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Routledge Studies in Asian Law

LAND LAW AND DISPUTES IN ASIA

IN SEARCH OF AN ALTERNATIVE FOR DEVELOPMENT

Edited by
Yuka Kaneko, Narufumi Kadomatsu and
Brian Z. Tamanaha

ROUTLEDGE

Land Law and Disputes in Asia

Through an in-depth legal analysis by leading scholars, this book searches for the exact legal causes of land-related disputes in Asia within the histories, legal systems and social realities of the respective countries. It consists of four main parts: examining the relationship between law and development; land-taking in developmental stages; common ownership; and proposals for new approaches to land law and dispute resolution. With a combination of orthodox legal interpretations and the empirical approach of legal sociology, the contributors undertake an extensive comparative legal analysis across common and civil law traditions. Most importantly, they propose pathways forward for legal transformations in the pursuit of sustainable development in Asia.

This book is vital contribution to the study of comparative law, and especially property law, in East and Southeast Asia.

Kaneko, Yuka, LL.D., Professor, Kobe University Center for Social Systems Innovation. She is active in the field of Asian comparative law as well as in the sociology of law. She is the author of several books, including *Asian Crisis and Financial Law Reforms*, Shinzan-Sya in 2004; *Law Reforms and Legal Development in Asia*, Daigakukyoiku-Shuppan in 2010; *Asian Law in Disasters: Toward a Human-Centered Recovery*, Routledge in 2016; *Law and Development of Myanmar*, Koyo-Syobo in 2018; and *Civil Law Reforms in Post-Colonial Asia: Beyond Western Capitalism*, Springer in 2019.

Kadomatsu, Narufumi, LL.M., Dean and Professor at Graduate School of Law, Kobe University. He studies legal issues of administrative law and urban land law. He has published many articles in academic journals in Japanese, English and German. He is an editor or a contributor of several books, including Kadomatsu et al., *Legal Response to Vacant Houses: An International Comparison*, Springer 2020. He is also a member of the board of directors of the East Asia Administrative Law Association.

Tamanaha, Brian Z., John S. Lehmann University Professor, Washington University School of Law, St. Louis, U.S.A. He is a renowned jurisprudence and law and society scholar, and the author of nine books, including his latest book titled *A Realistic Theory of Law* (2017), which received the 2019 IVR Book Prize from the International Association of the Philosophy of Law and Social Philosophy for best legal philosophy book published in 2016–2018, as well as an Honorable Mention for the 2018 Prose Awards in Law by the Association of University Presses. His book, *On the Rule of Law* (2004), has been translated into nine languages.

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Contributors

GILLESPIE John, Adjunct Professor (research) in the Department of Business Law and Taxation, Monash University. He is working on a research project exploring the role of emotions in judicial decision making in East Asia. He has also authored and edited eight books and published more than 60 articles and book chapters in journals such as the *Law and Society Review*, *International Law Quarterly Review*, *Harvard Human Rights Journal*, *Law and Social Inquiry*, *Stanford Journal of International Law and New York University* and *Journal of International Law and Politics*.

JIAO Shu, Doctor of Laws (Kobe University), Lecturer at Shanghai University of Engineering Science. She has been working on the nature of the public interest requirement in land expropriation laws of China and Japan.

KADOMATSU Narufumi, LL.M., Dean and Professor at Graduate School of Law, Kobe University. He studies legal issues of administrative law and urban land law. He has published many articles in academic journals in Japanese, English and German. He is an editor or a contributor of several books, including Kadomatsu et al., *Legal Response to Vacant Houses: An International Comparison*, Springer 2020. He is also a member of the board of directors of the East Asia Administrative Law Association.

KANEKO Yuka, LL.D., Professor, Kobe University Center for Social Systems Innovation. She is active in the field of Asian comparative law as well as in the sociology of law. She is the author of several books, including *Asian Crisis and Financial Law Reforms*, Shinzan-Sya in 2004; *Law Reforms and Legal Development in Asia*, Daigakukyoiku-Shuppan in 2010; *Asian Law in Disasters: Toward a Human-Centered Recovery*, Routledge in 2016; *Law and Development of Myanmar*, Koyo-Syobo in 2018; and *Civil Law Reforms in Post-Colonial Asia: Beyond Western Capitalism*, Springer in 2019.

LEE Ming-Chih, Ph.D. Candidate, Osaka University Graduate School of Law and Politics, Japan. She is also a recipient of a fellowship for doctoral candidate of Institutum Iurisprudentiae, Academia Sinica in Taiwan from July 2020 to June 2021, and JSPS (Japan Society for the Promotion of Science) Research Fellow from April 2018 to March 2020. She has served as a lawyer in land

expropriation cases in Taiwan from 2011 to 2015 and has published five articles and book chapters in journals on land expropriation issues in Taiwanese Mandarin and Japanese.

MATSUMOTO Mikiko, Officer at Administrative Management Bureau, Ministry of Internal Affairs and Communications; Ph.D. Candidate in the Graduate School of Law, Kobe University and JSPS (Japan Society for the Promotion of Science) Research Fellow from 2019 to 2021. She has been working on a comparative legal study on public–private cooperation in Japan and China.

