Land rights and the forces of adat in democratizing Indonesia : continuous conflict between plantations, farmers, and forests in South Sulawesi

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2 LAND RIGHTS DEVELOPMENTS IN INDONESIA: FROM ADAT LAW COMMUNITIES TO CITIZENSHIP AND BACK

2.1 INTRODUCTION

The position of customary land rights under Indonesian law is a contentious issue. Present day debates on customary land rights bear strong similarities to the discussions of the late colonial period, when the scope of adat law and adat land rights divided legal scholars and Dutch parliamentarians. Two key terms currently used in Indonesia to refer to indigenous communities are adat community and adat law community. These concepts, inherited from the late colonial period, play a prominent role in both the discourse of the indigenous movement and Indonesian legislation that regulates the recognition of customary land rights. Both refer to groups of people with a communal territory governed by their own customary law and institutions. In order to understand contemporary discussions and struggles over customary land rights in Indonesia, it is necessary to look at country's legal and political history. That is the focus of this chapter.

While addressing the historical developments of customary law in Indonesia, I will look at the changing role of adat law and the adat law community concept in legal policies, assessing the political factors that accounted for this change over time. I will explain how adat law and adat law community became central concepts in the colonial policy of legal pluralism. After Indonesian independence, land law changed significantly as a result of Indonesia's unification project and in the 1960s, legal pluralism largely had to make way for a unified law. Old legal terms such as adat law community lost much of their relevance. Instead, the state promised an egalitarian distribution of land on the basis of individual citizenship, but by and large failed to deliver. A land reform program was initiated in the 1960s but was never completed. Under the New Order of Suharto, the government prioritized economic development while customary rights of local populations remained of secondary concern.

After the fall of the New Order, the colonial legal concepts have regained prominence as a result of civil society advocacy for secure land rights. Rather than referring to the individual land rights provided in Indonesia's unified land law, NGO's began to invoke the colonial legal terminology related to adat law to demand secure land rights for rural citizens. The adat law community concept subsequently made its return in Indonesian law, most notably in the legal regime on forestry rights. Adat law community rights designate culturally distinct rural communities as the collective holders of customary land rights. As such, these rights are indicative of a specific, localized form of citizenship that is differentiated from national citizenship. We will see that under Indonesian law, it is almost exclusively in the context of this form of layered citizenship that customary land rights can be recognized by the government (Lund, 2011: 10-11; Yuval-Davis, 1999: 122).

2.2. ADAT LAW, LAND RIGHTS AND THE COLONIAL STATE

2.2.1 Citizenship and legal pluralism under Dutch rule

The Dutch presence in Indonesia began with the arrival of the VOC (*Verenigde Oost-Indische Compagnie*), which aimed at resource extraction. During the VOC period, direct forms of rule generally did not exceed beyond coastal settlements and trading posts. Outside of these areas the company only interfered with the rules of indigenous authorities when it was deemed necessary to safeguard commerce (Sonius, 1981: LX). Respecting the law of the indigenous people was considered the most efficient and inexpensive way of governing trade (Lev, 1985: 57-58). Despite this 'neutral' attitude towards local laws and authority, the VOC's demands for agrarian commodities probably did have an impact on indigenous laws and institutions (Sonius, 1981: LIII).

Beginning in the late eighteenth century- a time when a wave of liberalism influenced political thinking in the Netherlands – a debate emerged about which legal policy would be most suitable for colonial rule. The VOC went bankrupt in 1799 and after an interlude of British rule (1811-1815), the Dutch restored their authority and established full control on the economically important island of Java. The archipelago was subsequently incorporated into the Kingdom of the Netherlands as the Dutch East Indies.

The dual aim of both profitability and just rule lumbered the Dutch with a dilemma on legal policy (Fasseur, 2007). A choice was to be made between legal unification and legal pluralism. Under a unified legal system, all people inhabiting the archipelago would be subject to the same laws, whereas in a system of legal pluralism, different norms and rules would apply to various population groups. The Dutch eventually chose the latter mainly for reasons of expediency. The pluralist legal system, formalized in the colony's constitution (*Regeringsreglement*) of 1854, made a basic distinction between Europeans and indigenous people (Lev, 1985; Fasseur, 2007).

Citizenship in Indonesia hence became based on ethnic differentiation. The ethnic group to which a person belonged determined one's legal status. The Dutch distinguished between three major groups: the Europeans, the indigenous population and the foreign Orientals.[13] According to the law, indigenous persons were never citizens but subjects (Djalins, 2015: 229).[14] While the Europeans were subject to Dutch law[15], the indigenous population continued to 'live according to their own laws and traditional institutions'. Foreign Orientals had an intermediate status (Sonius, 1981: LVIII). This pluralist model was inspired by liberalist ideas of 'fairness and good government' but it also served other goals. By upholding indigenous rules and institutions, the Dutch could rule in an indirect way that was both efficient and cheap. In addition, allowing indigenous people their own laws and institutions would prevent rebellions against colonial rule (Benton, 2002: 2).

[13] I use the term 'indigenous' here to refer to the (now considered inappropriate) colonial term '*inlands*' (indigenous/native) or '*inlander'* (indigenous/native person).

[14] Indigenous persons had the legal status of Dutch *onderdaan,* a status established by law (Wet op het Nederlands onderdaanschap, Wet van 10 februari 1910, Stb. nr. 55)

[15] According to the '*concordantie* principle', laws enacted by the colonial government in the Dutch East Indies had to be as much as possible in conformity to Dutch law. See: Ball, 1982: 29.

The different ethnic groups were thus subject to different legal systems. Two parallel administrations were created along ethnic lines, the indigenous administration being subordinated to the Dutch. A similar duality existed in the judiciary. There were two separate, though hierarchically connected judicial systems. Appeals against decisions of indigenous courts were dealt with by European courts, reflecting the supremacy of the Dutch in deciding legal matters (Lev, 1985: 59-60).

2.2.2 Discovering the importance of adat law

Given that the Dutch presence in the archipelago was above all motivated by the potential to profit from 'agrarian production for the world market', the land rights of the indigenous population proved to be a vital matter (Sonius, 1981: LIV). The complexity of this issue particularly rose to forefront during the debates of the 1860s regarding the enactment of an Agrarian Law (*Agrarische Wet*) for the Indies. These debates revealed the awkward dual aims of colonialism: gaining profits from large-scale agrarian production was not possible without some form of encroachment of land belonging to indigenous communities. In 1870, after the abolishment of the government-controlled Cultivation System, the Dutch moved towards a more liberal economic policy allowing the establishment of large-scale plantations by private corporations (Burns, 2004: 33). Large tracts of land became available for this 'plantation economy' (Benda-Beckmann and von Benda-Beckmann, 2011: 178).

The law governing land rights was characterized by compromise between contradicting interests. The 1870 Agrarian Law stated to respect indigenous land rights, but also provided that unused virgin land (*woeste gronden*) could be leased to non-indigenous entrepreneurs. Moreover, the *vervreemdingsverbod* (alienation prohibition act) of 1875 prohibited the sale of indigenously owned land to non-indigenous people. This meant to serve as a mechanism to protect indigenous people from dispossession. Along these lines, ethnic status also determined the status of the land rights that someone in the Dutch East-Indies could obtain.

Related to the growing concern for the land rights of the indigenous population, as well as their welfare in general, was an increased interest in indigenous culture and customs. At the close of the nineteenth century, the relative indifference towards indigenous culture and customs gradually made way for a growing concern with indigenous society, particularly among colonial civil servants (Fasseur, 2007; Burns, 2004: 49-50). From 1842 onwards, colonial officials had to learn indigenous languages as part of their professional education, something which was largely neglected previously. Scholars, officials and missionaries began to carry out research in which they focused among others on the normative aspects of indigenous society such as property and village institutions (Fasseur, 2007). These developments were driven by the liberal idea that colonial rule could only be fair and just if the culture of the indigenous population was properly understood (Heslinga, 1928: 13). Moreover, opposition against abusive agrarian policies such as the Cultivation System triggered the initiation of studies on indigenous land rights (Sonius, 1981: LVI). Through this system controlled by the colonial

government, Javanese farmers were to produce agricultural commodities as a form of taxation. The system boosted agrarian productivity and was eventually highly profitable for the Netherlands, but had catastrophic effect on the farmers and put much of the population of Java in misery (Burns, 2004: 24).

