Indonesian Transitions

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Glossary and abbreviations

<i>adat</i>	custom
<i>Agrarische Besluit</i>	Agrarian Decree
<i>alim ulama</i>	religious leaders
<i>angkatan</i>	generation
<i>beschikkingsrecht</i>	the community right of control or avail
<i>bijwoner</i>	co-resident
<i>bundo kanduang</i>	woman associations
<i>bupati</i>	district head
<i>daerah</i>	region
<i>Dana Reboisasi</i>	Reforestation Fund
<i>desa</i>	administrative village
<i>dukun kejawan</i>	Javanese shaman
<i>eigendom</i>	ownership
<i>fiqh al-nisa</i>	gender issues
<i>gotong royong</i>	mutual assistance
<i>hak bangsa</i>	right of the nation
<i>hak menguasai negara</i>	state's right of control
<i>hak milik</i>	ownership rights
<i>hak ulayat</i>	traditional rights to communal land
<i>haram</i>	illicit
<i>HP bekas</i>	second-hand hand phone

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1. Introduction

HENK SCHULTE NORDHOLT

Turbulent times

In the decade between 1996 and 2005 Indonesia experienced fundamental political and economic changes.¹ A highly centralized authoritarian regime was replaced by an emerging democratic system, while administrative decentralization gave way to a measure of regional autonomy. Large demonstrations in July 1996 foreshadowed the demise of the New Order regime, which occurred in May 1998, while the presidential elections of 2004 and the elections of regional administrators in 2005 marked the consolidation of electoral democracy.

What started as a monetary crisis in 1997 evolved into a multi-dimensional crisis, ranging from El Nino, economic setbacks and political instability to ethnic and religious conflicts and violations of human rights by the military and civil militias. Compared with neighbouring countries, economic recovery was slow due to the

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3. Private law and public power: Tangled threads in Indonesian land regulation

DANIEL FITZPATRICK*

Introduction

THREE distinct stages may be discerned in Indonesian land and natural resource regulation. The first, characterized by the Basic Agrarian Law 1960 ('the BAL'), was concerned with attempts to unify the colonial legacy of legal dualism. This endeavour was partly based on the alleged existence of pan-Indonesian customary (*adat*) law principles. The second, coinciding with the New Order period, was characterized by extension of centralized executive control over access to land and natural resources. In this period *adat* law failed to meet its romanticized promise, either as an effective source of

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private law or as a check on public administrative power. The third, apparent in current processes of *reformasi* and regional autonomy, is ostensibly concerned with re-recognizing pluralism, devolving public administrative power and ensuring more equitable access to land and natural resources. Yet, here too there is substantial confusion over the status of 'adat' and its relationship to private law and public power.

These three stages are evident from a comparison of the Preambles to the BAL and its proposed successor, the draft new Agrarian Law.¹ The Preamble to the BAL states that the current land law of Indonesia is incompatible with the interests of the people and the State, as it is based upon the objectives and principles of the colonial government. The Explanatory Memorandum expands on this notion by explaining that the pluralism of colonial land law, in which diverse *adat* laws existed alongside Dutch statutory law, is inconsistent with nation-building and fails to provide legal certainty to autochthonous Indonesians. The Preamble then states the BAL's objective: to lay the foundation for a national agrarian law that provides legal unity, simplicity, and certainty to all Indonesians, and prosperity, happiness, and justice for the nation and the people, including farming communities.

The Preamble to the draft new Agrarian Law has quite a different flavour. Forty-four years after passage of the BAL, it states that Indonesia's agrarian policies have not led to justice, or created even distribution and utilization of resources. Indeed, because underlying issues of socio-economic pluralism have not been fully ad-

¹The draft considered is that issued for public discussion in April 2004. A revised draft was issued in May 2004. Both have been stalled in bureaucratic processes, and Indonesian Parliament has yet to consider either of these drafts.

ressed, discrimination has resulted that has become a source of conflict. Thus the new law's concerns lie not legal unity and a socio-political quest for nation-building, but with pluralism and the resolution of widespread discrimination and conflict. These concerns manifest themselves in a number of provisions, including processes for the recognition of community rights to land and natural resources (*hak ulayat* and *hak utama*).

Do the positive references to pluralism in the draft new Agrarian Law, and its associated Reformasi regulations, indicate a return to the pluralism of colonial Dutch laws? Is it back to the future for Indonesian land and natural resource regulation? At first glance, at least, there would be much to please colonial *adat* law devotees in post-Suharto law reforms. The 1999 Constitutional amendments recognize the existence of 'adat law communities' (art. 18B). The 1999 Human Rights Act states that traditional rights to communal land (*hak ulayat*), being part of the cultural identity of *adat* communities, deserve recognition and protection (art. 6). A 1999 Ministerial Regulation on *hak ulayat* even establishes a mechanism for recording and demarcating the boundaries of traditional communal land. The draft new Agrarian Law recognizes *hak ulayat*, and provides that *adat* law shall be the basis for natural resource regulation (arts. 5, 8). Of course, all these concepts – *hak ulayat*, *hukum adat*, *masyarakat hukum adat* – were coined and proselytized by the Leiden School of colonial *adat* scholars.

Adat terminologies and concepts have thus re-emerged significantly in the post-Suharto era. Yet, it is quite clear that these terms now operate in a dramatically different social and political setting from earlier colonial contexts. At the end of the New Order period, over 200 million Indonesians competed for land and natural resources in the shadow of a corrupt developmentalist State, not a Van Vollenhovesque environment of autonomous communities

and localized *adat*. Moreover, after 1999 – when much of the ‘wild’ re-claiming of land was justified on the basis of ‘*adat*’ – the *adat* asserted by claimants and activists was certainly not the same as that described by Van Vollenhoven in his *Adatrechtbundels* (45 volumes) and *Pandecten van het Adatrecht* (10 volumes). As a number of studies have noted, this new *adat* movement in Reformasi Indonesia is not so much a detailed classificatory scheme for discerning organic private law rules, but a broad and unruly vehicle for regionalism, ethnicity, elitism and localized manoeuvring over access to land and natural resources (Acciaioli 2002, forthcoming; Davidson forthcoming; Van Klinken forthcoming; Li 2003, forthcoming; McCarthy 2004).

How are these changes to be analysed? How should lawyers deconstruct and adapt their own analytical frameworks so as to understand both the past and present, and accommodate the future of Indonesian law reform? What new concepts and languages are required to understand and improve the current wave of Indonesian legal reform? This chapter discusses these questions through an account of the three historical phases of land and natural resource regulation in Indonesia. Particular emphasis is placed on themes of continuity and change in the current phase. The primary argument is that while many issues and concepts remain the same, including fundamental uncertainty as to the relationship between public power and private law, dramatic changes in social and political conditions have created new pluralist structures that significantly challenge existing analytical frameworks.

