법제교류 연구 14-18-④

A Comparative Study on Land Rights Laws in Indonesia and Korea

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Abstract

Ⅰ. Purpose and Scope of Research

□ Indonesia and Korea almost started in the same time in reformulating their land law, but produced very different results. Comparing laws of the two countries may provide explanation for the striking difference.

□ Overview of laws related to Land Rights in Indonesia is provided, and the primary laws on the issue are explained and analyzed more in detail in comparison with Korean laws.

Ⅱ. Contents

□ Land Rights Laws in Indonesia

○ The overlaps of land laws' issues in Indonesia, including forestry, *Adat*, spatial planning, mining, etc have grown into complicated system since the enactment of the Basic Agrarian Law (BAL) 1960.

○ BAL recognizes *Adat* laws and customary rights, but is considered as ideal and not realistic; Basic Forestry Law (BFL) does not provide any protection on *Adat* laws and customary rights.

○ Constitutional court decided that BFL should amend to recognize *Adat* laws, although only in very limited span.

○ Land certification process in Indonesia has been slow and painful, and the difference between the customary perception on land and the legal protection provided increases disputes and conflicts, especially in Seram and Flores region where very low registration rate shows their reluctance to be bound by law.

□ Land Rights Laws in Korea

○ Historical Developments of Land Rights Laws in Korea are reviewed.

○ Various laws related to land rights are examined, while focus is placed on National Land Planning and Utilization Act, its restrictions on land use, and the relationship with ownership rights.

○ With the overhaul of land rights system, customary laws and possessions do not exist in Korean legal system any more.

○ Electronic registration system and the Real Estate Act are discussed to introduce Korea's electronic registration system and concerns related to the law

○ When compared with Indonesia, comprehensive change in the land rights legal system in Korea brought about the subsequent developmental differences.

Ⅲ. Expected Effects

□ Through the comparative analysis on Land Rights Laws in Indonesia and Korea, this research aims to provide foundational knowledge on both countries for legal scholars for further research in detail.

□ This research report may be utilized as basic information for land rights laws in Indonesia and Korea.

Key word : Land Rights laws, Indonesia, Korea, Registration, Certification, Ownership

목 차

Ⅰ. Introduction

A. Purpose of Research

Only five percent of the Indonesian land area is formally registered for private ownership or user rights. A minor share of this is freehold property. A large but unknown percentage of the total area is unregistered land. The national government through the Ministry of Forestry legally claims the full ownership right over more than two-thirds of Indonesian land currently or previously under the forests regime. In Indonesia, customary and communal land ownership lacks formal legal recognition.

There are many examples of non-coherence between the existing systems of land ownership distribution and administration and the current and democratic demands for social equity and justice, gender fairness, environmental sustainability, economic efficiency, and conflict avoidance or reduction. Expectations to administrative fairness, efficiency and transparency are also increasing based on the potentials of modern technology in geographical mapping and information systems.

Meanwhile, peculiar historic reference and legislative developments are observed in Korea's Laws on Land Rights. From late *Chosun* Dynasty through Japanese colonial period to the Republic of Korea, changes in the governing system of the country inherently affected what regulated ownership and all related rights on lands. Sometimes through customary law and other times by formal legislation, the law on land rights have evolved rather rapidly and towards the direction of catching up with the technological advancements Korea has achieved.

Although there may be still a gap between what the law envisions and what the reality unfolds in Korea, the footsteps the legislative process took in the past century may provide an example worth to review when setting a target direction of developments on land rights law in Indonesia, of course through assessing similarities and differences in specific socio-economic status of countries.

Through a comparative analysis of laws on land rights in Indonesia and Korea, this research hopes to build a helpful resource for scholars and legislatures in their quest of journey for better legislation on land rights laws.

B. Scope of Research

Overview of laws related to Land Rights in Indonesia is provided, and the primary laws on the issue are explained and analyzed more in detailed. Narration on *Adat* and traditions, the peculiar characteristic of Indonesian land rights law follows, along with the main concerns of the laws such as certification and disputes are addressed, also with the evaluation of international norm. Then the traits of the Indonesian laws are compared with Korean counterparts, focusing on the main issues of ownership, certification, dispute resolution issues, as they are the points of the most discussed and the down-to-earth.

Ⅱ. Overview of Land Related Legal Framework in Indonesia

Land ownership in Indonesia is tainted by diverse interests of forest concessions, industrial forest plantations, commercial agricultural plantations, mining concession, settlement programs and local population pressures are overlapping in many areas (Löffler, 1996). Competing for resources and the booming of development have also put more pressure on the local community and indigenous people in the rural areas. Although Article 33 of Indonesia’s Constitution of 1945 had stated that “Land, water and natural resources in it are owned by the State and used for the people’s prosperity”, the reality is somehow different. The spirit of this article, which originally was to protect the rights of the people and to consider land as a common property, has shifted and used as an appropriation tools by corrupt actors.

Legal protection for land ownership in Indonesia is mainly stipulated in Act No.5 Year 1960 on Basic Principles of Agrarian Law (BAL). BAL defines different types of land rights (rights of ownership, of cultivation, to use building, to use, to lease, and to clear land and collect forest product). Although using BAL as the foundations for agrarian law seemed simple, BAL often became overlapped with other laws, including the Forestry law. The rights to land in BAL have included the right to clear land and collect forest product which is also regulated in the Basic Forestry Law (BFL).

Forests and forest areas are regulated in the Law No.41 Year 1999 on Basic Forestry Law (BFL). The Forestry Law 1999 contains provisions

relating to the sustainable use and multiple functions of forests. However, this law and its implementing regulations are problematic. Firstly, it has to be understood that there are people who live in and outside the forest of Indonesia. They are the '*adat*' (indigenous) people, or the non-*adat* people, who have lived for generations as forest dependent people—even in the conservation forests. Secondly, it gives subsidiary position to adat forest as well as to the *adat* people and local people's 'ownership' living in and surrounding the forest. Hence, tenure security has very little clarity both in the forest and its immediate surroundings. The '*adat*' people who believe that they have rights on their land from generations, most often undocumented, hence are vulnerable to land appropriations, by the state or other parties.

Apart from the BAL and BFL, there are further laws and regulations which play an important part land ownership. They are: Spatial Use Management Law, and the Conservation of Living Resources and their Ecosystem, and other related laws. This table below lists all related Laws to Land Ownership and REDD+:

No	Law	Substance
1.	Law 12/2011	Legislation Composing
2.	Law 41/2009	Sustainable Food Agricultural Land Protection
3.	Law 31/2009	Meteorology, Climatology, and Geophysics
4.	Law 32/2009	Environmental Management and Protection
5.	Law 4/2009	Mining of Mineral and Coal
6.	Law 26/2007	Spatial Planning
7.	Law 17/2004	Ratification of Kyoto Protocol to the UNFCC

No	Law	Substance
8.	Law 32/2004	Regional Governance
9.	Law 33/2004	Fiscal balance
10.	Law 7/2004	Water Resources
11.	Law 1/2004	State Treasury
12.	Law 17/2003	State Finance
13.	Law 41/1999	Basic Forestry Law
14.	Law 20/1997	Non-Tax State Revenue
15.	Law 5/1994	Ratification of UNCBD
16.	Law 6/1994	Ratification of UNFCC
17.	Law 5/1990	Biological Resources Conservation
18.	Law 5/1960	Basic Agrarian Law

Efforts to protect *adat* areas are being done by various actors such as *adat* government, NGOs and academia, but the confusion still remains on land ownership because of 'unclaimed' land, 'over-claimed' land and overlapping borders. Local land (and forest) governance is also deeply needed in the areas.

A. Basic Agrarian Law ("BAL"), an Overview

The 1945 Constitution states the goals of the Indonesian state in paragraph four of its preamble:

> *"Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to*

> *improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice"*

Achieving these objectives requires a strong state role especially in governing natural resources. This is regulated in Article 33(3) of the 1945 Constitution:

> *"The land, the waters and the natural resources within shall be under thepowers of the State and shall be used to the greatest benefit of the people"*

State control over resources is exclusively aimed at achieving benefit for the people, which are key elements in the goals of the Indonesian state.

An important component in state controlled natural resources is the land, constituting the surface of the earth.[1] Land has important functions for human life, we all require land both in life and even after death. Land is used for agriculture, construction, forestry and other functions. Heru Nugroho explains that land has a multidimensional scope. First, land is economically useful as a means of production to reach prosperity. Second, land can politically determine bargaining position in community decision making. Third, land can be used as 'culture capital' which determines the owner's social standing. Fourth, land may hold sacred value as it will act as our final resting place.[2]

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1) Act No. 15 of 1960, Article 4(1) states that as form of state control, several rights to the surface of earth, known as land, shall be made, which will then be given to natural persons, groups or legal persons.

