Revista Direito e Praxis

[Dossier: Decolonial comparative property law]

Property and the trauma of dispossession: an analysis of decolonial judicial reasoning in Indonesia

Propriedade e o trauma da despossessão: uma análise do raciocínio judicial decolonial na Indonésia

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Article received on 10/03/2025, accepted on 10/11/2025 and corrected on 15/12/2025.

Resumo

Este artigo examina a relação entre decolonialidade e raciocínio judicial por meio de uma investigação sobre como o trauma da despossessão molda a maneira como os decisores legais pós-coloniais (ou seja, juízes) entendem e criam uma abordagem pluralista do direito de propriedade na Indonésia. Através da lente do direito comparado decolonial, afirma-se que a decolonização do direito de propriedade é essencialmente construída a partir das imagens da configuração espaço-temporal da experiência vivida pós-colonial.

Palavras-chave: Propriedade; Decolonialidade; Cronotopo.

Abstract

This article examines the relationship between decoloniality and judicial reasoning through an investigation of how the trauma of dispossession shapes the way post-colonial legal decision-makers (i.e., judges) understand and create a pluralistic approach to property law in Indonesia. Through a decolonial comparative law lens, it is claimed that decolonizing property law is essentially construed upon the images of spatiotemporal configuration of post-colonial lived experience.

Keywords: Property; Decoloniality; Chronotope.

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

1. Introduction

In a post-colonial context, the concept of decoloniality of property is generally understood as a process of untangling various forms of property from dominant post-colonial extractivist relationships. Essentially, the governance of property in a post-colonial context has historically been tied to extractive relationships established during colonialism, leading to ongoing debates about whether these forms and aspects of property are remnants of colonial legacies or represent a new approach aimed at resolving inequitable colonial experiences (YI-SHIUAN CHEN, KUAN, *et al.*, 2018).

This study explores the plural normativities of property law. Focusing on Indonesia's judicial decisions related to resources, it aims to analyze and compare the country's legal interpretations concerning water and forest resources. Current studies have highlighted the challenges surrounding the country's regulatory approaches to these resources, indicating that the laws and legal frameworks have tended to homogenize the normativities of resources (ALAFGHANI, 2023, ARIZONA, ILLIYINA, 2024, MULYANI, 2023). Nonetheless, as part of the post-colonial Global South, scant attention has been paid to the intricacies of decoloniality and indigeneity of resources/property, particularly through judicial reasoning in the country.

Why are the judges' perspectives important to the concept of decolonizing property? In the realm of legal practices, the decolonization of property law depends on judges engaging in a creative and experimental exploration of the extractive governance network (MALDONADO-TORRES, 2016). This inquiry is rooted, as I have argued elsewhere, in an intuitive form of judicial reasoning, particularly as judges pay attention to the issue of colonial temporalities (CITRAWAN, 2025, cap. 4). By examining the legal challenges surrounding property and resource governance through the framework of temporalities, judges can access a richer understanding of reality that transcends their tendency toward parochialism, which simplifies property and resource governance to mere physical control over territory (KEENAN, 2013). To inspire such creative and experimental exploration, discussions on property and resource governance might (or should) delve into how individuals experience time and how they interact with property over time, specifically in our context: the colonial history of property.[1] We can assert that by engaging with a

[1] (VALVERDE, 2015) Following Valverde, it is important to note that in understanding creativity and experimental, "A lawyer, a judge, or a plaintiff using a term in a novel manner is unlikely to have done so out of a well-designed creative plan to reform language in general or law in general. Innovations often (probably

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

diverse range of human experiences, judicial understandings of *time* are effectively influencing the way property governance is *spatially* conceived (CAMPBELL, 2013, PURCELL, 2014).

The theoretical foundations of this proposition are twofold: (1) from an epistemological perspective, decoloniality is intertwined with the diverse governance of property through legal institutions (i.e., norms, principles, and reasoning), and (2) from a methodological standpoint, adjusting resource governance—specifically concerning water and forests—as part of the decolonization of property law requires judicial reasoning that considers both spatial and temporal governance. These foundations suggest that the decolonial approach is not merely an attempt to rethink history in a nostalgic way that idealizes past communal societies but rather focuses on understanding how contemporary post-colonial societies engage in lawful relationships with property and resources that do not perpetuate coloniality (SALAYMEH, MICHAELS, 2022, p. 188).

This study examines the contested lawful relations concerning water and forest governances in post-colonial Indonesia through the lens of temporalities. It aims to uncover some aesthetic aspects of these relationships, shaped by the linguistic choices made by legal decision-makers in specific legal cases. Drawing from methodological discussions in decolonial comparative law (SALAYMEH, MICHAELS, 2022, ZITZKE, 2018), the study posits that these legal relationships fundamentally rely on the imagery associated with the spatiotemporal configurations of post-colonial lived experiences. Specifically, these images are manifested in what I term *property hybridization*, as legal decision-makers implement pertinent legal concepts—e.g., freedom and autonomy, causation of harm, state control, legal agency, living law, and the universality of rights. By closely examining decolonial jurisprudential reasoning, I contend that the process of decolonizing property law is fundamentally a *performance* of interwoven affective dialogues between the *trauma* of colonial dispossession and the *anticipated* future trajectories of extractivist resource governance.