MUROI Sachihiko, Ph.D. Candidate, Kobe University. He is a member of the Japanese Association of Sociology of Law. He is exploring the contemporary contexts of the traditional rights of commons in Japanese society, from a comparative perspective involving other parts in Asia.

NGUYEN Hong Hai, Civil Code drafter, Ministry of Justice of Vietnam; former lecturer at the Hanoi Law University. He took the leading role throughout the drafting process of the 2015 Civil Code in Vietnam and was also the member of the permanent editorial team of the 2014 Law on Marriage and Family, the 2015 Civil Procedure Code, the 2015 Law on amendment, supplement of the Law on Civil Judgment Enforcement, the 2016 Law on Auction, 2020 Law on Securities and many other legal documents on the precedents of the Supreme People's Court, securities transaction, land, trade, dealing with bad debt and restructuring credit institutions, etc.

OKAWA Kenzo, Associate Professor, Setsunan University. He has been the legal advisor dispatched to Laos since 2014 by the Japan International Cooperation Agency (JICA) to support the drafting team of the Lao Civil Code, which was adopted in December 2018 and came into force in March 2020. He is the author of several academic articles written about legal reform cooperation, including "Issues of Japanese legal cooperation projects in Asia: viewed from the Assistance for Civil Code Drafting" in Yuka Kaneko eds., *Asian Civil Law in Economic Reforms*, Kobe University Publisher in 2019.

PHAM Duy Nghia, Professor, Fulbright University Vietnam, the former Dean of the Law Department of the University of Economics of Ho Chi Minh City. He is a leading legal scholar in Vietnam and is one of 12 members of the Case-Law Advisory Council at the Supreme People's Court. His recent research focuses on good governance, including perspectives on how to enhance the people's participation in policy making and enhance the efficiency, transparency and accountability of government.

RUDY Lukman, Associate Professor, Faculty of Law, Lampung University, Indonesia. He holds the positions of the Director of the Center for Law and Development and the Secretary of Institute of Research and Public Services of his university. He is also the legal counselor to the Legislation Making Committee of the Regional Representative Council (Dewan Perwakilan Daerah) of Indonesia since 2015 to present. He is a member of the drafting team on

the Law on Customary Land Rights, the Law on Land, as well as the Law on Customary Rights.

SAKANO Issei, Legal Counselor, Ministry of Justice of Cambodia. He was stationed in Cambodia as a technical advisor sent by the Japan International Cooperation Agency (JICA) to the Ministry of Justice of Cambodia during the codification work of the Cambodian Civil Code from 1999 to 2011. He was also dispatched by JICA as a technical advisor to the Union Attorney General Office of Myanmar from 2014 to 2016.

SE NooRi, Ph.D. Candidate in the Graduate School of Law, Kobe University. She has been working on comparative legal study of disaster law in Japan and Korea. She is also a correspondent of the Constitutional Research Institute of the Constitutional Court of Korea.

TAKAMURA Gakuto, Doctor of Laws, Professor of Graduate School of Policy Science & College of Policy Science, Ritsumeikan University, Japan. He received the award for best academic book from the Japanese Association of Sociology of Law in 2008 as well as the Shibusawa-Claudel and Louis Vuitton Prize in 2008 for his book titled *Historical Sociology of Freedom of Association and State Imagery in France*, Keiso-shobo, 2007. He was also awarded the Prize of Fujita by the Foundation of the Tokyo Institute for Municipal Research in 2013 for his book titled *Urban Commons and City Revitalization: Community Management of the Commons and New Functions of the Law* (in Japanese), Minerva-shobo, 2012.

TAMANAHA Brian Z., John S. Lehmann University Professor, Washington University School of Law, St. Louis, U.S.A. He is a renowned jurisprudence and law and society scholar. He is the author of nine books, including his latest book titled *A Realistic Theory of Law* (2017), which received the 2019 IVR Book Prize from the International Association of the Philosophy of Law and Social Philosophy for best legal philosophy book published in 2016–2018, as well as an Honorable Mention for the 2018 Prose Awards in Law by the Association of University Presses. His book, *On the Rule of Law* (2004), has been translated into nine languages.

YANG Yashu, Doctor of Laws (Kobe University), Lecturer at Faculty of Law, Osaka Gakuin University. She has been working on the land expropriation and compensation for livelihood rehabilitation in China and Japan.

YE Naing Lin, Township Administrator of Oat-Twin Township, Taung-gu District, Bago Region, General Administration Department of the Ministry of Home Affairs of Myanmar. He is a Ph.D. candidate at the Law & Development Program of the Graduate School of International Cooperation Studies, Kobe University.

YOO Jin-Sik, Doctor of Laws (University of Tokyo). He is a professor at Jeonbuk National University Law School and specializes in administrative law, environmental law, and Japanese law.

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From constitutional justice to legislation making

Rudy Lukman

1 Introduction

Indonesia's transformation to constitutionalism and democratic change is a critical phase in Indonesia's life as a nation. One transformation was the significant amendment of the Indonesia 1945 Constitution, beginning from the first amendment in 1999 to the fourth amendment in 2002. The amendment marked Indonesia's transition to constitutionalism and democratic society. Indonesia's transition to constitutional democracy is the effect of constitutionalism waves in the world (Carothers 1998).

