The Revival of Indigenous Peoples: Contestations over a Special Legislation on Masyarakat Adat

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Introduction

“If the state does not recognise us, we will not recognise the state.” This statement is the outcome of the First Congress of the Indigenous Peoples of the Archipelago that was held in 1999. This motto challenges the contemporary state of Indonesia. It also repositions the relationship between the indigenous peoples and the state. The Indigenous Peoples’ Alliance of the Archipelago (Aliansi Masyarakat Adat Nusantara, AMAN) was formed in 1999 as a result of numerous meetings that helped to crystallize the ideas of the movement, eventually leading to the emergence of the indigenous peoples’ movement. AMAN is the biggest organisation that represents masyarakat adat in today’s Indonesia.

The first seeds of the indigenous peoples’ movement were sown in the 1980s. Early discussions were initiated by the environmental activists from the Indonesian Forum for Environment – Friends of the Earth Indonesia (Wahana Lingkungan Hidup Indonesia, WALHI) and by the legal aid activists from the Legal Aid Foundation of Indonesia (Yayasan Lembaga Bantuan Hukum Indonesia, YLBHI). At the time, these organisations had already started working on the protection of the indigenous peoples whose ancestral lands were being expropriated by the government
and turned into mining and forestry concessions under the developmentalist policies of the New Order regime.

In 1993, a number of organisations working on the protection of the indigenous peoples’ rights organised a meeting that led to the formation of the Indigenous Peoples’ Rights’ Advocacy Network (Jaringan Pembelaan Hak-Hak Masyarakat Adat, JAPHAMA). Subsequently, a number of similar networks have been established in various regions, such as Jaringan Penggerak Masyarakat Adat Nusa Tenggara Tengah (Jagat NTT) and Aliansi Masyarakat Adat Kalimantan Barat (AMA Kalbar). The youths in Mentawai created Yayasan Citra Mandiri, while the youths in West Kalimantan formed an organisation called Lembaga Bela Banua Talino (LBBT) (Moniaga 2010:311). Furthermore, JAPHAMA, in collaboration with other organisations, gathered hundreds of indigenous peoples’ representatives from around the Indonesian archipelago on March 17, 1999, for the First Congress of the Indigenous Peoples of the Archipelago (KMAN I). This Congress resulted in the creation of an organisation called the Indigenous Peoples’ Alliance of the Archipelago (Aliansi Masyarakat Adat Nusantara, AMAN). Since then, March 17 is remembered by all the indigenous peoples in Indonesia as the day of the emergence of the indigenous peoples’ movement.

One needs to recognise that the emergence of the indigenous peoples’ movement in Indonesia was influenced by the international indigenous peoples’ movement. The United Nations, for example, announced in 1993 that this was to be the Year of the Indigenous Peoples. The period from 1995 to 2004 was announced as the First Indigenous Peoples’ Decade, followed by the Second Indigenous Peoples’ Decade from 2005 to 2014. This UN initiative brought about the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. The intense exchanges between the local Indonesian indigenous peoples’ activists and the advocates at the international level were facilitated by attendance at the international meetings, as well as through hosting international activists in Indonesia. Due to these exchanges, the two movements are closely connected.

Despite the fact that the indigenous peoples’ movement is becoming stronger, the communities still have to struggle for their rights. In 2011 alone, AMAN registered around forty-eight conflicts that involved the indigenous peoples, consisting of a total of 947 families. These conflicts cover an area of 690,558 hectares1 and are caused by the lack of tenurial rights over the contested customary territories. Criminalisation of indigenous peoples is still recurrent. According to AMAN’s data, 224 members of indigenous communities were arrested and detained between October 2012 and March 2013; five of them were found guilty in court and two of them filed cassation appeals.

The existing legal regulations do not favour indigenous peoples. This is a reason for the frequent repression and criminalisation. Law enforcement is not a legitimate mechanism for achieving justice in these cases. On the contrary, it is seen as a system that sustains injustices towards indigenous peoples. Forestry Law is one of the

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1 Compare with the data from the Consortium for Agrarian Reform (KPA) from 2012, that registered at least 198 conflicts; the majority of conflicts (45%) occurred in the plantation sector; the smallest number of conflicts (2%) occurred in the coastal areas (Konsorsium 2012).
examples of an unjust law that is imposed upon indigenous peoples. At the present, the most recent data suggests that 16.62% of 129 million hectares, 67% of the land mass of Indonesia, had been determined as “forest area” (kawasan hutan) (Dirjen Planologi Kehutanan 2012). The government has already granted a lot of concessions to companies for the exploitation of forest resources. This, in turn, causes conflicts between the indigenous peoples and the companies operating in the forest areas that, in fact, have only an ambiguous legal status.2

Some examples of such conflicts over forest use may illustrate these conflicts (see also AMAN 2013). In mid-2012, the local government of the Sumbawa Regency (kabupaten), West Nusa Tenggara, set at least fifty housing units of the indigenous community of Pekasa on fire to evict the community from their customary land. These houses represented the old village the community had rebuilt in the area that was designated by the government as the protected forest area. However, the local government had issued a license to a forestry company and a mining company to operate in the customary lands of the Pekasa community. The Datuk (traditional chief) of Pekasa, Edi Kuswanto, was arrested by the police and taken to court but no evidence could be adduced that the disputed land was part of the forest area. Nevertheless, the Sumbawa District Court Judge sentenced the Datuk Pekasa to 18 months imprisonment with a fine of 100 million rupiah. At the appeal, the Supreme Court of West Nusa Tenggara upheld the verdict of the Sumbawa District Court. In June 2013, this case was filed for another appeal to the Supreme Court.