A figure of particular influence was government advisor and later Leiden professor of language and culture Christiaan Snouck Hurgronje. In his research on Aceh, he found that the living norms and practices of indigenous society were more important than rules prescribed by Islam. Hence, he coined the term *adatrecht* (adat law). The term adat had for long been used to refer to many kinds of indigenous practices (Burns, 2004: 59, 66). According to Snouck Hurgronje, adat law was distinct from adat due to its law like features (Burns, 2004: 66). The work of Snouck Hurgronje was followed up by many other research projects on adat law carried out in other parts of the archipelago. The jurist Cornelis van Vollenhoven would become adat law's central figure.

2.2.3 Ethical Policy and the legal battle of Cornelis van Vollenhoven

Liberalist thinking in the Netherlands reached new heights at the turn of the twentieth century when a new era of colonial policy began. The so-called Ethical Policy was explicitly geared towards the development of the indigenous population (Otto and Pompe, 1989: 245). The Dutch had come to realize that the indigenous population had long suffered from exploitative practices, which created a common sense of debt and a conviction that justice had to be restored.[16] Liberal lawyers and prominent officials expressed the view that the best way to 'uplift' the indigenous population was through legal unification. They contended that only the imposition of equal rights and obligations could create a fair society in the Indies (Fasseur, 2007: 58). It would also allow indigenous people to fully participate in the modern sphere of trade and business and hence formed the key to their modernization. In essence, legal unification would be a first major step forward towards conferring the indigenous population with citizenship rights.

However, the idea of legal unification was met with fierce criticism. The strongest and most grounded critique to legal unification of the Dutch East Indies came from the newly appointed Leiden law professor Cornelis van Vollenhoven. His longtime study of adat law was mainly driven by his respect for culture and critique of dispossession. Hence, his ambition was to change colonial policy. He believed that 'good governance and good administration of justice' could only be accomplished if colonial officials properly understood the nature of adat law and its functions in each particular local context (Sonius, 1981: XXXVI). In his eyes, the arrogant colonial officials – particularly those at the central level – had completely failed to comprehend adat law. It had resulted in great injustices for indigenous communities, particularly in the domain of land rights. Proving that adat law was real law and existed on a wide scale therefore became his primary objective.

[16] The best-known publication in which this sense of guilt was expressed is Van Deventer's '*Een eereschuld*', published in 1899 in De Gids.

In the early twentieth century, Van Vollenhoven's ideas became highly influential and the study of adat law 'began to flourish' (Van Dijk, 2005: 136). He turned the study of adat law into a true science (Sonius, 1981: LL). Rather than solely focusing on decisions of indigenous judges, he believed that one could best learn about the nature of adat law by observing daily social practices (Benda-Beckmann and von Benda-Beckmann, 2008: 180). Scholars, colonial officials and missionaries alike devoted themselves to the study of adat law throughout the archipelago and did so with pride. Van Vollenhoven's students engaged in extensive ethnographic research in each of the nineteen separate adat law circles (*adatrechtskringen*) that van Vollenhoven identified.[17] It resulted in a large number of publications, among which 43 *adatrechtbundels*. A research project on indigenous law of this scale was unheard of in other colonial territories (Benda-Beckmann and von Benda-Beckmann, 2008: 179).

Van Vollenhoven was highly critical of the way colonial officials interpreted and applied the 1870 Agrarian Law, especially its so-called domain principle (*domeinverklaring*).[18] This principle provided that all land to which no ownership rights could be proven, either by Europeans or indigenous people, fell under the domain of the colonial state. The domain principle was controversial because it was subjected to multiple interpretations. The diverging interpretations could potentially work in favor of the colonial state, for it allowed administrative discretion in handing out plantation licenses (Burns, 2004: 32; Fitzpatrick, 2007: 133). Van Vollenhoven accused colonial officials of disregarding adat rights to lands, particularly those held under *ulayat* arrangements. *Ulayat*, to which the Dutch attached the legal term *beschikkingsrecht* (the right of avail), was a form of 'socio-political control' exercised by rural communities. It could also extend over the virgin lands that were not permanently cultivated and were located outside of the community's village borders (Benda-Beckmann and von Benda-Beckmann, 2011: 177).[19] The disregard of *ulayat* allowed land-hungry plantation corporations to dispossess communities of their communal territories (Fasseur, 2007).

2.2.4 Adat law communities

For Van Vollenhoven, another concept intrinsically linked to adat law, and in particular to the right of avail, was *inlandse rechtsgemeenschap* (indigenous law community) (Sonius, 1981: XLVI). The concept was tightly interwoven with adat law because one could essentially not exist without the other. Adat law existed because the law community applies and it upholds it, while for the law community to exist, adat law is required since it regulates its legal autonomy. Von Benda-Beckmann and Von Benda-Beckmann describe

[17] According to Van Vollenhoven, in each of these circles, with common cultural and linguistic traits, a more or less coherent system of adat law was intact.

[18] This principle was set forth in Article 1 of the *Agrarische Besluit*, an Executive Decree of the Agrarian Law of 1870.

[19] Individuals that were part of the community could obtain preferential rights to land within the *ulayat* territory. Such rights were usually granted to individuals who were first to reclaim a plot of land for cultivation. Under no circumstances however would such preferential rights undermine the community's right of avail to the wider territory.

the concept of law community as following: 'it refers to the larger or smaller constituent corporate units of an organized indigenous society which, in Van Vollenhoven's conception, derive their distinct, legal autonomy in domestic affairs from the fact that each has: (i) its discrete representative authority, and (ii) its discrete communal property, especially land, over which it exercises control' (Benda-Beckmann and von Benda-Beckmann, 2008: 181). Due to Van Vollenhoven's efforts, adat law community became a central concept in the legal policies of the late colonial period and as will be explained below, has recently re-emerged as an important legal concept in Indonesian law.

Adat and adat law were not entirely different phenomena in the eyes of Van Vollenhoven. He acknowledged that the lines between the two were blurry. Yet adat laws were legal in nature because they constituted institutionalized norms and rules to which sanctions were attached (Vollenhoven, 1933). Although adat law was 'living law', - meaning that it was flexible and dynamic –in his view it was nevertheless true law. It evolved over time and adapted itself in accordance to the needs of local society (Benda-Beckmann and von Benda-Beckmann: 2008: 180). Therefore, Van Vollenhoven argued, adat law was for the time being much more suitable to the needs of indigenous communities than an externally imposed system of Western laws with fixed, rigid norms. For the sake of keeping adat law 'living law', Van Vollenhoven did not deem it desirable to codify adat law into fixed norms as it would destroy its flexible and dynamic character (Burns, 2004; Benda-Beckman and von Benda-Beckmann, 2011; 173).[20] He further held that adat law existed autonomously in indigenous societies, regardless of whether it was recognized by the state (Sonius, 1981: XLIII; Benda-Beckmann and von Benda-Beckmann, 2008: 180).

2.2.5 Realizing recognition of adat land rights in parliament

One of Van Vollenhoven's most fruitful endeavors was his opposition against a new agrarian law proposed in 1919. This law would have 'compelled the Indonesians to the full acceptance of European legal principles with regard to the ownership of land' (Fasseur, 2007: 60). The drafters of the bill intended to amend the agrarian legislation of the *Regeringsreglement* and move towards a unified system of land rights. They drafted the law in such a way that it would end the recognition of adat land rights (Burns, 2004). Van Vollenhoven tried to change the minds of the parliamentarians by referring to the extensive history of rural injustices that colonial policies had caused (Burns, 2004: 22).[21] With his book '*De Indonesiër en zijn grond*' (The Indonesian and his land), submitted in 1919 to the Dutch parliament, Van Vollenhoven tried to prevent that the law would be enacted.