2) Heru Nugroho, 2007. *Menggugat Kekuasaan Negara,* Muhammadiyyah University Press, Surakarta. p.237

Holding such importance, those who own or possess land would naturally seek to take all necessary measures to protect their rights, and intend to expand their holdings. Such a trend occurred during the colonial government which brought negative excesses to the land holders themselves, as well as exploitation towards the land and those individuals whose lives are tied to it. During the Dutch East Indies colonial government, the state became the actor of exploitation and refused to recognize the majority of indigenous land rights under their rule. As a result, large scale 'appropriations' tend to occur throughout the East Indies. Land tenure became an important concept to provide legal certainty and limitations on ownership or possession, by the state, individuals or communities. This regulation is chiefly aimed to prevent and solve land and agrarian conflicts. Cotula and Mayers, quoted by Handoyo, defined tenure as a system of rights, rules, institutions and processes to govern access and use of resources, as a key mechanism to distribute risks, costs and benefits.[3)]

The most first comprehensive and most important land tenure regulation in Indonesia is Act No. 5 of 1960 on Basic Agrarian Law, otherwise known as BAL (*Undang-Undang Pokok Agraria*). Although in substance BAL provides for the regulation of other natural resources, the lion's share of its provisions goes to regulation land rights. BAL is considered critical as it provides an overhaul of the old land tenure regime under the Dutch colonial government, as replaces it with an emphasis on the interests of the people and the state.[4)] It was the first comprehensive regulation as prior land tenure regulations dealt only with transfer of

3) Handoyo,dkk. Jurnal Penelitian Sosial dan Ekonomi Kehutanan Vol. 8 No. 4 Desember 2011, p. 307

4) BAL, Considerations (b)

property rights from the Dutch/European system to the Indonesian system, as well as property rights expropriation. Below are some of those regulations:

1. Emergency Act No. 1 of 1952 on Transfer and Usage of Land and Immovable Property under European Legal Titles
2. Act No. 5 of 1952 on the Implementation of Act No. 6 of 1951 to replace Grondhuur Ordonantie (Stbl. 1918 Nr. 88) and Vorstenlandsch Grondhuurreglement (Stbl. 1918 Nr 20) as an Act.
3. Act No. 5 of 1963 on the Need to Appropriate Tanah Partikelir into State Lands.
4. Act No. 24 of 1954 on the Stipulation of Emergency Act No. 1 of 1952 on Transfer of Land and Immovable Property Rights Under European Law, as an Act
5. Act No. 28 of 1956 on Oversight towards Transfer of Plantation Land Rights
6. Act No. 29 of 1956 on Regulations and Actions concerning Plantation Lands
7. Act No. 1 of 1958 on Abolition of Tanah Partikelir
8. Act No. 7 of 1958 on Transition of AgrarianDuties and Authorities
9. Act No. 86 of 1958 on Nationalization of Dutch Owned Companies
10. Act No. 2 of 1960 on Profit Sharing Agreements
11. Act No. 3 of 1960 on Dutch Owned Immovable Property Possession

Most of the above acts deal sporadically with land rights, most concern emergency situations which must quickly be solved. Several provisions within the BAL also deal with similar measures, which abolishes:[5)]

5) BAL, Implementing Provisions

1. *Agrarische Wet* (Staatsblad 1870 No. 55) as contained in Article 51 *Wet op de Staatsinrichting van Nederlands Indie* (*Staatsblad* 1925 No. 447) and other sub-articles thereto.
2. *Domein Verklaring*
    a. *Domeinverkaring* in Article 1 *Agrarisch Besluit* (*Staatsblad* 1870 No. 118);
    b. *Algemene Domeinverklaring* (*Staatsblad* 1875 No.119A);
    c. *Domeinverklaring untuk Sumatera* (Article 1 *Staatsblad* 1874 No. 94F);
    d. *Domeinverklaring untuk keresidenan Menado* (Article 1 *Staatsblad* 1877 No. 55);
    e. *Domeinverklaring untuk residentie Zuider en Oosterafdeling van Borneo* (Article 1 *Staatsblad* 1888 No. 58);
3. *Koninklijk Besluit* dated April 16 1872 No. 29 (*Staatsblad* 1872 No. 117) and implementing regulations;
4. Book II of the Indonesian Civil Code, those provisions concerning the earth and air, and natural resources contained within them, except for provisions regarding *hypotheek*.

The colonial regulations above were revoked as stated in BAL's Considerations, letters c and d. In essence, it states that colonial agrarian law has a dualist nature with *adat* law existing with European law. This does not guarantee legal certainty for indigenous populations since European law holds primacy, setting aside *adat* law. In addition, European law at the time contains elements of exploitation and extortion aimed at indigenous Indonesians. For example, the *Agrarische Wet* which provides for a wide discretion of land usage for investors under *Erpfacht*, which led to robbery of communal lands. As was the practice of *Domein Verklaring* which

expropriates lands to the state for those who cannot prove their *Eigendom* (ownership) rights over their lands. This is problematic to indigenous Indonesians as the Dutch government only recognizes written documents, which is nowhere to be found in *adat* law.

Polarizing the old system, the current national agrarian system is based on *adat* law over lands, ostensibly simple and guaranteeing legal certainty.[6] Land tenure under the BAL provides a hierarchy of land possession:[7] First is the people's right over land, which contains public and civil aspects. This is manifested through *ulayat* rights whose owners are the entire Indonesian people. Land and other natural resources are not only the rights of their owners, the same way that remote lands and islands do not belong solely to those who live there. The people's right is eternal, so long as an Indonesian people still exists. This people's right is based on Article 1 BAL which states:

> *(1) The entire territory of Indonesia is a unified motherland of the whole of the Indonesian people who are united as the Indonesian Nation.*
>
> *(2) The entire earth, water and airspace, including the natural resources contained therein, in the territory of the Republic of Indonesia as the gifts of God Almighty are Theearth, water and airspace of die Indonesian nation and constitute the wealth of Thenation.*
>
> *3) The relationship between the Indonesian Nation and the earth, water as well as airspace meant it in paragraph (2) of this Article is of an eternal nature.*

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6) BAL, Considerations (a)

7) Bahan Kuliah dosen agraria dengan pengampu Prof. Dr. Nur Hasan Ismail, bahan kuliah tidak dipublikasikan.

Second is the state's rights which is exclusively rooted in the public aspect. The state is considered as the possessor and not the owner of land, the basis of which may be found in Article 2 BAL:

> *(1) Based on the provision Article 33, paragraph (3) of the Constitution and matters meant in Article 1, the earth, water and airspace, including the natural resources, contained therein are in the highest instance controlled by the State being and Authoritative Organization of the whole People.*
> *(2) The rights of controlled by the State meant in clause 1 of this Articles provides authority:*
> *a. to regulate and implement the appropriation, the utilization, the reservation andthe cultivation of that earth, water and air space as mention above;*
> *b. to determine and regulate the legal relations between persons concerning the earth, water and air space;*
> *c. to determine and regulate the legal relations between persons and legal acts concerning the earth, water and air space.*
> *(3) The Authority based on the State's rights of control mentioned in paragraph (2) of this Article is exercised in order, achieved the maximum prosperity of the people in the sense of happiness, welfare and freedom in the society and constitutional State of Indonesia which is independent, sovereign, just and prosperous.*

Third are *ulayat* rights of *adat* communities, containing public and private aspects. *Ulayat* rights are recognized so long as communities meet the requirements to set up and implement such rights. Before the BAL's recognition of *ulayat* rights, no regulation has given it a legal status even

when courts have confirmed their existence in practice. *Ulayat* rights are governed in Article 2(4) and Article 3 BAL:

> *(1) The implementation of above mentioned right of control by the State may be delegated to the autonomous region and adat Law Communities, if deemed necessary and not being in conflict with the National interest in accordance with the provisions of Government Regulation.*
>
> **Article 3**
>
> *Considering of the provision in Article 1 mid 2, the implementation of the "Hak-Ulayat" (The Communities, in so far as they still exist, shall be adjusted as such as to fit in the National and Property right of communal property of an Adat -Community) and rights similar to that of Adat-State's interests, based on die unity of the Nation, and shall not be in conflict with the acts and other regulations of higher level.*

Fourth are individual rights over land, which is exclusively private in nature. This is an extension of the state's right to control land in Article 4(1):

> *Based on the State's right of control as it is meant in Article 2, several kinds of Rights are determined concerning the surface of the earth, which is called land which may Degranted to and owned by persons and by Corporations, while the types of individual land rights are governed in Article 16(1):*
> *(1) The rights on land as meant in Article 4, paragraph (1) include:*

a. the right of ownership (Hak milik)

b. the right of exploitation (Hak guna usaha)

c. the right of building (Hak guna bangunan)

d. the right of use (Hak pakai);

c. the right of lease (Hak sewa)

f. the right of opening-up land (Hak membuka tanah)

g. the right of collecting forest product (Hak memungut hasil hutan)

h. Other right not included in the above mentioned right which shall be regulated bylaw and rights of a temporary nature as mentioned Article 53.

