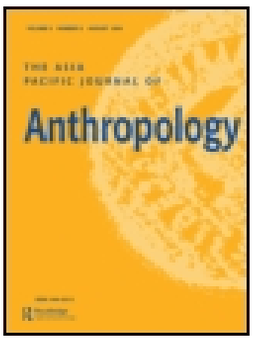

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Adat in Indonesian Land Law: A Promise for the Future or a Dead End?

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At present the contestation of the Indonesian state's dispossessory policies regarding land and other natural resources is dominated by a discourse based on adat. This situation is reminiscent of the colonial period, when invoking adat was a relatively effective means of protecting Indonesians from losing their land to plantation companies supported by the Netherlands–Indies government. However, adat lost its traction when Indonesia became independent and the new state started to vigorously pursue nation building and economic expansion. Only after the end of the New Order in 1998 did civil society groups revive the adat defence against dispossession. This article analyses current debates and developments concerning the place of adat in national land law and its potential for protecting communities against dispossession of their land by the Indonesian state. We argue that the promotion of adat has produced few concrete results and that it is unlikely to be more successful for this purpose in the future. Given Indonesia's current social and political realities, any land rights strategy for protecting people against dispossession that is based on indigeneity is problematic, and alternative approaches are needed.

Keywords: Land Law; Adat Communities; Customary Land Tenure; Indonesia

Introduction

If today we read about adat[1] in Indonesia's newspapers or popular media, in most cases there is a link with land disputes. This link is not exclusive: after the demise of Soeharto's New Order in 1998, the political meaning of adat, as something to denote the spiritual unity and the uniqueness of the Indonesian nation (Bourchier

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2007), made way for the notion of adat as something local with which to resist the national or the regional government (Henley and Davidson 2007, 10–13). Yet adat features most prominently in debates and conflicts about land and has become the basis for a major argument in resisting the dispossession of local communities by the state. This use of adat is remarkable, since alternative discourses centred on social justice and land distribution had become dominant after Indonesia gained its independence. Moreover, soon after the start of the liberalisation and democratisation known as *Reformasi* in 1998, it became clear that the strategy based on adat did not lead to the immediate return of land taken by the state or state-sponsored corporations. In an article from 2008 on the position of indigenous communities in Indonesian legislation, Bedner and van Huis (2008) found that the indigenous discourse on adat had moreover not produced any significant results even at the legislative level.

This article continues the analysis of changes in state law that concern adat as a basis for entitlement to land, and the effects of such changes in practice. It includes the widely discussed 2013 Constitutional Court's ruling that adat forest land is no longer part of the state forest but belongs to the relevant adat community. This judgment led to speculations that millions of Indonesians could now reclaim their lands from the state. However, this hope soon turned out to be as hollow as the one for legislative change, and we will argue that the legal and political basis for the success of a land-reclaiming strategy based on adat has continued to be thin (similar to van der Muur 2019). We start with a discussion about the rise of adat as a prominent concept in colonial land law. We subsequently look at adat after independence and in particular how it was reshaped during the making of the Basic Agrarian Law (BAL) of 1960. We then consider developments regarding adat community rights after 1998, and end with a discussion about the most recent legislative developments.

Our argument about legislative developments—the main focus of this article—is based on data we gathered about legislation and judicial decisions as well as from NGO reports. We have also used data from field research conducted in 2018 by Yance Arizona, who interviewed NGO activists, members of parliament and government officials about land-related issues. Other data were collected during Arizona's previous engagement in policy advocacy at the national and district levels concerning state recognition of adat communities and customary forests.

Adat in Colonial Land Law

The prominent role of adat in land law in Indonesia goes back to colonial times, when Leiden Law Professor Cornelis van Vollenhoven used the concept to attack the land policies conducted by the Netherlands' Indies administration. In 1870, the Dutch legislature had adopted a new land law for Indonesia that opened up the colony to private capital for developing new plantations. The Netherlands Indies' government at the time argued that all land not used by the local population was so-called 'waste land', which the state could give in lease to private companies. Against this interpretation van Vollenhoven argued that much of this land actually belonged to adat law

communities under a communal 'right to avail' (*beschikkingsrecht*), and therefore the state had no right to give it in lease to companies.

This view was never fully endorsed by the legislature or the government, but van Vollenhoven certainly made it more difficult for the Netherlands Indies' government to deny Indonesian land ownership over uncultivated land (Burns 2004, 89; von Benda-Beckmann and von Benda-Beckmann 2011, 179–181). His success can be measured by the huge sums of money the Dutch colonial-capitalist lobby was willing to spend on a new, competing Faculty of Indology in Utrecht. This institution, which was established in 1925, was meant to educate colonial officials in such a manner that they would be more sensitive to the concerns of private capital in the colony. The professors at the new faculty were also supposed to promote legal theories going against the adat theories of the Leiden school (Henssen 1983, 51–55).