These new pluralist structures are characterized by a high degree of contestation and fragmentation (McCarthy 2004). They are far removed from the traditional dualist paradigms generated by colonial frameworks. They do not rest on simple distinctions between laws of the State and customs of the people, or on binary

classifications of law/norms, formal/informal, legal/illegal, and legitimate/illegitimate. Instead, the new pluralism of Indonesian land and resource regulation is represented by three interacting components: 1. a formal system in which inconsistent laws, derived from multiple sources, compete more as ‘bids’ for resource control than as coherent public law regulators of State actions; 2. a semi-formal system that seeks private law certainty of land transactions and titles, but is forced to cluster around centres of State power by a lack of clarity and legitimacy in underlying private law frameworks; and 3. an ‘informal’ sphere that retains some semi-autonomous *adat* law characteristics, but is greatly disrupted by a history of State antagonism and widespread social upheaval.

These themes are explored through a discussion of the three phases of Indonesian land regulation. As a matter of preliminary definition, it is noted that the expression ‘public law’ is used to describe the (vertical) legal relationship between the State and its citizens. ‘Private law’ describes (horizontal) legal relationships between citizens. In the legal theory of civil law systems (including the Netherlands), the category of private law includes property law because property rights are traditionally interpreted in a natural law sense: that is, as zones of exclusion that are *prime facie* free of State interference or encumbrance.

The colonial legacy of legal and analytical dualism

Pluralist colonial frameworks created a number of enduring issues for Indonesian land regulation. The foundation of this pluralist legal legacy was private law distinctions among ‘Europeans’, ‘Native Indonesians’, and ‘Foreign Orientals’ (Sudargo Gautama and Hornick 1983: 2-14). ‘Europeans’ were subject to Civil and Commercial Codes imported from Holland in 1848. Autochthonous Indonesians were governed by their various *adat* laws, although these could be

overridden 'in the public interest' and/or by colonial regulations expressly made applicable to them (Sudargo Gautama and Hornick 1983:9). Autochthonous Indonesians could also voluntarily or presumptively submit to European law. 'Foreign Orientals' were governed by their own customary law until their participation in the colonial economy led the Dutch administration to apply the Civil and Commercial Codes to them (Sudargo Gautama and Hornick 1983:12-4). Upon independence, Indonesia adopted this dualist distinction between Indonesians and European/assimilated Europeans 'pending the development of laws better suited to a modern, independent nation'.²

In the event, the Indonesian legislature has done relatively little to develop unitary laws for the new nation-state. In formal terms at least, dualist colonial structures remain remarkably influential in modern Indonesian private law. To summarize:

- inheritance law remains governed by diverse customs and religions;
- contract, commercial and torts (delicts) law are governed by custom where autochthonous Indonesians are involved, except where there has been voluntary or presumptive 'submission' to the Dutch Civil and Commercial Codes of 1848;
- corporations, financial securities and other modern economic sector laws are governed by statutes that make no racial distinction;
- land and family law is formally subject to statutes that purport to abolish legal dualism, but which substantially allow for (highly qualified) custom to continue to operate;

²See Indonesian Constitution (Constitution of 1945) art. II (Transitional Provisions).

- a uniform National Court system operates without formal customary or village courts, or any established procedure for identifying custom or customary law.

Aside from modern financial sector laws, then, almost all substantive areas of private law remained governed by *de facto* and *de jure* forms of law/*adat* dualism. This fact has important social implications. As with most postcolonial systems, wealthier urban Indonesians now operate in the legal sphere previously occupied by Europeans and assimilated Europeans, whereas many rural and poor groups are left with uncertain and fractured forms of 'customary law'. Because the status and articulation of customary law has been so neglected, and because socio-political changes have eroded local forms of 'traditional' authority to such an extent, *adat* law has not emerged or evolved to give basic forms of legal certainty to private law interactions outside of established close-knit communities. This is particularly the case in relation to horizontal private law exchanges within and between heterogeneous communities involving access and rights to land and natural resources.

Thus, in theory, two Sundanese that enter into a non-modern contract, one that does not involve presumptive submission to Dutch law, create a legal relationship that is governed by the '*adat* law' of Sunda. This may be a viable private law result where both parties are members of a relatively close-knit community. However, where a Sundanese and an Acehnese contract outside of presumptive submission principles, their legal relationship is determined either by the *adat* law of Aceh or of Sunda. The applicable private law depends on complex conflict of law rules derived from Dutch jurisprudence (Sudargo Gautama and Hornick 1983:150-60). Yet, of course, this formal position is all but meaningless in the modern Indonesian context. Cross-cultural and cross-regional interactions are in-

creasingly common in Indonesia, particularly as a result of migration and displacement; but in practice the formal system of private law does not regulate non-'modern' forms of these heterogeneous interactions. Instead, the void is filled by relational networks clustered around centres of State power. With the fall of Suharto, and the public law shift towards regional autonomy, this relational system has fractured along fault lines set by fragmentation of the Indonesian State itself (McCarthy 2004: 1216).

This underlying confusion between public law authority and private law rights may be traced in part to colonial frameworks for land and natural resource regulation. For example, it was clear – initially at least – that the extension of Netherlands East Indies (NEI) control over land and resources had a public law character. The right to regulate access to resources arose either through treaty or conquest. Practical requirements of territorial control meant that this public law right had to be exercised, in a qualified fashion, by local rulers and village heads in the hinterland (including directly-controlled and indirectly-controlled territories). This delegated recognition of local authorities by NEI constitutional laws necessarily involved some recognition of private law 'custom'. After all, if local rulers and village chiefs were to be clothed with qualified administrative authority, then their private law determinations also needed some legal force and effect (Ball 1982: 4-16).

The late nineteenth century drive to increase export production, evident in most colonial systems, created corresponding needs for laws justifying enhanced State access to land and natural resources (McAuslan 2000: 80-4). In the NEI this took the form of the 'domain theory', the declaration in the 1870 Agrarische Besluit (Royal Agrarian Decree) that all land not held under private 'ownership' rights fell within the domain of the State (art.1). Not only was this declaration subject to varying interpretations –ultimately determined

by the bureaucracy rather than the judiciary– but the legal nature and status of the State's domain was affected by some uncertainty (Budi Harsono 2003:45). Was it simply a public law right to regulate and grant titles to 'unowned' land, or did it encompass a private law right of underlying ownership itself? If the former, why was the domain declaration at all necessary, given that the Dutch State had a pre-existing public law right of regulation arising from treaty or conquest? If the latter, why did the Agrarische Besluit use the uncertain legal expression 'domain' rather than spelling out the underlying private ownership (*eigendom*) of the State (Burns 2004: 32-7)?

