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Forest tenure in Indonesia : the socio-legal challenges of securing communities' rights

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4. FOREST TENURE AND MANAGEMENT IN INDONESIA: THE NATIONAL LEGAL FRAMEWORK

4.1 INTRODUCTION

With its theme, 'Forest for People', the Eighth World Forestry Congress held in Jakarta in 1978 promoted a radical change of the prevailing forestry development paradigm (see 3.4). Whereas the state had played the central role in forest tenure and management since the nineteenth century, it was now regarded as failing to deal sufficiently with environmental and social injustice in many countries. According to the new paradigm, national governments should eliminate inequalities of land distribution and people's access to forest.[1] In response, forested countries developed legislation and programs for recognizing property rights of forest communities and sharing forest management between the state and these people. While their approaches and results varied from one to another, the core idea of community-based forest management became widely accepted.

Almost a quarter of a century later, White and Martin published a report entitled 'Who Owns the World's Forests' (2002). Using official statistical data from major forested countries, the authors found that the role of forest communities was still very limited. They stated that while 24 countries had 3.9 billion hectares of forest or approximately 93 % of natural forests remaining in the world in 2002, 77 % of them were public forests[2] that were administered directly by the state, and only 4 % of these forests were reserved for forest communities (White and Martin 2002:6). This survey seems to indicate that the mission of 'Forest for People' had not had much practical impact on the distribution of forest.

Six years later, another study re-assessed the condition of global forest tenure. Interestingly, the report stated that there had been a decline of public forests controlled by state agencies during 2002–2008. By completing and updating White and Martin's 2002 data, Sunderlin, Hatcher and Liddle (2008:7) found that 74 % of the world's forests were administered by the state, compared with 80 % they found in 2002

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[1] Djakarta Declaration as can be found in http://www.fao.org/docrep/l2680e/l2680e06.htm#the%20world%20of%20forestry (accessed 24-6-2010).

[2] This report defines the public forests as forests found on land owned by governments, either central or regional governments (White and Martin 2002:4).

(according to the authors' own survey); 2.3 % of these forests were allocated for forest communities (they found in 2002 the rate was 1.5 %).

These figures indicate a positive development of state recognition of community forest tenure. However, as Sunderlin, Hatcher and Liddle cautiously conclude, the increase of state forest allocated to forest communities took place only in several countries, namely Brazil, India and Bolivia. In the majority of countries there was no change, some countries even indicated a dropping rate of state forest allocated to forest communities. Peru saw the greatest decline. Interestingly, by using FAO data, for Indonesia Sunderlin, Hatcher and Liddle found a decrease of state forests used by forest communities from 0.6 million hectares in 2002 to 0.23 million hectares in 2008 (Sunderlin, Hatcher and Liddle 2008:9-11). While these findings may be debatable, they make us wonder how the existing Indonesian legislation actually regulates forest tenure. How does the legislation define, interpret and legalize state control and communities' rights over land and forest?

For this research, a legal analysis of the state forest tenure system[3] is essential for two reasons. The first is because the state controls around 60 % of Indonesian land that has been designated as Forest Areas. Secondly, this study focuses on Social Forest legislation that is according to Law 41/1999 implemented in state forests. How does the legislation provide a legal basis for the government – in this case the Ministry of Forestry – to control state forest or land classified as Forest Areas? In addition, it is also important to understand how the legislation regulates state forest management and how it allows people to utilize the state forests. Trying to answer these questions is essential to provide a proper background of chapter 5 that will discuss community-based forest management legislation applied in Forest Areas, which in practice have been claimed as state land.

The next section discusses legislation and state institutions pertaining to land and natural resource tenure and management (4.2). The following sections deal with the concept of state control on land and forest: its legal basis, legal interpretations as found in legislation and judicial decisions (4.3) and the implications for community property rights (4.4). The last section of this chapter focuses on state forest tenure and management (4.5). It consists of some legal analyses concerning the property status of state and private forest and the state's claim on Forest Areas. In addition, there will be an explanation of regulations pertaining to forest management. How does the forestry legislation classify the different forest uses and how does it regulate forestry licensing?

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[3] For the concept of state forest tenure system see 2.3 (a).

4.2 LEGISLATION AND STATE INSTITUTIONS CONCERNING LAND AND NATURAL RESOURCES[4]

Law 10/2004 concerning Lawmaking[5] is the existing legal basis for the hierarchy of legislation in Indonesia. Article 7 (1) and 7 (2) of this Law establish the hierarchical order as follows:

a) The 1945 Constitution (*Undang-undang Dasar 1945*)

b) Law (*Undang-undang*)/ Government Regulation in lieu of Law (*Peraturan Pemerintah Pengganti Undang-undang, PERPU*)

c) Government Regulation (GR) (*Peraturan Pemerintah*)

d) Presidential Regulation (*Peraturan Presiden*)

e) Regional Regulation (*Peraturan Daerah, Perda*), consisting of:

   i) Provincial Regulation (*Peraturan Daerah Provinsi*)

   ii) District Regulation (*Peraturan Daerah Kabupaten*)[6]

   iii) Village Regulation (*Peraturan Desa*)

Besides these types of legislation, Law 10/2004 recognizes regulations enacted by ministers and other heads of state agencies (Article 7 paragraph 4 and its elucidation). This Law states that these regulations are legally binding in so far as their promulgation is to implement higher legislation. Unfortunately, Law 10/2004 does not clearly state the position of ministerial regulations (before 2004 mostly known as ministerial decrees) in the hierarchy of legislation. I assume that the ministerial regulations fall between presidential and regional regulations, considering that ministerial regulations are implemented nation-wide whilst regional regulations only apply to a specific region.

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[4] The major source of this section is Indonesia's National Strategy of Access to Justice (Bappenas 2009) and an unpublished Indira-project joint paper from 2007 (Indira 2007).

[5] The official name of Law 10/2004 is Law on the making of legislative regulation (*Pembentukan Peraturan Perundang-undangan*).

[6] This book also uses the abbreviated term *Perda*, for example, District *Perda* for District Regulations and Provincial *Perda* for Provincial Regulations.

Prior to the fourth amendment of the 1945 Constitution,[7] the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat, MPR*) was the highest state institution that supervised other state institutions including parliament and president. The *MPR* had the authority to issue a Decree of the People's Consultative Assembly (*Ketetapan Majelis Permusyawaratan Rakyat, TAP MPR*). Such decrees were legally binding for other state institutions. According to the hierarchy of legislation, as regulated by *TAP MPR* number III/*MPR*/2000 concerning legal sources and the hierarchy of laws and regulations, the position of the *MPR* Decree was immediately below the Constitution. Since the fourth amendment of the Constitution, the *MPR*, even though it still exists, is no longer the highest state institution. It merely functions as a joint session between parliament or the People's Representative Council (*Dewan Perwakilan Rakyat, DPR*) and the newly established Indonesia's Senate, the Regional Representative Council (*Dewan Perwakilan Daerah, DPD*). The *MPR* has lost its legal power of enacting an *MPR* decree (*TAP MPR*). Consequently, the Decree cannot be considered as taking in a position in the new hierarchy of legislation. Hence, Law 10/2004 does not include the *MPR* decree in its hierarchy of legislation. However, this does not mean that all existing *MPR* decrees have become invalid. *TAP MPR* I/*MPR*/2003[8] has categorized the validity of these decrees into six groups. Some groups were no longer considered valid. Others continued to be valid, yet on certain conditions. Of the valid decrees, there are eleven *MPR* decrees that are valid until the enactment of laws to regulate the contents stated in those decrees.

An example of such a valid *MPR* decree which is highly relevant to this chapter is *MPR* Decree number IX/*MPR*/2001 on Agrarian Reform and Natural Resource Management. This *MPR* decree provides guiding principles for the implementation of agrarian or land[9] reform in Indonesia as well as of undertaking the management of

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[7] During 1999 to 2002, after the end of New Order, the 1945 Constitution was amended not less than four times. In more general terms, Indonesia has several Constitutions. The first was the original 1945 Constitution. In 1949 when Indonesia became a federal state, this Constitution was replaced by the Federal Constitution (*Konstitusi Republik Indonesia Serikat*). A year later, Indonesia returned to be a unitary state (*negara kesatuan*) based on a liberal democratic government; a new Constitution, the 1950 Provisional Constitution (*Undang-undang Dasar Sementara 1950*), was promulgated. In 1959, President Soekarno decided to abrogate the 1950 Constitution, and restored the original 1945 Constitution. This continued during the Suharto's administration despite serious criticisms. Finally, after Suharto resigned the Constitution was successfully amended.

[8] *TAP MPR* number I/MPR/2003 concerning the review of the substance and legal status of *MPR* Decrees from 1960 to 2002.

[9] The term *'agraria'* in Indonesian legislation generally represents land, water and all natural resources in rural and urban areas. It does not refer to agriculture at all or to land per se (Tjondronegoro and Wiradi 2004:7). Nevertheless, to many law-makers, legal scholars and practitioners this terminology points to land

natural resource management. To avoid overlap and contradictory legislation in the future, Article 1 of the decree obliges legislation concerning agrarian reform and natural resource management to be based on the 2001 *MPR* Decree. Then, Article 7 obliges the Parliament and the President to regulate the implementation of agrarian reform and natural resource management based on the *MPR* decree including to revise or abolish legislation that is against this *MPR* decree.

Thus far, the Parliament and the President, however, have not consistently implemented the 2001 *MPR* Decree. The overlapping and inconsistent nature of legislation about land and natural resources has not changed. Indonesia has numerous laws pertaining to land and natural resources. The basic provisions concerning land and other natural resources tenure and management are laid down in Law 5/1960 on Basic Provisions of *Agraria* (Basic Agrarian Law, BAL). Since most provisions in the BAL relate to land, many perceive it narrowly as the land law (see also footnote 9 of this chapter). There is also a Law on Spatial Planning, Law 26/2007, that regulates the spatial allocation and utilization of land, water and sea, including air space in which natural resources can be found. For the protection of the environment, there is Law 32/2009 on Environmental Protection and Management.

For specific natural resources, there are various laws such as the Law on Forestry (Law 41/1999; amended by Law 19/2004); the Law on Conservation of Living Natural Resources and Their Ecosystem (Law 5/1990); the Law on Plantation (Law 18/2004); the Law on Water Resources (Law 7/2004); the Law on Fishery (Law 31/2004); the Law on Coastal Management and Small Islands (Law 27/2007); the Law on Oil and Natural Gas (Law 22/2001); the Law on Geo-thermal energy (Law 27/2003); and the Law on Mineral and Coal Mining (Law 4/2009).

A major problem with these laws is that they are not well coordinated or harmonised. Each of these laws seems to create an independent regulatory system implemented by autonomous state agencies. This has often led to overlapping and conflicting provisions.

For several reasons, the BAL should be an umbrella law for all other laws and regulations on land and natural resources.[10] Firstly, even though the main part of this law relates to land tenure, the BAL also consists of provisions concerning other natural resources. In the words of BAL, it is about 'the earth, water, and airspace, including the natural resources contained therein (*bumi, air dan ruang angkasa termasuk kekayaan alam*

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tenure. As such by the terminology 'agrarian law' they mean land law and for 'agrarian reform' is meant land reform.

[10] Other authors argue that the Spatial Planning Law is the more adequate umbrella law than the BAL (see Yusuf 2003:61-2).

yang terkandung di dalamnya).'[11] Secondly, the BAL also generally regulates the exploitation of natural resources, either conducted by private companies or by public-private partnership.[12] This sort of regulation now forms the basis for major provisions of specific laws on natural resources as previously mentioned. Thirdly, the BAL provides a basis for national and regional spatial planning legislation.[13] Similarly, it also has a provision on environmental protection.[14] Finally, the BAL itself aims explicitly at becoming the 'basic' act, that is, a foundational act and a main point of reference for other laws pertaining to land and natural resources. This is clearly indicated in the General Elucidation of the BAL, particularly part A.I. paragraphs 4 and 5, as cited below:

> The act [the BAL] is formally not different from other acts in the sense that it is to be made by the Government upon approval of the People's Representative Council (*Dewan Perwakilan Rakyat)*. However, due to its nature as a basis for the new agrarian law, the act should contain only the basic principles and issues in a broad outline and, therefore, it should be referred to as *Undang-undang Pokok Agraria* (Basic Agrarian Law). ...[T]he implementation of the Basic Agrarian Law will be regulated by way of acts, government regulations and other forms of legislation.