BAL is considered a basic law as it only deals with the fundamental rules which will then become the basis of other regulations. Formally it has the same legal standing with other Acts made by government with acceptance from the House of Representatives,[8] except that BAL contains basic principles and rules on agrarian law. The BAL's provisions are further implemented in acts, government regulations and other regulations.[9] To maintain legislative harmony no subsequent regulations are to conflict with BAL's provisions.

Implementation of land tenure under the BAL has not proceeded smoothly. It is still considered conceptually ideal, being recognized as an act whose goals are in line with social demands –advocating for those less well-off, farmers and laborers to be included in state development.

8) The unamended 1945 Constitution places legislative power in the government, the House of Representative merely accepts.

9) BAL, General Elucidations

10)In practice, many regulations dealing with land tenure stray from BAL. Changes in the politics of economy from a socialist equality to a capitalist growth outlook has robbed the BAL of its socio-economic legitimacy, leaving only its legal legitimacy.11) Originally formed as an umbrella act, BAL's implementing regulations no longer conform to it, especially during the New Order era which places economic development as the pivot of state policy. Consequently, large scale foreign investment were encouraged and legalized through Act No. 1 of 1967 on Investment and other regulations. This has led to a demise of an ideal, certain and integrated legal framework, leaving only sectorial and short-term policies. An unimplemented BAL robs a guarantee of land tenure rights.

Does this mean that BAL's goals of land tenure regulations remains unfulfilled? Does this also mean that we are reverting to back to a colonial system which was corrected by the BAL? More importantly, how does this affect protection for Indonesian citizens, individually and communally? We shall look into these questions by focusing on the overlap of land tenure regulations between communal rights and forestry regulations below.

B. Basic Forestry Law("BFL") and its overlap with BAL

Forestry law in Indonesia underwent an overhaul in 1999, when the Basic Forestry Law of 1999 ("1999 BFL") replaced the 1967 act of the same name ("1967 BFL"). Forestry reform was one of the conditions imposed by the World Bank before it would grant Indonesia structural

10) Achmad Sodiki, Urgensi Peneguhan UUPA dan Peraturan Pelaksanaannya untuk mendukung pelaksanaan pembaruan agraria, dalam Pembentukan Kebijakan Reforma Agraria 2006 -2007 : Bunga Rampai Perdebatan. STPN Press, Yogyakarta. p.144

11) Ibid p.145

adjustment loans. The focus of the new act is on increasing exploitation of the forests. In this regard, it is quite similar to the 1967 law. The 1999 Act also pays some lip-service to the idea of protecting the rights of indigenous communities, but effectively ensures that they will be unable to easily protect their customary land uses. The Indonesian Legislature passed the Act over the strenuous objections of various non-governmental organizations.

BAL is still problematic because it is overlapping with other laws, regulations and policies. For example, there is a huge overlap between 'agrarian land' and forests. Forests and forest areas are regulated in Law 41 1999 (Basic Forestry Law, BFL), which contains provisions relating to the sustainable use and multiple functions of forests. BAL and BFL are overlapping in several ways. For instance, the rights of millions of forest-dependent people who have lived for generations in or near Indonesian forests as *adat* (indigenous) or non-*adat* people are falling between the BAL and BFL laws. Tenure security has very little clarity in forests and surrounding areas. People who believe that they have rights on their cultivated land from generations, most often undocumented, thus become vulnerable to land appropriations by the state or other parties. The problems then arise when administratively the local people are in need to have their land licensed. If they are cultivating in an area classified as 'forest area', although de facto the land has been a cultivated land for decades, they would have to ask the Department of Forestry for the license. On the contrary, if the area is forested but not classified as forest, they have to contact the National Land Agency (BPN) for certification issues.

Adat peoples' recognition by the government has to go through a long and winding process before they can be legally acknowledged. The acknowledgement and respect of adat communities is listed in the 1945 Constitution (amendment): 'The State acknowledges and respects the unity of *adat* law communities and their traditional rights, as long as they are living and align with the development of the community and the principle of the Republic of Indonesia and regulated by the Law.' This article gives constitutional rights for the *adat* community and a blueprint for the State on creating a relation with *adat* law community (Zakaria 2013). There are also laws in relation to adat law community. One of the most prominent is the Law on Human Rights (39/1999), highlighting that: (1) In the event of human rights enforcement, the differences and needs of *adat* law community needs to be fostered and protected by the law, the community and the government. (2) Cultural identity of human rights of the *adat* law community is protected, including land rights of the *adat* law community. In the explanation of the Human Rights law, '*adat* rights', which are living law in the adat law community, have to be respected and protected as parts of Human Rights Protection and enforcement. Furthermore, this article also stresses that it is a must for the law, the community and the government to respect the diversity of identity and culture of adat communities in Indonesia. The denial of this diversity, such as acts of uniformity of values of *adat*, is trespassing human rights.

Other laws, such as Law of Regional Government (32/2004), stated the rights of *adat* law community to develop a political and governmental system in accordance with the local *adat*. For example, Article 3 of the law explains that 'the election of village head in an adat law community,

where law is still acknowledged by the local community, is enforced by a Government Regulation.'

Still, the real problem is the implementation on the ground. The mentioned laws are good, but the fact that the *adat* law community has to get acknowledgement from the lowest level of the government, the *desa* (village), and then *kecamatan* (sub-district), *kabupaten* (district), and province creates problems. Only based on the decision of the province will the central government decide whether or not they will acknowledge the *adat* community. Not only does this process take a long time and demands a lot of energy, but if the community does not have funding for 'greasing money', the acknowledgement will be stalled and even rejected. Corruption is a major problem in Indonesia and it has spread systematically within the bureaucracy of the government from top to bottom.

In relation to the rights of *adat* law communities, *adat* law is used as the foundation in forming national agrarian law. The rights of such communities must be recognized, even when limited by certain requirements. In practice, government recognition of *adat* law community rights are rare and almost never happen. What happens much more often is the expropriation of *adat* rights under the guise of development financed by domestic and foreign investors. Capitalization of land and natural resources, which should have been abolished under the BAL is paid for by the decimation of communal tenure rights.[12] This communal perspective contrasts with the individual land ownership rights under Government Regulation No. 10 of 1961 on Land Registration, which provides a

12) Myrna Safitri, *Mempertanyakan Posisi Sistem Tenurial Lokal dalam Pembaruan Agraria di Indonesia.* Pembentukan Kebijakan Reforma Agraria 2006-2007 : Bunga Rampai Perdebatan. STPN Press, Yogyakarta. Pg. 68

mechanism to obtain and transfer land rights. Government Regulation No. 24 of 1997 is similar, but has a narrower target; there is no meaningful obstacle in terms of land tenure in for private use.

Adat rights began to see legal abandonment through Act No. 5 of 1967 on Basic Forestry Law. Exactly seven years after the BAL intended to protect *adat* law communal rights, the 1967 BFL entered into force in harmony with liberalization and the economic development policies of the New Order Era marked with Act No. 1 of 1967 on Investment. The 1967 BFL contradicts the BAL by its weak position on *adat* rights. 1967 BFL failed to place the BAL as one of its considerations. Article 2 1967 BFL straight away classifies forests as state forests (unburdened by ownership rights) and private forest (bound by ownership rights).

Article 2 above contains at least two fundamental problems. First, under the BAL the state is not allowed to own forests, only to possess them. A possessor is only given rights to regulate, over fruits of labor and other rights. As an owner of forests, the state is acting in a similar manner to *domein verklaring* to the colonial government, taking ownership of lands whose ownership cannot be proven. This is contrary to the goals stated under BAL. Second, the dichotomy of forest ownership makes absolutely no mention of *adat* law communities, who are meant to possess *adat* forests.

Other forms of neglect for *adat* law communities find form through other provisions dealing with *Adat* rights namely Article 17, which states that “the rights of *adat* law communities and their members, as well as individual rights to receive benefits directly or indirectly from forests, which are based on a legal rule in force, cannot hamper the fulfillment of goals in this Act.” The implementation of *adat* law community rights

which already requires prerequisites under the BAL, now finds further requirements under the 1967 BFL. The drafters of the act has also taken the stance that *adat* law communities will in time, disappear on their own. This is implied in the general elucidations of 1967 BF:[13)]

> *In Article 2, the term "State forest" is used for all forests that are not considered "private forest". Thus, the meaning of "State forest" includes all forest belongs to adat community, based on the current national laws or adat laws. The management of land by the adat people based on adat law or commonly called 'ulayat rights' acknowledged by BAL on the conditions that those rights stil exist. In areas which ulayat rights do not exists anymore (or never exists), the mentioned rights will not be reenacted. Based on the current development, ulayat rights are getting weaker with time. And the implementation of ulayat rights can not be in contradiction with the national interests and subsequent laws and regulation.*

This manifests a regulatory perspective where the state has no interest to recognize *ulayat* forests, as they will weaken and disappear in time, which the state has no obligation to revive. The 1967 BFL also regulates forest possession for private parties, similar to concessionary rights during the colonial era.