In the early twentieth century, these basic constitutional uncertainties were overlaid by a fierce debate on the nature of *adat* law itself. Cornelius van Vollenhoven, a law professor at Leiden University, strenuously advocated *adat* 'law' as an organic system of authentic Indonesian law, a viable alternative to proposals to extend Dutch private law across all population groups in NEI. In this sense, *adat* law was viewed as predominantly private in nature. While it was administered by autonomous legal communities (*rechtsgemeenschappen*), it consisted of ascertainable rules and principles that governed interactions between autochthonous Indonesians. As a system of private law, therefore, it could be recognized by constitutional laws without disturbing the fundamental assumption of Dutch sovereignty or public law control (Burns 2004: 19).

Somewhat fatefully, van Vollenhoven further advocated the notion of '*ur-adat*' – the idea that certain universal principles underlaid the 19 different *adat* law systems in the NEI (Burns 2004: 3, 14; Fitzpatrick 1997: 177, 185-6; Lev 1965:284). The prime example was *beschikkingsrecht*, the community right of control or avail that is translated in Indonesian as '*hak ulayat*'. Van Vollenhoven's formulation of *beschikkingsrecht* had undoubted public law characteristics, evident

in an autonomous legal community's right to prohibit or veto land transactions with outsiders (Burns 2004: 15, 19). Nevertheless, because the context for its elucidation involved debate over the domain theory, *beschikkingsrecht* was advocated as a form of private law right to land – a right of control and exclusion compatible with Dutch classifications of private property rights. Thus van Vollenhoven argued that the Agrarische Besluit should be interpreted to exclude *beschikkingsrecht* lands from the domain of the State. This would allow an autonomous *adat* community to retain control over virgin lands within its territory, most importantly including forest lands that were not subject of intensive cultivation (Burns 2004: 19).

Colonial bureaucrats and their supporters at Utrecht University interpreted the Agrarische Besluit in a decidedly different manner. They viewed *beschikkingsrecht* as a public law institution, a municipal right of land management similar to that held by regional and local administrations in Holland. It did not fit into established terminologies or classifications of Dutch property law and, in any event, was incompatible with the underlying sovereignty of the colonial State itself. Thus the Agrarische Besluit was taken to extend direct State control over all untitled land that was not in 'constant use' (*gedurig gebruik*). As a result of an interpretation asserted by G.J. Nolst Trenite, a leading figure in the Utrecht school, this land was classified as 'free State land'. 'Not free State land' encompassed cultivated or residential lands held under autochthonous rights (including individual rights of *adat* 'ownership').³ While this land also fell within the domain of the State because it was not held under

³Although arts. 3 and 4 of the Agrarian Act purported to protect individual rights of *adat* ownership (particularly those evidenced by writing), it was only when those rights were converted on application to *agrarische eigendom* that they fell outside the State's domain.

private statutory ownership rights of ownership (*eigendom* or '*agrarische eigendom*'), in the ordinary case State titles to this land would not be granted without some form of compensation to affected landowners (Burns 2004:19, 34-5).

This distinction between 'free State land' and 'not free State land', and its concomitant effects on communal rights of access to common property resources, remains of fundamental importance in Indonesian land administration today (Budi Harsono 2003:46). Indeed, although in theory the Agrarische Besluit has been repealed, the modern Indonesian notion of State right of control (*hak menguasai negara*) bears a startling resemblance to interpretations of the Agrarische Besluit asserted by the colonial bureaucracy and its supporters at Utrecht University. It is suggested that this element of continuity stems, at least in part, from basic colonial uncertainties as to the relationship between public administrative power and private law property rights.

1. The postcolonial period

Van Vollenhoven's legacy

Bourchier (1999; forthcoming) has traced the way in which Van Vollenhoven's concept of *ur-adat* was adopted and adapted by leading lawyers and intellectuals in the postcolonial period. Colonial legal pluralism was denounced as discriminatory and obstructive of national development. The need for legal unity could be met through universal *adat* law principles, reflecting Van Vollenhoven's belief in a pan-Indonesian folk spirit. Yet, these principles also had to be 're-tooled' to the needs of a modern prosperous society. This adaptation process necessarily entailed an emphasis on public law elements. From Supomo's integralist ideology to Sukarno's Guided Democracy, such *ur-adat* concepts as *gotong royong* (mutual assistance) and *musyawarah dan mufakat* (consensus and deliberation)

were used to justify rejection of Western forms of constitutional democracy.

To what extent does this use or misuse of *ur-adat* concepts represent flaws in Van Vollenhoven's own vision? To what extent does the uncertain relationship between public power and private law derive from weaknesses in the Leiden school's *adat* discourse and its effects on colonial legal regulation? Burns (2004: esp. at 222-4) has argued that van Vollenhoven bears some responsibility for the stunted nature of legal development in independent Indonesia, in particular as a result of three key erroneous assumptions: that *beschikkingsrecht* was a private law right and not at heart an issue of public law or underlying sovereignty; that customary private law could be left to evolve and adapt to new circumstances without necessarily requiring intervention or legal verification by specialist (public law) State institutions; and that universal *adat* law principles could be discerned and elevated to a formal status primarily through painstaking research and classification (as opposed to special regulations or judicial exegesis). Burns further argues that these weaknesses arose in part because Van Vollenhoven was far more influenced by German notions of folk law, asserted as a reaction against Napoleonic over-codification, than the inherent viability of founding an Indonesian legal system on underlying principles of '*ur-adat*'.

These arguments are attractive because the notion of *ur-adat* and its unifying role in the sphere of private law continues to have significant influence on Indonesian legal reform. This may be seen both in the Basic Agrarian Law and in recent Reformasi legislation and regulations. Yet, what the following analysis of the Basic Agrarian Law will show is that it is the transformation of Van Vollenhoven's *adat* vision – from organic private law to ideological justification for public power and private law neglect – that has been central to the dispossession and conflict that now characterizes Indo-

nesian land and natural resource management. This transformation stems from a number of factors, including the failure to develop private law (Van Vollenhoven's primary area of concern), the assertion of public power under the New Order government, the inability to define the proper areas of operation for public and private law, and the overarching influence of social changes arising from rapid growth in migration, urbanization and population.