A similar type of conflict occurred over the customary territory of the indigenous community of Pandumaan Sipituhuta in North Sumatra. In 2012, the police arrested and intimidated the indigenous peoples of Pandumaan Sipituhuta because they stopped the operation of PT Toba Pulp Lestari (PT. TPL) on their territory of 6,000 hectares. The expropriation of the adat land had started in 2009 when the local government of the Humbang Hasundutan Regency issued a license to a pulp and paper company, PT. TPL. As part of its operation, the company had been felling the traditional benzoin forest that belongs to this community and started planting trees used for the production of pulp and paper. On September 18, 2012 a clash occurred between the community and the company’s security staff which was assisted by police officers from the Mobile Brigade (Brimob). Outnumbered, the security staff and police officers fled the area. In the aftermath, however, the Humbang Hasundutan police (polres) sent summons several times to some of the community members who were considered to be the clash coordinators. This case demonstrates that repression and criminalisation of masyarakat adat who defend their customary lands still occur and the

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2 Several regents from the province of Central Kalimantan submitted a Judicial Review of the Forestry Law to the Supreme Court of the Republic of Indonesia in 2011. The decision of the Supreme Court corrected the legality of the state forest area. In brief, the decision of the Supreme Court suggested that a forest area can be said to be a legal forest area (not in conflict with the 1945 Constitution) if the area has been already determined as a forest area, meaning that the area had already gone through the process of designation, defining borders, mapping and gazettement. This means that a forest area that is not supported by all these processes and is only pointed at by the Ministry of Forestry cannot be legally seen as a forest area.
legal regulations do not yet fully acknowledge the existence and the rights of *masyarakat adat*.

The Forestry Law that does not favour the interests of the indigenous peoples means, in fact, that the rule of law in the field of forestry supports the expropriation of the customary land of the indigenous peoples. It also means agreeing with the acts of violence against the indigenous peoples. Therefore, a law reform and creation of new laws are needed to respond to the plight of *masyarakat adat* and to defend their rights against the expropriation of their customary land.

**The Colonial Adat Studies and their Implications**

The key concepts in the study of *adat* and *adat* law were developed by several Dutch legal scholars, such as Cornelis van Vollenhoven, Barend ter Haar Bzn and their colleagues. Vollenhoven analysed the data he gathered from the reports about the lifestyles of the Netherlands East Indies’ residents compiled both by the researchers and the colonial officials. He systematised the data about the customary laws in volumes called *Adatrechtbundels* (*Adat Law Tomes*).³

Vollenhoven and his colleagues were sympathetic and highly interested in unveiling the lives of the indigenous peoples. They discovered communities with distinct legal systems that are different from those found in Europe. They tried to discover and understand the rule of law that the communities applied. Vollenhoven’s findings were published in a book entitled “The Discovery of *Adat* Law” (*De ondekking van het adatrecht*, 1928).

The Dutch colonial government had started to implement the so-called “ethical policy”, which was centred on the issues of education, emigration and irrigation.⁴ The legal scholars, influenced by liberalist ideas, struggled to advocate on behalf of *masyarakat adat*. They wanted them to benefit from the “ethical policy” of the Dutch colonial government. The recognition of the existence of the *adat* law communities also became a means to administer the colonies by indirect rule, that is, through the local elites and in the absence of the colonial authorities.

Several key concepts that are still being used today within the customary law research are *adat* law (*hukum adat* or *adat recht*), *adat* law circles (*lingkaran hukum adat* or *adat rechtskringen*), communal rights over land or “right to avail” (*hak ulayat* or *beschikkingsrecht*), and the *adat* law communities (*masyarakat hukum adat* or *adat rechtsgemenschaapen*). *Adat* law (*adatrecht*) is a term that was systematically used for the first time by Christiaan Snouck Hurgronje and, subsequently, by Vollenhoven (Snouck Hurgronje 1893:16; Vollenhoven 1933:3; Benda-Beckmann F. and K. v. 2011:170-171). They realised that the term *adat* was used in many places to describe an entity united by

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³ Cornelis van Vollenhoven wrote several series of *Adatrechtbundels* to describe the situation of laws and native customs in Indonesia in the early-20th century.

⁴ The three major programmes are called Trias Van Deventer, because they were being promoted by the Dutch liberal named Conrad Theodor van Deventer. The three programmes are: (1) irrigation, build and improve irrigation and dam systems for farming needs; (2) emigration, i.e. encourage transmigration; and (3) education, i.e. promotion of education.
The Revival of Indigenous Peoples

morality, customs, traditions, and legal institutions, even though the concept was not found on all the islands of Indonesia (Benda-Beckmann, F. and K. v. 2011:170-171). Furthermore, the concept of adat law circles (adat rechtskringen) was, in fact, created by these legal researchers in order to identify the common features and the culture-specific forms of intrinsic logic of these communities in Indonesia. Their observations were systematised into 19 adat law circles (compiled between 1906 and 1918) reflecting the state of knowledge at a time when knowledge and resources were limited (Benda-Beckmann F. and K.v., 2011:174).

The term beschikkingsrecht refers to the concept of hak ulayat and describes a land management system of adat communities that regulates and allocates land among the community members holding cultivation rights. Vollenhoven names six characteristics of beschikkingsrecht in his book Miskenningen van het Adatrecht (1909).

It is important to note that what is referred to as adat law communities or masyarakat hukum adat is a literal translation of adat rechtsgemenschaap. Adat law communities are local communities and live according to adat. Barend ter Haar Bzn suggests that a common origin (genealogy) and a shared territory are the key aspects that unite and characterize an adat community. Ter Haar Bzn maps 13 types of masyarakat hukum communities, such as nagari, marga, negeri, oboi, buta, kuria, binua, gampong, and others. These types vary according to the way they combine the genealogical and territorial aspects mentioned above (ter Haar Bzn 1962:65-81).

Independence, the New Order Regime and the Expropriation of the Indigenous Lands

The founding fathers of Indonesia intended to keep the existing governing structures of traditional village units within the new government system in the formation of the new independent state. Soepomo and Muhammad Yamin were the two influential lawyers who developed the first Constitution of Indonesia. In their design, they envisioned a hierarchical, tiered system that consisted of several governance structures. The lowest tier of the governance system is a territory-based adat law which communities organised in traditional villages and which is seen as a basic foundation for nation-building. In the middle, there is a regional government that consists of the provincial and regional (regency/city, kabupaten/kota besar) government. The national government represents the top of the governance pyramid.