Interestingly, other laws do not refer to the BAL. An important legal argument in justification is that according to the hierarchy of legislation as mentioned in the beginning of this section, all laws (*undang-undang*) have the same position. Thus, even if the BAL uses the title 'basic provisions',[15] this does mean that it is higher than others. A second reason relates to the administrative practices of state institutions responsible for land and natural resources.

Government officials generally consider the implementation of the BAL as a matter under the authority of the National Land Agency, whereas the other laws are implemented by other ministries or agencies. Thus, the Ministry of Forestry is responsible for implementing the Forestry Law including the Law on Living Natural

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[11] Articles 1 (2), (4), (5) and (6) of the BAL, see also footnote 9 of this chapter.

[12] Article 8, Articles 12 and 3 of the BAL.

[13] Article 14 of the BAL.

[14] Article 15 of the BAL.

[15] In Indonesian legislation history, the title of 'basic law' (*undang-undang pokok*) was used in other laws enacted in the New Order period, particularly during the late 1960s to the 1970s, such as Law 5/1967 on Basic Provisions on Forestry (*Undang-undang tentang Ketentuan-ketentuan Pokok Kehutanan*) and Law 11/1967 on Basic Provisions on Mining (*Undang-undang tentang Ketentuan-ketentuan Pokok Pertambangan*). However, since the 1980s, the title of basic provisions or basic law has disappeared.

Resources and Their Ecosystem Conservation. The Agricultural Ministry holds the authority over implementing the Plantation Law. The Ministry of Public Works is responsible for implementing the Law on Water Resources and on Spatial Planning Law. The State Ministry of Environment is the guardian of the Law on Environmental Management. The Ministry of Marine and Fishery oversees the implementation of the Laws on Fishery and Coastal Management. Finally, the Ministry of Energy and Mineral Resources holds authority over implementing the Laws on Oil and Natural Gas, Geo-thermal energy and Mineral and Coal Mining. The interpretation prevailing among government officials is that that ministries and agencies other than the National Land Agency do not necessarily refer to the BAL, but only to specific laws related directly to their domain.

The abovementioned ministries and agencies are part of the central government. They are directly responsible to the President and in administering their major tasks are coordinated by the Coordinating Minister of Economic Affairs. According to Law 22/1999, now replaced by Law 32/2004 on Regional Government, regional governments – consists of provincial (*provinsi*), town (*kota*) and district (*kabupaten*) governments[16] – have substantive authority in many domains, including 'land and natural resources'. As such, provincial, town and district governments have their own agencies, known as province or district service (*dinas provinsi* or *dinas kabupaten*) that administer land and natural resources. Prior to the implementation of Law 22/1999 on Regional Government, every ministry, including the Ministry of Forestry, had its representative agency in the provinces. These agencies were called the regional offices (*kantor wilayah*). After the implementation of Law 22/1999 in 2001, those regional offices of ministries, whose authorities had mostly been passed down to regional governments, were abolished.[17]

4.3 State control on land and forest

Different states hold control over land and natural resources in different ways and legalize that control through various types of national laws. Many of these laws, notably in Southeast Asian countries, have been a continuation of colonial legislation (Lynch and Talbott 1995: 51-66).

Indonesia has developed its own concept of state control on land and natural resources, including forest. A discussion on this concept and its implications is

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[16] See footnotes 6 and 12 of chapter 1.

[17] A few domains were expected from this far-reaching decentralisation, and ministries working in those domains continued to work in the provinces through their regional offices. They include the Ministry of Religious Affairs, the Ministry of Law and Human Rights.

necessary as the state, *in casu* the Ministry of Forestry claims the large majority of Indonesian land as Forest Areas. In addition, the existing Indonesian Forestry Law, Law 41/1999, states that the Social Forest policy model is applied to state-claimed forests. Thus, it is crucial to examine how state control of Forest Areas enables or prevents people from obtaining secure property rights on land and forest, which forms the key element of legal security of tenure.

To require an understanding on the notion of state control on land and forest in Indonesian legislation, this section describes three main themes: the basic principles of the state's right on land and forest in Indonesian legislation; the interpretations of this right; and the implications of the state's right to control land and forest for community property rights.

(a) The legal basis of state's right of controlling land and forest

Article 33 (3) of the 1945 Constitution – both in its original and amended versions – is the highest legal basis for the state's right of controlling land and natural resources. This article states 'the land and the waters as well as the natural riches therein are to be controlled by the state to be exploited for the greatest welfare of the people'.[18] A similar concept can also be found in Indonesian land and natural resources legislation including the 1960 BAL, and the 1967 Forestry Law as well as its successor, Forestry Law 41/1999.

While the 1945 Constitution uses the notion of the state's right of controlling land and natural resources – henceforth, *state's right of control* (*hak menguasai negara*) – it does not explain how this right must be interpreted. We do find an interpretation of this right in the BAL. This law emphasizes that at the highest level, the state – as a manifestation of people's political organization – controls all land, water, and natural resources. According to Article 2 (2) of the BAL, the state's right to control provides the state with the authority to:

- regulate and implement the allocation, use, reservation and preservation of land, water and air space;
- decide and make regulations on legal relations between humans and land, water and air space;
- decide and make regulations on legal relations among humans and legal actions concerning land, water and air space.

[18] A similar provision on the state's right of controlling land and natural resources was also found in Article 38 of the 1950 Provisional Constitution (*Undang-undang Dasar Sementara 1950*).

Forestry Laws (both Law 5/1967 and Law 41/1999) also use a provision of the state's right of control. Article 5 of Law 5/1967 stated that all forests within Indonesian territory including all natural resources therein are controlled by the state. The 1999 Forestry Law makes no correction to this provision, except for adding that state control must be used for the greatest welfare of the people (Article 4 of Law 41/1999). Closely resembling the abovementioned BAL provision, Article 4 (2) of Forestry Law 41/1999 states that state control over forests gives the government authority to:

- regulate and govern all aspects related to forest, Forest Areas and forest products;
- assign the status of certain areas – whether forested land or not – as Forest Areas or not;
- regulate and decide on legal relations between humans and forest and legal actions concerning forestry.

As with the BAL that states that agrarian affairs (*urusan agraria*) fall under the jurisdiction of the central government,[19] Law 41/1999 also considers that the authority deriving from the state's right of control belong to the central government, in this case the Ministry of Forestry.[20]

The Ministry of Forestry, thus, has various roles, as policy maker, forest planner, manager, and custodian (Article 10 paragraph 2 of Law 41/1999). This extended authority grants the Ministry with multiple forms of control over the forest including control of forest areas territories, resources and the people living in or having legal relations to forests. The territorial control is manifested by policies and government

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[19] The Elucidation of Article 2 (4) of the BAL.

[20] Article 1 point 14 of Law 41/1999. This provision is not in line with the idea of decentralization as promoted by the 1999 Regional Autonomy Law (Law 22/1999). This law gave broader authority to district and municipality governments to regulate land and natural resources in their areas. Enacted after Law 22/1999, Law 41/1999, in contrast, is mostly concerned with the authority of the central government. The Ministry of Forestry assumed that Law 22/1999 did not have enough provisions for forest preservation. In its press release, for instance, the Ministry of Forestry stated that Law 22/1999 allowed District or Provincial Regulations to apply maximum fine of 5 millions Rupiah for any violence of the Regulations; whilst according to Law 41/1999 the fine can reach 1 billion Rupiah. The Ministry of Forestry said that a low fine imposed by forestry-related regional regulations would be harmful for the forest. Only after a government regulation concerning Government Authority and the Provincial Authority as an Autonomous Region (GR 25/2000 then replaced by GR 38/2007, henceforth is GR on the Division of Government Authority) was enacted, did the Ministry of Forestry develop legislation concerning the guidelines of the implementation of regional forestry authority, notably on forestry licensing. Ten Minister of Forestry decrees were enacted for this purpose (Ministry of Forestry 2001b).

actions in declaring specific territories as Forest Areas, claiming all resources therein as state property and guarding this territory. The resource control emerges when the government monopolizes, taxes, and limits forest trades or transportation of certain species (Peluso and Vandergeest 2001:765). Meanwhile, control of people is determined by government decisions to distribute rights to forest and forest resources to selected people in Forest Areas.

(b) Different interpretations and purposes of the state's right of control

As the Constitution has a general provision on the state's right of control, this opens up different interpretations. A common interpretation as used by the BAL and Forestry Laws regards the state's right of control as a set of public authorities or powers under public law, such as regulating, planning, and allocating land and natural resources. However, in recent years, Indonesian Constitutional Court has broadened the interpretation of this right. The interpretation can be found in the Constitutional Court's decisions regarding the judicial reviews of Law 20/2002 on Electrical Power,[21] Law 22/2001 on Oil and Natural Gas and Law 7/2004 on Water Resources.[22]

Before describing how the Court has interpreted the notion of the state's right of control, I will explain the phrase 'controlled by the state' which has been used in the original and amended 1945 Constitution in two paragraphs of Article 33: in paragraphs (2) and (3). Article 33 (2) states that "sectors of production which are vital for the country and affect the life of the considerable part of the people shall be controlled by the State" (*cabang-cabang produksi yang penting bagi negara dan yang menguasai hajat hidup orang banyak dikuasai oleh negara*). Then, Article 33 (3) follows by stating that land, water and natural richness therein are controlled by the state for the greatest welfare of the people. In which sense the terms 'vital production sectors' can be distinguished from 'land, water and natural richness' remains unclear from the Constitution and its Elucidation. However, national legislation generally uses the words 'vital production sectors' for mining and other mineral resources as well as for electrical power. Laws regarding these subjects often refer to Article 33 (2) besides to Article 33 (3).

The Constitutional Court interpreted the words 'vital production sectors' in the same way as 'natural richness' in Article 33 (3). However, according to the Court, which resources are meant and when they can be considered as vital, is to be determined by the central government and parliament.[23]

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[21] Constitutional Court Decision Case number 001-021-022/PUU-I/2003.

[22] Constitutional Court Decisions Case Numbers 002/PUU-I/2003; 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005.

[23] Constitutional Court Decision Case number 002/PUU-I/2003, p. 210; 335.

In its decisions, it seems that the Constitutional Court makes two interpretations regarding the notion of state's rights of control. In its decisions on Law concerning Electrical Power and Law on Oil and Natural Gas, the court firstly ruled that the phrase 'controlled by the state' in Article 33 (2) and (3) of the Constitution means that pertaining to land and natural resources, the state holds the public authority of policy-making (*merumuskan kebijaksanaan*), regulating (*melakukan pengaturan*), governing (*melakukan tindakan pengurusan*), managing (*melakukan pengelolaan*) and supervising (*melakukan pengawasan*), for the greatest prosperity of the people.[24] Then, this interpretation was adopted by the Court's Decision on Water Resource Law.[25]

The Constitutional Court did not explain the meaning of policy-making. However, the term regulating was described as the authority to legislate and implement laws and regulation and regulations-making. Meanwhile, it stated that by the term governing is meant the state's authority of issuing and revoking licenses and concessions. Managing land and natural resources is carried out through share holding and/or direct involvement in the management of state enterprises. Finally, the state has the authority to supervise to ensure that the implementation of state's control upon important natural resources is performed for the greatest prosperity of the people.