This article is organized into three sections. *First*, it delineates the multiplicity of property governance, which challenges the pervasive logic of singularity in understanding property law as resource governance. As will be discussed later, this singularity functions through legal institutions (i.e., norms, principles, and reasoning) that objectify property

most often) arise from tactical decisions *to borrow a term that intuitively seems to work for one's pragmatic purpose* …" 26. (emphasis added)

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

under the umbrella concept of dominion. Against the dominion conception, which emphasizes property owners' right to exclude, I later argue for a pluralistic approach to property law that takes into account the complex interplay among space, time, and legal frameworks. The *second* section develops what I call decolonial judicial reasoning, forming the basis for this paper's argument that property governance must be justified judicially in relation to temporal contexts as part of the decolonization of property law. It primarily illustrates how the trauma of dispossession can inspire judicial innovation when judges face unjust circumstances that reflect colonial history. Central to our analytical framework is Bakhtin's concept of the *chronotope*, which aids in comprehending how such trauma is intertwined with judges' reasoning regarding property governance (VALVERDE, 2015). While the question of property governance has been epistemically revolving around the *who* and the *what* of governance, the final section highlights the importance of exploring *how* property governance has been exercised (or *performed*, in Blomley's (2013) thesis) in the past, particularly within a decolonial context. To illustrate this point, a *chronotopic* analysis will be conducted on the *Jakarta Water Deprivatization* lawsuit (2015-2018) and the *Adat Forest* constitutional review litigation (2009). This comparative study reveals how the courts have 'hybridized' the legal properties of water and forest governance by examining the interconnected and communal narratives surrounding property. In this context, hybridization refers to a process of expanding and contracting the dimensions of space and time in relation to resources, achieved through various legal techniques and principles (VALVERDE, 2015).

2. Property as a multiplicity of governances

Our epistemological investigation on decolonial property law embarks on the ways liberal theory frames property within law and the legal system. The liberals have been historically framing property as the cornerstone of the society because it underpins and reinforces the autonomy of individuals. Borrowing from Dagan's (2021) liberal theory of property law, we can identify three pillars of the autonomy-enhancing conception of property, including:

> (1) circumscription of owners' private authority to ensure that it follows property's contribution to self-determination, (2) creation of a structurally pluralistic inventory of property types offering people real choice, and (3)

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

> compliance of owners' powers with relational justice to verify that property does not offend the principle of reciprocal respect for self-determination substantiating its legitimacy (p. 4).

Dagan's view is fundamentally a critique against the dominant Blackstonian character that sees property as *dominion*. Historically rooted in the West—and arguably imported to the East during colonialism—dominion, or the ownership model as some suggest, has treated property as a singularity (DAVIES, 2019, SINGER, 2000). That is, as Davies (2019) suggests, "[t]he colonial form of property is based on a division between subject and object and the imaginary of a separated self in which a world understood as external can be appropriated by a single person and rendered unavailable to others" (2019, p. 11). Coloniality thus has been underpinned by a concept of property that focuses exclusively on the space-time matrix (MAWANI, 2014). This practice, following Dagan, inherently deviates from the pluralist approach of property law because space-time matrix posits property as singularity, which tends to homogenize the normativities of property.

Our epistemological claim builds on the pluralist pillar, which maintains that "the main task of property theory is not to ascertain a uniform core meaning of property but rather to distill the distinct human ideals of the various property institutions, to elucidate the ways each of them contributes to human flourishing, and to offer reform, if needed" (DAGAN, 2011, p. 73). Expanding on this perspective, we could propose that such human flourishing implies a complex interplay among space, time, and legal systems (ALEXANDER, PEÑALVER, *et al.*, 2008). In this regard, this interplay includes a spatio-temporal aspect of property law where (spatial) governance is fundamentally dependent on certain legal characteristics that embody the *multiple* temporal experiences of citizens (DELANEY, 2010, LAMETTI, 2003). Within this context, governance is interpreted broadly as a collection of governmental *practices* and *technologies* utilized by different types of actors. In applying governance within a post-colonial framework, we are not necessarily aiming to comprehend government actions in terms of spatial and temporal relations. Instead, the focus is on emphasizing the Foucauldian issues related to governance (FOUCAULT, 1991, HUXLEY, 2007, WALBY, 2007). To wit, it addresses a *network* of governance—that is, it brings attention to governance as "a whole range of apparatuses pertaining to government and a complex body of knowledge and 'know-how' about

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

government, the means of its exercise, and the nature of those over whom it was to be exercised" (ROSE, MILLER, 2010, p. 272).

The multiplicity of property governance in post-colonial contexts stems from a struggle against the historical injustices wrought by colonial extractive governance (BACHMANN, FROST, 2012, FROST, BACHMANN, 2012, JOIREMAN, 2001). This aspect is notably overlooked in Western property law theory. Although the concept of extractivism includes a broad array of social, political, and economic factors, recent literature reveals several important themes.[2] One key focus is the idea of wealth flowing across time and space, which shapes the constraints and pressures faced by nearly all humans and non-human entities. The term governance, when applied to post-colonial extractivism, may be understood as a persistent exploitative, repressive, and unequal dynamics that echoes its colonial history.[3] In this context, the dynamics highlight an *enduring* legacy of unjust dispossession politics, indicating that dispossession is not solely about direct control over physical objects but also involves the appropriation of the knowledge and imagination of those who are oppressed (BHANDAR, 2018, MIGNOLO, WALSH, 2018). This sort of repression, quoting Quijano (2007), involves "the modes of knowing, of producing knowledge, of producing perspectives, images and systems of images, symbols, modes of signification, over the resources, patterns, and instruments of formalized and objectivised expression, intellectual or visual" (p. 169). When we examine extractivist (property) governance in this manner, we can start to view any legal challenges to the exploitative framework—such as those discussed in our forthcoming case study on traditional rights concerning forest and water remunicipalization—as a way of reshaping lawful relationships.