[20] However, in order to demonstrate that adat law had a core of legal principles, Van Vollenhoven drafted 'A Short Adat Law Code for the Whole of the Dutch East Indies' (*een Adatwetboekje voor Heel Indië*), but as Von Benda-Beckman and Von Benda-Beckmann point out, this book dealt with the main legal principles rather than concrete legal norms.

[21] He for instance pointed at the exploitative nature of the Cultivation System that was applied between 1830 and in 1870 in Java and some other parts of the archipelago.

In the run op to the proposed bill that would amend the agrarian law, a fierce debate between Nolst-Trenité, a special advisor to the government concerning land matters, and Van Vollenhoven, concerned the interpretation of the domain principle. Van Vollenhoven accused both his intellectual opponents and the colonial administration of misinterpreting the right of avail. This right, he argued, had a private and public dimension and therefore it did not fit with the Western legal categories that the colonial legislation provided for. For legal scholars of Utrecht University, who were proponents of legal unification, the right to avail should not be considered a right but a mere local interest that was subordinated to the rights of the colonial state. The vast uncultivated areas under the socio-political control of rural communities were considered virgin lands belonging to the public domain of the colonial state. This meant that the state could lease such lands to private parties, notably for the establishment of plantations (Benda-Beckmann and von Benda-Beckmann, 2011: 177; Korn, 1958: 143; 's Jacob, 1945).

In the final years of the existence of the Dutch East Indies, political developments kept the colonial administration occupied and hampered the further evolution of adat law (Burns: 2004: 108). A final momentum for the adat law proponents was in reach when the *Agrarische Commissie* (Agrarian Commission) was established in 1928. The commission was established at a time of frequent rural uprisings, making the agrarian policy once again the topic of debate, this time within the Volksraad (the colony's 'parliament') (Burns, 2004: 103-104). The commission consisted of Dutch and indigenous officials and was assigned to review the domain principle as well as to investigate the existence of the right of avail. Their findings resulted in a far-reaching advice, submitted to the colonial government in 1930. The commission called for the 'radical abolition' of the domain principle, which was to be replaced with the recognition of the right of avail as the basic principle of agrarian policy.

The commission thus largely followed the lines of the Adat Law School. It was probably the last concrete result of van Vollenhoven's 'tireless struggle', as he passed away in 1933. Eventually, the advice of the commission never translated into the adoption of legislation or state policy due to a lack of political opportunity. When Japanese troops invaded the Dutch East-Indies in 1942, the colonial policy and law, including adat law, came to an end. This marked the beginning of a new era.

2.2.6 The aftermath of the 'adat law policy' and retrospective debates

Van Vollenhoven's lifelong advocacy for adat law was very effective in the sense that its 'existence could no longer be denied' (Sonius, 1981: XLVIII). At two instances, in 1904 and in 1919, he managed to convince the Dutch parliament not to adopt a bill that would unify the legal system in the Dutch East Indies (Otto and Pompe, 1989: 245). Yet, although Van Vollenhoven is universally credited for his extensive ethnographic research, his ideas – and particularly the *adatrechtpolitiek* - have later become the subject of fierce criticism. The issue of adat law is, in the words of Lev, 'one of the most perplexing and ambiguous themes in Indonesia's colonial history' (Lev, 1985: 63). Lev states that adat law 'is fundamentally a Dutch creation', meaning that it were the Dutch who tied adat law to the

authority of the colonial state, while originally, adat law only existed in the context of local political and economic interests (Lev: 1985: 63-64).

According to Lev, colonial policy makers above all favored van Vollenhoven's ideas because they did not pose a threat to the continuation and legitimacy of colonial rule. He stresses that the Adat Law School and the policies based on its ideas were rooted in conservative political thinking that helped to legitimize the authority of the colonial state (Lev, 1985: 65-66). Lev exemplifies that this 'political edge' was particularly evident when considering how both scholars and officials dealt with the role of Islam in indigenous society. Studies on adat law presented an image of indigenous communities as if they existed in isolation and as if their adat laws were closed off from external influence (Lev, 1985: 66). In similar vein, Burns (2004) calls adat law a myth invented by the Dutch.

The concern for adat law that marked the last decades of colonial policy tended to ignore – or at the very least undervalue – the importance of Islam and Islamic law. Adat law scholars and colonial officials were on the other hand strongly biased towards indigenous traditions. Much attention was given to local rulers of the nobility who derived their authority from traditional belief systems. Dutch officials liked to see these rulers stay in power because they played a crucial role in managing the administration of indirect rule (Lev: 1985: 66). The recognition of adat law was an extension of the efficient and inexpensive policy of legal pluralism, albeit with better-informed officials and scholars. As we will see later in this book, colonial researchers sometimes deliberately pushed adat leaders to the forefront in order to counter the rise of nationalist, Marxist and Islamic movements, which threatened stability of the colonial state.[22]

The critique on adat law has in turn also been challenged. Von Benda-Beckmann and Von Benda-Beckmann argue that scholars who refer to adat law as a 'myth' invented by the Dutch have not sufficiently considered the role of the indigenous population in the development of adat law. According to them, the notion of adat law as a Dutch invention overlooks the agency of the indigenous populations in the construction of adat law (Benda-Beckmann and von Benda-Beckmann, 2011). They do acknowledge that the adat law doctrine cannot be detached from the political advantages it brought the colonial officials. They also see that adat law was to a degree influenced by Dutch legal scholars (2011: 176). But what the critics of adat law do not consider is how Van Vollenhoven, in contrast to the majority of legal scholars of his time, advocated for interpreting adat law in its own specific contexts 'free from ethnocentric bias' (2011: 177). For Van Vollenhoven, adat law was flexible and differed according to its social context but above all, it also existed without the recognition of a state.

Ultimately, the most important question is what difference it all made to the indigenous population. Van Vollenhoven's ideas indeed put adat law on the map, but the implementation of the colonial government's agrarian policy was far from consistent. For instance, *ulayat* territories were never mapped and administrative discretion regarding decisions on the allocation of concessions to foreign entrepreneurs continued (Li, 2010:

[22] See Chapter 5, Subsection 2.3.

394). In practice, the right of avail 'was sometimes fully respected, sometimes partially recognized and sometimes totally ignored' (Sonius, 1981: XLVII).

Other authors stress that the way Van Vollenhoven perceived the problems related to land was not in tune with the real situation. In 1933, one of his students noted that 'the era of closed communities leading their own lives was almost everywhere a thing of the past' (Sonius, 1981, XXXVII). Sonius states that Van Vollenhoven overrated the capacity of adat law to resist and did not manage to combine his idealism with 'pragmatic realism' (Sonius, 1981: XXXVI). He argues that 'adat law has no institutions which could enable it to operate effectively outside the sphere of the local communities, or to prevent the abuse of foreign concessions' (1981: XXXIX). In this context, Sonius raises the question whether a 'less dogmatic adherence to adat law and legal pluralism' would not have served Indonesian society better (1981: XXXIX).

Adding to that, Li argues that already during colonial times the capitalist practice of commodity crop farming had a large impact *within* indigenous societies. The Dutch regarded inalienable communal lands as a safety net against dispossession, but imposing a prohibition to sell communal land did not put a stop to the internal forces that caused dispossession within rural societies (Li, 2010: 399). While corporate plantation projects did pose the threat of dispossession, so did exploitative practices among indigenous people themselves. According to Li, the practices of commodity crop farming by indigenous people led to excessive land dispossession, but colonial policies based on the ideas of Van Vollenhoven and his followers paid no attention to these practices (Li, 2010: 293). Hence, recognition of community rights had no effect on the more structural issue at stake, which was the dispossessory effect of capitalism as a whole.