Formal legal recognition for *adat* law communities was first given by Minister of Agrarian Affairs/Head of National Land Agency Regulation No. 5 of 1999 on the Operational Guide to Solve *Ulayat* Rights of *Adat* Law Communities. In accordance with Chapter II Article 2, *adat* law

13) 1967 BFL, General Elucidations

communities are recognizes as long as they continue to exist. *Ulayat* rights are deemed to exist if:

a. There is a group of people who still feel tied by the *adat* law framework as a community, who recognize and carry out such a communal framework in their daily lives;
b. There exists an *ulayat* land which is the living environment of such a legal union, which is the place of their daily lives; and
c. There is *adat* law in force on the administration, possession and usage of *ulayat* land, which is followed by that legal union.

As a measure to recognize *ulayat* rights, Article 5 places the burden of recognition to local governments to provide a legal basis in the form of local government regulations. However, practice shows that serious efforts to use this regulation as a basis to solve *adat* claims over land and natural resources are lacking.[14] The local government does not hold all the blame, as the central government has also failed to take optimal measures to guarantee land tenure by *adat* law communities.

This may be seen in Act No. 41 of 1999 on Forestry which replaces 1967 BFL. While is subject matter does regulate the rights of *adat* law communities, its most fundamental provision still negates such a concept by using the dichotomy of state forests and private forests. *Adat* forests are part of state forests. While this does not represent a well-intentioned effort, it should at least be appreciated as a foundation for *adat* rights recognition in land tenure. Fortunately, *adat* rights has also been recognized

14)Chip Fay dan Martua Sirait, *Kerangka Hukum negara dalam Mengatur Agraria dan Kehutanan : Mempertanyakan Sistem Ganda Kewenangan atas Penguasaan Tanah.* Paper dipresentasikan dalam *The International Conference on Land Tenure,* Jakarta, 11-13 October 2004.

through TAP MPR No. IX/MPR/2001 on Revisions of Agrarian Affairs and Natural Resource Management. This regulation states that the revision of agrarian affairs and natural resource management must be done in accordance to certain principles, among them respect for *adat* law communities and cultural diversity in terms of agrarian and natural resources.

C. BFL and its Unconstitutionality

The year 2012 saw an alliance of *adat* communities band together and submit a request for judicial review of certain aspects of the BFL to the constitutional court. In essence, they viewed that the BFL contains provisions which are contradictory to Article 33 of the Indonesian Constitution which requires that "Land, water and natural resources in it are owned by the State and used for the people's prosperity" read together with paragraph 4 of the preamble to the Indonesian Constitution:

> *"the state of Indonesia [shall protect] all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice"*

In addition they also relied on Article 3 BFL which requires the conduct of forestry regime to achieve equal an sustainable prosperity for the people. The petitioners saw that BFL has been used as a tool by the state to strip *adat* law communities of their *adat* forests, which are then declared as state forests and then given to investors through permits and concessions.

The tensions created by this case stems from the state's right to regulate as enshrined in the BFL and the state's obligation to respect *adat* law derived rights which are intrinsic in the Indonesian system.

The Court looked into the basic constitutional documents and saw that protection towards *adat* rights are well established in Indonesian constitutional law. The goal of the Indonesian state is seen as “the protection towards the nation and territory [and] general welfare” which translates into the creation of social justice of all Indonesians. The idea of a diverse Indonesian is found both in the motto of *Bhinneka Tunggal Ika* through Article 36A of the 1945 Constitution, as well as Article 18B(2) of the same which acknowledges the existence of *adat* law communities and their traditional rights. Such communities are to be seen as legal subjects as any other and deserving of equal treatment and protection.

The Constitutional Court itself has acknowledged that the regime of *adat* derived rights over forests are unclear when compared to other forms of land ownership. This has lead to a different and lowered standard of treatment of *adat* law communities, which makes them prone to situations where their legal rights and daily needs from forests are jeopardized. The Constitutional Court, after hearing the evidence brought before it has also affirmed the existence of numerous conflicts which stem from an unfair and often arbitrary revocation of *adat* rights.

The Constitutional Court affirmed that a reading of the constitution demands that state possession and regulation over forests and allocation of natural resources must be for the welfare of the people; in this case *adat* law communities are placed in a clearly disadvantageous position. As a result thereof, the Court decided to partially grant the petitioner's application.

First the Constitutional Court elected to remove the word “state” from Article 1(f) BFL, so that *adat* forests are no longer automatically considered as state forests. This is because *adat* forests is considered to fall under the recognized *ulayat* rights of *adat* communities, which are located in a territorial unit belonging to an *adat* law community, based on traditions living in the community, whose management is handled internally by that community. As such, subject to Article 18B(2) of the 1945 Constitution, the state cannot simply extinguish such rights by declaring *adat* forest to be ipso facto state forests.

The state's right to possess land as laid out under Article 2 BAL for example, clearly specifies public welfare as its objective, while at the same time Article 7 also limits unreasonable ownership and possession. As such, the Court granted the petitioner's request to remove *adat* forests from state forests.

The consequence of excluding *adat* forests from state forests is the inclusion of the former into the regime of private forests. Therefore, the Court saw fit in relation to Article 5(1) BFL to divide private forests into *adat* forests and forests owned by individual or legal persons. This discussion also points out the fact that the elucidations to Article 5(1) regarding the inclusion of *adat* forests into state forests contains a contravention to Article 5(1) proper and must be deemed unconstitutional.

Another concern was Article 4(3) BFL which states that:

> *“State possession over forests must take into account the rights of adat law communities, so long as they exist in reality and their existence is recognized, and are not in contravention with national interests”.*

The petitioners argued that such a limited requirement erodes the ability of *adat* law communities to claim their rights as it opens the doors to situations where an *adat* law community exists but is not recognized.

The Court looked to the realities that *adat* law communities are slowly being eroded, and saw future possibilities that their role, function and even existence may be under threat. *Adat* law as living law which is accepted and observed by the community is deemed to necessitate a certain form of evidentiary proof of continued existence and observance. The recognition of such communities are not meant to trap them in backwardness but to allow for affirmative action to ease their access to justice, which nevertheless requires a harmonization with status quo as per Article 28(3) 1945 Constitution. The Court finally determined that Article 4(3) BFL is conditionally unconstitutional, and only applies when interpreted so that:

> *"state possession over forests must take into account the rights of adat law communities, so long as they are still living in the community and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as contained in law"*

As a final point, the Court has reaffirmed -as was the case subject to Constitutional Court Decision No. 34/PUU-IX/2011 dated 16 Juli 2012- that the practice of demarcating state forests and *adat* forests may no longer by done unilaterally by the state, but must be done with close cooperation with the stakeholders in the disputed areas.

The Constitutional Court decision is important in that it upholds the basic principle that the state must take careful considerations into the

needs of *adat* law communities and thus to the protection of *adat*-based rights. While the Court cannot account for and fill the legal vacuum in which *adat* derived rights sorely needs greater clarity, the Court has proven that it would not shy away from revoking acts which are contrary to the protection of *adat* law.

D. Land Rights, Tenure, and the Complexity

Land ownership in Indonesia is tainted by diverse interests of logging concessions, industrial forest plantations, commercial agricultural plantations, mining concession, settlement programs, infrastructure development, and local population pressures. The history of marginalization of locals and *adat* people started even before the Indonesian independence. People who were accustomed to 'justice' as the end product of their *adat* laws were forced to change their perception to 'legal certainty' introduced by the Dutch colonial power.

Competing for resources and the booming of development have put more pressure on local communities and indigenous people in the rural areas. Although in Indonesia's Constitution of 1945, Article 33 states that, 'Land, water and natural resources in it are owned by the State and used for the people's prosperity', the reality is different. The spirit of this law article, which originally was to protect the rights of the people and land as a common property, has shifted and been used as an appropriation tools by corrupt actors.

Legal protection of land ownership in Indonesia is mainly stipulated in the Law 5/ 1960 on Basic Principles of Agrarian Law (BAL). BAL regulates the types of land rights (rights of ownership, of cultivation, to

use building, to use land, to lease, and to clear land and collect forest products). BAL actually overruled most of the old Dutch colonial agrarian law and provides a hierarchical system of land ownership:

(1) The nation's right forms the premier right in land ownership. This brings back the land ownership to Indonesians as a communal owner of land, water and space. The right has private and public consequences. This means that land and the natural resources of Indonesia do not only belong to the direct owners, but also to the whole nation. The nation's right is eternal and will follow the nation of Indonesia as long as the country of Indonesia is still intact.