Recall our epistemological claim earlier that decoloniality is inextricably linked to the multiple governance of property through legal institutions (i.e., norms, principles, and reasoning). It suggests that decoloniality shifts from a space/time matrix to a leap of memory/perception (YI-SHIUAN CHEN, KUAN, *et al.*, 2018). The prevalent decolonial perspective based on the space/time matrix tends to set us in a nostalgic view of a 'pre-

[2] (CHAGNON, DURANTE, *et al.*, 2022, p. 763) (emphasis added)

[3] (MCDONALD, SWYNGEDOUW, 2019) It is important to highlight McDonald and Swyngedouw's hypothesis on the inquiry of the *how* to govern. They argued that "remunicipalisation will continue to grow in the medium term due to widespread dissatisfaction with privatisation on the part of elected officials, civil servants and citizens, but that differences within the remunicipalisation movement, combined with ongoing fiscal restraints and growing resistance from powerful multilateral actors, may make it difficult to sustain this growth without significant changes to strategy, engagement and resources," 323.

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

colonial' communal society, thereby obscuring any critical analysis of the multitude of current experiences rooted in memory and perception. Memory/perception leaps, therefore, may broaden the understanding of post-colonial experiences. But, how do we comprehend the transition from a colonial space/time framework to a decolonial leap in memory/perception? The next section offers an analytical exploration of how this transition unfolds in judicial reasoning processes.

3. Decolonial judicial reasoning

Building on the epistemological assertion mentioned in Section II, decolonial judicial reasoning functions in both legal and ontological contexts. Legal-ontological endeavors, as Anna Grear (2020) suggests, primarily aim to deconstruct the imaginary of quasi-disembodiment. Therefore, to establish the methodological basis for decolonial reasoning, we must redirect our attention from the space/time framework to the memory/perception shifts associated with colonial aftermath. In that regard, Leela Gandhi argues in *Postcolonial Theory* (1998) that

> [t]he colonial aftermath calls for an ameliorative and therapeutic theory which is responsive to the task of remembering and recalling the colonial past. The work of this theory may be compared to what Lyotard describes as the 'psychoanalytic procedure of anamnesis, or analysis—which urges patients to elaborate their current problems by freely associating apparently inconsequential details with past situations—allowing them to uncover hidden meanings in their lives and their behavior.'(p. 8)

Gandhi's concept of colonial anamnesis allows for the recognition of the unique nature of memory within post-colonial communities, rooted in the trauma of dispossession. The narrative of trauma can be understood, following Caruth's (1996) perspective, "a kind of double telling, the oscillation between a *crisis of death* and the correlative *crisis of life*: between the story of the unbearable nature of an event and the story of the unbearable nature of its survival" (p. 7).In a related vein, Hirsch posits that postmemory necessitates a creative and imaginative engagement with the past (WARD, 2013). This engagement is anchored in immediacy, which Grosz (2004) describes as a "nick of time." The nick of time merges different time modalities (namely past, present, and future) and frames intuition as a key methodological tool (ALTAMIRANO, 2021).

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

On that note, within the decoloniality discussions, the varied nature of property governance not only highlights space-time relationships but also intertwines citizens' life experiences across past, present, and future, all of which are shaped by intuition.[4] By drawing on Bakhtin's literary notion of *chronotope*[5]—understood here as how legal practitioners utilize legal methods to integrate spatial and temporal dimensions within their inquiries—we can establish that property governance serves as an intuitive representation of resource management, rooted in the spatiotemporal context of human experiences (BLOMLEY, 2013, BRAVERMAN, BLOMLEY, *et al.*, 2014). This reference to Bakhtin's (2010) *chronotope* emphasizes the narrative connection between individuals and events and the interplay of time and space. This theory asserts the fundamental unity or "intrinsic connectedness" that exists within the narrative fabric of time and space (HOLQUIST, 2010). However, Bakhtin did not have the opportunity to provide a single, clear definition of *chronotope*. The closest like-definition Bakhtin ever wrote was that,

> [i]n the literary artistic scholarship, spatial and temporal indicators are fused into carefully thought-out, concrete whole. Time, as it was, thickens, takes a flesh becomes artistically visible, likewise, space becomes charges and repulsive to the movements of time, plot and history. The intersection of axes and fusion of indicators characterizes the artistic *chronotope* (p. 84).

In essence, Bakhtin proposed that "narrative texts are not only composed of a sequence of diegetic events and speech acts, but also—and perhaps even primarily—of the construction of a particular fictional world or *chronotope*" (BEMONG, BORGHART, 2010, p. 4). From this perspective, we can illustrate how (internal) legal temporalities contribute to our understanding of resource governance (CITRAWAN, 2025). In this regard, Bakhtin's concept of chronotope should be interpreted as the method by which legal decision-makers integrate the spatial and temporal contexts of their inquiries (HOLQUIST, 2010, VALVERDE, 2019). Drawing on narratology, this analytical lens can assist us, as Tait and Norris (2011) aptly indicate, "to determine not only what elements of a story repeat in each instance, reconfirming significance through the act of repetition, but also what purpose the repetition serves, whether it be to increase understanding or imply

[4] As de Sousa Santos (2015) argues that "Our knowledge is intuitive; it goes straight to what is urgent and necessary. It is made of words and silences- with-actions, reasons-with-emotions. Our life does not allow us to distinguish life from thought. All our everydayness is thought of every day in detail. We think of our tomorrow as if it were today." 12.