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5 Vollenhoven stated that adat law is “all the regulations that become behavioral guidelines for the native communities and foreign orientals (timur asing) which, on the one hand, consist of control sanctions (this is why it is called law) and, on the other, is not codified (this is why it is adat)” (Vollenhoven 1933:3; Holleman 1981:23; Benda-Beckmann, F. v. and K., 2011:170-1).

6 The six characteristics of beschikkingsrecht are: 1) a community’s authority over uncultivated land; 2) the use of land by outsiders can only exist through the agreement of the community; 3) payment for the land use as a form of recognition; 4) there is still a community authority over the land that is being cultivated; 5) collective responsibility over the territory; and 6) eternal land rights, which means the community possesses the unconditional right to relinquish (Vollenhoven 1909, 1919). Burns, however, contends that there is nowhere in Indonesia which fulfils all the six characteristics outlined by Vollenhoven (Burns 1989).
This governmental system can still be seen in the Law on Local Governance (UU No. 22/1948) that states that “Regions of the Republic of Indonesia are divided into three tiers, that is: province, regency (big city) and village (small town), negeri, marga, and others, which carry a right to regulate and manage their own households.” Thus, adat law communities, entitled differently in each area and often referred to as village (desa) or some other name, are the foundation of the state governance system. However, the existence of the adat law communities gradually disintegrated later, and its existence as a lower-tier governance structure was no longer recognised within the subsequent legal regulations.

Furthermore, the Basic Agrarian Law (BAL, No. 5/1960) also contributed to the marginalisation of the adat law communities by imposing a number of restrictions. This law recognises the land rights of adat communities under the term hak ulayat with the following conditions: (1) as long as such communities still exist, (2) it may not conflict with the national interest and the State’s interest, and (3) shall not contradict the laws and regulations of higher levels. This type of conditional recognition with strictly set requirements eventually led to the disappearance of the indigenous peoples’ land rights. What happened is, in fact, the state-isation (negaraisasi) of the indigenous territories (Rachman 2012).

This subjection of the adat land to the central state continued the colonial model of Domein Verklaring (Domain Declarations) despite the fact that the enactment of the Basic Agrarian Law (BAL) initially intended to eliminate this practice (Simarmata 2006; Termorshuizen-Arts 2010). The early nationalists had tried to surpass both adat law and the colonial governance system (Fitzpatrick 2008). However, the regulatory practice framework that was enacted during the formation of the new republic extinguished the traditional governance system and expropriated the indigenous peoples’ customary territories.

During Suharto’s repressive New Order regime (1966-1998), the indigenous peoples were expropriated of their land, often without proper compensation, in the name of development of infrastructure, for mining and timber concessions. The communities that refused were put under extreme pressure, experienced violence and were labelled as the followers of the Communist Party of Indonesia (PKI), conceived as the deadly enemy of the state. This, in turn, legitimised the silencing of the indigenous peoples. The case that is most often mentioned is that of the Amungme and the Komoro peoples in Papua Province, whose customary lands were handed over to PT. Freeport, a giant gold-mining company (Bachriadi 1998).

Operational regulations about hak ulayat (communal land rights, right to avail) in the BAL were developed by the government in 1999 through the Agrarian Ministerial Regulation No 5, 1999 about the Guidelines for Communal Land Dispute Settlement, that is, 39 years after the ratification of the BAL.

This party was accused of masterminding the G30S incident, the coup, in 1965. The parties that were close to farmers at the time were considered to be the members of this banned party. Many party leaders and cadres were imprisoned and killed by the military and the paramilitary. Farmers’ movements that demanded land rights were often associated with members of PKI, thus, justifying their extermination.
Customary land grabbing in the name of development resulted in protests from the indigenous peoples and their supporters, who were environmental and legal aid activists. In 1988, for example, hundreds of Batak Toba people of North Sumatra resisted the pulp and paper industry of PT. Inti Indorayon Utama (now called PT. Toba Pulp Lestari; Moniaga 2010:309). Men and women of this indigenous community protested because their signatures had been forged and the land taken over by the company. Similar types of protests against the developmentalist policies that overreached local communities also occurred in Kalimantan and various other places.

Not only were their lands stolen, but the indigenous peoples also experienced discrimination. They were referred to by the government as “forest encroachers”, “uncivilised” and “isolated peoples”, and were treated as a “social illness”. On the basis of these assumptions, the Department of Social Affairs (now the Ministry of Social Affairs) developed a programme that aimed to empower the “isolated peoples” (masyarakat terasing). Under this programme, the indigenous communities experienced forced relocation. One example is the case of the upland Orang Tompi of Central Sulawesi, whose connection to their ancestral lands was cut off due to forced relocation, and they were forced to adapt to a new lifestyle and a new farming system that often failed (Li 2012:147; see also the chapter by Grumblies in this volume).

Various land expropriation cases and the discrimination that these communities faced led to the emergence of various organisations that aimed to defend the rights of the indigenous peoples. These initiatives led to the establishment of AMAN, that has until now acted as the indigenous peoples’ organisation (see above). Therefore, one can say that the indigenous peoples’ movement emerged as a victims’ movement of Suharto’s developmentalist policies.

Arena of Legislative Contestations

The Reformation Period (reformasi) started in 1998 and led to the change of regime. This moment in Indonesian history presented an opportunity for rearranging the relationships between the state and the indigenous communities. If the indigenous peoples (masyarakat adat) and their supporters previously preferred informal protests, now was the time to try to push forward the agenda of the indigenous peoples at the formal, policy level.

During the First Congress of the Indigenous Peoples of the Archipelago (KMAN I) in Jakarta in 1999, the Minister of Agrarian Affairs/Head of the National Land Agency who attended the congress was pushed to recognise the land rights of the indigenous peoples. The participants, taking advantage of the opportunity, filed several complaints concerning cases of land expropriations that they had experienced. The Minister of Agrarian Affairs responded with a Ministerial Regulation on The Guidelines for Communal Land Dispute Settlement (No. 5, 1999).