(2) The state's 'ownership' right is strictly public and the state is positioned as the 'manager' or 'authorized body' of the land, – not as the owner. 'The state is authorized in the interest of the people to manage and organize the ownership, usage, utilization and maintenance of land' (Article 2).

(3) *Ulayat* rights /*adat* rights / traditional rights. These rights include public and private aspects. Although these rights are clearly defined and acknowledged in the BAL, there is a caveat on the acknowledgement of this right. The *adat* right must have an 'existence', align with national and state interests, be based on unity of the people, and cannot be inconsistent with other related laws and regulations.

(4) Individual land rights. Such rights are given based on the state's ownership rights and include civil rights of *hak milik* (freehold ownership right), *hak guna usaha* (cultivation rights), *hak guna*

bangunan (building rights), *hakpakai* (user right), *hak membuka tanah* (land clearing rights), and *memungut hasil hutan* (forestry rights).

Moreover, the implementing institutions of BAL (in this case: BPN: National Land Agency) and BFL (in this case: Department of Forestry in Jakarta and *DinasKehutanan* or Forestry Office at the province and district levels), have very limited coordination. Mostly, they coordinate based on projects, or based on overlapping activities. There are no routine or regularly scheduled coordination meetings between these agencies.

The Indonesian government's right to manage land was complicated somewhat following the era of widespread decentralization.[15] Act No. 22/1999 supplemented by Act No. 32/2004, both of which concerns regional autonomy, vests authority over land and agricultural affairs to regencies and municipalities in Article 11, while authority over natural resources are handed over to regional governments in Articles 7 and 10. Scholars have noted that these wide-ranging regional autonomy conflicts with established sector laws on natural resource management which empowers institutions such as the Ministry of Forestry and Department of Mines.

Fitzpatrick notes several legal products which are inconsistent with Act No. 22.[16] Article 2(3) of Government Regulation No. 25/2000, for example states that authority over land affairs, including administration, granting land rights and cadastral surveys, remains with the central government. Another is Presidential Decision No. 10/2001 which, while acknowledging

15) Daniel Fitzpatrick, Private Law and Public Power: Tangled Threads in Indonesian Land Regulation, 16-17 http://ssrn.com/abstract=2019779

16) Ibid, p. 16

decentralization of land affairs to regional governments, affirms that current legislation must remain valid, or Presidential Decision No. 62/ 2001 which exempts the BPN from decentralization.

An important part of this tangle is Presidential Decision No. 34/2003 which vests a wide authority to the regency and municipal government, including the authority to issue location development permits, permits to clear land, resolving compensation disputes, undertaking land reform and resolving disputes of vacant and *ulayat* lands.

In relation to BFL, Indonesian forestry law sees a contest of legal authority in the field of small scale forest concession.[17] Government Regulation No. 6 /1999 and Minister of Forest Decision No. 5 /2000 had allowed district heads to issue forest concessions up to 10 or 100ha, which as noted by several scholars[18] led to a large increase in small forest concession –many of which seem to overlap with national concessions and national forest boundaries. Interestingly, when Government Regulation No. 34/ 2002 and Minister of Internal Affairs Decision No. 541 sought to repeal this authority there was strong rejection from both regional governments and parliaments, claiming that the new regulations are inconsistent with the laws on regional autonomy.[19] This state of affairs has degenerated to such an extent that in 2004, Resosudarmo noted that:

> *"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*

17) Ibid, p. 17-18

18) Resosudarmo, I. A. P., 2004. 'Closer to people and trees: Will decentralisation work for the people and the forests of Indonesia?' *European Journal of Development Research* 16(1): pp. 118-119

19) Ibid, p. 118-125

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."[20]

20) Ibid, p. 124-125

Ⅲ. Empirical Analysis on Land Rights Laws in Indonesia

The analysis in thie Chapter is based on a field research conducted in 2 main research areas in *Flores* Island (regency of *Ende, Nagikeo, Ngada* and *Manggarai*) and *Maluku* Island (regency of *Seram Bagian Barat)*.[21]

This study is empirically based on information collected from study sites in two provinces in eastern Indonesia, *Nusa Tenggara Timur* (NTT) and *Maluku*, which are the economically poorest among Indonesia's 33 provinces. Triangulation of data and methodological approaches allow for both quantitative and qualitative analyses. In each province, researchers from University of Gadjah Mada, a leading Indonesian university, had an initial seminar with local academics. In-depth interviews were made with approximately 50 purposely selected key informants in each province, - from heads of departments at province and district levels, to traditional leaders and ordinary citizens at the selected rural and peripheral study sites.

Finally, a total of 640 questionnaires were filled in during trained enumerators' interviews with randomly selected ordinary people at the nine village study sites in each of the two provinces. The questionnaire was based on previous interviews with the smaller number of key informants. Both men and women have been represented by at least one third of the approximately 35 respondents at each of the 18 local study

21) The field research was funded by Norwegian Government as part of the 'In Search of Balance' research under the title of *"Traditions, Land Rights and Welfare Creation, the Case of East Indonesia"* by Linda Yanti Sulistiawati and Stein Kristiansen, 2013-14.

sites. The enumerators have strictly followed the structure and wordings of questions in a six-page questionnaire. Each interview took approximately one hour. The data collection was made in *NTT* in November 2013 and in the *Maluku* in December 2013 and January-February 2014.The selection of study sites is made to get close to a representative picture of land ownership, land efficiency and land conflicts in rural areas of Eastern Indonesia.

In the province of *NTT*, the main data collection was made in three sub-villages (*dusun*) in three different sub-districts (*kecamatan*) in each of three districts (*kabupaten*) on the island of *Flores.* There are huge varieties in traditions and legal systems among, and also within, these three districts. *Flores* firstly came under colonial rule by the Dutch only 100 years ago and has a history on non-united small political units of remote villages, often in conflict with each other. Five different languages are spoken on the relatively small island. The specific study sites are *Dhawe, Mulakoli* and *Maukeli* in *Nagekeo* district, *Seso, Wangka* and *Ruto* in *Ngada* district, and *Compang Dalo, Narang* and *Robek* in *Manggarai* district.

In the *Maluku* province, the nine local research sites (*dusun*) for the survey were selected in three sub-districts in only one of the three districts on the island of *Seram, Seram Bagian Barat (SBB).* In-depth interviews have been made also in the two other districts of *Maluku Tengah* and *Seram Bagain Timur*. The reason for concentrating the quantitative data collection in *Seram* in one district is that the researchers wanted to cover different ethnic, religious or heritage compositions of people and the possible subsequent social stratification within villages or ‘kingdoms’ (*negeri*). Villages on the north, south and west coasts are

included, with domination of both Muslim and Christian communities. The similarities in political organization and social structure among the three districts in *Seram* are strong compared with the huge variety among *Flores*' eight districts. This is partly explained by the common history of being under the *Ternate sultanate* from the 13th till the 19th century. The specific study sites are *Luhu, Liaela* and *Saluku* in the western *Huamual* sub-district; *Karmel, Eden* and *Nasaret* in the northern *Murnaten*; and *Kawatu, Rumberu* and *Waimital* in the southern *Rumberu* area.

A. *Adat* and Traditions in Indonesia's Land Rights: Land Certification

At the research site, land registration as regulated in Government Regulation No. 24 of 1997 have been conducted for land ownership and building exploitation permit for religious institutions, but *adat* rights have yet to be recognized at the National Land Agency's bureaucracy. The *Ngada* Regency's National Land Agency for example claim that there are no *adat* communities within their jurisdiction, while in fact the researcher met various living *adat* communities still holding on to their values in *Seso, Wangka* and *Ruto*.

Adat law communities in their own circles say that their rights are recognized through a Series A, which a letter of recognition over rights. These letters are usually used as a basis for taxation, similar to the *girik* system which used to be in force in Java. So far, recognition of *adat* communities as advocated by the Ministerial/Head of National Land Agency has yet to see implementation by the local government. This creates resistance from *adat* communities to register their lands because it is inconsistent with their cultural character.

Generally speaking, the society at the research site are against the privatization of productive land (sold, transferred etc.). However, in *Seram* 98% of respondents agreed that land ownership should be certified or registered, whether for private or communal ownership. Similar results were found in *Flores* where 60% agreed. Land ownership in *Flores* is known as permanent exploitation right (not ownership as land is considered as a 'mother' and cannot be owned but is only worked on and cared for). Their main motivation for land registration is to avoid future land disputes (95%). Less than 4% of respondents consider registration important for sale/transfer purposes.