The main problem with van Vollenhoven's line of argument and its emphasis on adat was that the Netherlands' Indies society and economy were changing rapidly. The penetration of capital, the increase of migration, and the education of an Indonesian 'modern' elite reduced the relevance of adat as the main organising principle of Indonesian society. As a result, a strategy that relied on the key concept of an 'adat law community' in defending Indonesian communal land against encroachment became tenuous. This problem was already evident during van Vollenhoven's lifetime.[2] However, it became more compelling after Indonesia became independent and adat almost disappeared from political debates.

Adat in the Formulation of the National Land Law

After Indonesia became independent in 1945 and implemented a nationalisation program in the late 1950s, there was no longer a need for an adat law theory to defend land against encroachment by a foreign empire and its agents. From now on land was meant to serve the economic development of Indonesia for the benefit of all Indonesians (Bedner 2017, 164–165). In the new state's ideology of nation building and modernisation, adat law and the right to avail, in particular, turned from a line of defence against exploitation into an obstacle to establish a unified national land law. Moreover, adat law communities were scarcely ever represented at the national level to champion their interest of securing traditional rights over land.

Generally speaking, we can distinguish three basic positions regarding the role adat should play in Indonesian national law. Those championing the first position argue that adat law should constitute the core of national law. Abstracted from local reality, adat law can serve as a vehicle for nation building as a hallmark of Indonesian identity, and as a code word for 'the original Indonesian culture' (Koesnoe 1996, 15–19). Mohammad Koesnoe, the main proponent of this approach, thus sought to replace the common understanding of adat law as a local system and a source of local autonomy, instead inventing a new, national 'adat law'. This new, symbolic adat could provide legitimacy to the modern legal system transplanted from Western examples (Koesnoe 1970, 21–22).

Those promoting the second position consider the relationship between adat law and national law from an evolutionist perspective. In their view, adat law is a vestige from the past, which over time is bound to disappear. According to Soepomo, the best-known proponent of this view, adat law was hence not something to be very concerned about. For the time being it needed to be incorporated into the national legal system—with some adjustments to align it with national developmental interests (Soepomo 1947).

Those taking the third position follow in the footsteps of the Leiden school. They continue to see adat law as unwritten law embedded within social practice in contrast to the national law created by the state. This view was clearly outlined in a 1975 national seminar on 'Adat Law and the Development of the National Law' organised by the National Law Development Agency of Indonesia. Here adat law was defined as indigenous Indonesian law, unwritten, and with some religious influences (Abdurrahman 1980, 63). Unlike Koesnoe, the proponents of this view do not propose to resolve the tensions between adat and state law by turning adat into an abstract set of principles. In this manner they open up space for a more open, empirical approach in identifying such tensions and in making informed policy choices.

In 1960, Indonesia enacted a new statute on land law that is still valid today. The Basic Agrarian Law (Law 5/1960 or BAL) reflects the dominance of the first and second position regarding adat law at the time. Its Article 5 contains a statement that the BAL's basis is adat, following Koesnoe's interpretation by adopting a Western system of land rights with adat labels attached to these rights (Fitzpatrick 1997, 183–184). The right to avail—now called *hak ulayat*—was seriously curtailed: its continued existence had to be proven and it could always be overridden by the public interest (BAL Art. 2(4) and Art. 3). In short, the BAL more or less gave the government a free hand in dismissing adat claims to communal land ownership (Fitzpatrick 2006, 7–9).

The BAL's lack of support for local adat law communities can be partly explained by the prominence of the Indonesian Communist Party (Partai Komunis Indonesia or PKI) in championing the interests of poor peasants and land labourers. The PKI had shown little sympathy for adat communities and their roots in the past. It rather focused its attention on the land reform program accompanying the BAL, which was informed by the PKI's revolutionary ideal of equal land distribution (Utrecht 1969).[3]

The land reform agenda was limited in scope, since it did not include redistribution of forest areas and plantations. These were excluded because the government wanted to keep them under state control (Rachman 2012, 37–44). Outside Java, where adat land law systems were still deeply entrenched, neither the government nor the PKI made serious attempts at land reform. In rural Java, the PKI deployed the BAL and the land reform program of Law 56/1960 with different degrees of success in targeting large landholders; mainly village elites and Islamic clerics (*ulama*) (Rachman 2012, 51–52). Simultaneously, the pressure on land rapidly increased. From 1945 to 1960 the Indonesian population grew from 73 to 93 million and more than 71 per cent

of the working population was still employed in agriculture (*Statistical Pocket Book of Indonesia* 1963, 273). As a result, the demand for land continued to grow.