The Basic Agrarian Law (BAL)

The BAL represents the high-water mark of private law unification endeavours in Indonesia. It purports to repeal pluralist colonial regulations relating to land, natural resources and water. This includes the *Agrarische Besluit* 1870. It then 'converts' all Dutch-derived land rights, and a number of *adat* rights, into a series of new statutory titles. While these new titles do not have *adat* attributes, they are contextualized by a number of other references to *adat* in the BAL. These include the statements in the Explanatory Memorandum that the BAL's rights are 'based upon *adat*', and that the new land law of Indonesia arising out of the BAL will be 'based on *adat* law' (Sudargo Gautama and Budi Harsono 1972:24).⁴ They also include the qualification in article 5 that *adat* land law is 'the agrarian law of Indonesia' insofar as it is consistent with national unity, the interests of the State, and the provisions of the BAL itself. In the result, the BAL is generally interpreted as confirming universal principles of *adat*, while specific *adat* rights and systems are subordinated to concepts of legal unification and the national interest

⁴Article 13 also states that all matters involving land will be conducted in accordance with the traditional *adat* principle of mutual co-operation (*gotong royong*).

(Fitzpatrick 1997: 177, 185-6).

While this *ur-adat* approach to legal unification bears resonances of Van Vollenhoven's approach, closer examination reveals that the BAL – in theory and practice – is far removed from the voluminous classificatory schemes established by Van Vollenhoven and his followers. This may particular be seen in the treatment of Van Vollenhoven's notion of *beschikkingsrecht* (*hak ulayat*). It is particularly significant that *hak ulayat* is not listed as a right that is converted into a statutory title by the BAL. Indeed, article 3 provides that the community right of disposal known as *hak ulayat*, and 'other rights resembling it', are recognized where they continue to exist, but that they must be adjusted to conform to the national interest. In combination with article 33(3) of the 1945 Constitution, which states that all land in Indonesia is under the 'control' of the State, article 3 has been interpreted as establishing a 'State *hak ulayat*' (Budi Harsono 1970: 166-9; Maria Rita Ruwastuti 1988:3). That is, the community right of control or avail now vests in the State rather than a multitude of *adat* law communities. Thus the autochthonous private law right identified by Van Vollenhoven, and allegedly administered by autonomous *adat* communities, is transformed by the BAL into a justification for State intervention and control in relation to land and natural resources. This is precisely the result that Van Vollenhoven railed against in his denunciation of the domain declaration.

There is nothing unusual in a State holding a public law right to regulate land and natural resources. Generally, this right arises from the fact of sovereignty alone. It is usually constrained by the existence of private property rights, and Constitutional guarantees against expropriation without adequate compensation. Even in common law systems, where the Crown also holds underlying private title to all land (allodial title), the combination of public law regulatory rights and private allodial title does not allow derogation from

other private rights or expropriation without due process and payment of compensation. In most British colonies these propositions eventually extended, in a heavily qualified way, to a recognition of private customary rights to land (McAuslan 2000:85-90). Aside from cases involving treaties (for example New Zealand), this recognition arose in part from judicially developed principles that the acquisition of allodial title through sovereignty did not necessarily extinguish pre-existing 'customary' rights to land. Although these principles did allow the extinguishment of customary rights through grant of an inconsistent title by the State, without any obligation to pay compensation, the common-law courts did make relatively clear distinctions between public law questions of sovereignty and private law issues of allodial and 'native' title.⁵ In other words, while it is true that the extent of dispossession was roughly equivalent in common law and civil law colonies, underlying principles of public and private law relating to control over land and natural resources were not as entangled as in colonial and postcolonial Indonesia.

It follows that the problem in independent Indonesia has not so much been the public law State right of control over land and natural resources, a relatively common legal device, but the interpretation of that right in the context of pervasive public power and private law uncertainty. Indonesian law does not allow the State or its agencies to hold private ownership rights (*hak milik*): hence it strenuously avoids arguments that the right of control amounts to a private right of allodial ownership. Yet, as with the colonial domain declaration, the postcolonial interpretation of the State's right of control goes far beyond a public law right to regulate. Even though

⁵See, for example, the judgement of Brennan J. in *Mabo and Others v Queensland* (No. 2) (1992) 175 CLR 1.

the Explanatory Memorandum to the BAL expressly states that article 3's reference to a State right of control over land is not intended to replicate the domain declaration (BAL, General Elucidation, art. 2.), in practice the New Order interpretation had precisely the same effect: it allowed the grant of rights to uncultivated and/or non-residential untitled lands without obtaining the consent of the relevant local community and without triggering the legal obligation to pay adequate compensation to holders of expropriated titles (Burns 1989: 19-32; Fitzpatrick 1997: 186-7). The New Order State even adopted the Utrecht distinction between 'free State land' and 'not free' State land, a concept that remains embedded in current bureaucratic thinking.

This result is quite clearly not a product of Van Vollenhoven's thought. It stems from rent-seeking interpretations of the State's right of control relating to land and natural resources, and a continuing failure to define the nature and limits of private property rights. While Van Vollenhoven himself may have mischaracterized private and public law distinctions by under-emphasizing the local sovereignty aspects of *hak ulayat*, as Burns correctly points out, it is the transformation of his vision into an instrument of public law oppression, combined with a failure to develop private law frameworks for citizen's property rights, that has led to the uncertainty and conflicts of current Indonesian land regulation.

2. The New Order period

The State's right of control

The most perverse and dispossessory interpretation of the State's right of control may be found in the 1967 Basic Forestry Law and its successor, the 1999 Forest Law. In 1967, the new Suharto-led government gazetted approximately hectares of land, or 70% of the total Indonesian landmass, as State forest land (Colchester et al. 2003).

Figure 1 below sets out the current extent of designated forest lands in Indonesia. Under the forestry laws as they are interpreted, property rights to this land other than those issued by the Department of Forests are heavily qualified and subject to discretionary acts of State recognition. While there are now large numbers of community and social forestry programmes, and some ad hoc declarations of *adat* forests, the underlying legal principle remains that *adat* property rights to forest land are treated as proprietary interests only in so far as they continue to exist (in the State's eyes), and are not inconsistent with statutory licences or nebulous concepts of 'national interest' (World Bank 2000:30-1). This does not necessarily mean that local landholders are evicted. Indeed, as discussed below, in many cases forest dwellers receive semi-formal documentation to evidence their land holdings. Nevertheless, it does mean that forest use and access practices are often curtailed, leading to large numbers of conflicts across the archipelago (Li 2003; Lynch and Harwell 2002; Ida Aju Pradnja Resosudarmo 2004: 117).

Figure 1. Designated Forest Land in Indonesia

Source: www.dephut.go.id November 2005.