According to the Court, the state's authority is derived from the collective ownership of the Indonesian people of land and natural resources as the manifestation of people's sovereignty. The people then mandate the State to apply the authority mentioned. In one sense, this interpretation follows the BAL when constructing the right of the nation (*hak bangsa*) as the source of the state's right of control.[26] Yet, unlike the BAL and the Forestry Law, that merely interpret the state's rights of control as a public authority, the Constitutional Court added that the state also holds a private ownership over 'vital production sectors'. The Court considered this private ownership an instrument to maintain the state's control of land and natural resources, as can be seen from the following citation of the Court's Decision on judicial review of Law 20/2002 on Electrical Power:

> In the concept of [state] control also includes the concept of private ownership as an instrument to maintain the level of thestate's c.q. government's control in managing the concerned electricity production branch. [*Di dalam pengertian penguasan itu tercakup pula pengertian kepemilikan perdata sebagai instrumen untuk*

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[24] Constitutional Court Decision Case number 001-021-022/PUU-I/2003, p. 334; Decision on Case number 001-021-022/PUU-I/2003, p. 211.

[25]Constitutional Court Decision Case number 058-059-060-063/PUU-II/2004 and 008/PUU-III/2005, p. 498-9.

[26] The General Elucidation of BAL II (1).

mempertahankan tingkat penguasaan oleh negara c.q. pemerintah dalam pengelolaan cabang produksi listrik dimaksud].[27]

Thus, regarding the so-called 'vital production sectors' as mentioned in Article 33 (2) of the Constitution, the Court regards the state both as the public authority holder and the owner. The Court argued that both the state's public authority and private ownership exist in the notion of state's right of control in Article 33 (2) of the Constitution.

The question arises whether the Court used the same interpretation of the state's rights of control with regard to other natural resources. Interestingly, it did not. In its Decision on Law on Water Resources, as noted, the Court only applied its public authority interpretation.[28]

The Constitutional Court stated that it undertook a dynamic interpretation of Article 33 of the Constitution to respond to a changing ideology of state economic development.[29] This statement calls for a further analysis regarding the interpretation of Article 33 (3) of the Constitution in different Indonesian development ideologies. Article 33 falls under the Chapter of Social Welfare (*Kesejahteraan Sosial*)[30] which consists of provisions concerning the national economic system.

Historically, this chapter was inspired by the idea of economic socialism. Mohammad Hatta, an economist who became the first Indonesian Vice President, was the one who strongly promoted this chapter. He was the head of the special commission on economic and finance in the Committee for the Preparation of Indonesian Independence (*Badan Penyelidik Usaha-usaha Persiapan Kemerdekaan Indonesia, BPUPKI*) – a committee tasked with the making of a constitution.

Hatta thought that the national economic system should be based on the idea of mutual help (*tolong-menolong*) and collective actions (*usaha bersama*). In this respect, the role of the state was central to ensure that any exploitation of land and natural resources would contribute to people's prosperity. Land, in Hatta's opinion, was a key production factor. As such, land regulations might be directed to make it a source of prosperity for the people. No institution could be expected to do so, except the state (Sekretariat Negara 1998:411; Hatta 1954:30-1).

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[27] Constitutional Court Decision Case number 001-021-022/PUU-I/2003, p. 335. This interpretation was referred to by The Court Decision on Oil and Natural Gas Law, see Decision, p. 210.

[28] Constitutional Court Decision on Water Resource Law, p. 498-9.

[29] Constitutional Court Decision Case number 001-021-022/PUU-I/2003, p. 332.

[30] The second amendment of the Constitution has changed the Chapter's title of Social Welfare to be 'the National Economy and Social Welfare'.

The centrality of the state in land and natural resources control was also emphasized by another intellectual father of the 1945 Constitution, Soepomo. When describing the draft-constitution in a *BPUPKI*'s meeting, he explained that the state, as a great family of Indonesians, must be in the highest position of controlling land and resource (Sekretariat Negara 1998:301-2). Hatta and Soepomo may have shared the same idea about a state-led economic system. However, in the constitution-making debates they did not provide clear points of view about whether the state had to be the owner of or only apply its regulatory authority to control of land and natural resources.

Finally, after fifteen years of absence of a formal interpretation regarding the state's position to land and resource tenure in Indonesian legislation, in 1960, the BAL clarified this position. The BAL – a law that is also strongly influenced by economic socialism – recognizes that the state is not the owner of land and natural resources. Its General Elucidation II (2) states:

> The Basic Agrarian Law is based on the position that in order to achieve what is stipulated in Article 33 (3) of the 1945 Constitution, it is not necessary and not appropriate for the Indonesian nation and State to act as land owner. It is more appropriate for the State, in its capacity as the people's organization of power, to act as an Authority Body (*Badan Penguasa).* It is from this perspective that the meaning of the provision of Article 2 (1), which says that "the land, water, and airspace, including the natural resources contained therein, are at the highest level controlled by the State" should be seen.

Interestingly, the BAL's view of the state as the holder of public authority was followed by other laws, including those that are known as a product of economic liberal ideology such as Law 5/1967 on Basic Forestry Provisions, Law 11/1967 on Mining, and in the recent decade, are Law 7/2004 on Water Resources and Law 22/2001 on Oil and Natural Gas. As the BAL, these Laws refuse to perceive the state as the owner of natural resources.

Evidently, whatever the development ideology behind the lawmaking is, land and natural resources laws in Indonesia have shared the same interpretation of seeing the state as a public body applying public authority, rather than as the owner of land and natural resources. Thus, it came rather as a surprise that the Constitutional Court introduced a different interpretation, i.e. of a dual position of the state, both as a regulatory body as well as the owner of certain natural resources.

This extraordinary interpretation of the Constitutional Court regarding Article 33 (2) of the 1945 Constitution, has not significantly impacted the current development of land and forestry legislation in Indonesia. The legislation is still in line with the interpretation of the BAL. Neither has, to date, the Constitutional Court's

interpretation of the state's right of control strongly influenced legal discourse in Indonesia. Few studies were carried out about this subject.[31] In fact, this interpretation could have many legal implications for the relation between the state and the people regarding land and natural resource tenure. Of which types of natural resources and under which conditions can the state act as the owner? What could be the implication of this state ownership for people's rights, particularly for the rights of *adat* communities as recognized by Article 18 B (2) and for individual property rights of citizens as stated by Article 28 H (4) of the amended Constitution? Certainly, this book does not aim to provide a comprehensive legal analysis of these questions. However, by describing this issue, it aims to identify the present legal position as one of unfixed legal interpretation concerning the concept of state's right of control. This situation has a negative impact on legal security of forest tenure, that requires clarity concerning the types of state and community property rights and the relation between these rights.

4.4 THE STATE'S RIGHT OF CONTROL AND COMMUNITY PROPERTY RIGHTS ON LAND AND FOREST

The common legal interpretation of the state's right of control in Indonesia, as noted, perceives the state as regulatory and managing body applying public authority to land and natural resources. But, in practice, the state behaves as the owner of natural resources, thus confirming one of the Constitutional Court's interpretations. To many legal scholars, this indicates a gap between legislation and practice. While this gap is often referred to as an explanation of the Indonesian state's right of control (Lynch and Talboot 1995; Hutagalung 2004:21), it raises important questions about the implication for community property rights notably of the *adat* communities.

As described, the 1945 Constitution contained a general statement of the state's right of control without identifying to which land this right applies. Hatta, almost a decade after, said that the state should control the land. However, according to Hatta, this control should only be applied to land beyond village territory and land belonging to the people as a whole (Hatta 1954:31).[32] In this sense, the state's right of control cannot

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[31] A related study on this issue can be found in Arizona (2007). The study, however, analyzes the types of legal interpretation used by the Constitutional Court; it does not investigate the impact of such an interpretation on the relation between state and community forest tenure system.

[32] Hatta did not explain his notion of village territory; whether village territory covered only cultivated land or extended to whole areas claimed by a village community. A similar problem concerning the boundary of recognized areas of customary-based land rights (*beschikkingsrecht*) occurred during the colonial period and raised a sharp debate between scholars such as Nolst Trenité of Utrecht Law School and Van Vollenhoven of Leiden Law School. For an extensive study regarding this debate, see Burns (2004).

be applied to land belonging to village or *adat* communities not to land privately owned by individual citizens.

A different view of the scope of the state's right of control comes from the BAL. It advances the notion of the state's right of control as applied over all of the country's land, privately or communally owned, or as the law formulates it 'titled or not'. The titled land refers to all land on which statutory land rights are exercised. These rights are enumerated by Article 16 (1) of the BAL as follows: the right to own (*hak milik*), the right to commercially cultivate (*hak guna usaha*), the right to construct and possess building (*hak guna bangunan*), the right to use (*hak pakai*), the right to lease (*hak sewa*), the right to clear land (*hak membuka tanah*), and the right to collect forest products (*hak memungut hasil hutan*). Untitled land or land without any of those statutory rights is 'land directly controlled by the state' (*tanah yang dikuasai langsung oleh negara*),[33] or in the words of GR 24/1997 on Land Registration, 'state land' (*tanah negara*).

With regard to the titled or untitled land, the state's right of control only varies as a matter of degree. The BAL's General Elucidation Part A.II (2) states:

> The State's control as meant above concerns all the land, water, and airspace, whether they are already possessed by individuals under certain rights or not. The State's control over land which is already possessed by an individual under a certain right is restricted by the contents of the right in question, and this means that the State's control over the land in question ends at the point to which it gives the individual in question authority to execute his right....[T]he State's control over land which is not possessed under a certain right by an individual or another party is broader and full....[T]he State can grant such land to an individual or corporate body under a certain right.

The content and nature of the state's right of control of untitled land or state land is indicated by the ability of the state to grant private land rights to individuals or legal bodies, or to delegate part of its authorities to regional governments and government's agencies, through a right of management (*hak pengelolaan*),[34] that is, the right of such agencies to plan, regulate, use and control state land.

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[33] The phrase 'land directly controlled by the state' can be found in several articles of the BAL: Article 28 (1); Article 37 a; Article 41 (1) and Article 49 (2).

[34] This sort of right is originated from GR 8/1953 on the Control over State Lands (*Penguasaan Tanah-tanah Negara*) as the government's legal basis to use land for its tasks. Although passed before the BAL, GR 8/1953 is assumed to be valid. Article 2 (4) of the BAL is the legal basis for continuing the implementation of GR 8/1953 (see the BAL's elucidation II (2) paragraph 7). After the BAL, there have been a number of regulations regarding the implementation of this right of management, promulgated by ministers who were responsible of land/agrarian affairs (Minister of Agrarian and Minister of Home Affairs who in a certain period of the New Order held authority in land/agrarian affairs). Presently, the right of

It is clear that there are different degrees of state intervention to titled and untitled land. Yet, a problem emerges when the strength of state's right of control is assessed in *adat* communal land known by diverse names such as for example *tanah ulayat, petuanan,* or *marga.* If state land has been defined as that located beyond land with statutory rights, what about the *adat* communal land? Article 18 B (2) of the Constitution in general recognizes the traditional rights of *adat* communities, even though it also restricts the rights in some respects.[35] Then, Article 3 of the BAL recognizes the communal land of *adat* communities as the *hak ulayat,* a term borrowed from the community land tenure system in West Sumatra.[36] By *hak ulayat,* the BAL refers to Van Vollenhoven's term of *beschikkingsrecht* or right of avail.[37] Nevertheless, it is still obscure whether the BAL considers such *hak ulayat* land to be state land, and whether the BAL recognizes the rights as communal or collective rights.[38]

Clarifying the status of public and private land as well as the sorts of communal or collective land rights is important for analyzing the 'robustness' of property rights to determine legal tenure security (see 2.4 (a)). The difference between public and private land determines the types of right bundles allowable on the land and the degrees of state intervention in property rights on these lands. Property rights on state land are generally more restricted than those found on private land. The state has a greater power to intervene in state land than in private land. Meanwhile, making a conceptual

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management has been broadly developed. It is not only held by government agencies but also by private companies. For excellent literature regarding this issue see Parlindungan (1989), Sumardjono (2008:197-215) and Soemardijono (2008).