The replacement of Soekarno's Guided Democracy by Soeharto's New Order meant a major turn in government ideology and economic policies. The New Order put all of its stakes on capitalist development, but with a major role for the authoritarian state. The main proponents of the land reform program at the local level, the communists and their allies, were killed in the 1965–66 massacre. The fear and terror this instilled completely changed the options for political action at the local level, including for land reform (Utrecht 1969, 86–87; Heryanto 2006; Rachman 2012, 40). The new regime replaced the land reform program with a policy of economic expansion focusing on natural resource exploitation and plantation development, soon followed by industrialisation.[4] At the same time, the New Order supported small-scale farming and provided many peasants with the opportunity to shift to cash crops which substantially improved their income and livelihood (Henley 2012, 529).

The New Order's natural resource exploitation policy directly encroached on the rights of local communities and caused large-scale deforestation (FWI/GFW 2002, 23). As a basis the New Order regime used the 1969 Forestry Law, which determined that all forested areas—amounting to about 70 per cent of Indonesia's land surface—were under the control of the government (Fitzpatrick 2006, 9). The New Order had little consideration for adat communities and tried to bring them under its control—sometimes by creating centralised hierarchies of adat councils at the district level (von Benda-Beckmann 2013, 131–134), but more often by intimidation and violence. The underlying rationale was a ruthless development paradigm, with no place for communal undertakings. In line with modernisation theory the New Order considered the state to be the main driver of capitalist economic development and part of that process was to individualise land titles and get rid of communal forms of land holding. For this purpose the BAL provided an effective legal basis.

Another cause for local resistance was the transmigration program that resettled landless people from Java to other islands. Many local communities resented the preferential treatment the immigrants received from the government in getting access to land and credit (Adhianti and Bobsien 2001). Similarly unpopular was the resettlement program that intended to move small, dispersed local communities to a single location. In places such as Kalimantan the government used this policy to wipe out adat rights and empty land for forest exploitation (Césard 2007, 455). A third type of injustice was straightforward dispossession. Following dubious legal procedures the New Order appropriated large tracts of land for sometimes equally dubious 'development' projects such as shopping malls and golf courses. Those resisting such practices were frequently portrayed as communists and often ended up in jail (or worse) (Lucas and Warren 2013, 14).

However, not everything went smoothly. The large-scale exploitation of natural resources in the outer islands combined with massive land dispossession led to increasing resistance (Simbolon 1998; Sangadji 1994). At the same time, the land-titling projects on Java appeared to be much more difficult to implement than

anticipated (van der Eng 2016, 234–237). They led to all kinds of disputes, often caused by the fact that the rights in the BAL did not correspond with the rights used in practice (Bedner 2016, 67).[5]

Simultaneously three discourses against dispossession emerged: human rights, environmentalism and adat/indigeneity. These discourses were considered 'safer' than arguments based on egalitarianism or fair distribution of land. Separated or combined they are still visible in present debates about land law (Bachriadi, Lucas and Warren 2013, 309–312).

The first discourse—human rights—was developed in the early 1980s by human rights and legal aid organisations. These assisted rural and urban communities who were victims in national development projects. The best-known example is the conflict about the Kedung Ombo Dam, which started in 1985 and continued for more than 10 years (Fitzpatrick 1997, 199–202). Kedung Ombo was the start of a flurry of human rights activism that also addressed workers' rights, and the discrimination of women and the urban poor (Ford 2011).

The second approach—environmentalism—was stimulated by the New Order's relatively positive attitude towards environmental regulation. Environmentalism gained prominence in the early 1990s and provided NGOs, who were promoting broader agendas of social change, with some protection against the state (Cribb 2003).

The third approach—relying on adat/indigeneity—developed even later. In their efforts to support rural communities who were in land conflicts with state agencies and companies, legal aid and environmental NGOs (re)discovered adat law as a promising discourse against land dispossession. Adat law intersected with human rights and environmental discourses and had the advantage that it did not bear the dangerous connotation of land reform and communism. It was this discourse that became most prominent after 1998.

Adat Communities' Rights in the Reform Era

In 1998, Soeharto was forced to step down and his successor B.J. Habibie started a process of democracy and rule of law reform. During this *Reformasi* the results of more than 30 years of New Order land policies became one of the main targets of popular anger, and gradually regional autonomy and adat became the dominant framework for discussing land relations.