Several basic fundamental obstacles to land registration for *ulayat* rights are:

1. Differing perceptions on, and contradictions of national land law and *adat* land law. Under *adat* law land ownership is communal and only allows exploitation times to be transferred and not ownership. Meanwhile under national law all legal connection to a land is severed when ownership is given away. This leads to an unclear land ownership structure if we were to follow current rules in land registration.
2. Overlap in land ownership and possession.
   a. Overlapping possession of *ulayat* land.
   b. Trans migrants only work the land while ownership/possession is still in the hands of indigenous tribes. As a result, transmigrants are not allowed to register land and it indicates conflict.
   c. Transmigrants and those outside tribal groups are allowed to exploit the land for an indefinite time period by oral agreement with the

chief, but may not register the land for private ownership.

d. Unclear divisions of land between differing tribes, leading to competing claims.

The researches concludes from these studies that land registration is not a main priority for *adat* communities at the research site. The community considers ownership over land as 'permanent exploitation rights' and see certification only as a tool to avoid future land disputes. The goals of certification as set by the National Land Agency such as to allow to auction or to securitize land property as business capital, is simply inapplicable for the most part in indigenous communities. The privatization of land is considered as taboo, because in *Flores* and *Seram* land is considered as part and parcel of one's identity.

Increased population and pressure from the investment of non-local companies lead to a high probability that traditional perspectives of land may shift. This is already the case in urban areas such as *End* and *Ngada,* where most of the land have been registered and sold to transmigrants. In several instances, the *Ngada* and *SBB* regencies have seen investment from mining and palm oil plantations. When the idealist *adat* identity faces off with money and political interests, it becomes for *adat* communities to maintain their character.

B. Land Disputes

Respondents at the research site report an increasing trend of land disputes. These conflicts may be divided into two categories:

1) Land disputes within a family, caused by a difference in opinion as to division of inherited lands. *Adat* land division based on the

assumption of unlimited land lead to society freely opening up lands and forests. The increased population which contrasts the stagnant growth of productive land leads to multiplying land disputes between families.

2) Inter-village conflicts. The natural borders between villages previously recognized, suddenly become problematic following an injection of outside capital. An *adat* chief put it succinctly: "village borders blur at the sight of investors with money."

Conflicts between tribes, and between *adat* communities and transmigrants, are not considered important at the research sites, as they only occur very rarely.

C. Choice of Law

On average in *Flores* and *Seram*, around 90 per cent of the respondents with access to agricultural land say that the land belongs to 'me or my family.' In spite of the individual or family ownership claims, less than 40 per cent of the respondents say they have a kind of formal land certificate for their productive land. For those who say they have a certificate, it normally covers only a minor fraction of the total land at their disposal, typically an irrigated rice field or an intensively used agricultural plot close to the village centre. As in the case of housing plots, the certification of productive land made by the BPN covers only a minor share of the land reported as certified by the respondents. Other kinds of certificates are issued by judicially informal institutions, such as clan elders or village leaders. In spite of the limited formal and national certification, remarkably, 97 per cent of land users in *Seram* are of the

opinion that their user rights are permanent and secured. The share is somewhat smaller but still high in *Flores*, at 55 percent.

As many as 90 percent of the survey respondents say that productive land in their village is distributed according to 'fair principles'. Communal consensus and obligations to ancestors are mentioned as the most important land distribution principles. At the same time, a clear majority of the respondents - 52 percent in *Flores* and 97 percent in *Seram* - say that land in their village could have been distributed more equitably or given under more reasonable conditions. The main argument used for having a different system of land distribution is to have land user rights spread more evenly among all village families. In *Seram,* 53 percent of survey respondents also say that land user rights should be distributed more evenly among genders.

In both provinces, the most respected dispute settlement mechanisms are based on *adat*, and the *adat* courts are said to be born out of the real needs of the *adat* law community. This type of dispute settlement is perceived to give more justice and legal certainty to the local people. The involvement and impact of the adat courts' decisions are felt and obeyed more readily by the locals than any decision made by government-established courts. In *Flores*, there is the traditional institution of *mosalaki*, which are *adat* leaders chosen by the local community. The authority of *mosalaki* councils in the adat law system includes legal dispute settlement at the village level and acting as judges in inter-village conflicts. In *Seram*, there are the institutions of *saniri* and *lattupati*. *Saniri* is a village-level court, focusing on land dispute settlements, and *lattupati* is a forum of village heads or kings (*rajas*), focusing on inter-villages disputes.

Asked who should be responsible for dividing land and deciding ownership borders in a potential certification or land redistribution process, most survey respondents clearly point to the traditional land guardians, the *mosalaki* or *raja*. Traditional rules and communal assemblies also in still much higher trust among ordinary people in terms of carrying out such tasks than state government institutions in both provinces. The survey respondents hardly have any knowledge about state government laws and institutional responsibilities related to land ownership and use. Representatives from government agencies related to land use are generally associated with private business interests, corruption and military force.

We conclude this discussion by stating that customary law is clearly a more respected instrument for organizing land user rights and solving land disputes than national laws and formal judicial institutions.

D. Incompatibility of Adat Law, BAL and International Law on Land Rights

On the international plane, Indonesia's recognition over its indigenous societies are somewhat problematic.[22] For example, while Indonesia has submitted itself to most ILO conventions concerning labour law, it has yet to ratify ILO Convention 169 on Indigenous and Tribal Peoples. In other respects Indonesia is legally bound to respect the rights of indigenous communities. The preamble of the 1992 UN Convention on Biological Diversity, ratified via Act No. 5 of 1994:

22) Adriaan Bedner and Stijn Van Huis, The Return of the Native in Indonesian Law: indigenous communities in Indonesian legislation, Bijdragen to the Taal-, Land-en Volkenkunde Vol. 164 No. 2/3 (2008), pp. 165-193

> *"[Recognizes] the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components"*

What is interesting is that the official Indonesian translation of the convention translates the term "indigenous" not as *adat* but as *lokal* and *asli* (local and genuine). The latter terms are meant to indicate ethnic Indonesians as opposed to Indonesians of Chinese, Arab or Indian descent, which effectively nullifies the purpose of the convention. However, if a conflict should arise Article 42 of the convention holds that inter alia the English version of the text would hold primacy over the Indonesian translation.

The constitutional recognition of *adat* communities and *adat* derived rights are found in Articles 18(B) of the 1945 Constitution:

> *"The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law."*

And Article 28i(3) of the same:

> *"The cultural identities and rights of traditional communities shall be respected in accordance with the development of times and civilizations"*

It must be noted that the terms by which *adat* derived rights are recognized are subject to the development of times and civilization as well as the interests of the Unitary State of the Republic of Indonesia –unitary because there is a very real fear of separatism within Indonesia's politics.

In the previous iteration of the Indonesian Constitution, indigenous communities were given a relatively wider berth by virtue of then Article 18, which allows for divisions of Indonesian territories based in consideration of deliberation in the government system, the right of origin and special territories. The elucidations to the old Article 18 notes that there are 250 self governing entities and autonomous communities, all of which were effectively abolished with the newest amendment to the 1945 Constitution. Thus as greater development of regional autonomy and more complex rules on land and forestry laws are being implemented, one may argue that following the reformation era constitutional protection of *adat* derived rights have actually decreased.

E. Forms of Land Registration and the Impact to Social Livelihood

Besides regulating land law reform, land use and various forms of land rights, BAL also deal with the critical issue of land registration in Article 19:

(1) To guarantee legal certainty, the government shall carry out land registration throughout the territory of the Republic of Indonesia in accordance with provisions laid out in Government Regulation.

(2) Registration as mentioned in Sub-article (1) above comprises:
   a. Land mapping and book-keeping.
   b. Registration and transfer of land rights.
   c. Issuing documentary evidence of land rights, serving as evidence of high probative value.

(3) Land registration is conducted by the State and society in view of the circumstances, the purposes of socio-economic traffic, and possible implementation, according to the Minister of Agrarian consideration.

