

# INDONESIAN LAND RIGHTS AND DEVELOPMENT

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Martin E. Gold & Russell B. Zuckerman

## Abstract

Indonesia's traditional land tenure system, called *adat*, satisfied the needs of many generations, but did not provide certainty or formal legal relationships conducive to development. The post-independence government has sought to mold the existing system into a more modern form that would better aid its development and has at the same time, sought to maintain control over the country's natural resources, each to the disadvantage of local communities. The agrarian reforms that were passed created a dual system of law, and resulted in conflict between traditional rights and the modern, western-influenced, interests and purposes of the state. The lack of title registration has been a continuing impediment: the complex procedures, the time, and the cost of securing registered title has been beyond the capacity of many landowners. In dealing with the mix of laws and customary rights and the lack of clear titles, it is the practice of lenders to give a small level of value to land as collateral, not nearly as much credit as would be given in a more modern system. Character counts more than collateral for land users seeking financing. But registration is now coming. The new, technologically advanced, mobile LARASITA registration system recently created, is an important innovative step that is moving the country in a positive direction.\*

We begin, in Sections I and II, with a brief discussion of the current political structure in Indonesia and of Dutch and British rule. Section III looks at the customary law, called *adat*, and how it has been affected by Islamic law and European rule. Sections IV and V provide an overview of the central tenants of the Basic Agrarian Law Number 5 of 1960, the centerpiece of the national legal effort to modernize the *adat* land tenure system. Section VI focuses on the national government's use of the Basic Forestry Law of 1967 to classify over 69% of the nation's land as forest. This has the effect of frustrating the ability of local *adat* communities to farm large swaths of land. The Indonesian land titling system is discussed in Section VII. Section VIII focuses on important regional variations in *adat* and land titling and juxtaposes two regional variants – that of the Dayak people of Kalimantan, with their relatively less modern system, and the heavily sharia oriented system in Aceh. Section IX discusses the importance of land titling for access to financing. Then Section X

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looks at the new LARASITA land registration system, which, with its modern tools and thinking, is dramatically increasing land registration in substantial parts of the country.

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## I. Basic Political Structure in Indonesia

The Republic of Indonesia is the world's fourth most populous nation and third most populous democracy.<sup>1</sup> It is an archipelago consisting of 17,508 islands, 6,000 of which are inhabited.<sup>2</sup> The central government includes the executive and legislative branches located in the capital, Jakarta.<sup>3</sup> Governance in Indonesia is divided into 33 provinces which are further divided into districts or regents (*kabupaten*) and municipalities.<sup>4</sup> The regional authorities of the provinces, districts and municipalities administer and manage their own affairs according to the principles of regional autonomy and a so-called duty of assistance (*tugas pembantuan*).<sup>5</sup> Recent changes in Indonesian law, primarily the implementation of decentralization in January of 2001,<sup>6</sup> have resulted in increased power to the *kabupaten*, which are charged with providing most government services.

## II. Colonial Rule

National law in Indonesia is based on a civil law system that incorporates both Dutch components and customary (*adat*) law.<sup>7</sup> The Dutch were the primary colonial power in the region starting in the seventeenth century.<sup>8</sup> During the Dutch colonial period, the Dutch East India Company administered the colony and seized lands without paying compensation to local people.<sup>9</sup> Neither seized land, nor other lands, were registered or titled.<sup>10</sup> This continued until the arrival of the British in 1811; the British established a

<sup>1</sup> USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 4 (2010), available at [http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID\\_Land\\_Tenure\\_Indonesia\\_Profile\\_o.pdf](http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Indonesia_Profile_o.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Country Profile: Indonesia, AM. SOC'Y OF SAFETY ENG'GS, [http://www.asse.org/assets/1/7/Indonesia\\_Profile.pdf](http://www.asse.org/assets/1/7/Indonesia_Profile.pdf).

<sup>4</sup> INDON. CONST. ch. VI, art. 18, unofficial translation available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_174556.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_174556.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Bert Hofman & Kai Kaiser, *The Making of the Big Bang and its Aftermath: A Political Economy Perspective* (2002), available at <http://www1.worldbank.org/publicsector/LearningProgram/Decentralization/Hofman2.pdf>.