What was it that made adat so attractive to this end, more than 50 years after Soepomo's prediction that adat was bound to disappear? We can add that reliance on adat has a serious downside. For adat communities, adat is not only a normative framework for land relations, but also a central focus for collective identity. It can facilitate the exclusion of others and promote communal violence, as happened in Borneo and Sulawesi (van Klinken 2007, 1–3). Adat can thus provide a weapon against an external force, but at the same time be deployed by local elites to exclude whoever does not fit within the adat category (Hall, Hirsch, and Li 2011; Astuti and McGregor 2016). In the most extreme cases this has led to ethnic cleansing with hundreds of people

killed and thousands removed from their homes (Davidson 2008). Yet, many civil society organisations turned to the adat argument (van der Muur 2019).

One explanation is that adat resonated precisely with the intense feelings of regional identity the New Order had repressed for so long (Li 2000). Adat could be mounted as the local versus the national, the *Bhinneka* versus the *Tunggal* (Avonius 2003, 128–129; Acciaioli 2001, 88–89). Resistance against exploitation in the regions became integrated with a movement for regional autonomy, with a change in land policies as one of the goals (Tyson 2010). A second explanation—already mentioned above—is that in Indonesia a leftist discourse of land reform is problematic. This is the result of a combination of the ascendancy of neo-liberalism as well as of the particular Indonesian history of the left (Li 2010). A third and more practical explanation is that Aliansi Masyarakat Adat Nusantara (AMAN), the main organisation representing indigenous groups, was highly effective in promoting the adat discourse as the key alternative to the dispossessory and individualising policies by the Indonesian state (Fay and Denduangrudee 2016; Arizona, Wicaksono and Vel 2019). AMAN used the political space to turn the debate about land to adat and actively started promoting adat recognition as an agenda for law reform (ICRAF, AMAN and FPP 2003).

Soon the results of AMAN's efforts became visible at the regulatory level. In 1999 the Minister of Agrarian Affairs, Hasan Basri Durin, was present at AMAN's first congress, when representatives of adat communities accused his department of carrying responsibility for massive land dispossession (Rachman et al. 2012). Following the meeting, Durin promulgated the Minister of Agrarian Affairs Regulation 5/1999 (henceforth Ministerial Regulation 5/1999), the first regulation ever to contain a procedure for the recognition of adat law communities and their right to avail (Bedner and van Huis 2008, 185–186).

While symbolically significant, the procedure produced few results on the ground. Only a few communities have managed to obtain recognition and they have not been returned any land: they either already controlled the land, for instance the Baduy community in Banten province (Wiratraman et al. 2010, 79–81), or they encountered problems in implementation, as happened in Nunukan in North Kalimantan (Bakker 2009, 336–337). This is not surprising given the limitations inherent in Ministerial Regulation 5/1999. First, *hak ulayat* can only be recognised if the land concerned has never been the object of a BAL land right or concession. Second, the regulation does not apply to forest areas, where most land disputes occur. As already mentioned, these cover nearly 70 per cent of Indonesia's land surface (Bedner and van Huis 2008, 183; Moniaga 2007, 279).

Yet encouraged by the legislative success, AMAN and other NGOs started aiming at the reformation of higher level regulations. They first targeted the People's Consultative Assembly (Majelis Permusyawaratan Rakyat or MPR). This is Indonesia's constitution-making body which, at the time, also held the authority to promulgate decrees that are binding upon the government. AMAN and its allies managed to convince the MPR to adopt Decree IX/2001 concerning Agrarian Reform and Natural Resource Management. This decree rules that agrarian reform must recognise, respect and

protect the rights of adat communities as well as cultural diversity related to land and natural resource management. The decree thus rejected BAL's approach of conditional recognition and its underlying evolutionist theory (Arizona 2014).

During the same period (1999–2002), the MPR was in the process of amending the constitution. However, neither adat communities themselves nor the NGOs speaking on their behalf had any substantive representation in the MPR and they never managed to influence the amendment process as they had done in the case of MPR Decree IX/2001.[6] Articles 18B(2) and 28I(3) of the constitution therefore continue the conditional recognition of adat communities, in line with BAL, the Forestry Law 41/1999 and the Human Rights Law 39/1999. This means that adat communities have to prove that they have not ceased to be adat communities as a result of 'societal developments' and that their rights can be overruled by higher regulations because of 'the national interest' (Bedner and van Huis 2008, 171–172; van der Muur 2019, 38). Laws related to land and natural resources that were adopted after the constitutional amendment followed the same pattern (Arizona 2010).[7]

The only exception is the Village Law 8/2014. This Law enables the establishment of so-called adat villages, allowing adat institutions to be integrated into the village governance structure. This can be explained by the law-making process, as the MPs promoting the new law needed the support from AMAN (Vel, Yando Zakaria, and Bedner 2017). However, in practice few regions have introduced adat villages, for both financial and political reasons (Vel and Bedner 2015, 503–504). AMAN and its constituency were also disappointed with the new law, because contrary to what they had expected, it offered hardly any new means of contesting land dispossession, especially in forest areas.