The rise of constitutional democracy has been a world phenomenon followed by the new emergence and expanding role of constitutional courts in many countries as part of the institutionalization of each constitutional structure (Ginsburg 2003). In Indonesia, together with many other jurisdictions belonging to the civil law traditions, this constitutional democracy has taken the pattern of creating the constitutional court through the series of constitutional amendment process.

The result is the new provision of the Judicial Power constructed in articles 24–25 of the 1945 Constitution of the Republic of Indonesia. The judicial authority provided in Article 24 paragraph (2) confirms that judicial power vested in both the Supreme Court (hereinafter stated as "MA") and Constitutional Court (hereinafter stated as "MK"). With this constitutional arrangement, MK has an equal position with the MA, while both are defined as the judicial power holders who have different authorities. The construction of the MK has a purpose in strengthening the people's constitutional protection as the guardian of the Constitution.

Such a construction of the MK seems to be a natural phenomenon given the fact that the role of the Constitutional Court has long been associated with the two dimensions of the Constitution, namely, procedural and substantive objectives (Tate 1995). For example, Mauro Cappelletti (1970) explained the constitutional court's role as a method for validating the Constitution's positive values.

One of the aspects of the Indonesian Constitution in which the role of MK is tested is the matter of natural resources, which primarily involves the land-related questions (Robinson 2014). Land law in Indonesia has long been associated with the complexity, inconsistency, fragmented, injustice, and far from reality (Lindsey 1998). International financial agencies have long asked for the legislative reconstruction in this area of law.

At the same time, the constitutional amendment process has also covered the amendment on the provision on local government and local autonomy, including the provisions relating to the customary legal rights or "*adat*." Namely, such a specific area of *adat* right provision as the constitution guarantee upon the *adat* law in Article 18B paragraph (2) of the 1945 Constitution has been debated in regard to the role of the State that recognizes and respects the societies with customary Law and traditional rights as long as they remain in existence, fit with social development and in harmony with the principle of the Unitary State of the Republic of Indonesia.

The establishment of the MK and the *adat* revivalism guaranteed by the Constitution have invited a wave of the petition calling for the *adat* rights recognition. Now is the era when Indonesian people have started to seek the agrarian justice under the MK judgments. This situation has brought it the new controversy of two different judicial powers in conflict. The MK has been deemed with a positive image in exercising judicial power, while the MA has a negative image of maintaining a conservative consistency through several judgments. Pompe, for example, gave a lousy assessment of the MA (Pompe 2005), even though the MA Reform since after the reformation period has not had much impact on the quality of the MA judgment (Djohansjah 2008).

On the other side, since its birth, the MK has been rendering the judgments favoring the agrarian constitutionalism, such as the ones for the protection of communal forest or known as the "Adat Forest," as well as the ones finding the unconstitutionality of the privatization on natural resources management. The recognition by MK of the Adat Forest triggered the *adat* revivalism calling for all the more recognition of *adat* issues, such as the institutionalization of the communal land rights into formal law. It stems back to the past when one of the Suharto New Order efforts was the enactment of Law No. 5/1979 on the Village Government. The Law systematically abolished the *adat*-based governance system by making all the Village Government uniformed throughout Indonesia, and thus destroyed the long-established basis of the *adat*-based community. This Law had also been the basis for the court to deny the legal capacity of *adat* community.

In the specific area of land law, the conflict between national law versus customary law is evident where the government has been destined to win based on the positive law. The defeat of *hak ulayat* (indigenous right) usually happened when the *adat* community made an agreement with private companies to create the right of use. After the right of use period ends, the land automatically becomes

the state land under the provision of Basic Agrarian Law enacted in 1960 and the *adat* community lost its *hak ulayat*. This is due to the logic that they cannot any more prove the continued existence of *adat* community, which has been the result of the aforementioned Law No. 5/1979 on the Village Government. This result has been endorsed by the MA, which has withheld the positive law rather than take more account on *adat* claim.

The sinking of the *adat* system was changed by the agrarian justice given by the MK. It is proven by the series of judgments by MK, from constitutional recognition on *adat* democracies to the recognition of Adat Forest as *adat* people's constitutional rights. However, even agrarian justice has been given to the *adat* community. The number of agrarian conflicts involving *adat* rights has not been reduced.

In 2017, at least 659 agrarian conflicts are reported in various regions and provinces with a total accumulative conflict area of 520,497.87 hectares. The number of family heads involved in the conflict was at least 652,738. The 2017 conflict data show a significant increase of 50 percent when compared to 2016 data. That is, if averaged, agrarian conflicts occur two times per day (Konsorsium Pembaruan Agraria 2017). In 2018, there were at least 410 agrarian conflicts in various regions and provinces with a total accumulative area of conflict area of 807,177,613 hectares. The number of family heads involved in the conflict was at least 87,568. Based on the 2018 data, an accumulative 1,769 agrarian conflict occurred during the 2015–2018 period (Konsorsium Pembaruan Agraria 2018). In 2019, there were recorded at least 279 agrarian conflicts in various regions and provinces with a total accumulative area of conflict area of 734,239.3 hectares. The number of family heads involved in the conflict was at least 109.42, spread in 420 villages throughout Indonesia (Konsorsium Pembaruan Agraria 2019).