[5] *See* BAKHTIN, 2010, VALVERDE, 2015 Moreover, borrowing from Valverde (2015), "chronotopic analysis demands not only that we consider how temporalization affects spatialization and vice versa, but also, how *heterogeneous* and even *contradictory* chronotopes coexist not only in a single literary (or legal) text but even within a single utterance." p. 22 (emphasis added)

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

legitimacy" (p. 12). The essential methodological aspect here is Bakhtin's (2010) idea of hybridization, which refers to "a mixture of two social languages within the arena of an utterance, between two different linguistic consciousnesses, separated from one another by an epoch, by social differentiation or by some other fact" (p. 358). The synthesis of (elastic) space and time through the narratives reflects judges' reasoning in assigning meaning to legal relations under post-colonial extractivist governance.[6]

4. Hybridizing property

This final section explores how judges identify justifying reasons in specific legal cases through decolonial intuition. It focuses on how this decolonial judicial reasoning grapples with the traumas resulting from historical extractive governance. By using *chronotopic* analysis, the judicial decisions suggest that the judges' decolonial reasoning enables them to interpret the significance and impact of qualitative aspects of property injustice within the country. This creates a connection between the judges' attentiveness to experiences of injustice and the reasons they provide for their decisions. Viewed in this light, spatial property governance is examined through the lens of the multiple societal traumas stemming from colonialism and, to some degree, authoritarianism, suggesting an intertwining of citizens' past, present, and future experiences.

4.1 Water Deprivatization

Our initial case addresses the Jakarta Water Deprivatization citizen lawsuit (CLS), which is widely regarded as part of the global water remunicipalization movement (HANNA, MCDONALD, 2021, MCDONALD, SWYNGEDOUW, 2019). Within this global context, the struggle over water resources in the city has primarily centered on the spatial dimensions of governance. Here, water is perceived as a component of a city's spatial resources, thereby viewed as property—a tangible asset that can be controlled and owned (ROTH, 2014).

This spatial perspective on water governance is exemplified in the 2015 CLS, where the courts addressed allegations of mismanagement within Jakarta's water governance

[6] *See* generally (VALVERDE, 2015)

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

system. The plaintiffs, led by Nurhidayah and others, brought a lawsuit before the Central Jakarta District Court against a mix of public and private defendants, including the Central Jakarta local government, PDAM Jaya (Jakarta's publicly owned water service company), and two multinational corporations PT. Aetra Air Jakarta and PT. PAM Lyonnaise Jaya. Echoing the demands of similar water remunicipalization movements globally, the plaintiffs requested that the court annul the 1997 water privatization agreement made between PDAM Jaya and the two multinational firms. Contextually, according to Braadbaart (2007), the water problem in Jakarta is typical of state-owned water utilities: "local government interference in price setting and staffing led to systemic financial problems; capital injections were used for network expansion but not for rehabilitating or upgrading existing systems" (p. 299).

Let us first outline a concise summary of the case proceedings. In 2015, the initial civil trial took place at the Jakarta District Court. Although the case was fundamentally processed through civil procedure, the Plaintiffs presented their claim in the form of a Citizen Lawsuit (CLS). It is important to point out that CLS has not yet been officially recognized as a specific legal procedure within the country's civil litigation framework, and the court does not have a specific procedure to handle such cases other than those involving environmental harm and consumer protection claims. However, people are still using the term CLS in many ocassions and the court's decision has been equivocal on this, as will be shown in the case below.

Interestingly in *Jakarta Water Deprivatization* the trial court decided to accept the case under ordinary litigation process, concluding that the Defendants have engaged in unlawful actions by entering into the water privatization agreement in 1997, which resulted in "losses to the Jakarta local administration and its citizens" (PN JAKARTA PUSAT, 2012, p. 59). However, at the appellate stage in 2016, the Jakarta High Court reversed this ruling, stating that the lawsuit did not conform to the essential characteristics of CLS (PT DKI JAKARTA, 2015). In 2017, the case was taken to the Supreme Court, which subsequently reversed the High Court's decision, asserting that the initial trial had correctly applied the relevant laws (MAHKAMAH AGUNG REP. INDONESIA, 2017). A year later, the case reached the case review (*peninjauan kembali*), during which the Supreme Court ruled the lawsuit invalid due to the Plaintiffs' failure to establish their legal standing to pursue a CLS claim (MAHKAMAH AGUNG REP. INDONESIA, 2018).

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

Reading *Jakarta Water Deprivatization* entails how decolonial judicial reasoning *hybridizes* water governance through several justifying reasons. This hybridization indicates a process of stretching-narrowing the concepts of: (1) freedom of contract (i.e., the privatization agreement is deemed invalid), (2) causality of harm (i.e., financial losses incurred by private companies create hardships for citizen-consumers), and (3) access to water as a human right (i.e., the state's responsibility to ensure the quality, quantity, and consistency of water services).