At the same time, the Indonesian government came under increasing pressure from national and international organisations to recognise adat communities on the basis of the international standards for indigenous peoples. These organisations strongly emphasise the right to self-determination (Bedner and van Huis 2008, 168–169). At its second congress in 2003, AMAN concluded that a special law on adat communities would be the most effective instrument for achieving self-determination. It took some time to lobby the government, but during the celebration of the International Day of Indigenous Peoples on 9 August 2006, President Susilo Bambang Yudhoyono spoke out in favour of a special law for adat communities. However, the government took no further steps and AMAN itself only managed to produce a first draft law in 2011 (Arizona and Cahyadi 2013). AMAN then started to lobby parliament to include its proposal into the national legislative agenda. At AMAN's third congress, Speaker of the House, Marzuki Ali, promised to have the special law scheduled for debate in 2012, but eventually the debates were delayed for several years. Neither parliament nor the government showed any true commitment to take the matter further (we will return to this bill below).

In addition to legislative initiatives, AMAN has several times petitioned the Constitutional Court to challenge laws underpinning land dispossession.[8] AMAN achieved a major victory in 2013, when the Constitutional Court upheld part of its petition for the

review of Articles 1–6, 4(3) and 5(1) and (2) of the Forestry Law (MK PUU 35/2012). The Court determined that the word 'state' should be erased from the said articles and that as a result customary forest would no longer be part of the state forest area. However, the Constitutional Court also recognised the validity of the conditional recognition from Article 18B(2) of the Indonesian Constitution. The judgment therefore was not quite the breakthrough that many thought and it has hardly produced any changes on the ground.

Once again AMAN and its allies were more successful at the symbolic level, drawing the attention of the government and parliament to the issue of adat communities' rights (Arizona et al. 2015). During the euphoria about the Constitutional Court's decision, AMAN decided to support Joko Widodo (Jokowi) in the 2014 presidential election. After his election, Jokowi included six items of the AMAN agenda into his Nine Priorities Agenda (*Nawacita*): reviewing all land-related laws according to the principles of MPR Decree IX/2001 concerning Agrarian Reform and Natural Resource Management; implementing the Constitutional Court ruling on customary forest; deploying the Village Law for the benefit of adat communities; enacting a special law on adat community rights; resolving conflicts about adat land; and establishing a special state agency for accelerating the legal recognition of adat communities' rights.

Another favourable development for AMAN was Jokowi's decision to merge the Ministry of Forestry with the State Ministry of the Environment. This State Ministry had a history of collaborating with NGOs and the merger meant that the Ministry of Forestry became more accessible to NGOs. Indeed, some of the new ministry's officials became slightly more inclined to accommodate adat in their policies. Former NGO activists now assist the Ministry of Environment and Forestry as well as the Presidential Office, and they have managed to effectively promote the adat agenda.

In the end, these policy changes and institutional developments promoted the promulgation of a series of implementing regulations concerning recognition of adat communities and adat land. Twelve ministries and state agencies determined a Joint Agreement on Forest Area Consolidation, which included the legal recognition of adat forest as a strategy to accelerate the forest gazettement process in a fair manner (Bedner 2016).[9] Another Joint Regulation of the Ministers of Domestic Affairs, Environment and Forestry, Public Works and the Minister of Agrarian Affairs, issued on 17 October 2014 (and now replaced by Presidential Regulation 88/2017), provided new procedures for dealing with individual and communities' land claims within forest areas.

Likewise, many districts have enacted regulations and decrees concerning the recognition of adat law, adat councils, adat forest and the right to avail. At first sight these regulations seem to provide a genuine step towards real change. The Epistema Institute (2017) found that 69 district regulations and decrees on adat-related issues were enacted between 2013 and 2016; 538 communities were recognised as adat communities; 133 villages registered as adat villages; and 197,541.85 hectares of land were legalised as adat territories (Arizona, Malik, and Ishimora 2017, 1). These district-level

measures were followed by the recognition of the adat forests of nine adat communities in 2016 by Jokowi (van der Muur 2019, 47).

At first this looks as though, finally, legislation is being translated into practical results. However, the figure is far below the expectation of AMAN, which claims 40 million hectares of forest area as adat forest. Once again, the legislative changes look good, but their practical implications are limited.