This ministerial regulation, furthermore, pushed forward the numerous initiatives that led to a number of regional regulations (Perda) on the recognition of the existence of indigenous peoples and their rights, including both land and local governance rights (such as in West Sumatra, Lebak, Jambi, Malinau, Morowali, Papua, Aceh, and many other places). At the same time, the initiatives of the regulatory legislations, such as the

Despite the fact that many laws were initiated, these laws do not solve the existing problems. On the contrary, they make the situation even more complex, and are often not implemented. There are at least four major criticisms of these laws. Firstly, the conditional recognition of the indigenous peoples and *hak ulayat*, as formulated in the BAL No. 5/1960 (see above), is still in place. Noer Fauzi Rachman argues, “On the one hand, the state is willing to recognise; on the other hand, the state suspects the indigenous rights will interfere with what is referred to as ‘the national interest’, which, in turn, often implies the opening of large-scale commercial timber and other plantations” (2000; translation by the authors). Even worse, this model of recognition is the one that was also introduced in the Article 18B Paragraph (2) of the 1945 Constitution, thus, making these requirements crucial in defining the existence and the rights of the indigenous peoples. This, in fact, happened during the process of the faulty formulation of the Constitutional amendment (Arizona 2012).

Secondly, there is an erroneous understanding about the indigenous peoples and their rights to their lands and the natural resources. The lawmakers still consider the land rights of the indigenous peoples to be the rights granted by the state. However, the indigenous peoples themselves consider that their claim is older than the Indonesian state itself, which was only formed in 1945, since their ancestors have been living on their territories for many centuries. The indigenous peoples argue strongly that they are the original right-holders over land and natural resources. In addition, this claim also reflects the shock that the indigenous peoples experienced as a result of the expropriation of their ancestral territories through legal regulations. Due to this, this argument is an important one for the indigenous peoples. It demonstrates to the general public that the indigenous peoples matter.

Thirdly, the laws still promote a standardised, identical governance system, as introduced by the New Order, in order to control the communities and the natural resources for economic development and political stability. The New Order government had issued the Village Law (or Desa) Governance (No 5/1979) which introduced a standardised *desa* (village) model throughout Indonesia; it replaced and destroyed the different traditional village organisations that managed the indigenous communities’ lives across Indonesia. Thus, the villages were made identical in relation to structure, decision-making process and political authority. This also caused a huge number of internal conflicts. Later, the post-Suharto government acknowledged that the Village Law was a failure because it was not in accordance with the 1945 Constitution. Therefore, this Village Law of 1979 was replaced with the Village Governance Law (No. 22/1999). Today, there is an effort to revive a more

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9 Article 18B, paragraph (2) of the Constitution reads: the State recognises and respects the unity of *masyarakat hukum adat* as well as their traditional rights as long as they are still alive and are in accordance with societal development and the principles of the unitary state of Indonesia regulated by laws.
autonomous governance system based on *adat*. However, the lawmakers do not yet fully support this idea.

Fourthly, there is a sectoralism of legislations concerning the indigenous peoples. In reality, the Indonesian legislations are still based on sectoral interests. The forestry problems, for example, are managed by the Ministry of Forestry that applies the Forestry Law without attending to any of the other existing interests. The same goes for the problems related to mining that are solely managed by the Ministry of Energy and Mineral Resources that also only applies the Law on Minerals and Coal rather parochially. Inter-institutional conflicts within the government also have an impact on the protection of the rights of the indigenous peoples. At one point, the territory of the indigenous peoples would be appointed as a protected area, but at another point, one of the Ministries would put it under a mining licence. Meanwhile, there is no organisation that coordinates all the programmes of all the ministries and state institutions in relation to the indigenous peoples. Therefore, the laws that are being enacted for the recognition and protection of the indigenous peoples are becoming more and more problematic because they are being developed within an ambiguous legal development paradigm.

**The Bill on the Recognition and the Protection of the Rights of Indigenous Peoples (RUU PPHMHA)**

Efforts to renegotiate the status of the indigenous peoples in relation to the nation-state are clearly reflected in the motto (rendered in the first sentence of this chapter) that was issued when AMAN was established in 1999. It was only at the Second Congress, KMAN II (2003), in Lombok that the demands for a special law on the indigenous peoples were made for the first time. Two important decisions from this congress in relation to the legislative process were: Firstly, to push both the government and parliament to implement the People’s Consultative Assembly Decree TAP MPR IX/2001 on Agrarian Reform and Natural Resource Management to examine and revoke all the sectoral laws, among them are Forestry Law No. 41/1999 and Mining Law No. 11/1967, that do not recognise and even harass the rights of the indigenous peoples and to replace these laws with a new, comprehensive, cross-sectoral Natural Resource Management Law that also protects the indigenous peoples’ rights. Secondly, demand that the government and parliament of Indonesia make a special law that recognises and protects the rights of the indigenous peoples, as already stated in Article 18B Paragraph 2 in the second amendment of the 1945 Constitution. A meeting was organised at Wisma Margaguna, Jakarta in 2005 to map out ways to identify the indigenous peoples, drawing from local and international experiences. On the International Day of the Indigenous Peoples, August 9, 2006, the President of Indonesia, Susilo Bambang Yudhoyono, gave a speech at Taman Mini Indonesia Indah in Jakarta. In his speech, he expressed respect and support for the recognition of the indigenous peoples and their rights, and acknowledged the importance of the nation’s diversity. The President said:
Recognition and respect, it seems, also need to be assessed according to the development of our society, the principles of the unitary state of the Republic of Indonesia and our laws, so that things become clearer. It is the laws that can regulate the traditional rights of the adat law communities. As far as we understand, up to today, there is no law that regulates this. I hope that we can prepare a draft law in the near future.\(^{10}\)

(President Susilo Bambang Yudhoyono, April 9, 2006; translation by the authors)