Despite the *adatrechtpolitiek*, there was widespread rural resentment in the 1920s and 1930s, increasingly resulting in collective resistance and mobilized action against the colonial state. Rural protest movements had already begun to emerge in the late nineteenth century. They grew mainly in response to the 'plantation economy' introduced by the colonial government, which 'upset the traditional system and created considerable discontent' (Huizer, 1972: 1). In the first decades of the twentieth century, the rural uprisings increasingly took the form of 'modern political movements' grounded either in religion or communism (Huizer, 1972: 3). In 1926 for instance, a large revolt in West-Sumatra emerged which was subsequently suppressed by the colonial government. For Huizer, the attraction that ideological and religious movements quickly gained shows how much the intrusion of the colonial system favoring private capital disrupted traditional societies.[23] He explains that the word *merdeka* (freedom) became a key word for these movements in expressing their hope for a solution (Huizer: 1972: 3). Indeed, rural grievances played a substantial role in the popular support for the nationalist movement that had steadily emerged.

[23] Huizer explains that traditional societies underwent drastic changes in the final decades leading up to independence due to the 'rapidly penetrating colonial economy.' Especially in Java, traditional leadership was deteriorating while leadership based on religion or political ideology conquered ground (Huizer, 1972: 1).

2.3 After Indonesian independence: moving towards citizenship-based land rights

2.3.1 Legal unification, rural politicization and the enactment of the BAL

In the final decades of colonial rule, the Dutch East Indies enjoyed the international reputation of a properly ruled colony where just and good governance prevailed (Sonius, 1981: LXI). But soon after Indonesia's independence, this view began to change drastically. Many Indonesians held the Dutch and their adat law policy responsible for Indonesia's 'backwardness of political, legal and economic structures' (Sonius, 1981: LXI). Some of the most prominent legal scholars, including former students of Van Vollenhoven, developed 'a highly ambiguous attitude towards adat law' (Fasseur, 2007:63). An important point of critique was the lack of legal certainty that the adat law policy had created. The mostly unwritten adat laws with all their variations posed many practical difficulties for the young republic (Sonius, 1981: XXXVI). The emphasis on regional and local differences was now seen as a manifestation of divide-and-rule policies. Moreover, where the adat law policy in theory viewed all legal orders as equal, social relations had in practice been highly unequal. Europeans had been, both in terms of education and economic status, superior to the indigenous population (Lev, 1965: 284).

Given the changed attitude towards adat law, it is not surprising that Indonesian leaders opted for a significantly different legal policy. As in most post-colonial states, the choice of legal unification following the Western legal tradition prevailed (Benton, 2002: 23). In the eyes of Indonesian scholars and national policy makers, a unified legal system was necessary as a nation-building tool, aimed at unifying the country and overcoming regionalism (Parlindungan, 1983: 6). Another rationale was that a single unified law would bring legal certainty, a necessary condition for the complexities of a modern state and economic development. Although most colonial legislation remained valid after independence, newly adopted laws and regulations no longer used ethnicity as a legal category to determine applicable rights, the only distinction made was 'between citizens and non-citizens' (Lev, 1965: 285).

The Indonesian elite in charge of determining the country's legal and political course on the one hand considered adat law as something primitive, which belonged to the colonial past. While they saw that it survived in rural areas, they believed that it would eventually also disappear there. Adat law was furthermore associated with feudalist power structures (Lev, 1965: 285, 302). Indonesia's political elite on the other hand also realized that adat had great ideological value (Lev, 1985: 249). Adat helped to underpin that 'Indonesian culture is quintessentially communally oriented, spiritually and harmony loving – the opposite of Western mainstream culture' (Bourchier, 2014: 4). Therefore, in order to emphasize the distinct character of Indonesian law, newly adopted legislation still made reference to adat and adat law, 'the very term 'adat' serving to legitimize new law' (Lev, 1965: 303.) But beyond symbolic reference, these laws would not provide any concrete and substantial space for adat rights. The importance of adat law however did not instantly disappear. At the local rural level, adat law continued to regulate many social, economic and political matters.

The first serious attempt at unifying an important field of Indonesian law was the Basic Agrarian Law (BAL) of 1960.[24] It stipulated a set of new, far reaching rules on one of the most politically sensitive issues of that time: land ownership. Amidst a period of extreme politicization in the countryside and increasing tensions between large power factions in the country, the BAL was to serve as a unifying framework of agrarian law (Huizer, 1972: 18; Utrecht, 1969: 71). Though based on compromise, the substance of the law leaned heavily towards the ideology of the Indonesian Communist Party (*Partai Kommunis Indonesia* or *PKI*) and its associated farmer movement BTI (*Barisan Tani Indonesia*) that had grown rapidly in the 1950s.[25] Massive rural support had made the PKI the third largest communist party in the world. The BTI movement demanded the end of feudalism and landlordism, and a more equal distribution of land holdings. The drafters of the BAL had tried to accommodate these demands,

First, the BAL replaced the colonial agrarian legislation with a single code that ended the colonial system of different laws for different ethnic categories (Fitzpatrick, 1997: 180, Utrecht, 1969: 73-74). The only distinction in applicable rights was made between citizens and non-citizens.[26] Second, the BAL aimed to establish a more equal and just distribution of land holdings. It therefore provides the legal basis for the redistribution of agrarian land (Parlindungan, 1983: 11; Kroef, 1960: 5-13). Third, the BAL put emphasis on individual rights. Its drafters prioritized the interests of the individual small-scaled farmer, while the concept of 'adat law community', which had been of such importance under colonial law, became irrelevant. Though the BAL declares to be based on adat law, its drafters clearly wanted to move towards a system of individual land rights in order to provide citizens with legal certainty. All previously existing land rights, including adat rights, were to converted into rights regulated by the BAL. These were exclusively Western, such as individual ownership, while collective rights were severely restricted. Before discussing the implementation of the BAL, it is important to pay some extra attention to the BAL's ambivalent relation to adat law, which continues to be the subject of debate today.

2.3.2 The BAL and its relation to adat law

The BAL's preamble provides that it is 'based on adat law, which is simple and guarantees legal certainty for all Indonesian people'. This symbolic recognition emphasized the

[24] The term agrarian (Indonesian *Agraria*) in this context means 'relating to land tenure'.

[25] During the second half of the 1950s the Barisan Tani Indonesia (BTI), managed to mobilize millions of farmers, mostly in rural Java, Bali and North Sumatra. The BTI was founded upon Indonesian independence in 1945 and was originally a farmer movement in which all political streams, the so-called *aliran,* were incorporated. From the beginning, the BTI was supported by farmers who were frustrated with their land tenure situation, especially in areas dominated by commercial plantation estates. As the BTI became more Marxist oriented over the years and more closely associated with the PKI, some factions split off and set up their own organizations. The PNI for instance, though remaining associated with the BTI, created a farmer movement named Petani (*Persatuan Tani Nasional Indonesia*) in 1948. These organizations however did not manage to gain mass support.

[26] In the sense that foreigners are not allowed to own land in Indonesia.

Indonesian nature of agrarian law, in contrast to the old colonial agrarian legislation, which supported the colonial system (Burns, 2004: 250).

Substantively, the BAL recognized adat rights in a very restrictive way. It constrained adat rights in many ways, although it also provided that adat law would remain valid as long as implementing legislation was absent (Article 56). The BAL nevertheless subjects the recognition of '*hak ulayat* and similar rights' to a strict limitation by stating that the exercise of these rights must be 'in compliance with the national interest' (Article 3). Article 5 curiously declares that agrarian law is adat law (*hukum agraria … ialah hukum adat*), as long as it is not contrary to the national interests based on national unity and Indonesian socialism. Each of these limitations reflected how much the law was based on a compromise between the interests of different political and social groups. According to Utrecht, 'these limitations gave the new law more of a Western than eastern tenor' (Utrecht, 1969: 74).

While the BAL thus rendered adat law virtually meaningless in terms of concrete rights, it reiterates Article 33 of the Constitution, which granted extensive authority to the state to 'control' land matters. Article 2 stipulates that the state has the right to control (*hak menguasai*) the land, water, air and space. This means that the state is the sole regulator of land rights (instead of the adat law community). The BAL also gave the state the power to create new land rights, such as concession rights for plantation estates. Despite the seemingly obvious similarities between *hak menguasai* and the colonial domain principle, Indonesian legal scholars rejected the notion that the two are the same. Parlindungan for instance argues that the control of the state granted by the BAL should not be understood in terms of state ownership, but merely as an authority to regulate (Parlindungan, 1983: 4).