[35] For criticism of Article 18 B (2) of the amended Constitution see Bedner and Van Huis (2008:170-1).

[36] In the course of this chapter the term *hak ulayat* and *adat* communal land rights are used interchangeably.

[37] The Elucidation of Article 3 of the BAL explains that the term *'hak ulayat* and the like' refers to what customary law literature names *'beschikkingsrecht'*. Van Vollenhoven was the first to introduce this term. In one of his articles as edited by Holleman (1981), Van Vollenhoven conceptualizes *beschikkingsrecht* as the fundamental right of an *adat* community to freely benefit from and administer land, water and other resources within its territory for the benefit of its members, and by excluding outsiders, except those who have been temporarily privileged to use the land, water and other resources. The *beschikkingsrecht* or right of avail has been a source of individualized user rights of the *adat* community members (Holleman 1981:43).

[38] As described in 2.3 (b) the notions of communal and collective rights denote different types of rights and right holders. The term communal land rights refers to the rights over land and natural resources that belong to the community as a whole social grup, as has been practiced in many *adat* communities in Indonesia. The collective land rights are the ownership rights of sub-groups or families within the *adat* communities.

boundary between communal and individual/collective rights is also necessary to describe the appropriate right holders.

Undoubtedly, the BAL has been the pioneer of state recognition of *adat* land rights in Indonesia. Article 3 and 5 of the BAL provide clear evidence of this recognition. However, this recognition has not contributed to a high degree of legal security of *adat* communities' land tenure. Firstly, it is because the same BAL, even though recognizing *hak ulayat,* also promotes restricted, conditional and inconsistent recognition of these rights (Bedner and Van Huis 2008:178-81). The second reason is that the BAL holds dual perceptions as to whether the status of *adat* communal land is public or private according to the state land tenure system.

Article 3 of the BAL recognizes the *hak ulayat* as a private right and the *adat* communities perform as private entities. This is clearly proven by the General Elucidation II (2) paragraph 7 saying that the state's control over land is also restricted, more or less, by the *hak ulayat,* in so far the right in reality still exists. This means that the state's right of control cannot directly intervene in the *hak ulayat,* just as it cannot do so in individual private rights. However, Article 2 (4) views the *hak ulayat* differently. By saying that the implementation of the state's right of control can be delegated to *adat* communities, this article considers *adat* communities rather as state entities. In this view the *hak ulayat* represents a delegated state's right of control, and consequently, the land is state land.

State recognition of *adat* communal land as promised by the BAL is hardly implemented due to this unresolved dual position. General statements as found in Articles 3 and 5 of the BAL are not sufficient to conclude that the BAL recognizes *adat* communal land rights. It is necessary to clarify what kinds of rights are recognized by the BAL. The types of rights depend on the status of the land; public and private land will have different types of property rights.

Indonesian legal scholars have different views on this issue. Parlindungan, for example, is one of the few scholars who interpreted the *hak ulayat* as a delegated authority of the state's right of control (Parlindungan 1989:1-2; 58). He proposed to create rights namely village management rights (*hak pengelolaan desa*) to recognize the *hak ulayat*. His argument was based on the interpretation of Article 2 (4) of the BAL stating that the implementation of the state's right of control can be transferred to *adat* communities. In this view, the delegation may take place as long as required, and if not in contradiction with national interests; it is to be regulated through a government regulation. Article 2 (4) of the BAL has been used mostly as a legal basis for granting management rights to government agencies.[39] In fact, no regulation has been made in

[39] See General Elucidation Part II (2) paragraph 7 of the BAL.

relation to the delegation of the state's right of control to *adat* communities. Hence, Parlindungan viewed that it is still necessary to regulate *hak ulayat* in order to spell it out as a management right.[40]

Another scholar, Harsono, one of the principal drafters of the 1960 BAL, also believes that *adat* communal land or *ulayat* land must be considered as state land. He divides state land into two categories: state land in the broad sense and in the narrow sense. State land in broad sense includes land donated for religious and social purposes according to Islamic law (endowment, *tanah wakaf*), land with management rights (*tanah hak pengelolaan*), *ulayat* land, and land in Forest Areas which are under the Ministry of Forestry's control. State land in the narrow sense covers all land beyond (Harsono 2005:271-3). It falls under the authority of the National Land Agency, which can grant private land rights or right of management on that land (Harsono 2003:55).

Harsono's ideas raise some questions, particularly about the status of *ulayat* land and Forest Areas. If the *ulayat* land are put in the same category as Forest Areas, that is, as state land in a broad sense, how can the National Land Agency grant land rights to individual members of *adat* communities as regulated by the Agraria Minister's Regulation 5/1999 concerning the guidelines of resolving the problems of *ulayat* rights of customary law-based communities (Article 4 (1) b); while, in the Forest Areas, forestry legislation does not allow for granting private land rights, neither to *adat* communities nor to non-*adat* ones? How can the status of Forest Areas undermine the status of *ulayat* land? The Forestry Laws (both the Law 5/1967 and Law 41/1999) state that forests located in areas controlled by *adat* communities (*Adat* Forests) are part of state forests. Unfortunately, Harsono has not answered these questions.

Harsono also does not explain what types of right the state must recognize when dealing with *ulayat* land. As a proponent of an evolutionist approach of communal land, he argues that *hak ulayat* will evolve into individual land rights, and eventually disappear in the future. Thus, Harsono says that the state does not need to regulate the *hak ulayat* (Harsono 2005:189). Surely, this opinion cannot be accepted. Whether in the future *adat* communal land will evolve into individual land tenure or not, remains to be seen. As for the present, state recognition of *adat* communal land should be reflected by clear property rights, granted or recognized by the state to *adat* communities.

A slightly different point comes up with Sumardjono who argues that state land (*tanah negara*) is land without private individual rights, land without management rights (*hak pengelolaan*), without *hak ulayat,* and without the rights of Islamic endowment (*tanah wakaf*). Sumardjono introduces the term 'government land' (*tanah*

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[40] For a different analysis of the Article 2(4) of the BAL see Bedner and Van Huijs (2008:179) who state that the right obtained by *adat* communities based on Article 2 (4) is merely the right to participate in the implementation of the state's right of control in the context or regional governance.

pemerintah) to denote land used by government institutions. According to her, government land does not fall in the category of state land because it is subject to the exercise of certain land rights such as the right of use and the right of management (Sumardjono 2005:62; 2008:144). She considers *ulayat* land as private land. Unlike Harsono who believes that the National Land Agency can only have authority to regulate and grant rights to what he calls state land in a narrow sense (Harsono 2005:272), Sumardjono argues that all state land should be administered by the National Land Agency (Sumardjono 2005:63).

Some questions come up with regards to Sumardjono's points. By considering the *ulayat* land as private land, what kind of private rights can be held by the *adat* communities to their *ulayat* land? How can they protect the rights from the state, other citizens and corporations?

Certainly more efforts and a new interpretation of the existing land legislation are needed before *adat* communal land can be classified as private land. The BAL has not clearly regulated the status of whole *adat* communities – as social entities – in terms of their ability to be private land right holder. Neither does the law contain any explicit statement about whether the *hak ulayat* should be regarded as one of the land rights enumerated in Article 16 of the BAL. In addition, the BAL does not state that the communal rights of *adat* communities should be registered. It only states that individual and collective land rights must be converted into ownership or use rights as stated in its Article 16.[41]

To provide guidelines for resolving these problems related to *hak ulayat*, the Agrarian Minister/the Head of National Land Agency enacted in 1999 Regulation number 5/1999. This ministerial regulation confirms the possibility of registering *adat* land by the individual members of *adat* communities through the BAL's statutory land rights.[42] The Regulation then mentions that the *ulayat* land,[43] if it still exists, must be displayed on the map of land registration, and if possible, recorded in the land register (*daftar tanah*). Nevertheless, land registration does not determine the property status of the land. GR 24/1997 on land registration explains that even state land must be registered.[44] The difference between state and private land is that the former is

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[41] The rights of *adat* communities in the BAL are known among others by *hak yasan, andarbeni, ganggam bauntuiak,* or *bengkok* (see Article II and VI of Part two of the BAL).

[42] Some *adat* communities have registered their communal land, either by using individual or joint land ownership (ADB 2002; Pusat Kajian Pembangunan Masyarakat Atmajaya 1998; Hermayulis 2000 and Warren 2002). The procedure of land registration follows GR 24/1997.

[43] The Agrarian Minister/the Head of National Land Agency Regulation 5/1999 defines *ulayat* land as *land* on which the *hak ulayat* (*ulayat* right) of *adat* communities can be found.

[44] Article 9 of GR 24/1997.

registered only by documenting the land in the land register, whilst registration of the latter can be followed by issuing land certificates.

What has been described so far indicates that old assumptions concerning the BAL's recognition of *adat* communal land need to be revisited. The BAL contains serious weaknesses in its provisions on *adat* communal land. It does not provide legal security of tenure of *adat* communities due to a number of reasons. Firstly, several key provisions are restricted and conditional. Secondly, the regulations concerning *adat* communal land are inconsistent, no matter whether the land is considered public or private property. Thirdly, there is uncertainty about whether communal or individual land rights are applicable to such land.

Interestingly, the BAL also has an ambiguous position regarding the types of *adat* land right. On one hand, it considers the right as communal land right (Article 3); on the other, it promotes individual/collective land rights of *adat* community members. Article 16 (1) and Article 22 (1) of the BAL and several articles in its provisions concerning land conversion[45] mostly deal with land rights of individual members of *adat* community or collective groups of family, clan and any sub-groups within the communities. The BAL pays more attention to regulation of these individual/collective rights than to the communal rights. In this respect, I agree with Bedner and Van Huis's about deprivation of *adat* communal rights due to the BAL (Bedner and Van Huis 2008:180-1).

Whilst the BAL contains a number of unclear provisions on the status of *adat* land, we must also conclude that the BAL applies different models in terms of its way of legalising the land rights of *adat* communities. Article 16 (1) and Article 22 (1) of the BAL, followed by Agrarian Minister Regulation 5/1999, legalize the rights of *adat* communities according to a so-called integration model. In this sense, the rights derived from the community land tenure system integrate into the system of rights as fully regulated by the state. At the same time, the BAL also uses another model of legalisation, recognising that the communities are still autonomous in applying their own community land tenure system. Article 2 (4) must be read in this sense. Similarly, the term recognition as used in the BAL requires further explanation. Unfortunately, the BAL does not do so. Article 3 mentions recognition, but this law only regulates the limitation of the recognition without clarifying the concept of recognition itself.

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[45] The BAL consists of two parts, the first one contains basic principles and provisions concerning land and natural resources tenure; whilst the second part is about the provisions of converting land rights known prior to the BAL's enactment to be integrated into the land tenure system envisaged by the BAL. Some of these provisions regulate the status of *adat* individual and collective land rights in the BAL's land tenure system. For a study on this topic, see Warman (1998).

To conclude this part, it is clear from the above description that the state's right of control to land complicates the security of community property rights, because the land legislation does not sufficiently clarify key provisions regarding the legal status of *adat* communal land and the rights that the *adat* community or its individual members hold on the land. The status of land – whether it is public or private land – has important implications for the bundle of property rights held by *adat* communities. The type of land right – whether they are communal or individual/collective rights – has legal consequences on tenure relations between people. The models of legalisation of the rights also have different implications. In sum, an appropriate regulation of community property rights, notably for *adat* communities, requires that state law should clarify these issues. How can the highest degree of legal security of community property rights be achieved if the rights are poorly formulated, if the state legal framework is ambiguous, and if the mechanisms of right protection are unclear? Without resolving these problems, *adat* communal land will remain vulnerable. These problems are more complicated when they occur in land classified as Forest Areas, as the following section will describe.

