indigenous territories) have been recognized by local governments. Most of these are located outside state-defined forest areas (Malik, Arizona, and Muhajir 2015). For their part in amending this process, the indigenous peoples' organization AMAN and its civil society supporters submitted maps of indigenous territories to the Ministry of Environment and Forestry that cover an area of 6.8 million hectares in total, part of which overlaps with forest area.

Constitutional Court Ruling 35 undermines the dual land administrative authority. By recognizing title forests, Ruling 35 clearly justifies a single land administration in forest and non-forest areas. The forest areas are no longer exclusively controlled by the state but can be owned by citizens as well. This is a great change in the land tenure laws in Indonesia.

Indigenous peoples' organization AMAN was a key actor behind Ruling 35. In 2012, AMAN and two indigenous communities registered a petition for constitutional review regarding several provisions in Forestry Law of 1999. Most of these relate to customary forest status, the procedure of enacting customary forest, and the requirements that indigenous peoples have to meet in order to become the right-holders of customary forests. AMAN basically echoed the prolonged legal advocacy by Indonesian civil society organizations (CSOs) that, soon after the enactment of the Forestry Law in 1999 incorporating customary forests into state forest, had raised their objection. Their efforts to ally with the parliament to replace this law had not been successful as parliament failed to discuss its revision.

Discussions among CSOs and AMAN were conducted for years before AMAN sent the petition to the Constitutional Court. In 2011, a year before the petition was registered, there was a policy change at the Ministry of Forestry when it agreed, for the first time, to discuss land tenure issues with broader international and national stakeholders. In a conference on Forest Tenure Reform hosted by the Ministry of Forestry and two international organizations, the ministry indicated its willingness to open a dialogue with the CSOs regarding a roadmap for forest-tenure reform, in which the recognition of customary forests was part of the agenda. Yet, many forestry officials did not straightforwardly accept the initiative of forest-tenure reform. Though political commitment had been expressed by the Forestry Minister, many officials, particularly those who strictly held to the perception that forest areas should be under state control, were unwilling to support this agenda. At this stage, AMAN and some CSOs decided to not just

depend on the political will of the Ministry of Forestry but to use the judicial process in order to speed up the desired change. This was the reason for AMAN and two indigenous peoples' communities that had been directly injured by the Forestry Law, to register their petition to the Constitutional Court on 19 March 2012. A year later, the court's decision, known as Ruling 35, was handed down.

GOVERNMENT RESPONSES

Prior to the recognition of customary forests by President Joko Widodo in December 2016, the national government responded to Constitutional Court Ruling 35 in two ways: a) presidential commitments to recognize indigenous peoples and their territories; b) the enactment of several new laws and policies, a procedure to recognize indigenous peoples, and social mapping of indigenous peoples. This section discusses the extent to which these responses have led to the effective implementation of Ruling 35 and the legal and political factors that influenced its implementation.

Presidential Commitments

A month after Constitutional Court Ruling 35 was declared, then-President Dr. Susilo Bambang Yudhoyono proclaimed his initiative to register customary land in Indonesia. In his speech at the International Workshop on Tropical Forest Alliance on 27 June 2013, Yudhoyono said, "I am personally committed to initiating a process that registers and recognizes the collective ownership of *adat* territories in Indonesia. This is a critical first step in the implementation process of the Constitutional Court's decision." However, the relevant laws and policies made during Yudhoyono's presidency were not sufficient to realize the implementation of Ruling 35. Not a single customary forest was enacted between 16 May 2013 and 20 October 2014, the last day of Yudhoyono's tenure.

Current President Joko "Jokowi" Widodo, on his part, promised six programs on indigenous peoples when he ran for the presidency (table 1). Some of these were a continuation of previous initiatives by government/parliament and by CSOs and AMAN.

Many CSOs, including AMAN, were supportive of Jokowi during the last Indonesian presidential election. They were active in the campaign as well as in the development of Jokowi's vision and mission document (known as *Nawa Cita* or Nine Pledges, the source of table 1). Undoubtedly, Jokowi's six pledges on indigenous people were

Table 1. Jokowi's Nawa Cita pledge on indigenous people

1. Review and adapt all laws and regulations related to the recognition, respect, protection, fulfillment, and advancement of indigenous peoples' rights, particularly those related to land and natural resources as mandated by the Decision of the Peoples' Consultative Assembly (TAP MPR) no. IX/2001 and Constitutional Court Ruling 35/2012.
 2. Continue the legislative process of the Bill on Indigenous Peoples' Rights.
 3. Ensure that legislation, such as the Land Bill, will be in accordance with Constitutional Court Ruling 35/2012.
 4. Initiate a bill of agrarian conflict resolution.
 5. Establish an independent committee regarding indigenous peoples.
 6. Commitment to facilitate regional governments to properly implement Law 6/2014 on the Village, particularly on the establishment of adat villages.
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Source: Vision and Missions of Joko Widodo and Jusuf Kalla (2014).

based on the agenda of CSOs, such as the Bill on the Recognition and Protection of the Rights of Indigenous Peoples, the independent committee on indigenous peoples, and agrarian conflict resolution. These agendas had been advocated for decades.⁵

Unfortunately, there appeared a gap between pledges and the actual development plan. Of the six pledges mentioned in table 1, only two were adopted in the national mid-term development plan 2015–2019: the Land Bill and the policy on *adat* villages. Others remain at the level of CSO discourse rather than government policy (Safitri, Berliani, and Suwito 2015).