In the elucidations to Part IV BAL –which contains provisions land registration- it is noted that is considered as a "basis to create legal certainty." It elaborates on the step-by-step process for land registration based on areas and legal subjects, in greater detail below:[23)]

> *Article 23, 32 38 are meant for land rights holders and are intended to enable them to obtain legal certainty concerning their rights. On the other hand, Article 19 is meant to be an instruction for the government that land registration in the nature of rechts-kadaster be administered throughout Indonesia in order to provide guaranteed legal certainty.*
>
> *This registration will be implemented by taking into account the interests and condition of the State and the people, the needs for socio-economic movements, and the possibilities open in terms of personnel and manpower. In view of this, the cadaster will be implemented first in cities and subsequently on a gradual basis, throughout Indonesia.*

23) BAL, General Elucidations Part IV

> *In line with its purpose, namely to provide legal certainty, the registration is compulsory for every land right holder. Otherwise, the implementation of land registration – which obviously requires manpower, equipment and money in high quantities – would be meaningless at all*

Land registration is conducted based on the principles of simplicity, ease and citizen-based.[24] In the registration system as regulated in Articles 19, 23, 32 and 38 a negative assumption is used, where a person's land certificate may be revoked, if another party could prove that they deserve the land certificate through court decision. In simpler terms, this model allows for possession so long as other persons cannot prove their entitlement to such rights.[25] This system under the BAL recognizes the registration of rights as opposed to deeds; the government would recognize a right and issue proof in the form of a land certificate. Budi Harsono saw this as also implying a positivist view, since high probative value is attached to the certificate.[26]

Land registration under the BAL remains undefined, as was the case with Government Regulation No. 10 of 1961 on Land Registration. A definition was finally given by Government Regulation No. 24 of 1997 which replaced the 1961 regulation. Article 1(1) states that land registration is a series of acts carried out continuously, sustainably and in an ordered fashion, by government, and comprises of collection, analysis, book-keeping, presentation and care, of physical and legal data, in the form of maps

24) BAL, Elucidations, Article 19

25) Chaerul Basri, *Pendaftaran Tanah,* diakses pada http://datatanah.peradabanmelayu.my/index.php/pendaftaran-tanah/36-pendaftaran-tanah/39-pendaftaran-tanah pada 05 desember 2013

26) Pendaftaran Tanah di Indonesia, diakses pada http://pajarr.blogspot.com/2011/09/pendaftaran-tanah-di-indonesia.html pada 05 Desember 2013.

and lists, regarding plots of land and housing units, including issuing certificates denoting land rights and ownership rights to apartment units, as well as corresponding rights. The above definition also expands the scope of land registration to individual housing units. Paragraph 9 contains more specific matters now related to land registration:

a. Plots of land to which ownership rights, cultivation rights, building exploitation rights and right to use;
b. Right to manage lands;
c. Wakaf (form of Islamic bequeathed) lands;
d. Ownership rights over apartment units;
e. Security rights;
f. State lands.

In addition to expanding the objects of registration, the 1997 Land Registration Regulation also broadened the principles and goals of land registration. This is noted in Article 2 which states that "Land registration is conducted based on the principles of simplicity, safety, affordable, cutting-edge technology and openness. Meanwhile the purposes of land registration is reaffirmed in Article 3, and expanded in Article 4:

a. To provide legal certainty and protection to the land rights holders, holders of apartment ownership rights and other rights. To that end, land right holders are issued land right certificates.
b. To provide information to relevant parties including the Government, so that necessary data for legal actions taken concerning registered plots of land and apartment units. Therefore, both physical and legal data over such registered plots and units are open to public.

c. To achieve administrative order in land law. All plots of land, apartment units, including their transfer, reclamation and deregistration must be registered.

The new government regulation pushes for land registration through a systematic but sporadic process. Systematic registration is based on a work plan carried out in local districts as set by the Minister, whereas sporadic registration is conducted in villages and districts which have yet to be set for systematic registration.[27] Even so, estimates point to large areas of land and various rights which have yet to be registered. Uncertified land is estimated to cover 25% of urban areas and 70% for rural areas. Conservative estimates of the land registration process puts the completion date sometime in 2143.[28] One of the critical challenges facing registration is the matter of ulayat rights. This government regulation does not accommodate for the registration of *ulayat* rights, which leads to a much tougher procedure as compared to other forms of rights.

Ulayat rights is implicitly recognized but was never given a legal framework by which to register it. In fact, it goes on to regulate conversion of *ulayat* lands which may be registered. Article 24 states:

(1) A land right resulting from the conversion of an old right shall be evidenced with written documents and witnesses information and/or statements which are evaluated by the Adjudication Committee in the case of systematic registration or the Head of the Land Office in the case of sporadic registration as having an adequate content

27) Government Regulation No. 24 of 1997 on Land Registration, Articles 13(1), (2) and (3)

28) Ratna Juita dan Heni Yuanita, *Permasalahan dan Solusi Pendaftaran Tanah Pertama kali di beberapa Kantor Pertanahan.* Jurnal Iptek Pertanahan, Vol. 1 No. 1 November 2011. p1

of truth for purposes related to the registration of the right in question, of the right holder, and of other parties rights which encumber it.

(2) In the case where there is not any evidence or there is no longer any evidence as carried out on meant in paragraph (1), the recording of the right in question can becarried out on the basis of the fact that the land parcel in question has been physically possessed for twenty (20) consecutive years or more by the person applying for the registration of the right in question, under the following conditions:

a. that the possession of the land parcel in question has been made in good faith and in a transparent way by the person in question as the party which is entitled to it;

b. that the possession of the land parcel in question was not questioned by the relevant adat law community or the relevant village/*kelurahan* community or other parties either before or during the period of announcement as meant in Article 26.

The above provisions clearly open room for conflict, when the land to be registered is still in the possession of *adat* law communities. Its evidentiary proof will also be problematic since land certificate for adat possession or ownership is not accommodated. This occurs at both research sites in *Flores* and *Seram*.

Overall, it is clear there is disparity in the meaning of 'legal certainty' in land ownership in Indonesia. In big cities, legal certainty in land ownership is proven by land certification. On the other hand, in rural areas of East Indonesia, '*adat* law legal certainty' is in the form of verbal agreement of land ownership/management by all tribe members and

guarantee from the head of the clan. The fact that *adat* law in rural areas of East Indonesia gives more legal certainty (and security) for the *adat* community reflects that:

(1) The *adat* communities are not completely well informed of Indonesia's land registration and certification system.

(2) The current land certification system does not quite fit the need of adat land ownership and management. While the national land certification system offer an individual type of ownership (one piece of land can only certified if it is owned by one individual), the *adat* community ownership or management rights are communal, one piece of land (and forest, coastal areas) are owned by one single community. For the *adat* people, there is no logic of certifying the land under one individual's name, even if it is their head of the clan, because the land belongs to all of them, not just one person.

(3) The *adat* community acknowledged that land certification is an important matter, but it is not a priority. They think that land certificate will come handy when there is a land conflict, but the economic value of a land certificate can not be counted. They perceive land as part of their identity, and hence can not be sold. So the government 'idea' of using land certificate as a 'mortage' for people to get loan/capital from the bank, do not resonance well in the rural areas of East Indonesia.

(4) Land, as part of their *adat* identity is only start to weakened, when there are some outside investors offering them things that the adat communities can not refuse;

(5) Land conflict resolutions in the study areas, the majority of them are solved by *adat* dispute settlement mechanism. The study suggests this is due to: (i) Trust. the trust of the *adat* community to their own *adat*

law is higher than their trust to the national law. Most of the *adat* people interviewed for the study did not even recognize any types of national law in relation to land (besides certification). (ii) Process. The process of the dispute settlement in *adat* is more acceptable and familiar for the adat people. On the other hand, they know nothing about the process of land dispute settlement in the national court. This includes the types of institution responsible in managing land dispute, the fee that they have to pay for filing a dispute, etc. (iii) Solution. *Adat* court has different ways in solving disputes than national courts. In relation to land disputes, in the study areas, there are cases which were solved in a 'win-win' solution. The *Adat* elders can sometimes play a role as a mediator, rather than a judge in settling a dispute. The national court has a different rules and procedures, which sometimes hinder a win-win solution. *Adat* disputes, which are brought to national courts, are usually public domain disputes, such as criminal action of killing a person, war between clans, etc.

(6) This study suggest and conclude that in rural areas of East Indonesia, when it comes to land issues, the law which protects and is in touch with everyday living of the community is *adat* law, not national law.

Ⅳ. Comparison on Land Rights Laws in Indonesia and Korea

From *Chosun* Dynasty through Japanese colonial period to the Republic of Korea, through the radically different types of government the laws on land rights have changed accordingly. It is notable that the modernization of the land rights in the legal system has been performed and settled in a rather short period of time. The main force behind such fast adaptation of modern legalization of land rights perhaps could be found on the high-degree economic growth Korea achieved in short time, that the land as property with value inevitably was attached to the economic growth.

It is truly astonishing that an electronic register system of land ownership has been implemented and currently in use, along with the online procedures that makes registration of real estate fast and easy. Despite the concerns raised on authenticity issues that are integral in the registration of lands, the system's simplicity and transparency that leads to the reliability and broadened application of the law is worth to be appreciated.

Indonesia, as a country that has deep traditional root on land rights system that continuously employs *Adat* law and tradition along with its modern law, shows vivid differences with Korea where the law's adaptation to modern legalization and high-tech infrastructure is in fast fashion. Below, comparison on essential features of laws on land rights are portrayed.