The first legal principle being analyzed is the freedom of contract, which pertains to how judges evaluate the legitimacy of the water privatization agreement. The Plaintiffs argue that this agreement breaches the freedom of contract principle outlined in the Indonesian Civil Code. They support this claim by pointing out that the late President Soeharto was influenced by the World Bank's privatization strategy and issued a directive to the Ministry of Public Works in 1995. This directive stipulated two critical points:

> 1) The need for proper handling of clean water supply for DKI Jakarta and its surroundings for the benefit of the wider community; 2) The handling is to involve two private companies by setting the handling limit, namely Ciliwung River in the west and east, where each company is assigned the task of providing clean water of ± 20 m^3/s each. (p. 19)

Subsequent to the presidential directive, two additional letters of support were issued by the Governor of Jakarta and the Minister of Finance. These executive actions are perceived as external pressures compelling Jakarta's publicly owned company, PDAM Jaya, to form an agreement with two multinational private firms for control over water governance in Jakarta. The Plaintiffs argued that the oppressive environment during the late President Suharto's regime was a contributing factor to this illegal action. This executive directive was viewed as a form of quasi-legislation during that time, possessing a normative power that seemed to extend beyond the constitution (PN JAKARTA PUSAT, 2012, p. 142). Upholding the lower court's decision, the Supreme Court (2017) at the cassation level accepted the Plaintiff's historical argument, reasoning that,

> The Judges [of the Jakarta District Court] have been correct in applying the law related to the existence of unlawful acts in the establishment of the Jakarta Water Privatization Cooperation Agreement which violates Article 1320 of the Civil Code. This is because Defendant VII [PDAM Jaya], in entering into a cooperation agreement with Co-Defendants I [PT. Aetra Air Jakarta] and II [PT. PAM Lyonnaise Jaya], *was not free as they were under the influence and intervention of the President*. Whereas it should be a Regional Owned Enterprise in accordance with the provisions of Article 15 in conjunction with Article 45 of the Local Regulation Number 13 of 1992, the cooperation agreement is decided by the Management (Directors) after obtaining the

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

> approval of the Governor and consideration from the Supreme Audit Agency without *the intervention of the President*. (para 86)

It's important to highlight how the Supreme Court has sought to frame its argument within a wider historical context. The Court's reference to the freedom of contract clause is notable, as the plaintiffs, supported by rulings from both the Supreme and District Courts, reveal not only a clear breach of the fundamental principle of contract law but also represent a certain quasi-normative force that leads to this violation. This quasi-normative force, originating from the era of authoritarian rule, serves as a structural backdrop for property law, mirroring the distinctly colonial history.

The second justifying reason pertains to the causality of harm. Both the Jakarta District Court and the Supreme Court recognize the probable causal link between the agreement and the compensation for the company's shortfall. Furthermore, this compensation is said to impose a burden on consumer citizens through frequent increases in tariffs. The Supreme Court (2017) asserts that,

> The opinion of the Judges [of Jakarta District Court] … citing the Supreme Audit Agency's report correctly shows how a shortfall can occur due to the high charge of water, which is not followed by an increase in tariffs, and it causes the tariff for drinking water in DKI Jakarta Province to be the highest compared to other regions in Indonesia. The calculation and determination of the water charge by Co-Defendants I and II were not transparent and unbalanced. As a result of the shortfall in 2007, PDAM Jaya's debts amounted to Rp. 116,976,729,331.00 and as of September 30, 2008 amounted to Rp.131,989,359,912.00 and accumulated losses for 2007 amounted to Rp. 1,776,158,302,289.00 and as of September 30, Rp. 1. 659,828,124,603.00; […] These matters are caused by: (1). Inequality in making the cooperation agreement and its attachments (addendum rebasing), thus only securing the position of PT Palyja and harming PDAM Jaya; (2). PDAM Jaya's Board of Directors did not perform adequate planning, monitoring, and evaluation so as to make commitments that were detrimental to the community and regional finances. (paras 90-92)

By connecting a series of corporate failures, government losses, and the rise in tariffs, the Plaintiffs are trying to establish the nature of the harm, specifically whether it stems from the contentious privatization agreement. At this stage, we can show that the past is reinterpreted through the courts' insights by blending the temporal aspects of financial losses, categorized over time, with the consistent and ongoing burden of tariffs (i.e., on a semi-annual basis). The Supreme Court's evaluation below offers examples of this:

> … it is evident that the shortfall is a definite result of the PKS [privatization agreement] clause, which is designed in such a way as to benefit the private sector, which must be accepted and agreed upon by PDAM Jaya at the time

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

> of making the PKS. The exact formula shortfall is due to the water charge clause that adheres to the full cost recovery system in the Cooperation Agreement which is not supported by the increase in the rate of the Supreme Court of the Republic of Indonesia; Since 2007 the Jakarta water tariff was decided by Defendant V not to increase, but the large shortfall burden borne by PDAM Jaya was not only caused by the tariff (water price) which had not increased since 2007 but because of the water charge set by Defendant VII with the Co-Defendants [PT Palyja and PT Aetra] very high and even unreasonable which caused the high shortfall expense approved by Defendant VII. (paras 93-95)

The third justifying reason relates to the unique relationship the nation has with water. The discussion around the right to water emerged in the context of the CLS as the Indonesian Constitutional Court determined that the entire 2004 Water Resources Law was unconstitutional (85/PUU-XI/2013). In this review, the Court established two key principles regarding water governance in the nation: first, that water possesses a unique character within the country, particularly contrasting with the Western perspective on resources; and second, that the manner in which Indonesians utilize (*memanfaatkan*)—rather than exploit (*eksploitasi*)—water should break away from the extractive practices of colonial times. In this ruling, the Constitutional Court (2017) asserts that,