The IP Bill provides another example of the gap between government commitment and lawmaking. The bill was proposed by AMAN to the last parliament. Opposition party PDIP, led by former president Megawati Soekarnoputri, accepted AMAN's proposal and became the bill's initiator. Key provisions were discussed and agreed upon, including a single definition of indigenous people, general criteria to determine indigenous groups, and the procedure to recognize them. In terms of land rights, the bill recognizes communal land rights as well as individual land rights of the members of indigenous groups.

However, the bill was not acted upon by the end of the parliament's term in September 2014. The government, represented by the Ministry of Forestry, failed to extend the bill the necessary attention. The Ministry of Forestry sent a representative who had no authority to discuss the bill with the parliament, according to the chairperson of the committee that deals with the IP Bill. This stalled the review process of the bill until the end of the parliament's term in 2014.

Consequently, AMAN and CSOs worked to get the bill listed in the next National Legislative Plan of 2016 and 2017, though the current parliament has not yet indicated its willingness to actually discuss the bill.

Government Regulations on Indigenous Peoples and Their Territories after Ruling 35

Different ministries have responded to Ruling 35 with several regulations. The Ministry of Home Affairs prepared the Village Law in 2014 where some of the provisions concern traditional or *adat* villages. Aside from this, there was a ministerial regulation regarding the procedure of recognizing indigenous communities. The Ministry of Forestry revised its ministerial regulation regarding forest gazettement in which the conditions of customary forests to be recognized are restated. In addition to this, this ministry also provided the technical procedure in recognizing customary forest as part of title forest. The National Land Agency enacted a ministerial regulation concerning the registration of communal land of indigenous communities. How have these regulations strengthened and competed with each other will be described below.

The 2014 Village Law (6/2014) attempts to operationalize the criteria for recognition of indigenous peoples as contained in Ruling 35. This law also promotes the revitalization of *desa adat* (traditional villages), which was abolished by the 1979 Village Law. Moreover, the Forestry Minister issued a *pengukuhan kawasan hutan* (ministerial regulation on forest gazettement) (Ministerial Regulation 62/2013). This regulation states that the requirement to have customary forests recognized include the existence of provincial and district regulations that recognize the indigenous peoples and their territories, as well as a map of indigenous territories where the claimed customary forest is situated. As stated earlier, providing local governments with the authority to regulate this process without providing them any other form of legal support does nothing to accelerate the recognition of indigenous peoples. Many local governments prefer to allocate the land to plantation or mining corporations than to indigenous peoples. They believe that recognizing indigenous territories would discourage local investments.

In 2014, the Minister of Home Affairs of Yudhoyono's Cabinet, Gamawan Fauzi, issued a regulation to guide and assist local governments in recognizing indigenous peoples while the IP Bill is not yet enacted (Regulation 52/2014). He also circulated a letter for local governments

in December 2013 to conduct a social mapping of indigenous peoples. Ministerial Regulation 52/2014, however, created a legal problem as it stated that recognition by local government is legalized through a decree of the *bupati* (district head) or governor, whereas the Forestry Law requires a regulation at the district/provincial level, which is a higher level in the hierarchy of Indonesian legislation.

On 17 October 2014, several days before the end of Yudhoyono's administration, four ministers⁶ agreed to pass a joint ministerial regulation to guide the handling of land claims in forest areas, including the handling of customary land claims. However, without a decision on the IP Bill, the implementation of this regulation was constrained, as the question of how one should determine indigenous groups as land claimants was not resolved.

Then, the Minister of Agrarian/Spatial Planning passed a regulation concerning Communal Land Rights (Regulation 9/2015) that recognized the eligibility of indigenous peoples to hold communal land title. However, several legal scholars disagreed with the idea of indigenous peoples land titling. They argued that *hak ulayat* (indigenous peoples communal land, which is also known by different terms in different indigenous communities) is not a land title as such but a source of land title (as explained above). The Basic Agrarian Law clearly states that the agrarian law—including land law—is based on customary law. As such, *hak ulayat* should be the source of land title within indigenous territories, either individually or collectively as the land of families. Thus, *hak ulayat* cannot be granted land title, but it can only be registered and marked in a land registration map.

Apart from these legal debates, the Minister of Environment and Forestry tried to develop a more operational regulation to recognize customary forests. In particular, upon the advice of CSOs, the minister made a regulation on title forest (Regulation 32/2015). This Regulation re-emphasized that customary forest is part of title forest and that "forest area" consists of state and title forest.