During the process of assisting adat communities that try to obtain legal recognition, Arizona noticed the following problems. First, adat communities seldom conform to the image of homogenous and harmonious societies that AMAN promotes—an image that many scholars have criticised as a myth (Henley and Davidson 2007; White 2017; van der Muur 2018; Vel 2008, 72–73). Most adat communities are stratified and consist of diverse groups with conflicting interests (Arizona 2010; Zakaria 2016). Such divisions not only impair the application process, but also make it harder for these communities to answer the criteria of the relevant regulations. Second, the current procedures require recognition of the adat community before they can become a legal subject entitled to the land they claim. It is difficult for the district government to clearly define who exactly should constitute this new legal subject, as migration and 'inter'-marriage have often blurred boundaries between in- and outsiders. Third, the recognition process is complex and expensive. Not only does it require intense lobbying, but it also involves cumbersome assessments by research institutions. The nature of the procedure creates a dependency of rural communities on intermediary institutions, especially NGOs (Arizona, Wicaksono and Vel 2019). Willem van der Muur (2018) takes this point even further, arguing that it is crucial for an adat community to have 'relatively strong connections to influential state actors' for obtaining the legal status desired (see also Hirtz 2003).

The Current Debate on the Bill of Adat Communities' Rights and the Land Bill

Recently, AMAN has put most of its efforts into getting enacted the special Law on Adat Communities' Rights mentioned above and into improving the position of adat communities in the new land bill. Each of these draft laws has been submitted to parliament, but in both cases the process has been stagnant for years. As mentioned earlier, the Bill on Adat Communities' Rights was first drafted by AMAN in 2011. They found support from the Indonesian Democratic Party of Struggle (Partai Demokrasi Indonesia Perjuangan or PDIP) which, at the time, was in opposition to the government. However, the committee for preparing the bill for discussion was chaired by a member of Yudhoyono's ruling Democrat Party. This chair had clear political reasons to oppose the AMAN/PDIP initiative and was quite effective in slowing down the legislative process. The government team involved in the discussion was, moreover, led by a lower-level official from the Ministry of Forestry who had no authority to take any decisions. As a result not much happened.

During the presidential elections in 2014, the PDIP promoted the Bill on Adat Communities' Rights as part of Jokowi's presidential program. However, after the latter's

election, the PDIP lost interest. Even though it was the largest party in the parliament, and even though the legislative agenda is set by the president and parliament together, the Bill on Adat Communities' Rights was not included for discussion in 2015. AMAN then got support from MP Luthfi A. Mutty, a member of the National Democratic Party (Partai Nasional Demokrat/Nasdem). AMAN and Luthfi together ordered a new academic report for the bill and on this basis reviewed the 2011 draft.[10]

In 2016, parliament started the discussions about the new bill, but these did not run smoothly, in part, because, the adat-cause supporters were themselves not entirely happy with its contents in the end. During a workshop in April 2018—organised by the Ministry of Environment and Forestry—NGOs (including AMAN) and academics argued against the continued requirement of a district regulation for the legal recognition of adat communities' rights. The chapter on the evaluation of an adat community's legal status invited similar critique: it states that if an adat community no longer fulfils the requirements in the law, the government has the authority to revoke its status and take over its land. Finally, AMAN demanded that the provision about restitution and rehabilitation—which had been part of the first bill—be included in the new one too. This would ensure that the new law could be used to redress past cases of land dispossession.[11]

The representative of the Minister of Domestic Affairs leading the government team then raised a number of other issues to take the speed out of the process. In a letter (410/2347/SJ) to the Presidential Secretary (Menteri Sekretaris Negara) he argued that the bill would promote or even revive 'traditional' forms of religion—religions other than the six officially recognised by Indonesia, implying that this would be dangerous. He added the fundamental point that there was no need for a special law on adat communities, because all of its content was already covered by existing regulations. And finally, he added that the implementation of the law would require a considerable sum from the state budget, since it would provide for the payment of state compensation to adat communities.

The letter provoked an angry response from AMAN and its allies, who accused the Ministry of hypocrisy. A special law on adat communities had even been part of Jokowi's presidential election campaign program. The Minister responded that of course he supported the bill but that some of its provisions ought to be adjusted. In private interviews, officials from the Ministry of Domestic Affairs said that they in fact wished to obstruct the legislative process because they assumed that the result might interfere with their routine programs such as those for village development, land concessions for corporations and remote community empowerment.[12]

A similar story can be told about the Bill on Land. Parliament has discussed this bill since 2014 and it seems unlikely that it will be passed in the near future. Crucial issues have not been settled yet, including measures for land reform, and the establishment of a land bank and land court. AMAN and its allies have lobbied parliament to accommodate adat communities' rights, but they have not been able to present a solid proposal on legalising customary land tenure because there is a lack of ethnographic data. Another problem is that only a few individual MPs, rather than political parties, are

interested in the plight of the poor and landless. And finally, the Land Bill is supplementary to the BAL, and is therefore tied to the limitations this statute imposes upon the right to avail (*hak ulayat*) (Soemardjono 2015).