This increasing number of conflicts even after the constitutional judgments by the MK makes us question the fate of the constitutional justice in Indonesia, since it implies the fact that the governmental institutions or even the MA is not always following the constitutional judgments by the MK. In fact, MA judgments rarely follow the path of MK judgments, as many researchers have voiced about this problem (Bedner and Arizona 2019). In this situation, the judgment of MK is not sufficiently capable for making an immediate impact on the ground (Ardiansyah et al. 2020). More studies on the phenomenon should be awaited with the comparative exploration on the trend of the constitutional courts in the world.

At the same time, with the difficulties in applying customary rights in the Indonesian legal system, the formation of legislation has also been carried out. The effort to guarantee *adat* rights is currently being conducted through the drafting processes of the Bill on Hak Ulayat of Adat Community, Bill on Land and the Bill on Recognition of Adat Community. The following section of this paper will discuss how Indonesia is developing the perspective of the constitutional justice

through the dynamic challenges, with a focus on the judicial as well as legislative development to secure *adat* land rights.

2 Constitutional justice on *adat* land rights

Indonesian MK is one of such typical products amid the third wave of democratization. Until the introduction of the Indonesian MK in 2003, neither sense of the rule of law namely the procedural sense of rechtstaat or the substantive sense of democracy was within the reach of the Indonesian people. Indonesia's constitutional doctrine that "Indonesia is rechtstaat but not machstaat" was only written in the Constitution elucidation and constitutional books but had never been realized. It is reasonable to assert that throughout Indonesian history, particularly at dictatorial rule periods, constitutional Law had been assigned a marginal role. The leading causes of the constitutionalism failures were the 1945 Constitution's weaknesses and the absence of an institution for safeguarding the Constitution.

All those experiences and the 1945 Constitution's weaknesses were the considerations that led to the MK establishment as one of the judicial power executors and the Supreme Court. The establishment of the MK was regarded as one of Indonesia's most significant constitutional reforms after President Suharto's fall in 1998 (Subekti 2008).

With the MK establishment, two branches of judicial power under the MA and the MK were established in Indonesia. Constitutional adjudication in Indonesia follows the path of civil law pattern by a centralized model like the Kelsen model of the constitutional court, outside of the regular judicial establishment (Rudy 2013). In this system, the MK stands as the independent branch of judicial power beside the MA with different jurisdictions pursuant to the Indonesian 1945 Constitution.

For many years, the Indonesian judiciary hardly played a legal evolution role, as it lacked the institutional devices to turn legal interpretation in single cases into a judicial doctrine (Bedner 2013). However, the establishment of Indonesia's MK in 2003, combined with the accessibility and acceptance of legal sources of international and translational origin, has changed this.

The birth of the MK is giving hope for agrarian justice. The MK has granted many petitions asking the recognition of *adat* rights. This Judgment covers many dimensions of *adat* rights, from the *noken* practice on voting to the Adat Forest. This section discusses the constitutional court judgment on the dimension of agrarian justice. Based on a search from the MK's official website in the range of 2005 to 2019, we found 25 Judgments related to land disputes. The highest number of Judgments was in 2015, with details in Table 10.1.

However, only a few MK Judgments related to *adat* land whose lawsuit was accepted by the MK from 2004 through 2019, namely, MK Judgment Number 45/PUU-IX/2011, MK Judgment Number 35/PUU-X/2012 and MK Judgment Number 95/PUU-XII/2014. Outside the ruling, several cases were tested at the court but rejected by it. The Judgment will be discussed next.

Table 10.1 Total number of land-related cases in the MK

Years	*Number*
2005	1
2006	0
2007	1
2008	0
2009	1
2010	0
2011	4
2012	2
2013	2
2014	3
2015	6
2016	2
2017	1
2018	1
2019	1

Source: Rudy (2020a).

2.1 MK Judgment

2.1.1 MK Judgment Number 45/PUU-IX/2011

The case adjudicated was the review of Law Number 41 of 1999 concerning Forestry. In this case, the applicant is the Kapuas Regency Government, Dr. Hambit Bintih, M.H., Regent of Katingan, Regent of East Barito, Regent of Sukamara and Dr. Akhmad Taufik, M.Pd. The plaintiffs challenged the constitutionality of Law on Forestry, stipulating that the Ministry of Forestry has the authority to stipulate rather than appoint land within the forest area territory. In this case, the MK found in favor of the plaintiffs and granted Judgment on this matter.

It held Article 1 paragraph (3) of Law 41/1999 on Forestry (as twice amended) to be inconsistent with Article 15 of the same Law and hence in contravention of Article 28D (1) of the Constitution, which guarantees legal protection and certainty. In the Judgment, the MK held that only if the full process of gazettement of an area is complete could this land be labeled as forest area. According to the Court, the contested Article 1 paragraph (3) must now read: *Forest areas are areas gazetted by the government to be maintained as permanent forest.*

In its Judgment, the MK stated that the phrase "appointed or determined" was contrary to the 1945 Constitution because it was not in sync with the provisions in a quo Law and caused legal uncertainty. The court in deciding this case is based on the rule of Law based on Article 1 of the Indonesian Constitution.