The number of people affected by this sweeping act of dispossession is estimated variously at between 20 and 95 million (Colchester et al. 2003). Most live in the Outer Islands, where extraordinarily large tracts are deemed to be free of private property interests other than those issued or recognized by the Department of Forests (World Bank 2000:11). For example, in West Papua the entire province save for one mining concession is officially classified as State forest land.⁶ In Central Sulawesi, the amount of land theoretically subject to various agriculture, forest and mining concessions exceeds the total amount of land in the province itself (Arianto Sangaji forthcoming: 16). The result is that overlapping interests, uncertain boundaries and the underlying weakness of property rights not issued by the State have become defining characteristics of forest and non-forest holdings in Indonesia. It follows that resource governance mechanisms are not found in western rule of law conceptions – interlocking private property interests delineated and described in public land registries – but through relational networks and sources of social power that thrive on overlapping uncertainties and multiple ordering systems. As a result of the extension of State authority in New Order at times, and the corrupt nature of the New Order State itself, these sources of social power generally cluster around public/private partnerships between officials and their cronies.

Outside of designated forest areas, the New Order State also applied concepts and practices that generated pervasive forms of private law uncertainty and tenure insecurity. Significantly, this was often justified on the basis of (much-abused) *ur-adat* concepts. In ideological terms the New Order State co-opted Supomo's integralist ideology and re-tooled it as *pancasila* democracy and the *kekeluargaan* (family) principle (Bourchier forthcoming). In legal terms, it co-opted

⁶See <http://www.dephut.go.id>.

the *ur-adat* notions of *hak ulayat* and *musyawarah dan mufakat* as indigenous Indonesian justifications for its centralizing and developmentalist objectives (Fitzpatrick 1997, 1999). This has been seen in the perverse use of *hak ulayat* to justify the State's right of control. It may also be seen in two other issues: first, the way in which the acquisition of land for development is mediated almost entirely through State institutions rather than private land markets; second, the utter neglect of private law frameworks relating to land and natural resource rights. Both these issues deserve some explanation, particularly as they are relevant both to the colonial legacy and the current phase of land regulation and reform.

Acquisition of land for development

The compulsory acquisition of land for public purpose development should be governed by a 1961 statute that requires parliamentary approval and payment of full compensation. Instead, the bureaucracy relied on a 1975 Minister of Internal Affairs Decree, and its successors a 1993 Presidential Decision and 2005 Presidential Decree, to obtain the 'release' of land on the basis of traditional processes of *musyawarah dan mufakat*. This requirement is often said to be satisfied by discussion with the village chief or local consultative council alone; and even where the titleholders are consulted examples abound of inappropriate pressure, intimidation and fraud (see Fitzpatrick 1999). Indeed, this process has become the primary mechanism for private and public land development in Indonesia. Because most land is unregistered, because the legal status of particular *adat* titles is uncertain, and because no law facilitates direct dealings with an *adat* group, the great majority of development projects in Indonesia use the laws on release of land to obtain titles directly from the State rather than through agreement with the landholders themselves. This phenomenon is facilitated by the notorious location per-

mit (*izin lokasi*) process, and the lack of regulations or judicial principles governing the grant of secondary rights by private holders of statutory interests (Fitzpatrick 1997: 199-203).

Transactional uncertainty

Compounding this State domination of land acquisition for development is a fundamental lack of legal certainty relating to private transactions in rights to land. Formal law requires all contracts transferring registrable rights to land to be executed before a government-certified notary known as a PPAT (Pejabat Pembuat Akta Tanah) (Art. 19 PP 10/1969). Rights to land not subject to a registered title may also be transferred through PPAT documentation. In this case, the proof of right will commonly be a letter of payment of land tax, a letter of acknowledgement of rights (*surat keterangan hak atas tanah* or SKT), or a document of title from colonial times (for example *girik* or *kekitir*). The transaction must also be witnessed by the village chief of the area containing the land and one other member of the village government (Efendi Peranginangin 1994:12). In more remote areas, the sub-district head (*camat*) is a certified PPAT for these purposes.

Many transactional issues are resolved or governed by the standard form PPAT contract, including identification of parties and subject-matter, warranties as to title, and method of performance. But a standard form contract cannot resolve all potential contractual issues. What, for example, would be the governing law should an event beyond the control of the parties prevent performance of the contract? What if two bona fide purchasers claim competing rights to land? What if, as often happens, a vendor sells a defective title to a bona fide purchaser, who then transfers this title to another bona fide recipient? These well-known property conflicts require private law and it is in this regard that there is substantial uncertainty in Indonesia.

The difficulty is that the BAL expressly repeals Book II of the colonial Civil Code, which had regulated land transactions according to the racial classification of the land in question. Hence, when asked what contractual law covers land transactions, many Indonesian lawyers reply that legal pluralism has been abolished and therefore the governing law is that established by the BAL, or at least by standard form PPAT documentation. Yet, neither the BAL nor PPAT contracts establish a comprehensive code for land transactions. Thus the formal position is that, in so far as not excluded by presumptive submission principles and the provisions of standard form PPAT contracts, *adat* law provides the governing law for land transactions (Efendi Peranginangin 1994:13-4). This conclusion flows from the fact that the general law of contract retains pluralist distinctions between *adat* and statutory law. It is also supported by a series of decisions of the Supreme Court, holding that transfers of *adat* lands according to *adat* procedures were valid notwithstanding a lack of compliance with formal requirements for land conveyancing and registration.⁷

Yet this result only serves to highlight the underlying phenomenon of private law uncertainty. What is the 'law of *adat*' relating to land transactions? What conflicts of law rules apply in contracts between members of different *adat* systems? What law governs land transfers involving migrant groups? What is the status of *adat* rights converted into statutory rights by the BAL, but subsequently transferred according to *adat* rules and practices rather than PPAT processes? These questions of law deserve sustained attention in current processes of legal reform; yet the fact that they have not been addressed (see below) illustrates a widespread failure in Indonesia to

⁷See Decisions of the Mahkamah Agung 16 Jun 1976 no. 1082/K/Sip/none 76; 19 Sep 1970 no. 123/K/Sip/1970; and 12 June 1976 no. 952/K/Sip/none 74.

appreciate the importance of private law frameworks to effective land regulation.

The status of non-statutory interests in land

A related area of private law neglect in independent Indonesia concerns the status of non-statutory interests in land. Unlike common law systems, Indonesian law does not recognize property rights that arise through occupation alone, or provide for acquisition of title to land through 'adverse' possession. In other words, people who have been in long term occupation of vacant or State land, without either agreement from the owner (for example under lease) or any attempt to evict them, do not acquire rights by reason of that occupation. It is true that article 27 of the BAL does provide for termination of a right to land in the event of abandonment; and article 56 does recognize acquisition of rights through traditional means, such as clearing land for cultivation. However, the former article only allows unused private land to revert to the State rather than an occupier, and the latter is not applied to land occupation or cultivation outside formally recognized *adat* areas. Indeed, examples abound in Indonesia of long term occupiers, some of whom have been paid land tax and been in possession for more than 30 years, being evicted on the basis that they do not have formal rights to their land (Fitzpatrick 1997:197).