<sup>7</sup> Kallie Szczepanski, *Land Policy and Adat Law in Indonesia's Forests*, 11 PAC. RIM L. & POL'Y J. 231, 236 (2002).

<sup>8</sup> *Id.* at 234.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

land issues commission called the McKenzie Commission.<sup>11</sup> The Commission introduced a land titling and registration system modeled on the system instituted by the British in India.<sup>12</sup> However, the British registration initiative was a complete failure, as village chiefs, lacking accurate surveys of their lands, simply made up figures to submit to the British colonial government.<sup>13</sup> The Netherlands then regained control of the archipelago in 1830.<sup>14</sup> Two separate systems of law emerged from these colonial periods: one for the foreigners and their employees, and one for the majority of Indonesians.

Indonesia formally gained independence from the Dutch in 1945, enacting a constitution that year that included a number of significant provisions relating to land ownership and control based on the customary principles of *adat* and the colonial laws.<sup>15</sup> Less than five percent of all land in Indonesia was surveyed and registered by 1960, with the remainder continuing to be controlled by the customary principles of *adat*.<sup>16</sup>

### III. Legal Landscape

Article 33(3) of the 1945 Indonesian Constitution provides that “the land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.”<sup>17</sup> This article of the Constitution is the source, and foundation, for the extensive governmental ‘control’ over land in Indonesia. This very high level of state control is said to provide more benefit to those with political connections and financial means than it has for the greater Indonesian society.<sup>18</sup>

The single most important piece of legislation governing land rights is the Basic Agrarian Law No. 5 of 1960 (BAL).<sup>19</sup> Sometimes called “the umbrella law governing land ownership in Indonesia,”<sup>20</sup> the BAL defines the fundamental

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 236.

<sup>16</sup> *Id.*

<sup>17</sup> INDON. CONST. ch. XIV, art. 33(3). The unofficial translation of the Constitution used here is from [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/--ilo\\_aids/documents/legaldocument/wcms\\_174556.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/--ilo_aids/documents/legaldocument/wcms_174556.pdf).

<sup>18</sup> Daryono, *Transformation of Land Rights in Indonesia a Mixed Private and Public Law Model*, 19 PAC. RIM L. & POL'Y J. 417, 421 (2010).

<sup>19</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>20</sup> AM. BAR ASS'N, ACCESS TO JUSTICE ASSESSMENT FOR INDONESIA: SOUTH SULAWESI PROVINCE 15 (2012), available at [http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia\\_access\\_to\\_justice\\_assessment\\_2012.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/indonesia/indonesia_access_to_justice_assessment_2012.authcheckdam.pdf).

types of rights that may be held by private individuals and entities, and sets out the role of the state with respect to its direct use of land as well as its regulation of private rights and private uses of land.<sup>21</sup> Article 5 of the BAL states that Indonesia's agrarian law is the *adat* law, i.e. Indonesian customary law, "as long as it does not conflict with national interests," "Indonesian socialism," "religious laws," or other regulations set out in the BAL.<sup>22</sup> However, these Article 5 concepts were never defined, which has reduced their value and generated struggles over their meaning and purpose.<sup>23</sup>

*Adat* is the customary law of the people of Indonesia and Malaysia.<sup>24</sup> It is the unwritten, traditional code, governing all aspects of personal conduct. Prior to Islamic influence, *adat* in at least portions of these two countries was a mixture of Hindu law and native customs.<sup>25</sup>

The word "*adat*" is derived from the Arabic word *adat*, meaning "custom" or "habit," and is considered to be synonymous with another Arabic word meaning "commonly accepted."<sup>26</sup> It generally refers to long-standing conventions and applies to criminal and civil activity<sup>27</sup> as well as property.<sup>28</sup> Although it is referred to as if it were one uniform system, *adat* varies widely, sometimes even over short distances, and the rules in one *adat* area can be as different as European law is from *adat*.<sup>29</sup> As a result, the Dutch divided

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<sup>21</sup> USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 6 (2010) (citing ROBERT MITCHELL, ROY L. PROSTERMAN & AKHMAD SAFIK, LAND POLICY CHALLENGES IN INDONESIA: FINAL PROJECT REPORT OF THE LAND LAW INITIATIVE (2004)).

<sup>22</sup> Szczepanski, *supra* note 7, at 240–241.