This Judgment is vital since many conflicts relating to the land within the forest area is caused by the appointment of land use given to many corporations by the Ministry of Forestry. This mere appointment by deliberation has pushed aside the *adat* community within the area and instigated the forest area's conflict.

2.1.2 MK Judgment Number 35/PUU-X/2012

The case adjudicated was the review of Law Number 41 of 1999 concerning Forestry. In this case, the petitioners are the Indigenous Peoples Alliance of the Archipelago (AMAN), the Kuntu Adat Community and the Cisitu Adat Community. In this case, the MK granted part of its petition for the review of Articles 1–6, Article 4 paragraph (3), and Article 5 paragraph (1) and paragraph (2) of Law Number 41 of 1999 concerning Forestry. The court determined that the word "state" should be erased from the said articles, and as a result, the Adat Forest would no longer be part of the state forest area. By this Judgment, the Ministry's stipulation shall not reach the Adat Forest area. However, MK also recognized the validity of the conditional recognition from Article 18B (2) of the Indonesian Constitution.

By this condition, the application of deciding Adat Forest is the question of proving whether the *adat* community is still existing. Therefore, without the Law that will be giving the mechanism of the *adat* land legal recognition within the forest area, this Judgment cannot be applied to protect *adat* land in the forest area.

2.1.3 MK Judgment Number 95/PUU-XII/2014

The case was the constitutional review of Law Number 41 the Year 1999 concerning Forestry. Petitioners in this case are Mr. Mawardi title Datuk Malin, Edi Kuswanto, Dato Perkasa, Murshid, Walhi, AMAN, Agrarian Reform Consortium (KPA) and several other parties.

This Judgment essentially gives *adat* people's rights as "people who have lived for generations in the forest," among others, to cut trees or harvest or collect forest products in the forest and herd cattle in the forest area as long as they are not for commercial purposes. This Judgment is trying to stop the criminalization of *adat* people who live in the forest and take a small portion of forest resources.

2.2 The Judgment of MA following MK Judgment

Our research on the Supreme Court (MA) Judgment supports our argument that the other institution, including the MA, does not always follow the MK Judgments. The data collected from the MA directory during years 2003–1019 encompassing Civil Law, State Administrative, and Judicial Review found a total number of 2,818 land-related cases in Judgments for Civil Law, 1,060 Judgments for State Administrative and 895 Judgments for Judicial Review.

Table 10.2 Total number of land-related cases in the MA

Supreme Court decisions about land disputes 2003–2019

Year	*Total*		
	State Administrative	*Civil Law*	*Judicial Review*
2003	18	20	13
2004	32	11	11
2005	41	19	8
2006	47	71	28
2007	60	80	20
2008	102	75	27
2009	103	87	27
2010	75	99	45
2011	114	146	57
2012	51	207	55
2013	33	246	128
2014	125	312	100
2015	134	291	84
2016	46	359	63
2017	22	367	75
2018	38	262	85
2019	19	166	69
Total	**1,060**	**2,818**	**895**

After the classification of Judgments based on fields and years, the Judgments are analyzed. The Judgment analysis process is carried out in detail by reading one by one the Judgments that have been downloaded, to see the relationship between the MA Judgment and the MK Judgment. After analyzing each of the Judgments related to land in the private Law, administrative case, and Judicial Review, we found three Supreme Court Judges relating to the MK Judgment. They were primarily related to Adat Land in MA Judgment Number 47P/HUM/2011, Number 248K/TUN/2016 and Number 433K/PID.SUS-LH/2016. The following is the analysis of the MA Judgment.

2.2.1 The Judgment of MA Number 248K/TUN/2016

The Judgment of MA Number 248/K/TUN/2016 involves the Saumolewa Adat Peoples as petitioners against the Regent of South Buton and Satya Jaya

Avadi Corporation bringing a legal case against forest exploitation in Sampolawa District, South Buton District. Forest exploitation by Satya Jaya Avadi Corporation is based on South Buton Regency Government Decree Number 110 the Year 2015, dated June 20, 2015.

This Judgment justifies Makassar State Administration Judgment Number 01/B/2016/PT.TUN.MKS, rejecting the Representative of Adat Community representative who lives around the Saumolewa forest. The Judgment was rendered with the reasoning that there is no evidence of indigenous peoples' existence in the region. The rejection of the lawsuit was due to the absence of strong evidence that they were indigenous people whose interests had been impaired by the dispute.

MA Judgment 248/K/TUN/2016 is related to MK Judgment 35/PUU-X/2012, which has provided legal protection for indigenous and tribal peoples regarding customary forests. Juridically, indigenous peoples through a quo Judgment have obtained rights to their customary forests as long as the indigenous peoples concerned still exist and are recognized.