In retrospect, the BAL should be seen in the context of the nation-building ambitions of its drafters, for which unity (*kesatuan*) was a key word. Adat law was important as an ideological concept, but its 'regionalist' dangers had to be eliminated. The 'national unity' restriction to adat law is an indicator of this. Parlindungan explains that the adat law provisions of the BAL restored the nation's dignity (*harkat bangsa*) because they abolished the dualist system of agrarian law and adat law which served colonial rather than Indonesian interests. Moreover, he argues, the adat law that Van Vollenhoven 'found' is different from the adat law of the BAL because the latter must be adjusted to 'progress' (*kemajuan*), cannot be regionalist (*bersifat kedaerahan*) or feudalist, and must be in compliance with national interests. In other words, the BAL meant to transform (or elevate) adat law from a regional and local phenomenon into a national phenomenon, the state being its final guard. That the adat law provisions remained in the abstract helped to realize the BAL's 'nation-building potential rather than its direct applicability' (Bakker, 2009: 108).

Nevertheless, even if the drafters of the BAL intended to radically break with the colonial legal regime, the law's restrictions on adat rights combined with the extensive control of the state later proved to be a basis to reinforce the almost absolute authority of the state over land (Burns: 2004: 250; Fitzpatrick, 1997: 183-184; Utrecht, 1969: 74; Bedner, 2016). The 'centralized, statist framing of land governance' was legitimized by

equating 'state sovereignty' with 'the people's sovereignty' (McCarthy and Robinson, 2016: 4). According to this rhetoric, the state, as the ultimate representative of the people, became the only valid entity to issue and register land rights.

2.3.3 The 1965-1966 massacres and the end of land reform

The BAL's most immediate effect on society was the initiation of an extensive land redistribution program. Two years after the enactment of the BAL the implementation of the program began, when President Sukarno formed land reform committees at the national, provincial and district level. The committees at the district level were the most important as they were tasked with measuring land, expropriating surplus land and determining the amount of compensation to be paid (Utrecht, 1969: 77). The land redistribution program would start in Java, Bali and West Nusa Tenggara and then the rest of Indonesia would follow. However, its implementation turned out to be highly problematic in the politicized countryside.

When the program began, many landowners resisted heavily. Mostly local elites, such as village heads, were selected to be part of the land reform committees at the district level, many of them being landowners themselves. The redistribution of land was not in their interest and this greatly slowed down the decision making of the committees. Local bureaucrats and military officials worked together with landowners to obstruct the implementation of the program (Robison, 1981: 9). There were also landowners who tried to distribute their lands to family members and associates before the reform program began. Many religious and conservative political groups, who were generally against land reform, supported the landowners. The farmer organizations on the other hand were hardly represented in the land reform committees (Huizer, 1972: 38-29). All of these factors seriously slowed down the progress of the land redistribution program.

The resistance from landowners sparked a reaction from the BTI farmer movement, many of its members being landless or semi-landless farmers. In 1963 the PKI and BTI initiated the '*Gerakan Aksi Sepihak'* (unilateral action movement), urging landless farmers to implement the land redistribution program by themselves. These actions eventually led to severe repercussions and it is in this context that we should understand the wave of massacres that shook the Indonesian countryside in late 1965. In the aftermath of an aborted leftwing coup of 30 September 1965, a nationwide hunt on PKI members and associates began. In less than a year, up to half a million people were slaughtered, mostly by para-military groups coordinated by the army. Most of the killing took place in Central and East Java, Bali and North Sumatra, all densely populated areas with tense land tenure situations. In addition, up to a hundred thousand PKI members, other leftwing elements, and people suspected to be sympathizers of the PKI were detained (Huizer, 1972: 50-52).

After the massacres came to an end, the land reform program was stopped and in many instances its results were even reverted (Utrecht, 1969: 86). Most of the beneficiaries of the land reform had been murdered and their family members were prevented from using the land. In the midst of the killing, the former landowners could

gain back their land (Wertheim, 1969). With the elimination of the PKI, the agrarian movement also came to an end. The succeeding government did not have any interest in land redistribution but instead favored the concentration of landholdings to facilitate capitalist modes of production (Wertheim, 1969; Robison, 1981).

2.4 THE DISREGARD OF CUSTOMARY LAND RIGHTS UNDER THE NEW ORDER

2.4.1 The BAL under the New Order: legitimizing dispossession

When in March 1966 Suharto rose to power in the aftermath of the massacres, political activity in the countryside had virtually gone down to zero. The massacres had eliminated the agrarian movement. In political terms, Suharto's New Order managed to secure stability, achieved by a dominant government party (GOLKAR) and a powerful army that penetrated all facets of society, including the bureaucracy. Economically, the New Order became a success story although economic growth relied heavily on the country's vast natural resources. In order to exploit these, the Suharto government needed to gain control over large tracts of land. Hence, state policy on land affairs aimed at facilitating massive appropriation of land to the domain of the state. The regime severely restricted civil liberties and suppressed almost all forms of critique towards the regime. Corruption practices soon became rampant and assured that profits would flow unevenly into the pockets of Suharto's family, his business allies and loyal officials (Robison, 1981).

The New Order period was generally marked by a disregard of land tenure systems based on customary arrangements. At the same time, the government performed very poorly in terms of registering land rights. Registration was expensive and complex and hence, often inaccessible for much of the rural population. As such, the land tenure security of millions of people was very weak. In rural areas, people were well-known within their community as the rightful owners of their land. But without a state registered certificate, the government often disregarded such rights. When local authorities gave some legitimacy to informal land rights, semi-legal land administration systems came into being. But because higher government agencies or courts often rejected such evidence in case of disputes, land tenure remained highly insecure. State interference with land rights varied from place to place. In some areas, the government did not enforce its claims to state land, but in other places, it explicitly prohibited people from entering or cultivating state land areas (Bedner, 2016: 77).

For the New Order government, the BAL became a useful tool to legitimize the authority of the state over land. Although conservative groups at first criticized it for being 'communist', the BAL remained in force during the New Order (Huizer, 1972: 54). Its centralist nature could serve the regime's interests simply because it 'reinforced the state's position in land management' (Bedner, 2016: 66). The *hak menguasai* provisions justified the state's allocation of large tracts of land to private or state companies for development projects or agricultural plantations (Fitzpatrick, 1997: 122). The BAL's restrictions on adat rights meanwhile, were useful in 'legitimising dispossessory projects' of the regime (Bedner, 2016: 67). The government did not apply the BAL in a consistent

manner, though. Provisions of the BAL that conflicted with government interests were simply ignored. For instance, the provisions covering the maximum size of land ownership were never implemented (McCarthy and Robinson, 2016: 7).

In the 1980s the government did make attempts to improve land tenure security by implementing several massive land registration projects such as the World Bank sponsored PRONA. These programs had very limited success (Bedner, 2016: 66). Acquiring a registered land title from the National Land Agency was a lengthy, complex and expensive process and as a consequence few Indonesians could actually legally register their land. What had also complicated land tenure security at the outset of the New Order was the enactment of sectoral laws on natural resources, primarily the Basic Forestry Law, which I will discuss below.

2.4.2 The 1967 Basic Forestry Law

While Suharto kept the BAL in place, he passed a number of additional laws. To a significant degree, these laws helped the New Order government to further strengthen its position in the management of the country's vast natural resources. Among them was the 1967 Basic Forestry Law (henceforth BFL), which became one of the most controversial and contested pieces of legislation in Indonesian history for it declared that all forests are to be controlled by the state (Safitri, 2010: 75).[27] All land designated as forest were administered under the legal category 'Forest Area' (*kawasan hutan*), which would automatically become state forest (*hutan negara*) and thus owned by the state (Safitri, 2010: 89-91). This control provided a legal basis for physical control over land on which forests were located.[28]

Huge areas were designated as Forest Area, of which the bulk was located in the outer islands. The Forest Areas eventually came to encompass some 70% of Indonesia's land mass (Bakker, 2010; Peluso and Vandergeest, 2001). At least one third of the land administered as Forest Area was in reality not covered with forest according to figures from the Ministry of Forestry (Safitri, 2010: 90). The Forest Areas were therefore divided between two categories: 'forested Forest Area' and 'non-forested Forest Area' (Safitri, 2010). To characterize this system of administration, Peluso and Vandergeest (2001) use the term political forest, whereas Safitri uses the term politico-administrative forest given that the designation of Forest Area is contingent on administrative decisions (2010: 91).