<sup>23</sup> *Id.* at 241; Daryono, *supra* note 18, at 421.

<sup>24</sup> BRITANNICA ONLINE ENCYCLOPEDIA, *Adat*, <http://www.britannica.com/EBchecked/topic/5336/adat> (last accessed December 29, 2014).

<sup>25</sup> *Id.*

<sup>26</sup> ABDUL GHOFFUR MUHAIMIN, THE ISLAMIC TRADITIONS OF CIREBON; IBADAT AND ADAT AMONG JAVANESE MUSLIMS 115 (Australian National University) (2006), available at [http://press.anu.edu.au/islamic/itc/mobile\\_devices/index.html](http://press.anu.edu.au/islamic/itc/mobile_devices/index.html).

<sup>27</sup> *Id.*

<sup>28</sup> Hooker quotes the Indonesian scholar, Djojodigono, saying that *adat*, in one sense, means all law in Indonesia which is not derived from written law but yet is enforced by authority of government, and that in another sense, it consists of "norms which emerge directly from the general Indonesian culture, particularly in social relationships" such as family arrangements and activities, including contracts between individuals. M.B. HOOKER, ADAT LAWS IN MODERN INDONESIA 28 (Oxford University Press 1978) [hereinafter Hooker], citing M.M. Djojodigono, ADAT LAW IN INDONESIA 13, (1952).

<sup>29</sup> SUDARGO GAUTAMA AND ROBERT N. HORNICK, AN INTRODUCTION TO INDONESIAN LAW 9 (Alumni Press 1974).

Indonesia into nineteen separate *adat* law “areas.”<sup>30</sup> And even within one *adat* area the rules are not always uniform although they will be similar.<sup>31</sup>

The Dutch colonial government in Indonesia regarded *adat* as prescriptive rules not connected to Islamic law.<sup>32</sup> The Muslim position held that where *adat* institutions were contrary to Islamic teaching, the *adat* needed to be reformed.<sup>33</sup> The Dutch considered Islam to be a threat and sought to contain or reduce its influence during conservative periods of their rule.<sup>34</sup> *Adat* was indeed changed by Islamic law.<sup>35</sup> There is much debate on how much change was brought about by Islam and on the historic and current relationship between *adat* and Islamic (Sharia) law.<sup>36</sup> Some claim that *adat* and Sharia are intimately related.<sup>37</sup> Others argue that the two are quite separate, and in some areas are in clear competition.<sup>38</sup> The differences in views in part reflect the fact that Islam had different degrees of penetration in different areas. It was greatest in northern Sumatra (Aceh Province) which we will look more closely in Section VIII(B), and weakest in Bali where it never penetrated.<sup>39</sup> Also, attempts at accommodation between the two systems were quite widespread.<sup>40</sup> One’s view in this debate may also depend on his or her general view of Sharia law or on the geographic areas they know best.

European rule also influenced the *adat* system. The colonial era was marked by alternating periods in which the colonial power either sought to have European law exclusively govern certain subject matters and/or geographical areas (while *adat* would govern the rest), creating a “dualism” or

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<sup>30</sup>B. TER HAAR, ADAT LAW IN INDONESIA, introductory map, (E. Adamson Hoebel, A. Arthur Schiller, Bharta, Djakarta trans., 1948) (1962) [hereinafter Ter Haar]; see also Hooker, *supra* note 28, at 16 and note 20, at 30.

<sup>31</sup> Gautama & Hornick, *supra* note 29, at 9.

<sup>32</sup> Muhaimin, *supra* note 6, at 116.

<sup>33</sup> Hooker, *supra* note 28, at 97.

<sup>34</sup> *Id.* at 95.

<sup>35</sup> *Supra* note 1.

<sup>36</sup> See e.g. Ter Haar, *supra* note 30, at 2–4, and Muhaimin, *supra* note 6, at 116.

<sup>37</sup> Muhaimin, *supra* note 27, at 118 (quoting Pak Solek, noting the following comparison:

“The case of *adat* and *sharia* is just like doing prayer and wearing sarung and topong. Prayer belongs to *sharia*, wearing sarung and topong belong to Javanese *adat*. How then, should they be separated? It is true that doing prayer is valid without wearing sarung and topong provided the awrat is covered. But clearly, doing prayer and wearing sarung and topong are united, they are not opposed to *sharia*.”).