2.2.2 The Judgment of MA Number 433K/PID.SUS-LH/2016

The case decided in this Judgment was about the criminal conviction of Haji Mandau for illegal logging and illegal use of forest areas. Forests that have been illegally logged in this case are forests that have been determined in the Map of Forest Area and Water Conservation of Central Sulawesi No. 869/Menhut-II/2014 dated September 29, 2014. This piece of land is under the Defendant's control in Sampalowo Village, West Petasia District, North Morowali Regency, based on a quo map that is a protected forest area. The criminal charges imposed on the Defendant are the act of ordering, organizing or mobilizing illegal logging and illegal use of forest areas because they were not permitted by the authorities, both the Local Government and the Ministry of Forestry.

MA Judgment No. 433 K/PID.SUS-LH/2016 then provides guarantees to communities or individuals freedom from criminal threats because the land or buildings they have legally can already be claimed as holders of land rights in forest areas. The Defendant has a letter of land-ownership called SKPT owned by the Defendant originating from customary land whose existence is still recognized. This evidence follows the Letter of the Head of the Central Sulawesi Province Regional Office Number 1460/72/XII/2014 dated December 15, 2014, concerning the explanation of SKPT as proof of ownership of land rights.

This MA Judgment follows the Judgment of the Constitutional Court Number 35/PUU-X/2012 dated May 16, 2013, which in essence, in determining the status of the forest, the existence of customary rights must still be recognized.

2.2.3 The Judgment of MA Number 47P/HUM/2011

The case in this Judgment was a judicial review of the Decree of the Minister of Forestry of the Republic of Indonesia dated February 16, 2005, Number:

SK.44/Menhut-II/2005, concerning the Designation of Forest Areas in the North Sumatra Province Area. MA Judgment No. 47P/HUM/2011, in this case, contains consequences for right holders in forest areas.

This Judgment is in line with MK Judgment No. 45/PUU-IX/2011 of which constitutionally has corrected the Article 1 number 3 of the Forestry Law. In the application level, the Minister of Forestry enacted Decree No. 579/2014 as a substitute for Decree of the Minister of Forestry No. 44/2005 as a product of the MA Judgment No. 47P/HUM/2011, giving legal certainty to holders of land rights in forest areas.

3 Securing *adat* rights with legislation

From the previous examination of judgments, it is shown that the MK plays an important role and even legally has absolute legal superiority concerning institutions from other branches of power, such as the executive and legislative branches. This is because, in the development of practice, the MK acts as a negative legislator who cannot change the norms of the positive Law directly. The MK Law states that all Judgments of the MK are final and binding. All Judgments of the MK must be carried out by all Indonesian citizens, including the MA and all other state institutions.

The fundamental problem of the MK Judgment is the failure of the constitutional order to force law enforcers and legislators to comply. Although the words final and binding have been stated explicitly in the 1945 Constitution and the MK Law, they are often ignored by the State organs. Not all Judgments of the MK can affect the legislature and other state institutions or other nonjudicial actors. The execution of the MK Judgment emphasizes self-respect and legal awareness without coercion.

In addition, law enforcers are not aware of the MK Judgment. Many legal provisions that the MK has declared unconstitutional are not well documented in the lower level. The law enforcers, especially judges in the general court are not well informed with the Judgment. This fact has been known during the research on the consistencies of the Judgment between the MK and the MA. Based on the interview during the focus group discussion with judges in the general court, several judges said the Judgment of the MK was not disseminated in the region. In fact, this is happening because so many Judgments have been delivered by the MK making the gap of information on the substance of Judgment. Besides, judges usually follow the positive Law in the form of legislation not to be so well informed on the MK Judgment. They will prefer to learn the Law's application based on legislation in force rather than the Judgment given by the MK.

This is proven that still, so many criminalizations happen under the name of legal certainty. Based on Vote for Forest data, in 2018, there were 326 natural resource conflicts involving around 176 thousand indigenous peoples (Alaidrus 2020). Indonesian Legal Aid (YLBHI) noted that throughout 2019, 43 indigenous peoples were criminalized, mostly because of traditional farming and clearing land by burning. Most of them were caught in Article 108 in conjunction

with 69 Law No. 41/1999 on Forestry and Law No. 18/2013 on Prevention of the Eradication of Forest Destruction (Nugraha 2019). As we know, MK Judgment Number 95/PUU-XII/2014 is protecting *adat* peoples from cutting trees or harvesting or collecting forest products in the forest and herding cattle in the forest area as long as they are not for commercial purposes.

The solution to this problem is not simple because it requires constitutional communication, primarily because the 1945 Constitution of the Republic of Indonesia does not provide a constitutional construction regarding the executorial institutional relationship for the MK Judgment.

The response to this difficulty is the making of legislation on *adat* rights. There are two development in this kind of legislation. The first is the *adat* court's recognition within the Law Concerning Special Autonomy, and the second is through legislation making on *adat* rights.

3.1 Recognition of adat *court in the law concerning special autonomy*

The recognition of customary courts in Indonesia's laws and regulations has been recognized in several laws, especially laws that regulate particular areas. There are four regions with special autonomy status in Indonesia, namely DKI Jakarta, Yogyakarta Special Region, Aceh Province and Papua Province. Of the four regions, only three regions accommodate *adat* rights in the content of their laws, namely Papua Province, Aceh Province and Yogyakarta Special Region.