In the event, the legal status of rights acquired other than through State grant remains quite unclear. In theory, most individually held *adat* rights to land were converted into statutory interests by the BAL. Yet, this process is itself shrouded with uncertainty as a definitive list of converted *adat* rights has never been produced, and the national discourse continues to speak of *adat* rights even though in formal terms these no longer exist as a legal category – except where they arise from clearing land in recognized *adat* areas

after 1960. To compound this uncertainty, the status of rights to land occupied and used in other areas after 1960 remains determined by ad hoc State recognition rather than underlying principles of private law. Because most land is now either State land or land subject to statutory interests, because the extent of recognized *adat* areas is relatively small, and because migration and urbanization has transformed land occupation patterns, most landholders that have acquired or derived their land through clearing or occupation after 1960 do not hold clear private property titles. This is further compounded by the fact that at least 75% of all recognized property titles in Indonesia remain unregistered, which means that there is a very vague dividing line between unregistered (but recognized) titles and unrecognized occupation-based interests.

While it is often mentioned in this context, the 1997 Indonesian law on land registration also provides no basis for acquisition of title through long term possession. It only allows 20 years possession as a basis for proving pre-existing titles, for the purposes of registration, and such proof only applies in the absence of any other evidence of title. Similarly, Government Regulation no. 36/1998 only establishes a procedure for the loss of rights to vacant land (*tanah telantar*), not the recognition of possessory rights. This regulation provides that land which is not being used by its formal rights-holder, consistent with the objectives and characteristics of that right, or – in the case of State land – has not been the subject of a formal application for a title by its controller (articles 5-7), may be designated as vacant land by the National Land Agency (art. 9). In this case the land falls under the direct control of the State (art. 13). However, long term occupiers of another's land (including State land) do not receive rights by reason of that occupation. In the result, perhaps not surprisingly, the only way that occupiers of abandoned or vacant State land can obtain rights under Indonesian land law is by ad hoc

application to bureaucratic officials. This often results in the issue of a letter acknowledging occupation (*surat garap*), a semi-formal document that is discussed further below.

The New Order legacy

All these issues – the State's right of control, the lack of transactional certainty, the uncertainty of non-statutory title acquisition – have led to a situation where large numbers of Indonesians occupy and use land without the certainties provided either by State law or established *adat* systems. As populations and migratory movements increased rapidly in the New Order period, neither formal law nor *adat* provided clear legal or normative mechanisms for verifying non-statutory titles and boundaries, or obtaining consents for title transfers from secondary rights-holders. As a result, many rights-holders in rural and peri-urban areas have obtained their rights without necessarily obtaining documents of title that clearly evidence the historical chain of ownership. All too often, this has left them unable to access formal systems of land administration because they cannot prove title, and equally unable to access non-State normative systems because these systems have not developed mechanisms to recognize and regulate informal and heterogeneous markets in rights to land (Fitzpatrick 1997, 2005, forthcoming).

In the event, a significant number of contemporary Indonesian land holdings do not fall easily into orthodox dualist distinctions between common property and private property, legal and normative rights, or traditional and modern systems. The dynamics of postcolonial change, including the interaction between public power and private law uncertainty, has produced a plurality of rules, processes and institutional structures. Very few landholders are untouched by State law and officialdom; yet very few laws are followed absolutely and unequivocally. In these circumstances, the courts and

other juridical institutions are often unable to provide authoritative determinations, and property rights are formulated, defined and re-formulated through constant negotiation and compromise, most often at the instigation of 'entrepreneurs' that cluster around centres of State power. While at times this entrepreneurial activity can result in clear property rights, at other times it leads to chronic conflict and uncertainty. This is particularly the case where centres of State power themselves compete for control over valuable resources.

The post-Suharto period

It is this phenomenon – competition between State institutions at various levels of government – that has become a hallmark of land regulation in post-Suharto Indonesia. It overlays the issues of public power and private law uncertainty that have been discussed so far. It particularly adds another layer of complication to pluralist analysis of land regulation. No longer is it sufficient to analyse normative and relational networks, including those that cluster around centres of State power. The nature of the State, its propensity to fracture over issues of legitimacy and resource competition, and its agencies' use of law-making powers to bid for resource control, must now also be taken into account in any comprehensive study of land regulation on Indonesian. In short, orthodox private law analysis of property relations in Indonesia – as relations between citizens – needs to be recast to take into account the significance of public power and administrative frameworks.

Of course, the tendency for State law-making and enforcement institutions to engage in internal competition for legitimacy and resource control, often manifested in inconsistent and vague legal results, was already apparent in the Suharto era. In many respects, this tendency was suppressed by the dominant role of the President. For example, no law ever expressly established the jurisdiction of

the Ministry of Forestry (Departemen Kehutanan, Dephut) over designated forest areas, and the concomitant lack of jurisdiction of the National Land Agency (Badan Pertahanan Nasional, BPN). Yet, this did not lead to substantial bureaucratic infighting between BPN and Dephut as the Ministry of Forests was a key source of informal revenue for President Suharto himself. In other respects, however, pluralist tensions within the Indonesian State began to be manifested at the local level. In particular, revenue and conflict-resolution imperatives at district, sub-district and village government levels often generated legal products that were inconsistent with national law and the stipulations of national agencies. For want of a better term, I describe these products as semi-formal because they derive from local sources of State power and yet lack formal validity in the eyes of national law.

The semi-formal system

This semi-formal system is interesting not only because it predated regional autonomy, but because it represents an under-recognized move away from dualist law / *adat*, formal/informal analytical frameworks. For example, we have seen that in designated forest areas as many as 65 million people live without effective or unqualified formal recognition of their rights to land. Yet, as a practical matter, many of these people have been allowed to live in and/or exploit the forest for decades. This applies to '*adat*' and migrant groups. Indeed, not only is occupation and use tolerated – where it suits the State – but forest-dwelling communities do at times receive localized forms of official recognition. On occasions, where land transactions occur in designated forest areas, local officials – either the sub-district or district head or a local district officer from the forestry Department – will stamp and verify the letters of land sale once a suitable fee has been paid. Alternatively, they will issue either

a letter acknowledging occupation (*surat garap*) or a letter of acknowledgement of land right (*surat keterangan hak atas tanah* – SKT).⁸ These documents, particularly the letter of acknowledgement, are used as a basis for the collection of district land tax:⁹ hence district officials have an interest in their issue. Yet, in terms of formal law and national policy, the parties to the transaction often lack an unqualified property right, and district officials or village heads lack any jurisdiction over land rights in designated forest areas.