<sup>38</sup> *Id.*, at 116; Hooker found such an opposition of legal systems in Minangkabau, which is one of the nineteen *adat* areas; Hooker, *supra* note 28, at 92.

<sup>39</sup> Hooker, *supra* note 28, at 91.

<sup>40</sup> *Id.* at 98.

“pluralism” in the legal system, as well as periods in which “unification” of the law (along mostly European lines) was the goal because *adat* and/or dualism was thought to be hindering advancement into the modern world.<sup>41</sup> Generally during the Dutch period, however, *adat* was considered suitable for the bulk of the population.<sup>42</sup>

Currently, over twenty discrete indigenous legal systems based on *adat* co-exist.<sup>43</sup> This dualism continues to complicate the land law of Indonesia. Since independence, hundreds of additional laws and regulations have been enacted relating to land ownership, control and use. Estimates put the number of laws, regulations and other applicable documents at nearly 600, making for an extraordinary degree of complexity.<sup>44</sup> Today most people are not even aware of where *adat* applicable to them came from or when it came into being.<sup>45</sup>

#### IV. Ownership Rights

*Adat* is essentially a communal approach to land rights, including land rights exercised by individuals with the consent of the community. *Adat* varies widely, sometimes even over short distances. The new forms of private land rights set forth in the BAL are a kind of Western categorization of land rights that have parallels with some *adat* systems, but are not consistent with the customary *adat* rights. It is useful to think of the BAL as aimed at ultimately obtaining individual or corporate land ownership or tenure in Indonesia.<sup>46</sup> The BAL provided a new certification process under which land was to be surveyed, mapped and registered. Many of its key provisions required amplification and implementation by enactment of additional laws and regulations, but the results have been marked by inconsistencies and by conflicts.

Agrarian law limits freehold land ownership (“*hak milik*”) only to Indonesian citizens and certain legal entities (e.g. state-owned banks, approved farming cooperatives and approved religious and social

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<sup>41</sup> Ter Haar, *supra* note 30, at 11–13; and, *see generally* Hooker, *supra* note 28, at 11–20.

<sup>42</sup> Hooker, *supra* note 28, at 20. Hooker, writing in the mid-1970’s stated that “...*adat* was and remains the law primarily applicable to something like 85 per cent of the population”. *Id.* at 25.

<sup>43</sup> Timothy Lindsey, *Square Pegs & Round Holes: Fitting Modern Title into Traditional Societies in Indonesia*, 7 PAC. RIM L. & POL’Y J. 699, 699–700 (1998).

<sup>44</sup> Hamid Yusuf, President, Indon. Soc’y of Appraisers, Land Administration System in Indonesia, (July 21, 2011) <http://www.aseanvaluers.org/PDF/Land%20Administration%20System%20in%20Indonesia.pdf>.

<sup>45</sup> Muhaimin, *supra* note 26, at 117.

<sup>46</sup> Daryono, *supra* note 18, at 421 (citing Daniel Fitzpatrick, *Disputes and Pluralism in Modern Indonesian Land Law*, 22 YALE J. INT’L L. 171, 171–212 (1997); Lindsey, *supra* note 43, at 699–719).

organizations).<sup>47</sup> All other entities may acquire a right of usage, under which the holder retains the right to use the land for 25-30-35 years depending on the type of title (*hak pakai*, *hak guna bangunan*, *hak guna usaha* respectively), with extension possible for 20-20-25 years respectively.<sup>48</sup> After the original term and extension periods have run, if the land continues to meet conditions set forth in the BAL and other supporting government regulations, the usage right can then be renewed.<sup>49</sup>

*Adat* land can only be registered and hence certified after having been rendered into one of the private, statutory land (tenure) formats explicitly recognized in Article 16 of the BAL or established subsequently through regulation.<sup>50</sup> Set forth in Section V below is a table describing the major land tenure formats provided in the BAL. While *adat* is declared a primary source of land law, it is simultaneously subject to the restrictions contained in the BAL. This ambiguity, or duality, has been a continuous problem.<sup>51</sup> The drafters of the BAL envisioned that *adat* would gradually be molded into the national law or be absorbed and replaced by it.<sup>52</sup>