The Third Congress, KMAN III (2007), was held in Pontianak, West Kalimantan. This congress also suggested that the indigenous peoples should be able to influence the drafting of the Village Law that was being initiated by several actors, including the Ministry of Internal Affairs and several national NGOs. The congress also recommended that a Commission on the Indigenous Peoples be formed that would aim to coordinate cross-sectorally and become a mediator in the resolution of conflicts between the indigenous peoples and other parties. These suggestions were strengthened at the AMAN Working Group meeting in Sinar Resmi, West Java, in 2009. This working group meeting stated that one of the reasons behind the oppression of the indigenous peoples is the absence of the comprehensive umbrella law that gives recognition, protection and respect to the indigenous peoples and their rights. That same year, a workshop was organised at Wisma YTKI in Jakarta. The workshop involved a number of NGOs that work on the issues of indigenous peoples. They expressed their commitment to the recognition and protection of the indigenous peoples by promoting a special law on indigenous peoples. A meeting at the Learning Centre of HuMa\(^{11}\) (now called the Epistema Institute) resulted in the formation of a team that would work on the advocacy of the Draft Law on the Recognition and the Protection of the Rights of Indigenous Peoples (RUU PPHMHA). The team consisted of a campaign team, a fundraising team, a lobbying team, and a research team to prepare a research paper and the draft law.

Research consultations with AMAN members took place in seven regions in 2010. Public consultations were held in co-operation with the institutions of higher education, including those in Jember (East Java), Medan (North Sumatra), Palangkaraya (Central Kalimantan), Ambon (Maluku), Makassar (South Sulawesi), Papua, and Bali. In addition, a national public consultation was held in co-operation with the Indonesian Academy of Sciences (Lembaga Ilmu Pengetahuan Indonesia, LIPI) in Jakarta. On the basis of these meetings, the internal AMAN team worked on


\(^{11}\) HuMa is the Association for Community and Ecologically Based Law Reform. HuMa is an NGO working to promote peoples' law and natural resources law reform (http://www.huma.or.id).
preparing the draft of the RUU PPHMHA and lobbied its inclusion into the National Legislative Programme (Prolegnas) in 2012.\textsuperscript{12}

A positive response from the National Parliament (DPR RI) could be seen at KMAN IV (2012), organised in Tobelo. At this congress, AMAN symbolically handed over the RUU PPHMHA to the chair of DPR RI. The chair responded that he would support the passing of the law and promote the draft law and that it would be approved at the plenary session of the same year, in 2012. However, up to the end of 2012, the draft law had not been approved. The congress also recommended that a state ministry be formed that specifically works on indigenous peoples’ issues.

Sometime later, the Epistema Institute, in co-operation with HuMa, organised a Symposium on Indigenous Peoples at Gallery 678 in Kemang, Jakarta that discussed the foundations of the indigenous peoples as the subject of a law that is going to be regulated under the RUU PPHMHA. In addition, the potential clash between the RUU PPHMHA and the RUU Desa (Draft Village Law) was mentioned. The meeting recommended that further research needs to be conducted to synchronise the two initiatives that are being discussed simultaneously in parliament.

At the same time, AMAN once again organised a number of public consultations with their members in twenty different regions. The outcome of these public consultations was a proposal to incorporate several changes into the RUU PPHMHA. At the time, it was already scheduled at the Legislative Body for the beginning of September, 2012. At each meeting, the members of AMAN in the areas where public consultations were held put on pressure to speed up the ratification of the RUU PPHMHA. This is why the AMAN working meeting held in Palangkaraya in March, 2013, agreed to accelerate the process of the RUU PPHMHA enactment. AMAN issued a statement that they would boycott the political parties that impeded or obstructed the discussion and legalisation of the RUU PPHMHA.

On May 16, 2013, the Constitutional Court of the Republic of Indonesia accepted the petition from AMAN and two communities from Kenegerian Kuntu (Riau Province) and Kasepuhan Cisitu (Banten Province). The decision of the Constitutional Court revised a provision regarding the customary forest in Forestry Law. In this decision, the Constitutional Court emphasised that a special law is needed to follow up the provision of Article 18B section 2 of the Indonesian Constitution regarding protection and promotion the rights of indigenous peoples (Constitutional Court Decision No. 35/PUU-X 2012:184).

### Scope and Criticism of the RUU PPHMHA

Responding to the growing strength of the indigenous peoples’ movement in Indonesia, the government passed a number of legal regulations both at the local and national levels (see Arizona 2010b).\textsuperscript{13} The RUU PPHMHA was agreed at the

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\textsuperscript{12} Prolegnas is a step in the preparation of legislation in parliament, where a variety of the proposed draft legislations are considered and which is going to be discussed in a given year is decided upon.

\textsuperscript{13} For more information regarding the trend of policy regulations on indigenous peoples in post-Reformation Indonesia, see Yance Arizona 2010a.
parliamentary plenary session on April 11, 2013. The term that was used to define the indigenous peoples was *masyarakat hukum adat*, not *masyarakat adat*.\textsuperscript{14} Even though the difference between the two terms lies only in one additional word, *bukum* (law), the observers of the indigenous peoples have been debating the two terms for a long time. Some of them argue that the two terms refer to two different subjects of law, while others believe that both terms allude to the same subject of law.

The term *masyarakat hukum adat* or *adat* law communities is often used by the policymakers, because this term appears recurrently in the legal regulations. The academics also use the same term, because it is a literal translation from *Adat Rechtsgemenschaapen* (see above). The *masyarakat hukum adat* are defined in the RUU PPHMHA as

a group of people who have been living in a certain geographical area for generations in the territory of the Republic of Indonesia because of the ancestral connection and a special relationship with the land, territory and natural resources, who own a customary governance system and an *adat* law order on their territory.\textsuperscript{15}

At the same time, the term *masyarakat adat* is used by the NGOs and the indigenous peoples’ activists. This term was coined only at the beginning of 1993 to refer to the rural people who became the victims of the New Order developmentalist policies. This term is used in a smaller number of legal regulations that are still in force, such as the Law on the Management of Coastal Areas and Small Islands (No. 27/2007). The deep fear of the indigenous peoples towards the use of the term *masyarakat hukum adat* is because the term risks suggesting that the indigenous peoples are only those who own a systematised, measurable law practice.\textsuperscript{16} This may overlook other realities of indigenous peoples, such as their belief systems, cultures, political systems, and other elements that define the identity of *masyarakat adat*.