Through the BFL, the government legitimized its plan to exploit Indonesia's resource rich outer islands. The BFL provided the Ministry of Forestry[29] with a legal basis to grant logging concessions and other exploitation permits. During the New Order, the revenue generated from timber trade increased tremendously and the logging industry

[27] Article 5 (1) reinforced the distinction between forest and non-forests made by the Dutch in the colonial era, even though the BAL abolished this distinction some seven years earlier. Doing so, the law excluded forest land from the scope of the BAL.

[28] Safitri (2010) however contests that the right to control the forest provides a legal basis for the actual physical control of the land.

[29] Before 1983, the Forest Areas were under the authority of the Department of Forestry, which was part of the Ministry of Agrarian Affairs. Currently, they fall under the jurisdiction of the MEF.

became one of Indonesia's most lucrative sectors. Especially Suharto's close business allies and loyal military officials benefited from this exploitation, which led to massive deforestation in the outer islands (Barr, 1998). The state's claim to forest control came at the expense of the already weak land tenure security of millions of people living in or near territories that had become designated as Forest Area. While the BFL did make a distinction between state forests (*hutan negara*) and private forests (*hutan milik*), it stated that even the latter were to be controlled by the state.[30] Moreover, private forests were only to be recognized where registered private land rights existed, to be evidenced by a land ownership certificate issued by the NLA.

The BFL disregarded customary land tenure. It gave some space for rights of adat law communities, but just like the BAL, strict limitations rendered this recognition almost meaningless. The elucidation of the BFL explains that adat law communities may not invoke adat law to challenge government projects, 'for instance the large clearing of forest areas for big projects or for transmigration purposes'.[31]

2.5 ADAT LAND RIGHTS UNDER INDONESIAN LAW

2.5.1 The fall of Suharto and the call for adat community rights

In May 1998, the New Order regime collapsed after 32 years. A process of *Reformasi* began, resulting in greater civil liberties and the initiation of legal and institutional reforms towards democracy and decentralization. The power transition was an important momentum for the struggle for secure rural land rights. Already in the final years of the New Order civil opposition regarding competing land claims had grown, although activist networks then still had to operate in an underground fashion. Now that the political circumstances were changing they no longer hesitated to undertake action. Rural protestors backed by activist organizations deployed different types of actions including land occupations and rallies. These actions, labeled 'reclaiming actions' happened virtually everywhere (Lucas and Warren, 2003: 87-88). Although the outcome of these actions varied, they played an important role in shaping the political and legal reforms of the initial *Reformasi* years (Lucas and Warren, 2003: 87-88).

Many of the social movements demanding rural justice addressed their beneficiaries in terms of distinct, traditional communities eligible to special communal rights, rather than as 'the people' (*rakyat*), the rural poor, or as Indonesian citizens entitled to rights (Peluso, Rachman, and Afiff: 2008: 387; Djalins, 2011: 123). This development has to be understood in the light of a more general trend: the nationwide resurgence of adat and ethnic regionalism during the *Reformasi* years (Henley and Davidson, 2007).

While the unimplemented agrarian land redistribution program of the BAL provided an obvious legal ground to challenge the unfulfilled promises of the state towards local land users, activist movements instead invoked the term 'adat community'

[30] Introduction of the elucidation of the 1967 BFL.
[31] Elucidation of Article 17.

(*masyarakat adat*), a term strongly resembling the colonial concept of adat law community.[32] Considering that even during Van Vollenhoven's time critics already argued that the concept was outdated, it is remarkable that it now resurfaced to the main political stage. The term adat community was first coined during a meeting of NGO's and activist movements in 1993 in Toraja, South Sulawesi (Li, 2007: 333). In the years following, many local adat community organizations emerged and their activists campaigned for both agrarian and environmental justice (Peluso, Rachman, and Afiff, 2008: 388). As discussed in Chapter 1, one of the main actors behind the adat revival was AMAN.[33]

The demand addressed to the state to recognize the rights of adat communities was one of civil society's many calls for reform after decades of authoritarian rule under Suharto. Such calls did not only come from within, but also from forces outside Indonesia. Multilateral development institutions such as the World Bank and the IMF also encouraged Indonesia to implement neoliberal reforms that would decrease the power of the centralist state. In the period following Suharto's demise, decentralization and democratization laws were promulgated. Political power made an important shift to the regions. The demands of an organization like AMAN, which advocated for a less dominant role of the state and more autonomy for communities to govern their land and natural resources, appeared to resonate well with the spirit of neoliberal reform. Chapter 4 will provide further explanations on why claims for rural land rights manifested in this particular way.

2.5.2 Legal change and the return of the adat law community in Indonesian law

During late 1990s, rural groups involved in local land conflicts already began to invoke the adat community claim, sometimes with success. An example is the Katu community from Central Sulawesi, whose occupation of a conservation site was informally allowed by the Head of the Lore Lindu National Park in 1998 (Sangaji, 2007: 329). In another instance, formal recognition materialized, such as the Krui community from Lampung, whose land was recognized as a 'special objective zone' (*kawasan dengan tujuan istimewa*) within a Forest Area by a decree from the Minister of Forestry in 1998 (Djalins, 2011: 140-141). Typically, however, such battles for land rights would at best result in an informal measure of recognition by local authorities and as such, they rarely created legal certainty (Lucas and Warren, 2013). It is in this context that AMAN began to exert increasing pressure on the central government to implement legal reform that would provide a mechanism for the legal recognition of adat communities and their land rights.

As outlined above, both the BAL and the BFL did not provide substantial space for customary land rights of rural communities; its drafters had expected that these communities and their normative systems would gradually lose their significance and eventually disappear, while legal rights granted by the unitary state would come to

[32] For further discussion on the definition, see Chapter 4, Subsection 2.1.

[33] A more in-depth analysis of why organizations like AMAN fell back on colonial terminology to address their demands will be provided in Chapter 4, Subsection 2.4.

prevail.[34] They would have never imagined that such terminology would reappear at full throttle four decades later.

Adat law communities (*masyarakat hukum adat*) were given ideological reference in the BAL and the BFL, but these laws did not provide enforceable rights. Thus, for the legal position of adat communities to strengthen much had to be changed in the law. In 1999, the pressure from civil society to implement legal reforms had become so high that the government could no longer avoid undertaking some action. Various new laws and lower level regulations[35] were enacted that acknowledged the existence and rights of adat law communities.[36]

The Minister of Agrarian Affairs issued Regulation no. 5/1999 concerning Guidelines to Resolve Problems of Ulayat Rights of Adat Law Communities. According to this Ministerial Regulation, *hak ulayat* is not an ownership right, but an 'authority' over a certain territory (Article 1). Furthermore, People's Consultative Assembly Decree no. IX/2001 on Agrarian Reform and Natural Resource Management mentioned the rights of adat law communities *(*Article 4 (J)). In addition, following the second constitutional amendment of 2002, adat law communities were explicitly recognized by the Constitution (Article 18 (B)).

Arguably the most important legal change was the enactment of a new BFL. BFL no. 41/1999 replaced the BFL of 1967. The overall result was disappointing however, and civil society organizations strongly criticized the new law (Moniaga, 2007). It turned out that the Ministry of Forestry was hardly willing to relinquish its control over forest lands. The new BFL kept the state's authority over all areas designated as Forest Area intact. One of its few bright spots was the introduction of a new category of forest, adat forest (*hutan adat*). Yet, it defined adat forests as *state* forests inside the territory of adat law communities (Article 1 (6) before Constitutional Court ruling no. 35/2012). This implied that adat forests remained under the direct control of the Ministry of Forestry and that adat law communities could use these forests, but would not be their owners. Their rights were limited to managing forest and collecting forest products.[37] In that sense, this new category thus created some additional legal space, but not much in terms of ownership rights (Bedner and van Huis, 2010: 184).