A similar phenomenon can occur in relation to 'unlawfully' occupied non-forest land. For example, much of the former Dutch plantation land in Java was nationalized and gazetted as State land in the 1950s. It was also often occupied by local farmers both in the early 1950s and then again after 1999. This has been the source of regular conflicts involving occupiers and holders of State titles or concessions. Yet the situation is not as simple as a formal/informal, legal/illegal analysis would suggest. In many cases, not only are the boundaries of these former plantations unclear, but occupiers have received a *surat garap*, SKT or inheritance-based land division (*pembagian hak bersama*) from the sub-district head (witnessed by the village chief). Alternatively, they may have generated their own letter of land sale (*surat jual-beli*), and this has been witnessed and verified by the sub-district head and village chief. While the 1997 Law on Land Regulation prohibits sub-district heads from issuing SKT, and requires them to stamp *surat jual-beli* with a notice prohibiting its use in further land transactions, the status of pre-1997 land documents issued or verified by sub-district heads has not been

⁸They may even have paid an informal forest tax (*pajak kehutanan*) to local forestry officials (personal communication Sandra Moniaga).

⁹Iuran Pembangunan Daerah (IPEDA) or Iuran Rehabilitasi Daerah (IREDA).

clarified. Indeed, my own inquiries in both Aceh and Lampung indicates that many sub-district heads continue to issue SKT and other land rights documentation upon payment of a suitable fee, notwithstanding the provisions of the 1997 national law. In some cases, the sub-district heads justify this practice on the basis that they belong to the district government, and are sufficiently empowered to undertake land administration under the laws on regional autonomy.

One last example of semi-formal property relations concerns urban slums in Jakarta. In many cases, urban slum-dwellers receive residency permits and official house numbers from their local village head. They may even receive a *surat garap* from the local sub-district head. They will also form neighbourhood (Rukun Tetangga, RT) and community associations (Rukun Kampong, RK), and take part in the Kampung Improvement Program (World Bank 2003:46). Indeed, in one case brought to my attention a certificate title-holder was warned not to attempt to evict urban 'slum' dwellers by the local village chief. One reason for this was the desire to secure the votes of the slum-dwellers in future elections.¹⁰

The scale of this semi-formal system can be seen in a 1990 urban household survey (Struyk et al. 1990:86-8). While 37% of respondents held land title certificates, all but 5.3% of those without certificates held some type of 'official' land documentation. The survey notes that this documentation includes:

Letters from local officials (*lurah* and *kepala desa*) that were not accompanied by tax receipts. It also includes a large variety of sale agreements and letters, some witnessed by local officials, some not, all unaccompanied by tax receipts [...] this category also includes squatters' letters, *surat garap*. This is a letter from a local official recognizing an individual's right to occupy public land; it too is a right that is transferred

¹⁰Personal communication with Djaka Soehendra.

or sold, and, in effect, creates a class of quasi-legal squatters. (Struyk et al 1990: 93-95; see also Wallace et al 2000: 2-9)

The era of decentralization

This semi-formal system has emerged strongly in the post-Suharto era. In legal terms, it has been complicated by a formal transfer of power to districts and provinces under the new laws on regional autonomy. Law no. 22/1999 thus devolves authority over land and agricultural affairs to districts (*kabupaten*) and municipalities (*kota*) (art. 11), and authority over the management of natural resources to regional governments (arts. 7, 10). These are sweeping changes that are not substantially affected by the 2004 Law on Regional Autonomy. In many respects they are inconsistent with existing sectoral laws for natural resource management, which continue to vest legal authority in national institutions such as the Ministry of Forests or the Department of Mines. Thus there is a *de jure* dimension to competition for resource control between State agencies at various levels of government. This is indicated by the number of inconsistent regulations concerning authority over land affairs issued since Law no. 22 was promulgated. These include:

- Government Regulation no. 25/2000, which states that authority over land affairs –including in relation to land administration, granting land rights and cadastral surveys– is retained by the central government (art. 2(3)).
- Presidential Decision no. 10/2001, which states that authority over land affairs is a matter for regional governments; but that all existing laws and regulations remain valid and need to be ratified as part of the passage of new regulations (art. 1).
- Presidential Decision no. 62/2001, which purports to exempt the National Land agency from the decentralization process.
- Presidential Decision no. 34/2003, which states that part of the authority of government over land affairs is to be undertaken

by districts and municipal governments, including authority over location permits for development (*izin lokasi*), granting permission to clear land, arranging the 'release' (*pengadaan*) of land for development, resolving compensation disputes relating to that release, resolving disputes over vacant land, undertaking land reform and ascertaining and resolving disputes over *hak ulayat* land.

Another important arena for contestation involving public law authority has been in relation to small-scale forest exploitation concessions. Under Government Regulation no. 6/1999 and Decision of the Minister of Forests no. 5/2000, district heads were allowed to issue a variety of forest concessions for areas up to 10 or 100 ha (depending on the nature of the permit). This led to a very large increase in small-scale forest exploitation permits, many which overlapped with the larger national concessions or indeed national protected forest boundaries (Rikardo Simarmata no date:6; Colchester et al. 2003; Ida Aju Pradnja Resosudarmo 2004:118-9). In 2002 Government Regulation no. 34 and Decision of the Minister of Internal Affairs no. 541 sought to retract the authority of district heads to issue these small scale permits. Some district governments (and parliaments) have rejected the laws on the basis that they are inconsistent with the laws on regional autonomy themselves (Ida Aju Pradnja Resosudarmo 2004:118-25). Ida Aju Pradnja Resosudarmo (2004: 124-5) concludes:

The Ministry of Forestry acknowledges that it is losing authority over forests: local governments now reject its orders and regulations [...] and the ministry has no power over them. Administratively districts are not subordinate to the Ministry of Forestry, but rather to the Ministry of Home Affairs. Meanwhile, the Ministry of Forestry's efforts to gain the Ministry of Home Affairs' approval to impose sanctions on 'defiant' local governments have not been successful.

In other respects there have been re-centralization processes in forestry regulation, particularly in terms of national police powers to impose sanctions on nonconforming district administrations and the transfer of powers from district to provincial administrations under the new 2004 Regional Government Act (McCarthy forthcoming).