3.1.1 Papua Special Autonomy Law

Papua Province is granted individual autonomy based on Law Number 21 of 2001 concerning Special Autonomy for Papua. The Law provides more space for the deliberation mechanism of indigenous peoples, including in determining their territory/land. The regulation regarding communal land in the Papua Special Autonomy Law provides space for customary law communities to carry out the management of their *ulayat* rights, which are operationally based on the provisions of laws and regulations.

By the Law, customary courts are recognized within specific customary communities. Papua's customary justice mechanism is given authority in cases of civil disputes and internal criminal cases of indigenous peoples. However, customary courts are not given the authority to impose imprisonment. Besides, Judgments are not final because they can be submitted to the First Level Court. Furthermore, customary courts are also defined as institutions for resolving *adat* disputes or cases in specific customary communities in Papua.

Regarding the types of sanctions in the Judgment of the customary court, it is described as consisting of customary fines and the traditional restoration ceremony's implementation. Judgments are made based on the customary law that applies to each indigenous community. *Adat* Judgments are binding if no objection is filed at the First Level Court.

3.1.2 Aceh Special Autonomy Law

The specialty of Aceh Province is granted through Law Number 11 of 2006 concerning the Aceh Government. Customary Law in Aceh, in this case, specifically refers to Islamic Law. The Law gives more room on the formulation of *adat* rights under the Qanun. This is also with regard to the existence of communal land and all those related to *adat* such as customary justice, communal land, customary institutions and so on.

The judiciary in Aceh, based on Article 128 of the Aceh Governance Law, is called the Syariyah Court. Unlike the customary courts in Papua, which are considered different from the state courts, the Syariyah Court, according to this Law, is considered an integral part of the national justice within the religious court.

Outside the Syariyah Court, based on the Aceh Qanun Number 9 of 2008 concerning the Development of Customary and Customary Life, the Gampong and Mukim Adat Courts are also recognized. The Gampong Customary Court, as the name implies, has a locus in each Gampong and Mukim (village). This court, in particular, carries out efforts to resolve disputes that occur at the village level.

Minor disputes resolved by the Gampong and Mukim Courts include domestic disputes, family disputes, disputes between residents, disputes over property rights, theft in the family, etc. The Gampong and Mukim Adat Courts have received legitimacy as agreed in the Joint Decree of the Governor of Aceh, the Head of the Aceh Regional Police and the Chairperson of the Aceh Adat Council concerning the Implementation of the Gampong Traditional Court and Mukim or Other Names in Aceh.

This Adat Court Judgment is final and binding so that it cannot be filed again by the general courts or other general courts. Regarding the form of sanction, the Adat Court Judgment is prohibited from imposing bodily sanctions such as imprisonment, washing with dirty water, cutting hair and other things that are contrary to Islamic values.

3.1.3 Yogyakarta special region law

Yogyakarta is one of the regions that have individual autonomy. In exercising land authority, the Sultanate and the Kadipaten in Yogyakarta are given a legal entity's status. Through this status, the Sultanate and the Kadipaten have rights to their own lands. The land coverage of the Sultanate and the Kadipaten itself is divided into two, namely, the Keprabon land and non-Keprabon land found in all districts/cities in the Yogyakarta region. The authority of the Sultanate and the Kadipaten in managing and utilizing their land oriented to the most significant possible development of culture, social interests and community welfare.

In the province of Yogyakarta, the prevailing judicial mechanism is the general court conducted by the judiciary under the MA. There is no customary justice mechanism in resolving land disputes.

3.2 *Securing* adat *rights through legislation making*

Following the call of *adat* revivalism, legislation makers are trying to draft several Laws related to *adat* rights recognition, including *adat* land rights. There are the Draft Law on Customary Land Rights or Hak Ulayat, the Draft Law on Land and the Draft Law on Adat Community.

3.2.1 Draft Law on Customary Land Rights

The Draft Law on Customary Land Rights was proposed by the Regional Representative Council of the Republic of Indonesia (DPD RI) on September 13, 2017. The proposal was initially included as part of the 2014–2019 national legislation program long list. Led by the famous scholar on land law Professor Maria Soemardjono, the Bill was drafted during 2018 and now waits for the next step on tripartite discussion among the Government, house of a representative and a regional representative assembly. The scope of *adat* land rights arrangements includes the following:

(1) recognition and confirmation;
(2) granting land rights above customary rights;
(3) transfer and imposition;
(4) compensation; and
(5) abolition of customary rights.

The provision in some ways is similar to the formulation of *ulayat* rights under the Draft Law on Land next.

3.2.2 Draft Law on Land

The Bill on Land proposal began on February 2, 2015, where this Bill was listed as one of the long lists of the 2014–2019 national legislation program. However, the end of Parliament periodization in 2019 cannot finish the draft.

The Government then asked the Indonesian Parliament to reenter the Draft Law on Land into the long list of the 2019–2024 national legislation program. This was then responded to by the inclusion of the Bill on Land as one of the bills that became the 2020 priority national legislation program, which means that the Draft Law on Land is carried over into the 2019–2024 long list national legislation program (Rudy 2020b).