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[34] The 1967 BFL for instance states that *hak ulayat* weakens (*menjadi lemah*) as time passes.

[35] The 1945 Constitution sits at the top of the hierarchy of Indonesian law, followed by a decree of the People's Consultative Assembly (TAP MPR). Laws (*undang undang*) are the third highest form of legislation, followed by government regulations (*peraturan pemerintah*), presidential regulations (*peraturan presiden*) and provincial regulations (*peraturan provinsi*). At the bottom of the hierarchy sits the district regulation (*peraturan daerah*).

[36] Most of the new legislation used the concept *masyarakat hukum adat*, a concept also mentioned in the BAL and 1967 BFL. Some authors point at the inconsistency between the concepts *masyarakat hukum adat* and *masyarakat adat*. Arizona and Cahyadi for instance express concern that *masyarakat hukum adat* are only those communities that 'own a systematized, measurable law practice' *(*Arizona and Cahyadi, 2012: 54). They argue that by omitting *masyarakat adat*, the laws exclude communities that do not have such law practice. As we will see in Chapter 4 however, the definition under Indonesian law and the one of the most important adat community advocacy organizations, AMAN, are almost similar. AMAN's definition too stresses that *masyarakat adat* are governed by customary law and customary institutions.

[37] Article 67 (1) of the 1999 BFL.

2.5.3 Constitutional Court ruling no. 35/2012 on the separation of adat and state forest

AMAN advocated for the right of self-determination of adat communities, a well-established right of indigenous peoples in international law. However, the government was reluctant to incorporate this principle in the new legislation. Both the Ministerial Regulation no. 5/1999 and the 1999 BFL authorized the regional governments to determine who would qualify as adat law community, and as such, the powerful position of the state was retained, albeit in a decentralized way. The BFL (Article 67 (2)) and Ministerial Regulation (Article 3) provide that provincial and district governments can enact a regional regulation (*peraturan daerah*) to grant an adat law community legal recognition. Before doing so, regional governments should consider the findings from expert research and the aspirations of the community.[38] Bakker notes that in practice, the question of which groups qualify as adat law communities has become a matter of discretionary arbitrariness. In many places, a lack of political will at the district level was a serious obstacle and therefore only a handful communities were recognized in the first years after the 1999 BFL was promulgated (Bakker, 2008: 20).

The continuing dominant position of the state vis-a-vis the autonomy of adat law communities was a matter of great concern for civil society organizations. Indigenous rights activists realized that they needed a helping hand to push powerful government institutions to realize more extensive reform. This helping hand was found in the Constitutional Court (*Mahkamah Konstitusi*), which has the important task to review laws in light of the Constitution. Established in 2003 it was designed to be a neutral and objective arbitrator in disputes about fundamental issues. Such constitutional review was not allowed in Indonesia for decades, much to the benefit of the Suharto regime, which arbitrarily enacted legislation without a strong democratic basis (Butt and Lindsey, 2008: 241). Not surprisingly therefore, the establishment of the Constitutional Court met positive response from civil society.[39]

In 2012, AMAN and several of its constituent member communities decided to test their luck at the Constitutional Court, by challenging the constitutionality of the 1999 BFL. They contested the validity of the BFL on two grounds, both regarding Article 67. First, they challenged the validity of the legal provision that stated that adat forests are state forests and not community owned. Second, they objected that the district governments, not the communities themselves, were authorized to decide on who gets adat law community status. Although the judges of the Constitutional Court rejected the second claim, to the surprise of many they accepted the former. In May 2013, the court decided that adat forests are not state forest. This implied that adat forests, wherever legally recognized, would become the collectively owned forests of adat law communities. The

[38] Elucidation of Article 67 (2) of the 1999 BFL.

[39] During its first years, the general view was that the Constitutional Court's performance was more credible, more objective and more progressive than Indonesia's Supreme Court (*Mahkamah Agung*), which has had a bad reputation for decades. This seriously undermined the trust in the judiciary in Indonesia. Recent corruption scandals have however altered the public view of the court.

ruling received much publicity and was generally considered a breakthrough for the rights of adat communities across the archipelago.

2.5.4 Legal options for the recognition of adat law communities

Since the 2013 ruling of the Constitutional Court, the legal framework on adat community rights has developed further, as I will now discuss. The 1999 BFL remains the most important piece of legislation, as it provides a definition of adat law community and a procedure for its recognition. An adat law community can be recognized when it still exists (Article 67 (1). This is the case when the community; is still a law community (*recht-gemeenschap*); has institutions based on traditional authority; has customary rules and a customary judiciary that are still adhered to; has a clear communal territory; which is used for harvests that are collected for daily needs (elucidation of Article 67 (1)).

In addition, following Constitutional Court decision no. 35/2012, several ministerial regulations were passed that provide further details on how the state can recognize adat law communities and their land rights. The central government can only grant adat forest rights if there already is a regional form of government recognition.

There are two options for such regional recognition. The first is a regional regulation as stipulated in the above-mentioned Article 67 (2) of the 1999 BFL. Secondly, Ministerial Regulation no. 52/2014 concerning Guidelines on the Recognition and Protection of Adat Law Communities, enacted by the Minister of Home Affairs, grants district heads/mayors the authority to issue a decree (*keputusan kepala daerah*) on recognition based on recommendations from special committees (*Panitia Masyarakat Hukum Adat kabupaten/kota*) (Article 6 (2)). These are appointed by the district head/mayor (Article 3 (1)). They consist of: the regional secretary, the regional working unit head, the district head of legal affairs and the sub-district head. Article 4 stipulates that the committee has the task to verify the identification (*identifikasi*), validation (*validasi*) and determination (*determinasi*) of the adat law community involved.

After regional recognition has been realized, the following step for adat communities to secure their collective land rights is recognition at the national level. The MEF has issued a regulation on this procedure with regard to the recognition of adat forest rights. This procedure only appertains to Forest Areas administered by the MEF and not to state land under the jurisdiction of the NLA. Ministerial Regulation 32/2015 concerning Private Forest Rights (*hutan hak*) regulates the procedural steps to be taken. A ministerial decree (*keputusan menteri*) can designate an adat forest and hence, change its from state forest into private forest.

Article 6 of the Ministerial Regulation provides the following conditions for the Minister to recognize adat forests by ministerial decree:

- An adat law community or right to avail (*hak ulayat*) has been recognized by a regional government through a regional legal decision (*produk hukum daerah*);
- There is an adat territory that is partly or wholly located inside a forest;

- There is a formal request from an adat law community to designate the adat forest;

The Ministerial Regulation furthermore states that if an area previously administered as Forest Area used to be a protected or conservation forest, the forest should still remain protected even though it is now a private forest (Article 9). The adat law community can manage the forest according to adat principles (Article 10).

2.5.5 Towards more inclusivity: 'hak komunal'

According to the 1999 BFL, adat forest rights are to be registered as ownership rights of adat law communities. The state registers this right and determines which communities qualify as adat law communities and which do not. Given that only traditional adat communities can qualify for communal ownership of forests, the legal regime on customary land rights stipulated in the BFL is rather narrow. Alternatively, non-adat communities can apply for social forestry (*perhutanan sosial*) rights. However, current social forestry schemes only provide communities with temporary usage rights and do not confer ownership rights. Hence, under social forestry schemes, land tenure security of land users remains weak (Safitri, 2010).

It wasn't until December 2016 that - for the very first time - the Minister of Environment and Forestry formally recognized a number of adat forests by issuing a number of decrees. Nine plots of forests, in total covering 13,000 hectares, were released from the state forest and the adat law communities living in or near these forests formally became their collective owners. The transfer was made into an event at the Presidential Palace in Jakarta, where President Joko Widodo ceremonially handed over the adat forest decrees to the leaders of the communities. The President announced that this would be the starting point of a longer, systematic process of formalizing communal forest rights of adat communities. Skeptical voices have however expressed their doubts as to whether such a process will actually materialize, as its realization largely depends on the will of regional governments.[40]

In attempt to broaden the scope and to allow for the recognition of customary land rights of subjects other than adat law communities, several government departments have recently enacted new regulations. This recently adopted legislation has broadened the scope of communal land rights beyond the category of adat law communities alone.[41]

[40] For a critical account of the government's 'adat forest' policy, see for instance: https://geotimes.co.id/opini/menindaklanjuti-pengakuan-hutan-adat/, last accessed 10 June 2018.