4.5 State Forest Tenure and Management

To understand how Indonesian forestry legislation regulates state and community property rights, it is necessary to be acquainted with some legal terms, concepts and classifications used by forestry legislation regarding the property status and formal functions of forest. With regard to its property status, forest consists of state and private forests. Meanwhile, according to its main functions, the legislation distinguish production forest (*hutan produksi*), protection forest (*hutan lindung*) and conservation forest (*hutan konservasi*). Different types of forest property status and functions determine different property rights of people in the forest.

In addition, Indonesian forestry legislation also uses the term Forest Area (*Kawasan Hutan*). The notion is different from the notion of state forest. Analyzing the legal status of state forest and Forest Area in which Social Forest legislation and licensing is to be implemented is important. Likewise, it is also essential to understand the procedure of creating state forest and Forest Areas, including the legal problems embedded in the establishment of these areas. Finally, knowledge concerning forestry licensing is essential as part of the basic information needed by people who need to choose between various ways of utilizing state forests.

This section describes these issues by firstly illustrating how the legislation has defined and classified forests in Indonesia and how it has set up a forestry licensing system in state forests.

(a) State and private forests

Forestry Law 41/1999 defines forest as an environmental landscape which unites land and all biological resources, in particular trees, into an integrated ecosystem unit (Article 1 point 2). In terms of its property status, forest, according to Article 5 (1) of Law 41/1999, consists of state and private forest. Forests found on untitled land are considered state forests;[46] whilst forests located on titled land are private forests.[47] Article 5 (2) of Law 41/1999 states that state forests can cover forests found in *adat* communities' land (*Adat* Forest). Then, the Elucidation of Article 5 (1) explains that state forest can also cover state forests managed by village institutions (Village Forest, *Hutan Desa*) and state forests that are utilized mainly for forest communities' empowerment (Social Forest, *Hutan Kemasyarakatan*).

Land title is the only criterion for classifying the property status of forest as state forest or private forest. According to the General Elucidation of Law 41/1999, the term title refers to those determined by the BAL. Article 16 (1) of the BAL, as known, is the provision that regulates types of private land rights (see 4.4). It is not clear, however, which land rights are used by the Forestry Law to differentiate state and private forests. The Elucidation of Article 5 (1) of Law 41/1999 says that private forest which is located on land with an ownership (*hak milik*) title is named People's Forest (*Hutan Rakyat*). This provision raises the question whether private forests can only be located on land with ownership? How about forest found on land subject to other land rights? To answer these questions, Forestry Minister's Regulation (Regulation P.26/2005, henceforth Ministerial Regulation on Private Forest) contains guidelines on private forests. The 2005 regulation states that private forests are forests located on land with ownership, use and commercial cultivation rights that have been designated as private forests by a head of district or mayor based on district/town spatial planning.[48] As such, private forests are under the jurisdiction of district or town governments. There are two conditions determining the status of private forest: the existence of a land certificate indicating a private right, and the administrative decision of a head of district or mayor to designate the land as private forest.

The Forestry Minister's Regulation on Private Forest cannot fully protect community property rights as rights that emanate from community forest tenure systems (see 2.3). Firstly, it limits the recognition of private forests merely to forest with land certificates. Given the slow process of land registration throughout the country,

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[46] Article 1 point 4 of Law 41/1999.

[47] Article 1 point 5 of Law 41/1999.

[48] Article 1 point 1 and Article 2 (1) of Minister of Forestry Regulation P.26/2005.

the use of a land certificate as the only way to prove land rights is not satisfactory. Furthermore, land registration is mostly concerned with individual title due to the existing land legislation in Indonesia. This is not effectively facilitating the registration of communal land.

Secondly, the 2005 regulation has granted authority to the Forestry Minister to change the status of private forests located in protected and conservation areas to (state) Forest Areas. This has initiated a systematic expansion of state control over private land; as soon as the status of forest function changes into protection or conservation forest, the private land rights will be abolished.[49]

Clearly, the existence of private forest does not ensure the full protection of community property rights. People's ownership on private forests is still at risk. The situation is even worse in the grey areas, for example on *adat* communal land where the public or private status is contested.

The 1999 Forestry Law has used the ambiguity of the BAL to strengthen state control over *adat* communal land. The absence of a land certificate allows the Ministry of Forestry to easily consider it as state land. The Law, then, understands *Adat* Forest as state forest management delegated to *adat* communities. The Ministry of Forestry can abolish the *adat* forest if the *adat* communities are assumed to no longer exist. Thus, the recognition of *Adat* Forest in Law 41/1999 is another means for reinforcing state power over forests.[50]

(b) Forest Areas

The previous section has shown that Law 41/1999 defines forest as an ecological phenomenon. However, in Indonesian forestry legislation there is another important term, that is, Forest Areas (*Kawasan Hutan*). A Forest Area refers to 'a certain area which is designated and or stipulated by government to be retained as permanent forest'.[51] Unlike the concept of 'forest' which is defined primarily on the basis of its physical qualities, the Forest Area is based on a government's administrative decision to allocate and utilize certain land – forested or not – as forest. Forest Areas throughout

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[49] Article 19 of Minister of Forestry Regulation P.26/2005.

[50] The Forestry Law was passed under the high pressure of reforming forestry legislation, soon after the end of Suharto's regime. The strongest petition of civil society groups and the *adat* communities was the recognition of *adat* communities' rights on forest. Something has been neglected during three decades implementation of Law 5/1967. The provisions of *Adat* Forest and *adat* communities in Law 41/1999 are compromising provisions made to meet people's request as well as to maintain the Ministry of Forestry's control to forests. Critics have addressed Law 41/1999 regarding its provisions of *Adat* Forest, see for example, ELSAM (1999); Simarmata (2007), Sumardjono (2008).

[51] Article 1 point 3 of Law 41/1999

the country cover 133.7 million hectares; however, only 90 millions hectares are covered by forest in the ecological sense, the others have been reported to be non-forest covered land.[52] The Forest Areas are administered by the Ministry of Forestry.

To understand Social Forest, which is the main subject of this study, a discussion on the notion of Forest Areas, and the ways this notion is constructed, is indispensable. Law 41/1999 has defined Social Forest as state forest utilized mainly for empowering forest communities. The Social Forest legislation itself states that Social Forest is applied to certain parts of Forest Areas. Thus, the first key element of Social Forest is the notion of Forest Areas. Therefore we need to clarify the precise meaning of Forest Area, and in which way it is different from 'state forest'; what the legal basis of state's claim to the areas is; and how the Forest Areas are established.

The concept of Forest Area in general has become confusing and controversial because it has been erroneously perceived by most forestry bureaucracies, and regarded in certain executive regulations of Law 41/1999, as state forest.[53] In addition, its legal status is procedurally questionable. Most Forest Areas exist without having followed the complete procedure prescribed by the Forestry Law to establish a Forest Area (see figure 4–1).

The classification of land as Forest Area has caused conflicts across Indonesia. This is largely caused by the abovementioned perception of Forest Areas as state forests, practically interpreted as state ownership. As a consequence, many communities have been deprived of their rights to land, they would have to leave their land or at least be given very restricted access to the land which the Ministry of Forestry designates as Forest Areas.

The perception of Forest Areas as state forests has no legal basis in Law 41/1999. Article 1 point 4 of Law 41/1999, for instance, defines state forest as 'a forest (not forest area) located on land bearing no title.' Obviously, by using the term 'forest', Law 41/1999 means state forests as forests in a physical sense. State forest is not an administratively or politically constructed forest as is the case with the Forest Areas.

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[52] http://www.dephut.go.id/files/Statistik_Kehutanan_2008_Planologi.pdf (accessed 26-5-2010).

[53] Regarding Forest Areas as state forest has been a common discourse of forestry officials. Clear evidence that operational regulations of Law 41/1999 perceive Forest Areas as state forest can be found in Minister of Forestry Regulation number P. 26/2005 concerning the guidelines of private forest utilization. Article 19 (1) states that the status of private forests that function as conservation and protection forests can be changed into Forest Areas. Then, paragraph 4 of this article adds that for this change, the government compensates the right holders of private forests who are also the holders of land rights where the forest is found. In other regulations that contain provisions on forestry licenses to the communities, there is always a condition that the licenses are not the equivalent of ownership rights to the Forest Areas. In this sense we can see that the legislation conceptualizes Forest Areas as land without any private rights which also applied to state forest.

As mentioned, the Forests Areas exist due to administrative decisions of the government. More precisely, the Forest Areas are established by political power of the state and legitimated through its administrative decisions. Peluso and Vandergeest (2001) use the term political forest to illustrate the construction of forests based on power and political considerations of the state. In this book, the term 'politico-administrative forest' has been chosen because administrative decisions have made all political processes in the establishment of Forest Areas concrete and legally accepted.

Defining Forest Areas as politico-administrative forests, in line with the definition of Forest Areas provided by Law 41/1999, says little about the property status of the land. In this sense, Forest Areas can be found in state or non state land. Other scholars say that Indonesian Forest Areas must be understood as a forestry planning domain (Contreras-Hermosilla and Fay 2005). As other zones in spatial planning, the establishment of Forest Areas does not determine the property status of land. Thus, there is no basis to solely accept the state's claim over all Forest Areas.

Law 41/1999 is clear in terms of defining the difference between forest, Forest Area and state forest.[54] Any other interpretation of Forest Areas as state forests, indicates a legal misapprehension, probably derived from the old Law (Law 5/1967). This law defined state forests as *"Forest Areas and forest located on land with no-ownership rights."* Consistent with this definition, under the regime of the 1967 Forestry Law it was assumed that once Forest Areas had been declared, they immediately became state land.

Law 41/1999 as noted has developed its own definition of Forest Area, but interestingly the old assumption about state forest and Forest Areas of Law 5/1967 has remained. Operational regulations of Law 41/1999 (the latest one is GR 44/2004 on Forestry Planning) state that regional governments should retain a minimum of 30 % of their territory land as Forest Areas. This has been interpreted as: 30 % of land in each region should remain Forest Area, and thus state land.

There are related problems regarding the legal basis of the Ministry of Forestry's land claims within the Forest Areas and the procedure of establishing the Forest Areas. As the only government institution administering Forest Areas, the Ministry of Forestry has control over 60 % of the whole country's land. This has raised criticism. Firstly, because there is no other government institution that practically controls such a large area as the Ministry of Forestry. Secondly, the exclusive implementation of forestry legislation in Forest Areas has undermined the BAL that, according to some Indonesian legal scholars and practitioners, must be applied to all types of land, including land in Forest Areas (Harsono 2005:8-9; Fay and Sirait 2006:3-4;. Moniaga

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[54] Article 1 point 2,3,4.

2006:46-7). Thus, Forest Areas have been a manifestation of dualist practice within the state land tenure system.

Whereas other sections of this study discuss the origins and problems of this dualism (see 4.2; 4.5 (a)), this section is in search of a lawful legal basis for the Ministry of Forestry's control over land in the Forest Areas. For the purpose of strengthening legal security of forest tenure, including state forest tenure, the existence of a clear and lawful legal basis of any claim by tenure actors on land and forest is essential. In fact, such legal basis for the Ministry of Forestry's control of land in Forest Areas becomes the first and foremost requirement.

The Ministry of Forestry has raised several arguments to justify its claim. The first argument as commonly said by forestry officials is that the Forestry Laws (Law 5/1967 and Law 41/1999) have provided the Ministry with a legal basis for physical control of the land in Forest Areas. Officials in the Ministry of Forestry and National Land Agency hold the same opinion about this issue.[55] Yet, this argument cannot be accepted since there is no provision in Law 41/1999 nor in Law 5/1967 which provides the Ministry of Forestry with such sort of authority. The formal authority of the Ministry of Forestry, as among others regulated by GR 38/2007 on the Division of Government Authority, consists of policy-making, planning, regulating, licensing, guiding and monitoring of forestry affairs; no authority relates to control the land.