Several provisions related to land dispute resolution were found in the draft, namely, the provisions regarding the settlement of land disputes and establishing a land court. In the chapter on dispute resolution, the provision of the Bill determines that Land dispute settlement prioritizes deliberation between parties to reach an agreement through mediation between the parties. The Minister will determine the Land mediation procedure in this formulation. Furthermore, dispute resolution through mediation shall be proven by a peace deed before the

authorized official. The peace deed shall be registered at the local court to obtain a peace Judgment to gain executorial power.

However, if the deliberation to reach an agreement cannot be reached, the parties can resolve the dispute through the Land Court. The Land Court determines land cases, which include civil lawsuits, state administration, and land crimes. Then, the Land Court will be established by the Supreme Court no later than five years from the Land Bill's enactment.

The Bill also provides the recognition of *hak ulayat*. *Hak ulayat* is defined as land located in the territory of customary law community, which according to the fact, still exists. The bill orders the Government to make measurements and mapping and recording of *ulayat* land. This Bill also contains a declaration of rights to the holder of Land Rights over the field of *hak ulayat* that was owned before the Bill was enacted.

3.2.3 Draft Law on Adat Community

The Draft Law on Adat Community is a formerly formulated Bill in 2014 under the title Bill on the Recognition and Protection of the Rights of Indigenous Peoples (PPHMHA). However, it was not resolved until the end of the DPR RI position for the 2009–2014 period.

In 2017, the Draft Law on Adat Community was included in the Legislation Planning 2014–2019 and became the draft bill initiated by the DPR RI on February 14, 2018 (Rudy 2017). A working meeting between the Legislation Body and the Government was held. However, until the end of the term of office of members of the DPR RI for the 2014–2019 period, the Government did not submit an Inventory of Problems List (DIM) to the DPR, which resulted in the discontinuance of the discussion on the Draft Law on Adat Law Community.

Currently, the Adat Law Community Bill is included in the list of the 2020 Priority number 31. The Draft Law on Adat Law Community consists of 16 Chapters containing 57 Articles (www.dpr.go.id). It is in the process of tripartite harmonization among the Government, House of Representative (DPR) and Regional Representative Assembly (DPD).

The draft has the provision on the Adat Territory and Dispute Settlement. In this provision, the Adat Community, determined as a legal entity, is entitled to the Customary Territories they own, occupy, and managed for generations. Customary territories are communal and cannot be transferred to other parties. *Adat* communities have the right to manage and utilize natural resources in the Customary Territory according to local wisdom.

Suppose in a Customary Territory, there are natural resources that have an essential role in fulfilling the people's livelihoods. In that case, the State can manage it with the consent of the Adat Peoples. For management by the State, Adat Peoples are entitled to compensation. Apart from compensation, Adat Peoples are entitled to receive the main benefits in implementing corporate social responsibility.

Adat Institutions will be given the authority to resolve the settlement of problems related to Adat Peoples. The settlement of disputes that occur due to violations of Adat Law in Adat Territories is resolved through customary courts organized by Adat Institutions. Every person who is not a member of an Adat Community who violates Adat Law in a particular Adat Territory is obliged to comply with the Adat Institution's decision.

4 Challenges in legislation formulation

From the previous discussion, we found that recognition of *adat* rights has been guaranteed in the special autonomy legislation. However, the special autonomy law is given only for the particular region in Indonesia. Therefore, the impact of the recognition is not significant compared to the number of regions in Indonesia.

On the other side, the Parliament and Government are trying to draft several laws to solve the problem of the recognition of *adat* rights and land application problems. The formulation of these laws is not smooth and took a very long time to be stipulated. The main problem is that several norms are tough to be formulated. This norm is very related to the definition and classification applied to all the Adat Community in Indonesia. The vast diversity of the *adat* system in Indonesia makes it difficult to find the similarity line for forming the norm in the legislation.

5 Conclusion

Constitutionalism in Indonesia took ground after a series of 1945 Constitution amendments from 1999 to 2002. The establishment of the Constitutional Court (MK) and the guarantee of local autonomy have made the revival of the *adat* rights. The MK itself has been consistent for the recognition of *adat* rights with the famous Judgment on Adat Forest Land that is constitutionally separated from the State Forest. While many pundits have hailed the Judgment of the MK, its Judgment has a weakness. The weakness lies in the application of the Judgment in the ground. Many *adat* rights are still waiting for the positive Law for its application.

At the same time, with the difficulties in applying customary rights in the Indonesian legal system, the formation of legislation has also been carried out. Following the MK Judgment, Indonesia, through the Government and Parliament, is trying to draft several laws to uphold the guarantee of *adat* rights. There are two developments in this legislation making. The first one is using the special autonomy law in Aceh, Papua and Yogyakarta. The second one is drafting the Law on Customary Land Rights or *hak ulayat*, Law on Land, and Law on Adat Community.

With the difficulty in applying the MK Judgment on the ground and the slow development of legislation making on *adat*-related Law, especially on *adat* rights on land, it seems we will have to wait more years to see the widespread recognition on *adat* rights, especially *adat* land.

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