Undoubtedly, the Forestry Minister's Regulation on Title Forest provided a legal procedure to recognize nine customary forests as declared by President Joko Widodo at the end of 2016. This Regulation also created ministerial discretion by accepting any legal products of district or provincial government to be used as the basis of customary forest recognition. Through this Regulation on Title Forest, the contradiction between the guidelines of the Forestry Law and the

Minister of Home Affairs Regulation 52/2014 as mentioned above was removed.

There is sufficient political commitment from national leaders in Indonesia to implement Constitutional Court Ruling 35. In general, laws and development programs also support the recognition of customary forest. The fact that the government had postponed the recognition of customary forests until the end of 2016 relates to several obstacles, which will be summarized in the conclusion.

CONCLUSION

The establishment of the Indonesian Constitutional Court in 2003 has opened new opportunities for using judicial advocacy to achieve legal recognition for indigenous peoples and their customary forests. The Constitutional Court Ruling 35/2012 stands as an example of how this advocacy could be successful. Nevertheless, in implementing this ruling, several political and legal factors must be considered—both as opportunities and constraints.

There are three main obstacles to the actual recognition of customary forest after Ruling 35. First, there is an inconsistency in national law regarding the legal blanket to be used to recognize indigenous peoples and their territories. The debate whether such recognition should be conducted through *perda* (local regulation) or decrees of district heads/governors is continuing. However, there is a regulation that aims to end this debate (Ministry of Environment and Forestry Regulation 32/2005 on Title Forest). It provides discretionary power to the minister to accept any legal products of district or provincial government to be used as the basis of customary forest recognition. Through this regulation on title forest, the contradiction of regulation has been removed and it has been used to recognize nine customary forests in December 2016.

The second obstacle is the misapprehension among many forestry officials that “forest areas” should be state forests and should therefore be kept “clean” from citizen’s land rights. This has led those officials to assume that customary forests must be released from forest areas. Once released, local governments can then convert those customary forests into non-forestry land use such as for plantation and mining. There is no strong policy or regulation to keep forested land outside “forest areas.” Thus, releasing customary forests from “forest areas” can be harmful for the sustainability of customary forests.

The third obstacle is the strong political-economic motivation among local governments to prioritize land allocation for large-scale investments rather than recognize indigenous territories. The last factor pertains to a lack of knowledge among local governments: most local governments erroneously assume that they have to wait for the enactment of the Indigenous Peoples' Rights Bill before they can make local regulations concerning the recognition of indigenous territories.

The Indonesian experience teaches us, moreover, that political commitments and general provisions on indigenous people are often in contradiction with national and local policies to accelerate infrastructure, mining projects, and food and energy estates. The number of licenses granted for such mega projects is far above the number of indigenous territories legally recognized by the government. This creates another constraint to the actual legal protection of indigenous land.

The IP Bill is urgent and needs to be enacted. Indonesia has been learning from the Philippines on how to set up a legal framework and institution to recognize indigenous peoples' rights. There are two issues of legal advocacy in Indonesia that are closely related to the Philippines' Indigenous Peoples' Rights Act of 1997 and its implementation. The first issue concerns the concept of *wilayah adat* (indigenous territories). For years, Indonesian CSOs and AMAN promote *wilayah adat* as the object of recognition. The concept of *wilayah adat* resembles the notion of ancestral domain in the Philippines' Indigenous Peoples' Rights Act. The second issue concerns the need for a national institution that is responsible for the recognition and protection of indigenous peoples. The Indigenous Peoples' Rights Act designated this responsibility to one institution, the National Commission on Indigenous Peoples. Yet, in Indonesia, there are several ministries that relate to indigenous peoples and their rights. An independent commission with broader tasks to recognize, protect, and empower indigenous peoples is required. Though President Jokowi promised to set up a *panitia masyarakat hukum adat* (independent committee on indigenous peoples), the parliament only envisages a committee with limited authority to verify and validate the existence of indigenous peoples and their territorial claims, as can be seen in the IP Bill. AMAN and some CSOs proposed the creation of an indigenous peoples' task force by the president as an intermediate strategy, to bridge the gap until the IP Bill is enacted and a national committee on

indigenous peoples is established; but the task force has not yet been realized.

Reviewing the experiences in the Philippines, Indonesia also needs to learn from the organizational problems faced by the National Commission on Indigenous Peoples, including its inadequate structure and personnel capacity, red tape, and governance issues (Keinburg 2012, 17). The challenge for Indonesia is how to mitigate the abuse of power of any organization formed to support indigenous peoples and what organizational forms and mechanisms can ensure an effective role to recognize and protect the diversity of indigenous peoples in Indonesia. ❀

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NOTES

1. For example, Environmental Protection and Management Law (Law 32/2009), Basic Agrarian Law (Law 5/1960), Forestry Law (Law 41/1999).
2. For example, Coastal and Small Islands Management Law (Law 27/2007).
3. For example, Law on Papuan Special Autonomy (Law 21/2001).
4. Article 18b, paragraph 2 of the 1945 Constitution.
5. An elaborate explanation about the struggle of AMAN to achieve the IPs Bill can be seen in Down to Earth (2012).
6. They were the Minister of Home Affairs, Minister of Forestry, Minister of Public Works, and the Head of the National Land Agency.

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