> History bears witness that since a long time ago, before society bound itself as a nation and state, until now, water is a basic human need that was gifted by *Allah Subhanahuwata'ala*, God Almighty, so that water becomes a public right (*res commune*), namely a right shared by the community. The fighters, from the independence movement to the struggle to defend and fill Indonesia's independence, named the place where this nation lived and defended its life as 'water-land' [*tanah air*] not 'the fatherland' (English) nor '*das Vaterland*' (Germany) which means 'land of father.' The use of the term water-land shows that in the view of the Indonesian people, land and water are two important resources in their lives that cannot be separated from one another. Indonesian citizens know and understand that Wage Rudolf Supratman, the composer of the National Anthem *Indonesia Raya*, which was sung and played on October 28, 1928, known as Youth Pledge Day, wrote in the first sentence, "Indonesia, my water-land."

In this opinion, the Constitutional Court expresses a rather sentimental and unique view of water as an essential resource for agrarian Indonesian communities—a viewpoint that finds historical grounding in the nation-building process following the colonial rule. The constitutional review case mainly addresses the legality of water privatization, yet it also sheds light on the CLS proceedings. Significantly, when evaluating *Water Deprivatization*, the Supreme Court referred to the Constitutional Court's reasoning in 2017, stating that the privatization agreement breached the people's right to water because "after the conclusion of this agreement, the services of clean drinking water for

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i

Jakarta citizens have not been improving in terms of quality, quantity and continuity" (MAHKAMAH AGUNG REP. INDONESIA, 2017, p. 158–9).

Engaging with the three foundational principles of water jurisprudence in the nation, a crucial aspect of our *chronotopic* analysis involves examining how water governance is influenced by both spatial and temporal dimensions. In particular, the temporal aspects present in the trial and cassation courts reveal the enduring traumas of exploitative colonialism and its reflections during the authoritarian era.

4.2 Forest indigeneity

Our second case explores the contentious forests governance in the nation. Specifically, the disputed legal examination focuses on the nature of *adat* (customary) ownership of these forests. This issue was widely debated at the beginning of the twentieth century, and the recognition of *adat* communities became prevalent within the Dutch colonial context (MULYANI, 2023, SUARTINA, 2020). The concept of pluri-normativity regarding norms in the East Dutch colony was first examined through van Vollenhoven's *Adat Law* publication, which colonial authorities acknowledged as a means to effectively manage the ethical politics of the early 1900s (LEV, 1965, VOLLENHOVEN, 2013).

The question regarding *adat* forests emerged as the primary focus in a constitutional review case in 2012 (35/PUU-X/2012). The central issue of this case is whether and to what extent forests within local *adat* community territories are constitutionally considered part of state-owned forests. The petitioners, primarily representatives of the *adat* community, approach the matter from a historical perspective, asserting that the current legal inquiry is rooted in the spatial governance established during the colonial period:

> With the limited resources of the Dutch kingdom, they developed an effective and efficient system, namely by forming two types of regions in the archipelago, namely: a) direct-controlled areas (*directe bestuurs gebied*) which were generally in urban areas; and b) indirect-controlled areas (*indirecte bestuurs gebied*) which are generally located in rural areas, most of which are indigenous community units and under the traditional leadership of their own customs (*Adat*). (para 35)

Historically, the concept of dominion over property during the Dutch colonial period was defined by *Domeinverklaring* (statement of dominion), which declared that all

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land on which no right of ownership has been proven by others is the domain of the State (*staatdomein*). Van Vollenhoven was sharply critical of this colonial approach, arguing that the dominion facilitated the dispossession of local communities rather than, as the colonial authorities suggested, fostering order and legal certitude (SIMARMATA, 2018, WIRATRAMAN, 2022). Without delving deeply into this historical narrative, it is important to note that this form of racially segregated territorial property has formed the structural foundation of forest law and governance in post-colonial Indonesia (ARIZONA, ILLIYINA, 2024, BEDNER, ARIZONA, 2019). As we will demonstrate later, this structural context prompts the Constitutional Court to hybridize various concepts of state control, legal agency, and living law in relation to forest management.

The court's (2017) initial rationale is based on the concept of state-welfarism (*negara kesejahteraan*), which serves as the constitutional framework for overseeing resource management:

> In the constitutional provisions—as the basis for regulation in the context of allocating the nation's living resources for prosperity, including natural resources, such as forests—these are important and fundamental things: First, state control over *branches of production* which are important for the state and which affect the lives of many people. Second, state control over earth and water and the natural resources contained therein. Third, state control over these resources, including natural resources, is intended so that the state can regulate the management of these *life resources* for the greatest prosperity of the people, both the people individually and the people as members of *adat* law communities. (para [3.12.1]) [7]

The court's hybridization of different elements is evident in how judges *create adat* communities as legal entities that have a unique legal bond with the forest as a form of property:

> The Forestry Law treats Adat law communities—which are constitutionally legal subjects related to forests—differently from other legal subjects, in this case related to forest categorization in which there is a *legal relationship* between legal subjects and forests. There are three legal subjects regulated in the Forestry Law, namely *the state, customary* (Adat) *law communities,* and *holders of land rights* on which there are forests. The state controls both land and forests. The holder of land rights in question also holds rights to forests, but Adat law communities do not clearly regulate their rights to land or forests. With this different treatment, customary law communities *potentially*, or even in certain cases *factually*, lose their rights to forests as a natural resource for their lives, including their *traditional rights*, so that customary law communities experience difficulties in meeting their living needs from forests as a resource. In fact, the loss of the rights of Adat law communities is often done in an arbitrary