Another prevalent argument of the forestry officials is based on the provisions in forestry laws concerning the state's right of control. This argument still does not provide the right legal basis because of two reasons. Firstly, the notion of state's right of control as used in the forestry laws denotes to regulatory and governance authority of the state to forest, Forest Areas and forest products; not to the land, or more precisely, not to the physical control of the land. Secondly, in line with Article 2 (4) and the General Elucidation II (2) paragraph 7 of the BAL, the state's right of control must be legally transferred to government agencies that will use the land for their tasks. According to the BAL the right of management is the proper legal tool for transferring the state's right of control to government agencies. Yet, the Ministry of Forestry does not hold such a right.

A third argument of the Ministry of Forestry asserts that "... [F]orest management needs control over the land"[56] and that the legal basis of the Ministry of Forestry for having the right of control is GR 8/1953 concerning the control of state lands. This is perhaps the most reasonable argument. GR 8/1953 was the legal basis for providing

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[55] I made these observations during personal conversations with forestry officials in Jakarta and in Lampung.

[56] See for this citation the Ministry of Forestry (1986:42).

land rights for government agencies to undertake their tasks.[57] The Regulation strengthened the Ministry of Forestry's authority of controlling land designated as forest. Prior to the enactment of GR 8/1953, the Ministry of Forestry in its book, *The History of Indonesian Forestry*, states that its control to forest land was based on GR 26/1952 (Ministry of Forestry 1986:42).[58] An incorrect legal basis has been presented by the ministry in this book since GR 26/1952 was about living allowance in remote regions. I assume the regulation that the ministry wants to rely on, is GR 20/1952 concerning organizational structure and executive management of state ministries. Yet, this regulation, as will be decribed below, did not contain any provisions concerning the ministry's authority of controlling land in Forest Areas.

GR 8/1953 is the first legislation which divides government's authority of state land control into the authority of the National Land Agency and other government agencies. Article 2 of GR 8/1953 states that the National Land Agency – at that time part of the Ministry of Home Affairs – holds the authority to control state land that, at the time of the GR 8/1953 enactment, was not controlled by other government agencies. Meanwhile, other land could be under the control of other government agencies on the basis of certain laws or regulations. It is obscure, however, which laws or regulations in 1953 provided the Ministry of Forestry the right of controlling forest land? Law 5/1967 and Law 41/1999 were not yet enacted. Then, GR 20/1952 as previously mentioned, did not regulate the Ministry of Forestry's authority of controlling state land. The Regulation was about the organization and managing personnel of state agencies. It can be properly used to provide the legal basis for the Ministry of Forestry's organization at that time, but not for its control on state land. Since there is no national legislation that can strongly support the ministry's control of forest land, we can try to search the legal basis in the colonial legislation. One can assume colonial Forestry Law for Java and Madura (*Bosch Ordonantie* 1927)[59] to be such a legal basis, since it declared the application of Domain Declaration in the forest (Termorshuizen-Arts 2010:63-4). Yet, I could not find whether this law had a provision clearly stating that the Ministry of Forestry was the right holder of land in the forest. More importantly the *Bosch Ordonantie* was not meant to be applied nation-wide, only in Java and Madura. In this respect, to follow the argument of GR 8/1953, we can conclude that forest land in Java and Madura islands must be under the authority of the National Land Agency.

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[57] See again footnote 34 of this chapter for further description concerning the legal basis of GR 8/1953 and its later development.

[58] This Government Regulation in the book, 'Indonesian Forestry History' (Ministry of Forestry 1986) is printed as GR 26/1952.

[59] Staatsblad van Nederlandsch-Indië 1927, no. 221.

The other problem relates to the basic principle of dividing the authority over state land between the National Land Agency and other government agencies – including the Ministry of Forestry – in GR 8/1953. As noted, Article 2 of the Regulation uses 1953 as the mark for determining such a division of authority. State land already controlled by state agencies before 1953 continued to be under the authority of those agencies. Meanwhile, the National Land Agency can only hold authority of state land that since 1953 was not controlled by any state agencies. To which category of state land do Forest Areas belong?

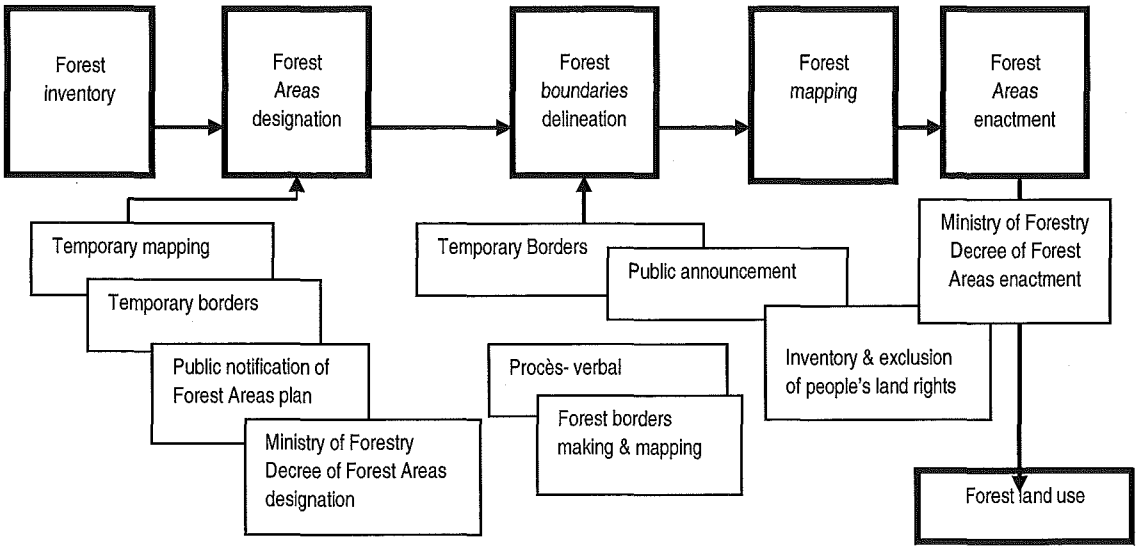
A general answer is not possible, since the Forest Areas have been designated gradually, notably outside Java. In 1953, the Ministry of Forestry focused mostly on its forest management in Java. As briefly described in 3.2, forest management on Java was relatively stable in the colonial times. The colonial forestry administration designated most state forests on this island. However, the designation of Forest Areas outside Java mostly took place in the course of the 1970s–1980s. Thus, in line with GR 8/1953, the Ministry of Forestry's claim on Forest Areas is only valid in areas that were designated before 1953. Most of them can be found in Java.

In sum, from a legal perspective, the arguments for justification of the Ministry of Forestry's control of all Forest Areas are weak. However, this study does not deny all state claims to Forest Areas. In some cases, the state needs to have a direct and effective control of forest, particularly for the sake of environmental protection. The main challenge is now to provide a lawful claim, which can provide the legal foundation for legal security of forest tenure, both for the state and the communities.

Finally, the last legal problem of Forest Areas is the procedure of establishing these areas. The Forest Areas exist when there is a series of government actions named forest establishment or *'pengukuhan hutan'*. This process entails forest designation, boundary demarcation, mapping, and official enactment of Forest Areas (figure 4–1). The whole process is intended to give legal certainty concerning the status, function, location, border and size of Forest Areas. For this reason, the Forestry Law and GR 44/2004 oblige the government to establish Forest Areas. Only after legal certainty is established concerning the Forest Area, the government can take the next steps of forest management such as determining forest land use and forest functions.

Figure 4–1

The establishment of Forest Areas in Indonesia



Source: Law 41/1999; GR 44/2004.

Although Law 41/1999 gives a detailed direction for establishing Forest Areas, in practice, most of the areas, notably in Indonesia's outer islands, do not follow that process to the end.[60] The political process in designing forest land has generally taken place through a policy called Agreement of Forest Land Use (*Tata Guna Hutan Kesepakatan, TGHK).* Decisions for designating Forest Areas have been made through negotiations and consensus among government agencies in each province, notably those who were responsible for land, agricultural, mining and transmigration affairs. The Forest Land Use Agreement has its legal basis in a decision of the Minister of Agriculture[61] in 1981 (Decree 680/1981) concerning the guidelines of Forest Land Use Agreement. The decree recognizes that it will take much time to prepare a

[60] Forest designation in Java generally has a colonial legacy. The national government only re-designated state forests as declared previously by the colonial government. As the first priority of colonial government focused on Java, so did the forest designation process. Only in the first half of twentieth century did the colonial government start to manage forest in out of Java island by mapping forest borders on paper and registering the forest areas (Simon 2004:4).

[61] Prior to its status as an independent ministry, the Ministry of Forestry was a Directorate General within the Ministry of Agriculture.

comprehensive forest use system based on the formal procedure as the Law prescribes. Thus, negotiations among government institutions are presented as a solution. The prevailing arrangements of the state forest tenure system have been achieved by negotiations in the making of Forest Land Use Agreement (see 2.3 (a)).

Firstly implemented in the 1980s, the Forest Land Use Agreements have been generating conflicts either between the Ministry of Forestry and forest communities, or between the Ministry and other departments/regional governments. Fundamentally, this is caused by the fact that many boundaries on the Forest Areas map based on the Forest Land Use Agreement, generally known as *TGHK* map, differ from the actual condition of forests, or from land use according to provincial spatial planning documents. Many Forest Areas on the *TGHK* map in fact overlap with villages, plantations, or people's agricultural land, as we will see in the case studies in chapter 11. But the Ministry of Forestry, had little difficulty in handling those conflicts, because, politically, it was a strong department, particularly in the 1970s and 1980s when it was believed to be a major contributor to Indonesian GDP.

Criticisms and pressure on the Forest Land Use Agreements continued and, finally, starting in 1994, the Ministry of Forestry agreed to adjust these agreements to Provincial Spatial Planning. At that time, as the result of Law 24/1992 on spatial planning, most provinces in Indonesia had completed their provincial spatial planning. Many provincial governments used their new Provincial Spatial Planning authority to renegotiate land allocation with the Ministry of Forestry. In 2004, the Ministry of Home Affairs instructed provincial governors in the entire country to harmonize their Provincial Spatial Planning map with the Forest Land Use Agreements.[62] This process is known as harmonious integration (*paduserasi*). The problems of overlapping of the Ministry of Forestry's *TGHK* maps with Provincial Spatial Planning map were used to encourage the Ministry of Forestry to revise its *TGHK* map. At the end of 2006, the Ministry of Forestry after finishing the forest designation process (*penunjukan kawasan hutan*), harmonized its map with Provincial Spatial Planning in 30 provinces, while in the other three provinces – Riau, Kepulauan Riau and Central Kalimantan – the forest designation continued to be based on the Forest Land Use Agreements. After this harmonious integration was completed in 2008, the size of Forest Areas had declined from 133.7 million hectares to 120.35 million hectares of designated Forest Areas.[63]

The Forest Land Use Agreement that had emerged as a form of state forest tenure arrangement eventually failed to be effective.[64] The harmonious integration (*paduserasi*)

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[62] Minister of Home Affairs Instruction number 471/4263/SJ, 27 December 1994.

[63] http://www.dephut.go.id/files/Statistik_Kehutanan_2008_Planologi.pdf (accessed 26-5-2010)

[64] For the concept of forest tenure arrangement see 2.3 (a).

became the new arrangement of state forest tenure. Meanwhile the problems regarding a legal basis of the Forestry Ministry's claim on Forest Areas, had still not been resolved.