The draft new Agrarian Law

So we conclude with an analysis of the draft new Agrarian Law. To what extent does this law resolve the confusion between public power and private property rights that has plagued Indonesian land regulation? In the first instance, the draft Law seeks to elaborate on the all-important concept of the State's right of control. It describes a new right, *hak bangsa* (right of the nation), which is defined as the right to own and hold all agrarian resources on the basis of national sovereignty and participation by the people (Art. 1(1)). It then states that the State's right of control (*hak menguasai negara*) is derived from *hak bangsa*, and represents the State's right to manage agrarian resources in accordance with the Constitution (art. 5). The State's right of control is to be implemented by the government (art. 5(3)). These provisions represent an improvement on the concept of State right of control established by the BAL. While *hak bangsa* may amount to underlying title, the State's right is only one of management rather than private ownership. In other words, it does not of itself grant the state any rights to exclude occupiers of the land in question. This result is consistent with formulations of sovereignty in many other jurisdictions. The true test, therefore, is whether the State's right of control is also counterbalanced by effective and clear recognition of private property rights, because unclear private rights allow the state far greater space to apply public management rights to dispossessory effect.

In this area, the draft Law unfortunately continues the uncertainties of Indonesian land regulation. In terms of *hak ulayat*, Art. 5 states that communal rights of customary law communities 'that are still in existence' shall be acknowledged, respected and protected, consistent with the:

dynamic development of customary law communities, national and State interests, and the principle of the Unitary State of the Republic of Indonesia and the implementation thereof may not be contradictory to higher laws and regulations.

Art. 61 also states that *adat* lands, in so far as they remain under customary control (*dikuasai*), shall be converted into statutory rights of ownership or use, so long as this procedure is not contrary to existing laws and regulations.

To some extent, these provisions are a significant improvement on the BAL which – as has been seen – failed to convert *hak ulayat* into a statutory right, and indicated that it could not be used to prevent 'development'.¹¹ Nevertheless, art. 5(4) of the draft Act goes on to state that *hak ulayat* shall not extend to land (1) already subject to statutory land rights or resource-exploitation permits, or already held (or applied to be held) by a government agency, legal entity or individual in accordance with current laws and regulations. As with the 1999 regulation on *hak ulayat*, therefore, the widespread dispossession of traditional land both during and after the Suharto era has been maintained, while lip-service has been paid to the recognition of *adat* rights and *adat* law communities.

Similarly, the draft does recognize *hak ulayat* on land not subject to existing or pending statutory rights, and presumably therefore individual rights granted pursuant to this communal right of allo-

¹¹See the BAL, art. 3; see also the Explanatory Memorandum, General Clarification, art. 2, par. 3.

cation, it does not address the vexed question of individual *adat* rights to land that do not arise or exist under a *hak ulayat* umbrella. At least the BAL (art. 56) stated that *adat* mechanisms for acquiring ownership of land will be recognized pending development of a new law on the acquisition of land ownership. The draft Act includes no such equivalent provision. In combination with art. 39, which states that all land rights and resource-utilization permits must be recorded, the result is increased legal uncertainty relating to individual (and unrecorded) *adat* rights of ownership or use.¹²

In other words, the draft Act does not establish that unregistered rights to land (*adat* or otherwise) are as valid as registered rights. Indeed, it makes no mention at all of *adat* rights other than *hak ulayat*. This stands in contrast to the BAL, which at least sought to convert specific *adat* rights (and rights resembling them) into statutory rights. Thus the draft Act compounds the uncertainty surrounding *adat* and other unregistered rights to land in Indonesia. It purports to repeal the BAL, thereby suggesting that its conversion provisions are no longer applicable. Yet it provides no specific substantive provisions relating to the legal status of *adat* rights other than *hak ulayat*. Aside from its simplification of various statutory use rights into one all-encompassing right of use, much of the draft Act is taken up with hortatory references to community participation in land and natural resource management. Yet, as in so many land and resource-related laws since 1999, there are no specific procedural measures for guarantees to ensure compliance with these principles.

Finally, in relation to acquisition of land for development the draft Law also fails to adequately protect private property interests. Article 42 states that rights to land may be expropriated for 'the

¹²I am grateful to Robert Mitchell and Roy Prosterman for this point (see Mitchell and Prosterman 2004).

purposes of development'. Articles 43-45 provide that this expropriation must occur *inter alia* by 'consensus', but that, where this is not forthcoming, expropriation may take place in one of two possible ways: first, pursuant to decision of the relevant provincial legislature ('for activities that are related to the public interest and cannot be re-located'); and, second, pursuant to procedures to be set forth in law ('for activities with public purposes'). In other words, by allowing consensus-based expropriation for all development, the draft Act continues the much-abused 'discussion and consensus' approach to 'releasing' land for private development. Needless to say, this creates no incentive for private developers to deal directly with local landholders, and entrenches the government's central (and often corrupt) role in land acquisition and development.

Indeed, the draft Act arguably compounds the potential for abuse because – after much controversy – a 1993 Presidential Decision repealed a 1976 Ministerial Decree that had allowed 'discussion and consensus' release of land for private developments. This Presidential Decision clearly stipulated that the release of title procedure could only be followed for government public interest projects (art. 2).¹³ In contrast, and without mentioning the 1993 Presidential Decision at all, the draft Act allows regional governments the power to release land without the landholders' consent for projects 'related to the public interest'.¹⁴ This vague phrase is distinguished from the phrase 'public purposes' in article 45,¹⁵ and arguably extends therefore to all forms of development that may benefit the public (including

¹³See Presidential Decision no. 55/1993; see further Fitzpatrick 1999.

¹⁴The Indonesian phrase is '*terhadap kegiatan yang bersifat kepentingan umum*'. A similarly broad definition of public purposes may be found in Presidential Decree no. 36/2005 on the release of land for development.

¹⁵Here the Indonesian phrase used is '*untuk kepentingan umum*'.

private purpose developments). Without an effective Court system to define the meaning of projects 'related to the public interest' (but not necessarily for 'public purposes'), and without further elucidation in the Act itself, yet another legal window is created for rent-seeking intimidation and economic distortions in the land acquisition process.

Conclusion

Where then is the continuity, and where is the change in Indonesian land regulation? The continuity lies in underlying uncertainty as to the relationship between public power and private rights. This uncertainty not only encompasses the colonial domain declaration and the modern State's right of control, both matters relating to public administrative power, it also extends to the private law status of adat and other non-statutory rights to land. For its part, the change may most notably be found in the socio-political context of land regulation. The extension of State control under Suharto, in combination with widespread migration, urbanization and industrialization, has created multiple arenas for land-related contestation and negotiation. These arenas include a burgeoning semi-formal system situated at district government level and below. Since the advent of regional autonomy, they also include considerable pluralism and contestation within the State at all levels of government. In short, if the modern nature of Indonesian land regulation is to be fully understood, it is necessary to develop analytical frameworks for pluralism and fragmentation in both private law and public power structures.*

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