[7] (emphasis added)

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> manner, which often results in conflicts involving the community and rights holders (paras. [3.12.2], [3.12.3]) [8]

From the court's ruling, we can grasp how the unjust experiences of *adat* communities—both "potential" and "factual"—have compelled the judges to consider the legal agency of these communities. In this context, the court asserted that the nation's legal framework has *contributed* to such injustices, rendering *adat* communities weaker than the state when it comes to controlling forests:

> The situation as described above is *a result of the enactment of norms* that do not guarantee legal certainty and give rise to injustice towards customary law communities in relation to forests as their source of life, because other legal subjects in the a quo Law obtain clarity regarding their rights. their rights to the forest. *Adat* law communities are *in a weak position* because their rights are not clearly and firmly recognized when faced with state's strong rights to control. State control over forests should be used to allocate natural resources fairly for the greatest prosperity of the people (para [3.12.4]).[9]

The third rationale for this constitutional review is the concept of living law as a legal approach that challenges the traditional notion of forest dominion. The scaling (VALVERDE, 2009)—i.e., through stretching-narrowing of time and space—of property governance is evident in the court's interpretation concerning the constitutional distinction between state forests and *adat* forests. The court argues that,

> … In reality, Adat forests are within Adat rights areas. In the Adat rights area there are parts of land that are not forests which can be in the form of grazing fields, cemeteries which function to meet public needs, and land owned individually which functions to meet individual needs. The existence of individual rights is not absolute, at any time their rights can become thinner or thicker. If it becomes thinner and disappears, it will eventually return to the community. The relationship between individual rights and Adat rights is flexible. The right to manage Adat forests rests with Adat law communities, but if in the course of development the relevant Adat law community no longer exists, then Adat forest management rights fall to the Government [vide Article 5 paragraph (4) of the Forestry Law]. The authority of Adat rights is limited to the extent of the content of the authority of individual rights, while the authority of the state is limited to the extent of the content and authority of Adat rights. In this way, there is no overlap between the state's authority and the authority of Adat law community rights regarding forests. The state only has *indirect authority* over customary forests (para [3.13.1]).[10]

[8] (emphasis added)
[9] (emphasis added)
[10] (emphasis added)

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As a result, the division between the state and the *adat* community suggests a unique form of authority, especially regarding the boundaries of their rights and control over forests. The state's increasing power, in contrast to the imperial era, represented an ideology-driven developmentalism following the country's independence. In a bid to decolonize agrarian laws, which encompass forest regulations, post-independence Indonesia vigorously promoted and enforced a unified legal system regarded as essential for post-colonial nation-building (LEV, 1983, 1985). This period, often referred to as the revolutionary era, homogenized the nation's time, effectively reshaping the concept of property within the country. However, the 1998/99 Reform challenged the state's tight control, during which rights and freedoms became tools for invoking tribal entitlements from the pre-colonial era. Consequently, this context necessitated a new approach to forest governance (MULYANI, 2023). According to the court,

> … the relationship between the state's right to control state forests and the state's control rights to customary forests is regulated. *Regarding state forests, the state has full authority to regulate and decide on the supply, allocation, utilization, management and legal relations that occur in state forest areas*. State management authority in the forestry sector should be given to the ministry whose field includes forestry affairs. *Regarding adat forests, the state's authority is limited to the extent of the content of the authority covered by customary forests*. Adat forests (which are also called clan forests, master's forests, or other names) are within the scope of customary rights because they are within one territorial unit (single territory) of customary law communities, whose demonstration is based on the traditions (*traditio*) that live within them people's atmosphere (*in de volksfeer*) and has a central management body that is authoritative throughout its regional environment. Members of Adat law community have the right to open their Adat forest, to control and cultivate the land, to fulfill their personal and family needs. Thus, it is not possible for the rights held by members of the Adat law community to be abolished or 'frozen', as long as they meet the requirements within the scope of the definition of Adat law community unity as intended in Article 18B paragraph (2) of the 1945 Constitution (para [3.13.1]).[11]

The quotation above suggests a type of governance concerning *forests as property*. It is suggested that *adat* entitlement to forests is not merely an abstract right stemming from a romanticized view of pre-colonial times. Rather, it is an assemblage of things, that is, "traditions that live within them people's atmosphere." Furthermore, the court asserts that,

> [a]fter determining the separation between state forest and private forest (whether in the form of private forest or Adat forest covered by Adat rights), it is not possible for private forest to be in a state forest area, or vice versa,

[11] (emphasis added)

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> state forest in a private forest area as stated in Article 5 paragraph (2) and Explanation of Article 5 paragraph (1) of the *a quo* Law, as well as Adat forests within state forests, so that the status and location of Adat forests becomes clear in relation to the recognition and protection of Adat law community units guaranteed by Article 18B paragraph (2) of the 1945 Constitution. Thus, forests based on their status are divided into two, namely *state forests* and *private forests*. Private forests are differentiated between *customary forests* and *individual/legal entity forests*. The three forest statuses at the highest level are all controlled by the state. Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution constitute the recognition and protection of the existence of customary forests in unity with the customary rights area of a customary law community. This is a consequence of the recognition of *adat* law as "living law" which has been going on for a long time, and continues until now. Therefore, *placing customary forests as part of state forests is a denial of the rights of Adat law communities* (para [3.13.1]).[12]

The court's reasoning highlights two key aspects of the concept of living law. Firstly, it supports the dynamic forms of jurisdiction by recognizing the ebb and flow of *adat* communities over time (BEDNER, ARIZONA, 2019, BUANA, 2016, SIMARMATA, 2018). Secondly, it offers a pluralistic perspective on property, allowing the court to present an argument against the colonial idea of forest dominion. But, this does not imply that the ruling to grant *adat* communities rights to the forest will result in favorable outcomes for them or that such rights will not lead to local forest dominions. At this stage, we are simply emphasizing how the reformulation of property relationships has been shaped by reasoning that challenges the colonial narratives.