As can be seen in figure 4–1, forest designation is an initial step in the process of establishing a clear legal status for Forest Areas. Law 41/1999 and Ministry of Forestry Decree 70/2001 concerning the enactment of Forest Areas and the change of status and functions of Forest Areas state that legal certainty depends on completing the whole process of forest establishment. Therefore, it is reasonable to say that following the whole process of forest establishment until its ultimate step, namely the enactment of Forest Areas (*penetapan kawasan hutan*), is necessary. Interestingly, most 'Forest Areas' are only based on designation (*penunjukan kawasan hutan*). Very few of the designated forest areas have also been delineated. In its recent statistical report, the Ministry of Forestry (2008) states that only around 14 million hectares of designated Forest Areas have actually been enacted, around 12 % of the total.[65]

Forest delineation is a central process to be undertaken before the enactment of Forest Areas. It is to verify whether there people have land claims on the designated Forest Areas. The delineation, although it does not determine the final legal status of Forest Areas, is important since the Ministry of Forestry's unilateral decision in forest designation can be reassessed, or even renegotiated with the people (Contreras-Hermosilla and Fay 2005:12). If only 12 % of all the Forest Areas has actually been enacted, it means that only these areas have been formally verified for the existence of community's rights. Moreover, we can even raise a question about the 12 %: has the process of verification ensured fairness for all community members? This study does not address this question. It is more interested in showing that in some 88 % of Indonesian Forest Areas, claims between the state and the people still overlap.

As long as no delineation process is carried out, the Minister of Forestry's decision to designate the land as Forest Areas cannot be used to avoid giving attention to community property rights on that land. Interestingly, the Ministry of Forestry refuses this argument. It states that Forest Areas that were designated prior to the enactment of Law 41/1999 are valid, basing itself on Article 81 of Law 41/1999. However, Article 81 of Law 41/1999 relates to the legal status of the forest designation only. It cannot be widely interpreted to be valid in terms of determining the final legal status of Forest Areas. The Ministry of Forestry's claim on the validity of its Forest Areas can still be challenged. Very clear, Law 41/1999 states that the legal status of those areas is determined by the complete process of forest establishment. In other words, only after

[65] http://www.dephut.go.id/files/Statistik_Kehutanan_2008_Planologi.pdf (accessed 26-5-2010)

the delineation and enactment of Forest Areas have been completed, the forest can be claimed as Forest Areas.

Nevertheless, in 2009, the Minister of Forestry enacted a ministerial regulation aiming to confirm the status of Forest Areas (Regulation number 50/2009).[66] Article 2 of this Regulation states that the legal certainty concerning Forest Areas exists if the following conditions can be achieved: (i) if the Forest Areas have been designated, or; (ii) if the designated Forest Areas have been delineated, or; (iii) if the procès-verbals of the delineation process have been approved by the Forestry Minister, or; (iv) if the Forest Areas have been enacted. So, the Forestry Minister Regulation P.50/2009 assumes that all stages in the establishment of Forest Areas have equal legal status.

Clearly, this Ministerial Regulation is against Law 41/1999 as well as GR 44/2004. Neither of the two conceptualizes each stage of forest establishment as having the same legal status. The designation of Forest Areas is only the initial legal phase, while the final one is the enactment. To return to the fact that most Forest Areas are still in the designation phase, and only 12 % has been enacted a significant question for this book is to which Forest Areas, communities' rights can be granted: on the designated areas or on the enacted ones?

(c) The change of Forest Areas

Forest Areas, even though they are legally controversial, are illustrative for how the Ministry of Forestry applies its control over land and forest. Nevertheless, this does not mean that the Ministry of Forestry's control over these areas is absolute and permanent. Its control can be changed and transferred to other parties. Indonesian forestry legislation has provided three mechanisms for that purpose, namely Release of Forest Area (*pelepasan kawasan hutan*), Exchange of Forest Area land (*tukar-menukar tanah kawasan hutan)* and Agreement to lend-and-use (*perjanjian pinjam pakai*).[67] These mechanisms allow the Ministry of Forestry to enable other government institutions, private companies and the people to utilize forest land temporarily or establish land ownership rights on its Forest Areas.

Forest release and forest land exchange concur in releasing the Ministry of Forestry of its control over Forest Areas permanently. Forest Area release and Forest Area land

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[66] The official name of this Regulation is Forestry Minister Regulation number P.50/2009 on the Confirmation of the Status and Functions of Forest Areas.

[67] The recent legal basis for Forest Area Release and for Exchange of Forest Area land is GR 10/2010 on the Mechanism to Change the Allocation and the Functions of Forest Areas (*Tata cara Perubahan Peruntukan dan Fungsi Kawasan Hutan*); for the temporary agreement to lend-and-use there is Forestry Minister Regulation number P.43/2008 on the Guidelines on lend-and-use agreement concerning Forest Areas (*Pedoman Pinjam Pakai Kawasan Hutan*).

exchange generally take place when the Forest Areas are needed for development purposes or other public interests. They vary in two ways. Firstly, in the forest release mechanism, third parties do not need to compensate the Ministry of Forestry with another area of land; while in forest exchange land compensation is obligatory. Secondly, forest release can only take place in provinces with Convertible Production Forests.[68] Provinces with no more this type of forest must use the mechanism of exchange. Only production forests can be exchanged.

Compensatory land is located outside the Forest Areas and provided by third parties for the use by the Ministry of Forestry as new Forest Areas. Ministerial Decree 70/2001 and Decree 48/2004 concerning Forest Areas Enactment and the Change of Status and the Functions of Forest Areas emphasise that the compensated land must be 'clear and clean', meaning that the legal status of that land is clear, and no overlapping claims can be found on that land. The 'clear and clean' condition of compensated land is interesting. It shows how the Ministry of Forestry does not want to engage in legal conflicts with the people, where on the other hand, it is also in contradiction with the Ministry of Forestry's own practices in Forest Areas designation, where unilateral decisions are often used to designate people's land as Forest Area, and thus as state forest.

Forest release usually serves to two kinds of development projects namely transmigration and plantation. The Ministry of Forestry in its 2007 and 2008 statistical reports states that release has been conducted for 4.8 million hectares of Forest Areas in order to be used as plantation and/or agricultural areas throughout the country.[69] Most of the Forest Area release took place in Sumatra and Kalimantan, two of Indonesian largest islands with rich forests. Lampung province, in Sumatra, where I undertook my research, is one of ten provinces with the largest release of Forest Areas. Some of those releases, however, ended in conflicts (see 11.2 and 11.3).

(d) Forest functions

Forest management in Indonesia is organized according to the functions of forest, which are legally defined. Law 41/1999 states that forests (state or private) have three major functions: production, protection and conservation. When forest has the main function to generate forest products, it will be considered as production forest. Protection forest is intended to protect life-supporting systems, prevent floods, control

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[68] For the definition of Convertible Production Forest see 4.5 (d).

[69] http://www.dephut.go.id/files/Stat_2007.pdf (accessed 28-5-2010); http://www.dephut.go.id/files/Statistik_Kehutanan_2008_Planologi.pdf (accessed 26-5-2010). The existing legal basis of releasing Forest Areas of plantation uses is Forestry Minister Regulation number P.22/2009.

erosion, prevent sea water intrusion and to maintain soil fertility. Conservation forest means forest to be used primarily for preserving plant and animal diversity and its ecosystem (Law 41/1999 Article 1 point 7, 8, 9).

The production forests are composed of Limited Production Forests (*Hutan Produksi Terbatas*), Permanent Production Forests (*Hutan Produksi Tetap*) and Convertible Production Forests (*Hutan Produksi yang Dapat Dikonversi*). A decision made by the Minister of Agriculture in 1981 (Decree 683/1981) defines Limited Production Forests on account of restricted logging. Another decision (Agriculture Ministerial Decision 682/1981) defines Permanent Production Forests as forests that should be retained because of their important contribution to the social and economic needs of the society and the state. Convertible Production Forests, on the other hand, are defined as production forests that can be converted into non-forestry functions, particularly for other development goals such as transmigration and agriculture. The conservation forests consist of nature reserve (*cagar alam*), wildlife sanctuaries (*suaka margasatwa*), national parks (*taman nasional*), grand forest parks (*taman hutan raya*) and nature recreation parks (*taman wisata alam*).

The Ministry of Forestry has the authority to decide about the functions of forests. GR 44/2004 concerning Forestry Planning has elaborated sets of criteria for the allocation of those functions. Prior to this regulation, the Ministry of Forestry used ministerial decrees as its legal basis for determining the functions of forests. All regulations have set up scientific criteria and procedures for the determination of forest functions. However, very few of these criteria and procedures have been followed. In Java and in some Sumatran provinces such as Lampung, the Ministry of Forestry simply confirmed the functions of forests as established by the colonial government. In some cases, the Ministry of Forestry then enlarged the forests by including people's land that was basically located outside the colonial forests (11.3). In other cases, the Ministry of Forestry changed the function of colonial forests, for instance by changing protected forest into conservation forest, as occurred in one of my village case studies in Lampung (8.2).

The other way to change the forest function is by declaring logging concession areas as production forests. In the early years of the New Order, Indonesian forestry was dominated by extractive logging. The law was to serve logging, as a source of revenue for national economic development. This was very clear from the old Forestry Law (Law 5/1967). Soon after the promulgation of Law 5/1967, the Minister of Agriculture issued a decree (Decree 291/1970) that stated all areas of logging concessions were designated as production forests. Then, the Directorate General of Forestry reinforced the Ministerial Decree by issuing a decree (Decree 54/1975) stating that the delineation process of logging concession areas should be interpreted as a preparatory phase of Forest Area establishment.

In fact, many logging concession areas were issued without taking into account the forest functions. In 1987, for example, the Ministry of Forestry recognized that of 50 millions hectare of forest concessions, only 75 % were located in production forests. Others could be found in protection and conservation forests. In addition, many logging concessions were also located outside the Forest Areas, in this case on people's land (Safitri 1999:4). Certainly, this caused conflicts between the logging companies and forest communities. The Ministerial Decrees 291/1970 and Director General of Forestry's Decree 54/1975 legalized all mistakes and injustices committed in designating logging concession areas as production forest. This possibly happened due to the absence of legislation pertaining to the criteria and procedure of forest designation. Yet, since the 1980s, the Ministry of Forestry has enacted several pieces of legislation concerning this issue such as the Minister of Agriculture Decrees 682 and 683 of 1981 and the latest one, GR 44/2004 on Forestry Planning. Interestingly, none of them have corrected the past failures in designating production forests. Article 46 of GR 44/2004 states: "Forest Areas that have been designated or enated or the functions of which were changed based on a Ministerial Decree enacted prior to this regulation, remain valid."

Forest functions are not only designated for state forests but also for private forests. Forestry Ministerial Regulation P.26/2005 states that the functions of private forests are designated in accordance with district or town spatial planning. The Spatial Planning Law (Law 24/1992, later replaced by Law 26/2007) divides the functions of spaces into two categories, that is, protected areas (*kawasan lindung*) and cultivated areas (*kawasan budidaya*).[70] The spatial planning laws include protection and conservation forests in the category of protected areas; whilst the production forests are part of cultivated areas. However, the determination of forest functions has undermined the property status of private forests. Article 19 of Forestry Minister's Regulation P.26/2005 has provided a legal basis for changing the status of private forests located in protected areas to be (state) Forest Areas. In these circumstances, the government must compensate the land right holders.

The determination of forest functions illustrates how the state has systematically restricted people's rights to the forest. Two prominent examples of this process are the determination and change of forest functions which generally neglects people's participation, and the government's assumption that protected areas must be state land.

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[70] Article 7 (1) Law 24/1992 or Article 5 (2) Law 26/2007.