\textsuperscript{14} Meanwhile, Article 18B, Paragraph (2), of the 1945 Constitution uses the term *Kesatuan Masyarakat Hukum Adat* (unity of customary law communities).

\textsuperscript{15} This definition was agreed upon at the JAPHAMA meeting in 1993 at Tana Toraja, South Sulawesi. This definition became the working definition of AMAN. On the basis of this definition, the RUU PPHMHA proposed the six characteristics of the indigenous peoples mentioned.

\textsuperscript{16} Soetandyo Wignjosoebroto, an expert on the legal history of Indonesia, states that there are two ways of understanding *masyarakat hukum adat* – the first one is as *masyarakat-bukum adat* and the second is as *masyarakat-bukum-adat*. The first reading implies that this entity is a subject of law called *masyarakat bukum*. The second reading suggests that *adat* law is the main element of this legal entity. In his opinion, the term *adat rechtsgemenschaapen* that was translated as *masyarakat bukum adat* should be interpreted according to the first reading (Wignjosoebroto 2012).
Comparison between *Masyarakat Hukum Adat* and *Masyarakat Adat*

<table>
<thead>
<tr>
<th>Elements</th>
<th><em>Masyarakat hukum adat</em> / Customary law communities</th>
<th><em>Masyarakat adat</em> / Indigenous peoples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Usage</td>
<td>Used by the colonial government to refer to a subject of law formed by the “native” (<em>pribumi</em>) peoples.</td>
<td>Refers to a movement of the rural peoples who still hold onto their traditions and were the victims of the developmentalist policy of the New Order regime.</td>
</tr>
<tr>
<td>When did it emerge?</td>
<td>Developed as a result of the colonial experiences at the end of the 19th and the beginning of the 20th century.</td>
<td>Developed as a result of the New Order developmentalist policy in the period 1980-1990.</td>
</tr>
<tr>
<td>Initial objective</td>
<td>Indirect rule by the colonial government. Demonstrates the uniqueness of the “native” peoples.</td>
<td>Movement for land restitution. Expresses resistance to discrimination.</td>
</tr>
<tr>
<td>Creators and supporters</td>
<td>Formulated by the Dutch legal experts and developed through research, teaching and state policy.</td>
<td>Formulated by the social movements and scholarly activists and developed by the resistance movement.</td>
</tr>
<tr>
<td>Dominant forming factor</td>
<td>Formed by anthropological research during the colonial times</td>
<td>Inspired by the international indigenous peoples’ movement.</td>
</tr>
</tbody>
</table>

The usage of the term *masyarakat hukum adat* is a compromise that allows the legislative process to continue. A similar situation happened with the Law on Environmental Protection and Management (No. 32/2009). This law uses the term *masyarakat hukum adat*, but gives the same definition that was applied for *masyarakat adat*, that is: “a group of people who have been living in a certain geographical area for generations because of the ancestral connection, strong relationships with the environment, and with a value system that defines the economic, political, social, and legal norms”.

The usage of the term *masyarakat hukum adat* in the RUU PPHMHA also indicates that the policy-makers are still co-opted by the concepts that were inherited from the
colonial era and taken over by many legislations after independence, including the constitution, without deep and holistic analysis of the present realities.

Stages of Legal Recognition

One of the difficult questions is how to recognise indigenous peoples. What are the stages of recognition and decision-making that need to be formulated within a legal document? This question was discussed by the indigenous peoples’ movement at a workshop in Wisma Margaguna, Jakarta in 2005. The greatest challenge here is to find the most appropriate way to regulate the insertion of the practice of self-determination into the RUU PPHMHA.

The RUU PPHMHA suggests three stages in the recognition process of the masyarakat adat: identification, verification and ratification. The identification is carried out by the indigenous peoples, the local government, or both together. The five indicators are: (a) history of the adat law communities; (b) adat territory; (c) adat law; (d) adat property relations, inheritance and adat artefacts; and (e) customary governance system. The results of the identification are handed over to the Committee on the Indigenous Peoples at the regency, provincial or state levels. These indicators of masyarakat adat are different, with six elements of beschikkingrecht that were promoted by Cornelis van Vollenhoven.\(^{17}\) Five indicators are used by the RUU PPHMHA to identify the subjectivity of masyarakat adat, and the sixth indicator was promoted by van Vollenhoven to show customary land management by native peoples.

Verification, the second stage of the recognition, comprises checking back on the identification process. Results of the verification are handed over to the regent, governor or the president so that an approval can be issued. At the third stage, the decision is ratified. If the existence of the indigenous peoples is to be decided within one regency (kabupaten), the regent has the authority of ratification; if several regencies

\(^{17}\) See footnote 7 in this chapter.
are involved, it is the governor; if several provinces are concerned, it is the president
who ratifies the final decision. The communities have a right to challenge the decision.

This model of recognition is complex (multiple parties) and problematic, since the
principle of self-determination of the indigenous peoples is ultimately determined by
the political decision-making of a regent, a governor or the president. In reality, it is
not easy to translate self-determination into a policy framework. This is why the model
elaborated in the RUU PPHMHA needs to be debated so that a fair, accessible
mechanism can be developed.

Administration and Conflict Resolution

The RUU PPHMHA regulates the rights and the responsibilities of the masyarakat adat. The types of rights that are regulated within the draft law are the following: (1) rights
to land, ancestral territory and natural resources; (2) rights to self-determined
development, which includes the rights of the indigenous peoples to accept or refuse
development agendas planned by other parties on the ancestral territories, and the
rights of the indigenous peoples to determine their own development; (3) rights to
spirituality and culture that include rights to profess and practice their own systems of
traditional beliefs, rights to preserve and develop their own traditions and cultures, and
rights to receive protection and promotion of their intellectual properties; (4) rights to
their environment; and (5) rights to practice customary law and customary judicature.