Decolonial judicial reasoners discover the multiplicity of experiences by encountering the social trauma of colonial dispossession. This encounter is subtle as it is judiciously concealed behind the citational practices towards numbers, graphs, maps, and statistics related to property management.[13] However, this encounter showcases the ideal scenario that introduces the notion of difference in kind, which steers intuitive judges toward grasping the fundamental nature of the case while drawing upon the traumatic legacy of colonialism and the indigenous narratives regarding property ownership. It is important to note that experiences of property injustice are ultimately constructed—or performed, according to Blomley's (2013)—by these intuitive judges through the immediacy of the trauma of dispossession. In the realm of decolonial property law, performativity in this context, as Blomley articulates, "encourages us to

[12] (emphasis added)

[13] The use of this Deleuzian term borrows from Lefebvre's depiction of a non-dogmatic image of law. *See* CITRAWAN, 2025, LEFEBVRE, 2008.

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trace how property gets variously performed and to explain which of these performances have performative effect; that is, successfully constituting the reality of property in particular ways" (p. 34).

The intricate relationship between the spatial and temporal aspects of property in these instances is reflected in the judges' intuitive reasoning regarding property governance (ALAFGHANI, 2023, CITRAWAN, 2025). Through a *chronotopic* analysis, we have identified two intersecting discussions: national trauma and risk projections. Regarding the former, the legal treatment of resources, such as forests and water, is influenced by the collective national experience of foreign occupation and the abuse of power during authoritarian rule (KOESWAHYONO, ANGGORO, *et al.*, 2022, ROSSER, 2013). This is evident in how the intuitive judges interpret property rights within the context of national resource control, allowing private and foreign exploitation only in very rare and specific situations. At the same time, the historical lens on *adat* forest and water privatization highlights the state's power in standardizing property law's temporal aspects. The cases also indicate that risks and projections encompass more than just measurable figures (such as a company's or government's economic losses); they are also qualitatively experienced by citizens who have endured the consequences of resource extraction. It demonstrates the contingency and situatedness of (decolonial) legal judgment, where qualitative experiences go beyond simply recalling past events as they serve as a projection for future rights to water (e.g., by addressing the increasing financial losses and foreseeing potential restricted access to water in the coming years) and the tribal community's right to forests (e.g., by recognizing the possible loss of their rights to forests as essential resources for their livelihoods). The property norms, due to their contingent and context-specific nature, are in fact made *senseless* by the courts, which tailor these norms to reflect the multiple experiences of injustice within society.[14]

[14] *See* CHOWDHURY, 2020, DAVIES, 2017. Chowdhury differentiates *sensed* and *senseless* legal norms. He asserts that, " 'sensed legal rules' anticipate the facts which they apply to, whereas 'senseless legal rules' elevate the fact situation, which then determines how a legal rule is applied, opening up the possibility for a creative-type of adjudication, particularly in response to so-called 'hard cases'." (p. 6).

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5. Conclusion

This article has presented a form of judicial reasoning that addresses the immediacy of trauma, guiding legal decision-makers to consider critical aspects of post-colonial experiences. The two cases in Indonesia, concerning the constitutionality of *adat* forests and the deprivatization of water, exemplify the complex interplay between law, space, and time in property governance. This multifaceted approach to property governance occurs not only in economic terms but also within cultural contexts, as the temporalities of post-colonial extractivism intertwine the past, present, and future of citizens' lived experiences (GEERTZ, 1984, LEV, 1965, PHILIPPOPOULOS-MIHALOPOULOS, 2013). Ultimately, this shows that to decolonize property law it is essential to foster overlapping affective dialogues that bridge the anticipated future paths of extractivist resource governance with the trauma of past colonial systems.

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Authorship credits
The author is solely responsible for writing the article.

Conflict of interest statement
There are no possible conflicts of interest in carrying out and communicating the research.

Funding information
This research was written as part of the Decolonial Comparative Law programme, a programme hosted and run by Max Planck Institute for Comparative and International Private Law. This edition gave rise to two scientific events co-organised with Brazilian partners, one with the Catholic University of Brasília (UCB) and another one with the Federal University of Bahia (UFBA). The workshop conference leading to the finalisation of the article was funded by Max Planck Förderstiftung. The study which this article is based on is funded by Badan Riset dan Inovasi Nasional: RP OR-IPSH 2025 (CFRC1-014).

Data Availability Statement
The data supporting the findings of this study are available within the article.

Statement on the Use of Artificial Intelligence
AI tools were used for language review and translation purposes.

Editors Responsible for the Evaluation Process and Editing
Carolina Alves Vestena and Bruna Bataglia.

This document contains an errata: https://doi.org/10.1590/2179-8966/2025/95630

https://doi.org/10.1590/2179-8966/2025/94513i | ISSN: 2179-8966 | e94513i