## V. Traditional Land Tenure Formats Recognized Under the BAL

The traditional land (tenure) rights, recognized in the Basic Agrarian Law can be compared based on (among other things), the following characteristics:

- a. Whether they are transferrable to other parties through sale, exchange and other means as regulated by law;
- b. Whether they can be pledged as collateral; and
- c. Whether the rights-holder can extend and renew the right, provided that the land continues to be used for the same purpose as it was originally intended when the right was granted, the holder continues to be an Indonesian citizen or a legal entity established and domiciled in Indonesia, and the land continues to be zoned for the usage within Regional Spatial Planning.

As mentioned, customary *adat* land rights vary from region to region and even from village to village. In an effort to harmonize and unify the various land use systems throughout the archipelago, the BAL recognizes only certain

<sup>47</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 21, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>48</sup> KPMG, REPORT ON ACCOUNTING PRACTICES FOR INCIDENTAL LAND OWNERSHIP IN INDONESIA (2012), available at <http://www.kpmg.com/ID/en/IssuesAndInsights/ArticlesPublications/Documents/Accounting-Outlook-March-2012-1.pdf>.

<sup>49</sup> *Id.*

<sup>50</sup> USAID, *supra* note 21, at 6 (citing Laurens Bakker, *Can We Get Hak Ulayat?* (2008), available at <http://escholarship.org/uc/item/5pj3z2jr>.)

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



forms of land rights. As mentioned above, to gain formal title with respect to a particular land right, the applicant must first demonstrate that the land use can be classified as one of the recognized forms of tenure under Article 16 of the BAL.<sup>53</sup> The following table describes these recognized land tenure formats. *Hak milik* is the closest to complete ownership of all rights, as in a freehold or fee simple title.

Tenure Form	Characteristics
<i>Hak Milik</i> (proprietary right)	<ul style="list-style-type: none"> <li>• Absolute ownership of land which loosely corresponds to a fee simple or freehold title in common law jurisdictions.<sup>54</sup></li> <li>• Hereditary and only available to Indonesian citizens. If a non-citizen obtains <i>hak milik</i> land (e.g. by inheritance) or the owner loses his or her citizenship, he or she must relinquish the land within one year or have it fall to the state at the end of the year.<sup>55</sup></li> <li>• Certain legal entities specified by the Government can hold a right of ownership, namely state banks, community agriculture cooperatives, and religious or social organizations designated by the Minister of Agriculture or Minister of Agrarian Matters.<sup>56</sup></li> <li>• Unlimited in time and capable of being sold, bequeathed, transferred and mortgaged.<sup>57</sup></li> <li>• Can be sold through conversion regulations, grants from the government, or in accordance with <i>adat</i> law where that gives a right to sell.</li> <li>• An owner can convey the right of building, right of use, right of rent, land pledge/lein (<i>hak gadai</i>), share cropping or right lodgings on this land.</li> </ul>

<sup>53</sup> *Id.*

<sup>54</sup> AM. BAR ASS'N, *supra* note 20, at 17.

<sup>55</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 21, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>56</sup> *Id.* arts. 21–22.

<sup>57</sup> *Id.* art. 25.

<i>Hak Guna-Usaha (right to exploit or cultivate)</i>	<ul style="list-style-type: none"> <li>• An agricultural commercial lease of state-owned land, at least five hectares, allowing those in possession the right to cultivate or exploit state-owned land for agriculture, fishery, or husbandry purposes for a period up to 25 years (35 years for a company) with a possible 25 year extension.<sup>58</sup></li> <li>• Can be held by Indonesian citizens/entities as well as government approved foreign direct investment companies, commonly known as “PMA Companies” (including Indonesian companies incorporated with foreign owned companies).</li> <li>• Can be transferred.<sup>59</sup></li> <li>• The certificate providing this land right can be mortgaged.<sup>60</sup></li> </ul>
<i>Hak Pakai (right to use)</i>	<ul style="list-style-type: none"> <li>• Usufructory<sup>61</sup> and not permanent.</li> <li>• A right to use State-owned land or land owned by private persons or entities for a specific purpose. It can be granted for a definite period or for as long as the land is used for the specified purpose.<sup>62</sup></li> <li>• Can be sold or transferred if it is explicitly provided for in the original grant or has the approval of the government.<sup>63</sup></li> <li>• The right of use on State-owned land is valid for a maximum of 25 years but subject to mutual agreement between the land owner and the <i>hak pakai</i> holder,</li> </ul>

<sup>58</sup> *Id.* arts. 28–29.