The regulation of various types of rights within the draft law adopts the
stipulations from other laws and also translates the rights of the indigenous peoples
that were outlined in UNDRIP. However, the rights to self-governance were not
included in this draft law. The Legislative Body of the Parliament that prepared the
RUU PPHMHA and the Parliamentary Commission II that discussed the RUU Desa
reached the agreement that the rights of the indigenous peoples to self-governance
would be included within the RUU Desa. Here, the right to self-governance is, in
reality, the realisation of the indigenous peoples’ right to self-determination, which, in
fact, is the condition for the indigenous peoples’ realisation of all the other rights.

The RUU PPHMHA does not regulate the administration of the masyarakat adat
rights in any concrete way and may hamper the fulfilment of their rights in the future.
Even more so, in a situation where the majority of the administration of the masyarakat adat is connected to other governmental structures, such as the Ministry of Forestry in
relation to adat forest or the National Land Agency in relation to the land rights, and so
on.

The RUU PPHMHA authorises the local adat organisations to resolve conflicts
that arise among members within their own group. However, this authority is restricted
to conflicts that are classified as civil offences and minor criminal offences. Major
criminal offences and special criminal offences are resolved by the state judicature. A
major criminal act within the draft law is referred to as a crime that is regulated via
Book II of the Criminal Code. A “special criminal act” is defined as a criminal act that
is outside the Criminal Code and is regulated through special legal regulations, such as
acts concerning corruption, terrorism, drugs, and others.
At the same time, concerning conflicts that arise between two different indigenous communities, the RUU PPHMHA regulates that these conflicts need to be resolved via a consensus-oriented process of *musyawarah* (deliberation) between the local *adat* institutions. If this process does not succeed, the disputing members need to go through the *adat* judicature. If the parties disagree with the decision of the *adat* judicature, then the case goes to the state judicature, i.e. it is submitted to the Supreme Court.

The draft of the RUU PPHMHA does not fully acknowledge the *adat* justice system. Firstly, the indigenous peoples do not strictly differentiate between a civil and a criminal offence, as these are recognised within the state law. Therefore, the difference as stipulated by the RUU PPHMHA is not accurate. Secondly, *adat* judicature is not an *adat* court. *Adat* judicature works as a local institution and is one of the functions of the *adat* council. However, it is not hierarchically organised in a similar way to the contemporary state administration. Thirdly, the draft law does not talk about ways to regulate conflicts that arise between the indigenous communities and external parties, such as companies that are operating on the customary territories. The RUU PPHMHA authorised the *adat* judicature. However, if there is a party that does not recognise the decision of *adat* judicature, the conflict goes to the Supreme Court.

Institutional Limitations

As briefly mentioned, there is no state ministry or committee that specifically promotes the rights of the indigenous peoples. Even the RUU PPHMHA has not yet pushed for the birth of such an institution. The draft law mentions a special committee for *masyarakat adat* that is organised hierarchically at the regency, provincial and national levels. This is a temporary committee because its objective is only related to the verification stage of the recognition of the indigenous peoples. After the process of verification, the committee is supposed to be dissolved.

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18 Article 44, paragraph (4), in the RUU PPHMHA states: *Adat* Judicature is formed by an *adat* organisation starting from a regency/city level and going to the provincial level.
The Revival of Indigenous Peoples

The RUU PPHMHA regulates a number of tasks and competences of the government to promote the rights of the indigenous peoples. The following table explains the tasks and competences within the RUU PPHMHA:

<table>
<thead>
<tr>
<th>Government tasks</th>
<th>Government authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. To develop and implement a programme for the empowerment of adat law communities by reconsidering the local wisdom/knowledge;</td>
<td>a. To ratify the existence of the customary law communities;</td>
</tr>
<tr>
<td>b. To provide the necessary means and infrastructure needed by adat law communities;</td>
<td>b. To approve policy on the empowerment programme of adat law communities by reconsidering the local wisdom/knowledge;</td>
</tr>
<tr>
<td>c. To socialise and inform the development programmes planned to adat law communities;</td>
<td>c. To approve policies of the necessary tools and infrastructure;</td>
</tr>
<tr>
<td>d. To supervise or give guidance to the adat law communities</td>
<td>d. To approve policy for the protection of artefacts, culture and language of adat law communities;</td>
</tr>
<tr>
<td></td>
<td>e. To approve policy of socialisation and information dissemination informing adat law communities about the development programmes;</td>
</tr>
<tr>
<td></td>
<td>f. To approve a policy about the supervision or guidance of the customary law communities.</td>
</tr>
</tbody>
</table>

Even though the draft law regulates the tasks and authorities of the government, it does not specifically mention the institutions that are responsible for executing these tasks. Several suggestions were made by KMAN IV in Tobelo in 2012. This congress gave a mandate for forming a State Ministry on the Indigenous Peoples and the public consultations suggested an independent Commission on Indigenous Peoples as an independent governmental institution. Nevertheless, these ideas were not accommodated within the RUU PPHMHA that is currently (May 2013) being prepared by the parliament.

**Challenges of the RUU PPHMHA and the Threat of Traditional Elites**

It was agreed that the RUU PPHMHA would be a parliamentary initiative. This means that this draft law will be discussed between the parliament and the government. Every law has to pass through two stages: firstly, the parliamentary commissions and,
secondly, the parliamentary plenary session. Each reading is carried out together with the government to achieve an agreement.

In the first stage, the decision is taken as to which commission is going to consider the RUU PPHMHA. If it is in the Commission 2 that is also discussing the RUU Desa, then the opportunity for synchronisation between the RUU PPHMHA and the RUU Desa is greater. However, the risk here is that the RUU PPHMHA might lose its zeal to recognise the rights of the indigenous peoples on the basis of their ancestral traditions, because the RUU Desa focuses on structural government perspective.