(e) Forestry licensing

Law 41/1999 allows anyone to utilize state forests by holding licenses of forest utilization.[71] The Law and its implementing Regulation, GR 6/2007 on Forest Systematization, and Planning for Forest Management and Utilization (henceforth, Regulation on Forest Management),[72] provide for forest utilization licenses as follows:

i) License for commercial utilization of Forest Areas (*Izin Usaha Pemanfaatan Kawasan Hutan, IUPK*)

ii) License for commercial utilization of environmental services (*Izin Usaha Pemanfaatan Jasa Lingkungan, IUPJL*)

iii) License for commercial utilization of timber products (*Izin Usaha Pemanfaatan Hasil Hutan Kayu, IUPHHK*) from natural and planted forests.

iv) License for commercial utilization of non-timber products (*Izin Usaha Pemanfaatan Hasil Hutan Bukan Kayu, IUPHHBK*) from natural and planted forests.

v) License for commercial utilization of timber products for the purpose of ecosystem restoration in natural forests (*IUPHHK restorasi ekosistem*)

vi) License for harvesting of timber products (*Izin Pemungutan Hasil Hutan Kayu, IPHHK*)

vii) License for harvesting of non-timber forest products (*Izin Pemungutan Hasil Hutan Bukan Kayu, IPHHBK*)

GR 6/2007 has some very complicated provisions concerning forestry licensing. However, by understanding how this regulation categorizes the objectives and permitted activities of forest utilization as well as the types of forest functions for which the licenses are granted, we can arrive at a simple classification of forestry licenses in Indonesia.

Firstly, GR 6/2007 generally implies two objectives of forest utilization, that is, large-scale utilization carried out mostly for commercial purposes and small-scale forest

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[71] Articles 26 to 39 of Law 41/1999 regulate forestry licensing.

[72] The official name of this regulation is Government Regulation on Forest Systematization and Planning for for Forest Management and Utilization (*Tata Hutan dan Penyusunan Rencana Pengelolaan Hutan serta Pemanfaatan Hutan*). It replaces GR 34/2002, see 3.6 for a discussion concerning GR 34/2002, and the Ministry of Forestry's reason for replacing it with GR 6/2007.

utilization to supply forest communities' needs. Based on these objectives, licenses can be classified in two types: licenses for commercial forest utilization (*izin usaha pemanfaatan hutan*) and licenses for harvesting (*izin pemungutan*) timber and non–timber forest products. The first five licenses on the above list are part of the former type of license, whereas the latter type is represented by the last two on the list.

Secondly, the licenses vary based on permitted activities for their holders. In this categorization, there are licenses for utilizing Forest Areas covering land and all forest resources utilization (the first on the list); licenses for utilization of environmental services such as water, nature recreation, carbon reservoir (the second on the list); and a license for utilizing forest resources – timber or non-timber – (the remaining five types of license on the list).

Thirdly, licenses can also be categorised according to locations where they are granted. In this category, there are licenses for forest utilization in protection and in production forest. For the latter, there are several more categories: natural production forest and planted production forest. Natural production forest consists of general natural forests and natural forest for ecosystem restoration. Licenses for commercial timber utilization in the latter category of production forest aim to develop and rehabilitate damaged natural production forests which basically have important ecosystem functions. By obtaining a hundred year license, license holders are obliged to rehabilitate the forest and forbidden to log the forest until it will be fully restored as the hundred years pass. During the duration of this license, they can obtain other licenses such as licenses for utilizing Forest Areas, environmental services or non-timber forest products.

Licenses for forest utilization offer the right of utilizing state Forest Areas or resources therein for a period ranging from one to a hundred years. Most licenses are extendable based on evaluation carried out regularly (from six months to yearly) by the licensing authorities. Individual citizens, cooperatives, state-owned enterprises and private companies owned by Indonesian citizens are eligible to be license holders. Licenses for commercial timber utilization and licenses granted on cross-provincial border areas are issued by the Minister of Forestry; whilst regional governments hold the authority to issue other licenses in their own administrative areas. Table 4-1 shows details about these licenses. Forest utilization licenses oblige license holders to protect the forest[73] as well as to pay forestry fees and funds.[74]

Forest utilization licenses are not private land ownerships; yet, they bestow their holders with rights to utilize and benefit from Forest Areas (including land) and

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[73] Articles 32 and 48 of Law 41/1999.

[74] Articles 79-80 of GR 6/2007.

resources. Thus, these licenses confirm the notion of property rights described in 2.3 (b) as any justifiable claims to land and/or forest resources that exist in the form of right to own, utilize, benefit, transfer or use as credit collateral forest resources in certain period. As property rights exist in different degrees – the extended one concentrate all bundled rights in one right holder but the limited one only covers one or a few rights, we can say that for practical purposes forest licenses are limited property rights. They offer to the license holders rights to utilize, benefit and transfer.[75] However, most forestry licences neither include a right to own land nor a right of using the license as credit collateral.[76] The extent to which these forest licenses provide legal security of forest tenure must be measured separately for each license. This study will focus only on Social Forest licensing.

4.6 Conclusion

The concept of the state's right of controlling land and forest has been central in Indonesian legislation regulating forest tenure relations between the state and people. Found in Article 33 (3) of the original and amended versions of the 1945 Constitution, this concept has been referred to by all laws pertaining to land and natural resources in general and forestry law particularly. However, the Constitution does not explain how to interpret this concept.

The BAL is the first law that elaborates on the concept of the state's right of control. Aimed at countering the colonial Domain Declaration that considered the state as the owner of land and natural resources, the BAL understands the state's right of control as a public authority of the state – as the representation of the Indonesian people – of regulating land and natural resources. The 1999 Forestry Law using a similar concept of the state's right of control, interprets the state's right of control as a regulatory authority of central government, to be precise of the Ministry of Forestry. All laws regarding natural resource management use the same concept.

Regardless of the development ideology behind the lawmaking – socialist or neo-liberal – laws on land and natural resources have to refer to Article 33 (3) as their basic framework of regulating land and natural resource tenure. They also share the same idea of the BAL, which considers the state as the regulatory authority, not the owner, of land and natural resources. A surprising development took place in the 2001–2004 period when the Constitutional Court in a number of cases interpreted the state's right of control broader than state public authority. The Court argued that the state's right of control must be also interpreted as state ownership. This sort of interpretation needs

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[75] Article 20 (1) of GR 6/2007 allows transfer of licenses upon written approval of the Ministry of Forestry.

[76] Article 20 (2) of GR 6/2007.

further clarification. In the context of forest tenure, there must be an explanation about the land, forest and category of people, which can be subject to state ownership. Then, it is necessary to examine what the legal consequence of such an ownership are for community's property rights, particularly those found in state-claimed Forest Areas.

Although the state's right of control is undoubtedly the basic legal concept of the state forest tenure system, it is not a fixed and clear concept. It is open to many interpretations. To some extent, this can be accepted as a common phenomenon of general rules such as can be found in the Constitution. However, it is essential to know to which extent the interpretation promotes legal security of community property rights. Unfortunately, attempts to clarify the state's right of control in Indonesian legislation have not succeeded.

The BAL and Forestry Law are the major pieces of legislation with regards to forest tenure. However, the BAL holds a dual position about whether *adat* communal land rights have a public law status or a private law status. It is also ambiguous about whether property rights of *adat* communities are individual or communal rights. In addition, it does not offer adequate right protection to the communities. The result is limited legal security of community property rights.

The Forestry Law is clearer than the BAL in that it has determined all people's rights in Forest Areas as parts of state forests. However, this is not to say that the law provides the highest level of legal security of community forest tenure, in particular in *adat* communities. Law 41/1999 on Forestry also includes forests located on *adat* communities' land as state forests. It undermines traditional rights of forest tenure of these communities, even though the Constitution in general recognizes them. Meanwhile, like the BAL it also does not provide adequate protection for community property rights.

Another problem in the field of forestry relates to the legal status of the Ministry of Forestry's claim to Forest Areas, and the legal status of land that has been designated (*ditunjuk*) as Forest Areas. This chapter shows that there is no legal basis for the Ministry's claim on Forest Areas. The Ministry's arguments, including those based on the 1967 and 1999 Forestry Laws, are unacceptable. Neither law states that the Ministry should have control over land, where Forest Areas are found. In addition, the majority of existing Forest Areas is in the designation phase, which is merely the initial step of establishing the legal status of Forest Areas. The designation of Forest Areas is a unilateral decision of the Ministry of Forestry to determine certain land as Forest Areas. As such, in many of the designated Forest Areas there is a strong possibility of overlapping claims between the Ministry and forest communities. Such community rights will only be verified and acknowledged when the areas go through the next stages of delineation and enactment. However, most areas have not been officially delineated, let alone enacted (*ditetapkan*). For now, only some 12 % of the Forest Areas

have been enacted. So, we may expect many more, potentially clashing, claims between the Ministry and the people.

Considering the abovementioned problems, we can see how in the legal sense, both community and state property rights suffer from insecurity. Certainly, this is a key problem to implementing community-based forest management, including Social Forest. Chapter 5 will detail how Social Forest law and other legislation concerning community-based forest management strengthens or restrains legal security of community property rights in Forest Areas. However, the present chapter has explained to us that, even if the Social Forest legislation is successful in providing such legal security, it still has to deal with the bigger problem of the legality of Forest Areas where the Social Forest model will be applied, and the legality of the Ministry of Forestry's claim on those Forest Areas.

Table 4–1

Licenses of forest utilization in Indonesia according to GR 6/2007

TYPE OF LICENSE	LOCATION	LICENSE HOLDER	MAXIMUM DURATION	LICENSE ISSUER
License of Commercial Utilization of Forest Area *(Izin Usaha Pemanfaatan Kawasan, IUPK)*	Protection Forest	Individual citizen Cooperative	10 years	*Bupati*/mayor; Governor for cross-district areas; Minister of Forestry for cross-province areas
	Production Forest		5 years	
License of Commercial Utilization of Environmental Services *(Izin Usaha Pemanfaatan Jasa Lingkungan, UPJL)*	Protection Forest	Individual citizen Cooperative State-owned corporations (central/regional government corporations) Indonesian private corporation	50 years depending on type of utilization	*Bupati*/mayor; Governor for cross-district areas; Minister of Forestry for cross-province areas
	Production Forest			
License of Commercial Utilization of Timber Products *(Izin Usaha Pemanfaatan Hasil Hutan Kayu, IUPHHK)*	Natural production forest	Individual citizen Cooperative State–owned corporations (central/regional government corporations) Indonesian private corporation	55 years	Minister of Forestry
	Industrial Plantation Forest area (*HTI*)	Cooperative State-owned corporations (central/regional government corporations) Indonesian private corporation	100 years	Minister of Forestry
	People	Individual citizen	100 years	Minister of

	Plantation Forest area (*HTR*)	Cooperative		Forestry; can be delegated to governor
	Rehabilitated Plantation Forest (*HTHR*)	Individual citizen Cooperative State-owned corporations (central/regional government corporations) Indonesian private corporation	1 year	Minister of Forestry
	Natural production forest for ecosystem restoration	Individual citizen Cooperative State-owned corporations (central/regional government corporations) Indonesian private corporation	100 years	Minister of Forestry
License of Commercial Utilization of Non-Timber Forest Products (*Izin Usaha Pemanfaatan Hasil Hutan Bukan Kayu, IUPHHBK*)	Natural and planted production forests	Individual citizen Cooperative State-owned corporations (central/regional government corporations) Indonesian private corporation	10 years	*Bupati*/mayor; Governor for cross-district areas; Minister of Forestry for cross-province areas
License of Timber Products Harvesting (*Izin Pemungutan Hasil Hutan Kayu, IPHHK*)	Natural Production Forest	Individual citizen Cooperative	1 year	*Bupati*/mayor; Governor for cross-district areas; Minister of Forestry for cross-province areas
	Planted Production forest	Individual citizen Cooperative	2 years	
License of Non-Timber Forest Products	Natural production forest	Individual citizen Cooperative	1 year	*Bupati*/mayor; Governor for cross-district areas;

Harvesting (*Izin Pemungutan Hasil Hutan Bukan Kayu, IPHHBK*)	Planted production forest	Individual citizen Cooperative	2 years	Minister of Forestry for cross-province areas
	Protection forest	Individual citizen Cooperative	1 year; 5 years only for bird nests collection	

Source: GR 6/2007.