[41] Another example is Joint Ministerial Regulation no. 79/2014 concerning Procedures for Settling Land Tenure within Forest Areas, adopted by the Minister of Forestry, the Minister of Home Affairs, the Minister of Public Works and the Head of the NLA/Minister of Agrarian Affairs. It provides a procedure for the release of land from the state forest when individuals, collectives or adat law communities have controlled this land for more than 20 years (Article 8). Special verifications teams, the so-called Tim IP4T, are tasked with inquiring the requests. They consist of officials, including sub-district heads and village heads (Article 2 (2)). The results of their inquiry are to be submitted to the head of a regional NLA office (*kantor wilayah*), who in turn sends the results to the MEF. The Minister can then decide to release the land from the state forest.

Among these is Ministerial Regulation no. 10/2016 concerning Procedures to Determine Communal Rights of Adat Law Communities and Communities in a Specific Zone, by the Minister of Agrarian Affairs/Head of National Land Agency. This Ministerial Regulation replaces Ministerial Regulation no. 5/1999 concerning Guidelines to Resolve Problems of Ulayat Rights of Adat Law Communities and adopts a more inclusive approach in two ways. First, it allows for the recognition of communal land rights (*hak komunal*) in both state forest and on state land (*tanah negara*) controlled by the NLA. Second, the Ministerial Regulation provides the possibility for both adat law communities *and* other communities to obtain communal ownership rights in a Forest Area or state land. It refers to these communities as 'communities in a Specific Zone' (*masyarakat dalam Kawasan Tertentu*). Special Zone refers to a Forest Area or to a plantation concession. Including this type of community as a category was motivated by the practical difficulties for communities to prove that they are an adat law community.[42]

For communities to obtain *hak komunal*, a request has to be filed with their district heads. These shall then form an inventory team called Tim IP4T.[43] After the Tim IP4T verifies the communal land right, the land in question shall be released either from the state forest or from the plantation concession. If the land is located inside a Forest Area, the Tim IP4T will hand over its results to the MEF, which should then release the land from the Forest Area (Article 11). If the land is located inside a plantation concession, the holder of the concession rights shall be requested to exclude the plot of land from its concession (Article 13 (1) b).

After the Tim IP4T has given its approval to the particular district head/governor, a district head decree or governor decree shall be issued, which shall then be sent to either the Ministry of Agrarian Affairs/NLA or the MEF (Article 18 (2)) who will be asked to exclude it from their jurisdiction. While the conditions for adat law communities are very similar to those stipulated in the 1999 BFL, those for non-adat law communities are less strict; the most important one is that the community has had physical control over the concerned land for at least ten years (Article 4 (2) a). As such, this Ministerial Regulation moves towards a more inclusive approach to secure community land rights.

Until now however, the Ministerial Regulation has yet to be implemented. Currently, the website of the MEF only refers to social forestry and adat forests as the legal mechanisms through which forestland will be distributed to communities.[44] There are several explanations for this. First the Ministerial Regulation includes groups that are not adat law communities, which significantly widens the number of people that could make claims to land located in the Forest Area or in a plantation concession. One major restriction of adat forest rights is that they can only be held by adat law communities. In Chapter 7, we shall see that it in order to obtain this status in practice, communities need

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The Joint Ministerial Regulation does not provide clarity on whether the applicants will receive land ownership certificates, either on a collective on individual basis.

[42] Interview with Head of Legal Affairs and People's Relations of Ministry of Agrarian Affairs/NLA, 30 September 2015.

[43] IP4T stands for *Inventarisasi Penguasaan, Pemilikan, Penggunaan dan Pemanfaatan Tanah* (Inventory of control, ownership, use and benefit of land).

[44] http://pskl.menlhk.go.id/akps/index.php/site/cara_pendaftaran, last accessed 24 July 2018.

to prove that they are sufficiently 'traditional'. The Ministerial Regulation on *hak komunal* on the other hand only demands communities to have occupied a plot of land for ten years. This is a claim that arguably millions of people living in Forest Areas can make, and if recognized, would pose a great risk to the control of the MEF.

A second explanation is that the Ministerial Regulation was singlehandedly enacted by the Minister of Agrarian Affairs/NLA, but provides legal procedures for the release of land from Forest Areas, which fall under the jurisdiction of the MEF. These two ministries are known for their competing claims to state land and therefore, the MEF might view the Ministerial Regulation as an infringement on its jurisdiction. Due to the lack of implementation, the broadened scope of customary land rights in recent legislation does not yet offer an effective alternative to the limitations of the adat law community legislation. The general discourse on customary rights in Indonesia currently remains centered around the rights of adat law communities.

So far I have discussed two of the most important features of the legal framework on customary land rights in Indonesia: the narrowly defined concept of adat law community and a dependency on regional government agencies for recognition. I will show in subsequent chapters that the political constellation at the district level is a decisive factor for the extent of success that adat community claims might have. For claimants to qualify as adat law community, they sometimes have to 'make them fit where they do not', especially when the necessary defining conditions of adat law community are no longer in place (Bowen, 2000: 14). The practical implications of these obstacles will be more elaborately discussed in the case studies in Chapter 6 and Chapter 7.

2.6 CONCLUSION

In this chapter I have provided a historical overview of customary land rights developments in Indonesia. I have explained the importance of the concepts 'adat law' and 'adat law community' during the late colonial period, their fall into oblivion in the decades following independence, and their resurgence in the 1990s.

The full-fledged return of the adat law community concept in post-Suharto Indonesia must be understood against the backdrop of the failure of the state to provide secure land rights on the basis of citizenship. While a unified, pro-poor land law was put in place in 1960, political constraints hampered the realization of its promises; land tenure security and a fair distribution of land holdings. Under Suharto, people's land tenure security was weak while the control of the state was close to absolute. Since *Reformasi*, calls to revive colonial concepts of rural justice came about. I have explained how the concept of adat law community has regained a prominent position in Indonesian law. Little by little has the state given in to public demands to widen the scope of the recognition of adat communities. The Indonesian legal framework on the recognition of adat law communities is now fragmented over different laws and regulations. The legal position of adat law communities has transitioned from mere symbolic acknowledgment, to a concrete procedural framework of legal recognition.

The Indonesian government nevertheless remains reluctant to relinquish its decision-making authority on who qualifies as adat law community. Under the current legal framework, the realization of customary land rights is contingent on the decisions of government agencies. Like colonial officials during the Ethical Policy, they are tasked to observe and recognize the normative systems of traditional communities. This in fact confers government agencies extensive political control. Regional governments are for example required to appoint research teams to verify the existence of adat law communities. On paper, this procedure merely entails conducting research on whether a community-based normative system is still in place in a given location. However, as we will see in later chapters of this book, questions of land use and customary tenure are actually highly complex. Local land users typically make claims to adat land rights in conflict situations that not only involve a local community, but also state and corporate actors. In such cases, verifying the existence of an adat law community may be a contentious issue given the various interests at stake.

Finally, it is worth stressing that apart from the new legal concept of *hak komunal*, obtaining the status of adat law community is at present the only legal mechanism available through which Indonesian citizens can secure customary land rights. This is highly ambiguous considering that already during Van Vollenhoven's time, critics pointed out that the term was outdated. These argued that self-governing communities belonged to the past. In this regard, one can raise question marks as to whether the concept of adat law community - when becoming the center of customary land rights policies - can actually improve land tenure security in Indonesia's complex contemporary social and political reality. Later chapters of this book will further look into this issue. In the next chapter, I will first analyze the causes of long-lasting land conflicts in Indonesia, focusing on a case that has dragged on for decades.