The government representatives, especially the ministries that also deal with the indigenous peoples such as the Ministry of Social Affairs, Ministry of Education and Culture, Ministry of Internal Affairs, Ministry of Marine and Fishing Affairs, Ministry of Environmental Affairs, and others, will be involved in the discussion of the RUU PPHMHA and will, therefore, be able to determine the content of the draft law. The challenge here, therefore, is overcoming the persisting sectoralism and promoting the understanding of the indigenous peoples’ concerns.

The emergence of the indigenous peoples’ movement in Indonesia has also been followed by the rise of the group of noble elites that represent kingdoms and sultanates, which existed before the establishment of Indonesia. Gerry van Klinken (2007) and, more recently, Fadjar Thufail (this volume) analyse the re-emergence of the groups of kings and sultans and their impact. There are at least three associations with different leaders, such as the Association of Kingdoms and Sultanates of Indonesia (Asosiasi Kerajaan dan Kesultanan Indonesia; AKKI), led by Raja Samu-Samu from Moluccas; the Friendship Forum of the Sultanates of the Archipelago (Forum Silaturahmi Kesultanan Nusantara; FSKN) led by Sultan Banten; and the Forum of Information and Communication of the Sultanates of the Archipelago (Forum Informasi dan Komunikasi Kesultanan Nusantara; FKIKN) led by Puro Mangkunegoro.

These groups constitute the traditional elites that are economically capable and have better political relations with the formal institutions. However, it seems that these groups are not well organised due to internal competition. As Klinken (2007) has shown, several of the individuals are district heads or/and parliamentarians at the national or regional levels. They can lobby and communicate with the chairs of the national and regional parliaments responding to this law initiative that can potentially be used to strengthen their traditional status. They do not oppose the indigenous peoples’ movement and they even voice the interests of the indigenous peoples. They aim to reclaim the lands of the kingdoms and sultanates that also applied the *adat* system, even though what they mean by *adat* is different from the *adat* of the local village people. The size of the difference between the *adat* of the kings and the *adat* of the common villagers shows that the claim on the basis of *adat* and tradition stretches over a wide scope and can be used for various interests (see the chapter by Thufail in this volume). The Sultan of the Melayu Sultanate of Jambi, Raden Abdurrahman Thaha Syaifudin, for example, reported a case of indigenous land expropriation by a

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19 Article 20, Paragraph (2), of the 1945 Constitution says that all draft laws must be discussed by the Parliament and the President to achieve a common agreement.
company with a timber licence from the Ministry of Forestry to the United Nations on the basis of the claim that the customary territory had been expropriated.

This danger, the use of adat for different purposes, also became apparent in the public consultations with kings and sultans in several regions that were conducted by the parliament in May, 2012. If left unguarded, there is a possibility that this draft law could be usurped by these feudal groups.

Potential Frictions and Legacies

The decentralisation process in the post-New Order era strengthened the neo-traditionalism, the adat institution and the village organisation that previously constituted the political units of adat law communities. In West Sumatra, the local government played a role in issuing a regulation to return the original village governance system that is called nagari. The same applies to several other places, such as Aceh, South Sumatra, Maluku, and others (see Benda-Beckmann F. and K. v. 2010).

The consequence is that the role of adat leaders becomes stronger in controlling the national resources by negotiating with the companies in their customary territories. This may also cause conflicts between the adat leaders and the administrative village leaders that can often explode in the power struggles over a village’s natural resources (see the chapter by Steinebach in this volume). This happened in West Sumatra between the wali nagari and the ninik mamak, and also in Bali between the desa dinas and desa adat (see the chapter by Hauser-Schäublin in this volume). This constitutes one of the conflictual points between the indigenous peoples and the village (desa). In several places, such as West Sumatra and Aceh, the whole village governance unit, called nagari in West Sumatra and gampong/mukim in Aceh, is referred to as masyarakat adat. In the local regulation of West Sumatra Province on the Nagari Governance (No. 2/2007), nagari is defined as the unity of masyarakat hukum adat that owns a certain territory, performs self-governance and acts in the interests of the local communities based on the customary philosophy of the Minangkabau that custom law based on sharia law, as well as sharia based on the holy Qur’an (adat basandi syarak, syarak basandi kitabullah) and/or on the basis of the origins and local customs of the Province of West Sumatra. Thus, the definition of nagari in West Sumatra is the same as the one of desa and of the masyarakat adat. At this moment (May 2013), the discussion of the RUU Desa is on-going in the parliament. Harmonisation of the RUU Desa and the RUU PPHMHA is needed in order to avoid a negative impact and a clash that the communities might experience in the future because of the application of both laws.

Another challenge within the discussion of the RUU PPHMHA is the colonial legacy that is hampering the renewal of the political concepts related to adat and is obstructing the fulfilment of the demands of the indigenous peoples. We can see this, for example, in the decision to use the term masyarakat hukum adat rather than masyarakat adat within the draft law of the RUU PPHMHA. There are also differences between the concepts of the colonial studies of adat and adat law communities and the contemporary discourses of adat, as well as between beschikkersrecht and adat land (tanah adat) or adat territory (wilayah adat), or between an adat law as adat that possesses sanctions and an adat as a general guiding principle of life that emerged and developed
among the people. Therefore, it would be necessary to break out from conceptual imprisonment of the past and to take a chance to make laws that advance the rights of the indigenous peoples.

The concepts developed by the Leiden Adat Law School need to be straightened out not only because of numerous translation mistakes from Dutch into Indonesian, but also because there was a misinterpretation of the findings of the Leiden Adat Law School researchers (Soesangobeng 2012a). Soesangobeng proposes that Pancasila as the national ideology of Indonesia might serve as a guideline for correcting those concepts; unfortunately, he does not propose to conduct empirical studies that test the relevance of the concepts and terms that are used in the contemporary adat studies.

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20 For a critical evaluation of the uses and (mis-)interpretations of adat see “Myths and stereotypes about adat law: a reassessment of Vollenhoven in the light of current struggles over adat law in Indonesia,” by Franz and Keebet von Benda-Beckmann (2011).