A. Historic Developments of Land Rights Laws in Korea

Lands, especially farm lands that consisted most of the lands of the country in *Chosun* Dynasty, were free to sell, inherit, or rent. Contrary to what some scholars argue that the modern real estate ownership was established through the Japanese colonial period, the full ownership of lands back in *Chosun* Dynasty evidences that such legal modernity on land ownership existed long ago.[29)]

During the Japanese colonial period, Japanese Civil Law was the main law that applies to land rights, while some customary law and law on cultivation rights from *Chosun* Dynasty were followed on exceptional cases.[30)] Those exceptional cases of applying Korea's traditional customary law ceased by the end of the colonial period. Along with applying the Japanese Civil Law as the foundational law for land ownership, the Japanese colonial government performed cross-the-board Land Investigation Business, through which a great proportion of lands were assigned to Japanese governments, businesses, and people from Korean. No doubt that most Korean farmers lost their cultivation rights that have been honored through customary law until that time.

Perhaps the most prominent and important legislation on land rights taken by Korean government was the Farmland Reform Act in 1949. With the purpose of distributing farmlands to farmers to promote self-sufficiency of farmers, successful demolition of landowner-tenant farmer

29) Byung-ho Park, *Hankukui Bup* (Law of Korea), King Sejong Memorial Business Association, 1999, pp.170-175

30) Article 12 of *Chosun Minsa Ryung* (Civil Laws of Chosun), enacted on March 18, 1912

relationship through confiscation and distribution both with compensation was accomplished. Establishing a large group of independent farmers was also a meaningful achievement of this law, but the most important point that this law proposed is that it was the first law on the restrictions of land rights, which may seem contradictory to the principles of the free to contract and the free to possess.

The Civil Law provides the fundamental rights of owning land as it defines land ownership as having the right, within the scope of law, to use, take the profits of, and dispose of, the article owned.[31] This definition implies that when such rights are infringed upon, compensation for damage could be claimed, which sheds important features on disputes and settlements later in this chapter.

After the Farmland Reform Act and aside from the Civil Law, Laws on land rights in Korea may be categoried into two: One for development of land, another for conservation of land. The former may include Framework Act on the National Land, National Land Planning and Utilization Act, Balanced Regional Development and Support for Local Small and Medium Enterprises Act, Industrial Sites and Development Act, Seoul Metropolitan Area Readjustment Planning Act, Special Act for Planning for Administrative Center Comprehensive City, Urban Development Act, Special Act on the Development of Enterprise Cities, Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents, and Special Act on the Promotion of Urban Renewal, while the latter encompasses Natural Parks Act, Act on Special Measures for Designation and Management of Development Restriction Zones, and Act on Urban Parks, Greenbelts, Etc.

31) Article 211, Civil Law

There are many laws related to land in both Indonesia and Korea; however, one striking point that sticks out from Indonesia when compared to the historic developments of Korean law is the fact that *Adat* law coexists with formal law. Not only *Adat* law maintains its format as the traditional law that people of the community adheres to, it is surprising to learn that *Adat* law is alive and well that community members around the country are still owning and using lands in accordance with *Adat* law. This may seem as a hinderance to the unification of all laws and regulations of land rights, on the other hand, honoring the *Adat* law may have been the reason behind less disputes and distress in large scale. In Korea, for example, through the colonial law and the cross-the-board new law after independence, the ownership system was completely overhauled, which at the end paved the way for today's unified legal system, and it produced major pain and agony across the country for both land owners and peasants without land.

B. Land Use and Ownership in Indonesia and Korea

Unlike Indonesian situation where the full ownership of certain land is either unclear legally or not recognized due to customary law that those uncertainty of legal ownership presents problems on the land use, in Korea, restrictions and regulations based on law may be the bigger issues in terms of exercising one's ownership right of land.

National Land Planning and Utilization Act in Korea divides national lands into 16 areas by purpose, 12 zones by purpose, and 4 districts by purpose. Besides this law, there are more than one hundred regulations

allocating certain area/district on purpose that are maintained and managed by the central government. As such, concerns regarding hierarchy of National Land Planning and Utilization Act and other regulations, over-lapping of regulations with each other, contradicting allocation of areas and districts, lack of pre-arrangements, non-transparency of the activities regulated, and procedural insufficiencies are raised. These issues led to the enactment of Framework Act on the Regulation of Land Use, which states the foundational concepts about designation and maintenance of areas and districts by purpose.

Having an instruction available as a requirement on the law for the standards of approval for citizens in terms of their use of the land, procedures for such approvals, and the necessary documents for application is a measure to maximize effective use of land in accordance to the designated zones or districts while not obstruct citizen's right of use on their lands. When a plot of land is prohibited from being sold by a contract, the owner, whose ownership right to sell the land was infringed by the government, has the righteous right to claim the government to buy the land instead so that he may get paid.[32)]

C. Registration of Land in Indonesia and Korea

The most striking different between Land Rights Laws in Indonesia and Korea can be found on the registration status of land. While only 5% of land in Indonesia is formally registered for private ownership or user rights while majority of lands are registered in Korea. Moreover, with the

32) Article 123(1), National Land Planning and Utilization Act

passage of the latest Registration of Real Estate Act in April of 2011, the computerized register system was established, that the current real estate registration system holds a completed digital record of all registers.[33)]

In the computerized system of registration of land, it would be much easier to determine which land parcel belongs to whom, from when, with what conditions, and many more features of the land in no time, significantly enhancing transparency of land ownership for any future transactions. To establish such system and to keep it up and running, there are a couple of assumptions that needs to be made – first, exact land survey can be performed and shared with the registration department, second, education on people of computerized system must be done to solve the computer-illiterate issues, third, the infrastructure to securely operate the system must exist, and fourth, the method to verify authenticity of individual landowners need to be devised.

The first two conditions were not much of an issue as the department on land registration works closely with the department in charge of land surveying, and Koreans are already tech-savvy enough to understand the rather simple registration procedure online, with the help of the detailed assistance and educational booklets produced. The latter two, however, are still points disputed and addressed as areas that needs to be supplemented. Clearly authenticity issues and the security online is progressing to the worse direction along with the technical advancement that forging and hacking skills are getting meticulous ever.

33) Kwang-dong Park, Changes and Recent Trends of Korean Registration of Real Estate Act, The 9th ALIN Expert Forum on Land Rights Law in Asian Countries, Booklet p.56

V. Conclusion

Through the review and analysis of the laws in Indonesia and Korea, following points the land rights could be made for Indonesia:

(1) Increase the awareness of the importance of land certification in the rural areas of East Indonesia. Disseminate the importance of securing land with the certification in relation to loosing your land to big companies. Although currently the situation is still stabile due to the fact that *adat* law is still intact, the danger of incoming investment from outside actors taking away land is very high. Companies with large capitals can offer funds that can not be refused by the *adat* communities in the rural areas. Companies with licenses from Jakarta can also come and evict the *adat* community because the *adat* 'legal certainty' of land, can not go above and beyond the national 'legal certainty' on paper (licenses).

(2) Adjust the current land certification system to the needs of the *adat* and local communities. Once they understood that they can certify their land in accordance to their rights of management (communal instead of individual ownership), there is a big opportunity that adat communities in rural areas will care more about their land certification.

(3) Increase trust to the current judicial system and disseminate the information of procedure needed to file a claim in court. Transparency and accountability also need to be shown to the adat people in the rural area, so they know that they can trust their national government. *Adat* court can also still take place and have a role in the dispute settlement mechanism. Acknowledgement from the judicial system of the already

known-for-centuries adat dispute mechanism will also strengthen Indonesia's legal pluralism.

As for Korea, the high registration rate and the nation-wide coordination of developmental plan of land can be presented as the features to be appreciated on land rights law. As for the suggestions for improvements, below are a couple of thoughts:

(1) Involvement of individual landowners to the National Development Plan through postings, public hearings, and online discussion participations. The already-decided area/district/zone by purpose are by law required to be posted for public but the law is not clear as to how much the public should be allowed to be included in the planning stage. It is only natural for land owners to decide for the best use of the land and they would comply better if their opinion were reflected on the planning or at least they were not singled out in setting the big picture as to how their land will be designed to be used.

(2) Guarantee Authenticity of identity. With the electronic registration and online procedure, verifying one's identity for legal document is more important than anything else. Innovative verification system such as Signature Verification is introduced and being used, however, whether the authenticity is reliable still is another issue. As the technology develops further, forging authenticity of signature may be an easy work and that may be the task to tackle on for the government to think carefully about.

(3) Security of the electronic infrastructure. In the same vein with the authenticity of signature verification, the Security of the electronic infrastructure may be the bigger issue to resolve. Although hard copies of the electronic registration remained, again in a highly technological society, having a paper back up shall not be the only solution for any possible

security breach. The entire system moved to the online world, and a single disruption online may cause serious disruption in the real estate market and possible to the economy of the country as a whole.

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