In short, at the time of writing, neither parliament nor government support the Bill on Adat Communities' Rights and they are divided over the Land Bill. Nor is there any consensus about answers to the main questions that must be decided concerning communal rights: how should an adat community be defined, what are their land rights, and what are the effects of legal recognition? As time passes, these questions become even harder to answer. Communities that have been dispossessed of their land or that have been using land without a formal title for many years are so diverse that they can never be fitted into a single national legal category (Zakaria 2016).

Supporters of adat propose two options for a solution to the problem of defining adat communities. One is to hark back to the colonial studies on the right to avail (*hak ulayat*) and the six criteria that van Vollenhoven elaborated on the basis of his archipelago-wide research. Today these criteria are seldom fulfilled; reference to colonial studies conducted about a century ago work for only a handful of cases of small, isolated communities (Zakaria 2016). Nonetheless, this concept is still the standard and law schools have continued to teach it as the 'true' form of an adat (law) community (Simarmata 2018, 447–448). Such use of the concept underpins the modern evolutionist approach to adat communities introduced by the Basic Agrarian Law that is now also part of the constitution (Art. 18B (2)). As already mentioned, this approach intends to dissolve adat communities into individual, 'modern' citizens with individual land rights and it has remained dominant until the time of writing.

The second option derives from international indigenous peoples' discourse. It is invoked by NGOs emphasising indigeneity and promoting self-determination. The origins of the concept of indigenous peoples lie in Latin America, the US, Canada and Australia, where a white settler population displaced and subjected the original inhabitants. In these countries there is still a visible division and huge power disparity between the groups. The absence of a dominant settler community in former colonies in Asia and Africa makes it much harder to promote policies based on 'indigeneity'; in these countries the rulers claim to be equally as indigenous as those rejecting their dispossessory policies. This also explains why the Indonesian government had no problem in signing the United Nation Declaration on the Rights of Indigenous Peoples in 2007, because the government denies that the declaration has significance in Indonesia.

Neither one of these two options seems to resolve any of the problems that the Bill on Adat Communities' Rights and the Land Bill intend to address. Neither one is helpful in promoting social justice in the present Indonesian context, given the current social structures at the grassroots level which do not conform to traditional definitions of adat law and the amount of communal land already appropriated by the state. What is needed for a solution is a systematic analysis of current land tenure problems and the related context based on ethnographic research in different locations. This may lead to new conceptual categories that could form the basis for the recognition of rural communities' land rights.

Alternatives to the Adat Land Claim

In the absence of such a systematic analysis we will venture a few preliminary thoughts about an answer to the following question: what might be viable alternatives to adat-based land claims in helping protect rural communities against dispossession? One such alternative would be a more flexible approach to the interpretation of the notion of an adat law community. Why be so strict and link it so much to tradition? Cannot traditions be changed or new traditions created? A flexible interpretation with less emphasis on adat institutions could expand the concept of adat community. An adat community could be an association of citizens that use adat as a core principle in the bylaws of the organisation, protected by the freedom of association and assembly. In this manner the complex procedure of existing regulation concerning the legal recognition of adat communities can be avoided. This approach should be applied carefully, for a loose definition of adat communities carries the risk of misuse by local elites who try to use adat to restore traditional privileged status from the past or to manipulate it for local election purposes (Arizona and Cahyadi 2013).

Another alternative could be the introduction of a new legal construct, the communal right (*hak komunal*). In 2016 some progressive officials at the Indonesian Ministry of Agrarian Affairs and Spatial Planning introduced this notion in Ministerial Regulation 10/2016. The communal right is quite similar to the right to avail, but it lacks the strict conditions required for recognition as an adat community, stipulating instead that a community has to have had

> physical control for a minimum of 10 (ten) consecutive years; [is] still extracting natural resources or utilising land directly in or around the particular region to meet daily living needs; [thus] becoming the main source of life and community livelihoods; and there being social and economic activities that are integrated with community life. (Art. 4(2))

Unfortunately, this promising idea has not been further elaborated upon or implemented since, as it has little support within the Ministry and few—if any—NGOs have been actively promoting it (see also Arizona, Wicaksono and Vel 2019). Even reported cases about recognition of *hak komunal* turned out to be canards. In 2015 the Minister of Agrarian Affairs and Spatial Planning claimed he granted 180 communal land certificates to Tengger communities in East Java, 168 communal land certificates to Dayak communities in Central Kalimantan, and nine communal land certificates to Papua communities in Jayapura. However, the Minister in fact did not provide any *hak komunal*, but distributed land titles only to individual community members. The single special feature was that the land certificates were co-signed by the village head (Negara 2016).

Finally, a solution could be to make use of an idea mentioned in the Land Bill: the right to manage (*hak pengelolaan*). This type of right is not found in the Basic Agrarian Law, but in some ministerial regulations. It is quite similar to the right to avail and it can, in theory, be held by a wide range of institutions, including villages (*desa*) and adat communities. To many land reform activists the right to manage has a bad

reputation because it has often been abused by the government to provide state-owned enterprises and departments with land planning and management authority, in this way circumventing the official rules regarding planning and management authorities (DPD RI 2012, 36–37). Yet, this does not detract from its potential as an alternative to the *hak komunal* and the right to avail, with the major advantage that the right to manage has been regulated in a fairly comprehensive manner.

Conclusion

After 1998 hundreds of land disputes resulting from the dispossession of rural communities escalated into the open. Those addressing such dispossession could rely on three lines of argument: one based on egalitarian ideas about land reform, one based on environmentalism, and one based on adat rights to land. Of these three the adat line of argument has become dominant.

The problem is that this argument is constructed on theories developed during the first quarter of the twentieth century when societal relations were quite different from what they are today. This means that to be effective they need to be adjusted to the present situation and so far this has not been achieved. Hence, the protagonists of this approach—led by the indigenous peoples' organisation, AMAN—have been quite successful in promoting legislative change at the national level, but this has hardly produced results on the ground. The evolutionist approach to adat rights has remained dominant among government officials who understand adat as something backward, an obstacle for modern economic development, and creating legal uncertainty due to the huge cultural variation of adat in Indonesia. According to the protagonists for the evolutionist argument, nothing needs to be done because adat rights will disappear in any case in the inevitable process of modernisation and nation building.

The weak spot in the evolutionist argument is that the typical adat communities of the past may be disappearing, but other types of community have emerged and they are, in principle, capable of exercising many of the land governance functions previously held by adat communities. Therefore, it would make sense for those promoting the adat line of reasoning to focus their energy on promoting a new understanding of adat communities that is more in line with the reality of most communities, instead of clinging to outdated concepts that the new legislation can translate into conditions for recognition that few communities can meet. This approach could be combined with the egalitarian land reform paradigm, which resonates with the current global rise of resistance against inequality and, in the end, probably provides the most powerful discourse in resisting the drive for more plantations, mines and shopping malls.

Notes

[1] By adat we refer to the local traditional systems of rights, beliefs and custom as they have evolved over time in different parts of Indonesia (Henley and Davidson 2007, 3–4).

[2] See in particular the contemporaneous comments by Nederburgh (Burns 2004, 185–188; von Benda-Beckmann and von Benda-Beckmann 2011, 187).
[3] The PKI's influence was also apparent in the government's policy to diminish sultanates' control over land and territory by abolishing the notion of 'sultan's land' (*sultan grond*) (Pelzer 1982, 59).
[4] The Land Reform Law was never abolished.
[5] This outcome is exactly as van Vollenhoven had warned 70 years earlier.
[6] Yance Arizona interviewed NGO activist (and later Human Rights Commissioner) Sandra Moniaga in June 2018.
[7] These include: the Oil and Gas Law 22/2001, the Water Resources Law 7/2004, the Plantation Law 18/2004 (later replaced by Law 39/2014), the Coastal and Small Island Law 27/2007, the Environmental Law 32/2009, and the Law on Prevention and Eradication of Forest Destruction 18/2013.
[8] The Constitutional Court has the power to annul provisions in acts of parliament because they violate constitutional provisions.
[9] To implement the joint regulation, the Minister of Domestic Affairs promulgated Ministerial Regulation 52/2014 concerning Guidelines for the Recognition and Protection of Adat Communities; the Minister of Environment and Forestry enacted Ministerial Regulation 32/2015 concerning Forest Title, which contains a procedure for the legal recognition of adat forest; and the Minister of Agrarian Affairs passed Ministerial Regulation 10/2016 concerning Guidelines for the Determination of Communal Rights of Adat Communities and Local Communities.
[10] Yance Arizona, interview with Luthfi A. Mutty, Member of Parliament from the Nasdem Party, Jakarta, June 2018.
[11] Yance Arizona, interview with Erasmus Cahyadi and Muhammad Arman, AMAN staff, Jakarta, November 2018.
[12] Yance Arizona, interview with two staff members of the Ministry of Domestic Affairs, Jakarta, December 2018.

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