<sup>59</sup> *Id.* art. 28.

<sup>60</sup> *Id.* art. 33.

<sup>61</sup> Usufruct is found in many parts of the world. It derives from Roman and civil law and is a right enabling the holder to use or derive the benefits or profit from the use of the land. Rights to the fruits can be in agriculture, livestock or other profit sources, and are generally for a limited duration, or for the lifetime of the person with the usufructory interest (e.g. *hak pakai* holder).

<sup>62</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 41, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>63</sup> *Id.* art. 43.

	<p>extendable for a period of 20 years (or occasionally for an indefinite period as stated in its grant or agreement if granted to embassies, non-department government institutions, representatives of international organizations, or religious or social institutions).</p> <ul style="list-style-type: none"> <li>• May be held by an Indonesian individual or entity or foreigner permanently domiciled in Indonesia, or a foreign legal entity with a representative office in Indonesia such as foreign banks, and embassies.<sup>64</sup></li> <li>• Government Regulation 40 of 1996<sup>65</sup> states that the initial period for the right of use may be owned by resident foreigners, and/or foreign companies that have a representative office in Indonesia.</li> </ul>
<i>Hak Guna-Bangunan</i> (right to build)	<ul style="list-style-type: none"> <li>• A right to use land owned by a private party (the "lessor") for building purposes for a maximum period of 30 years, with the ability to extend for up to 20 years.<sup>66</sup></li> <li>• Cannot be registered at the land office and therefore does not exist in certificate form.</li> <li>• May not be held by a foreigner, even one permanently domiciled in Indonesia. However it may be held by a foreign legal entity having a representative office in Indonesia.<sup>67</sup></li> <li>• Can be transferred and mortgaged.<sup>68</sup></li> </ul>

<sup>64</sup> *Id.* art. 42.

<sup>65</sup> Indonesian Government Regulation 40 of 1996 in the Right to Cultivate, Right of Building and Right to Use of Land ("Law PP 1997"), available at [http://ppesumapapua.menlh.go.id/index.php?option=com\\_rokdownloads&view=file&Itemid=121&id=111:pp-40-1996-tentang-hak-guna-usaha-hak-guna-bangunan-dan-hak-pakai-atas-tanah](http://ppesumapapua.menlh.go.id/index.php?option=com_rokdownloads&view=file&Itemid=121&id=111:pp-40-1996-tentang-hak-guna-usaha-hak-guna-bangunan-dan-hak-pakai-atas-tanah), with English translation available at: <http://translate.google.com/translate?hl=en&sl=id&u=http://ppesumapapua.menlh.go.id/&prev=search>.

<sup>66</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 35, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>67</sup> USAID, INDONESIA – LAND TENURE AND PROPERTY RIGHTS PROFILE (2010) (citing Lindsey, *supra* note 21, and Fitzpatrick, *supra* note 46).

<sup>68</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 35, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<p><i>Hak Ulayat (customary right)</i></p>	<ul style="list-style-type: none"> <li>• Embraces the communal property of an <i>adat</i> community. Translates to “communal right of alienation” and is a right that cannot be registered.<sup>69</sup></li> <li>• Exists on land administered by the National Land Agency (BPN) and on forest land administered by the Minister of Forestry and other sectoral agencies (including mines and energy).<sup>70</sup></li> <li>• Provides authority to: i) regulate and manage the use of land (for residential use, agricultural use, etc), determine the availability of land for future use, and land/soil conservation; ii) regulate and determine the legal relationship between persons and land (e.g. issuing specific land rights for community members); and iii) regulate and determine the legal relationship between persons and acts concerning land (transfer, inheritance etc).</li> <li>• These agencies can and do issue concessions or permits over such land. This traditional use has been challenged by national law and is the source of substantial conflict as discussed below.</li> </ul>
<p><i>Hak Pengelolaan (right to operate)</i></p>	<ul style="list-style-type: none"> <li>• Right to operate state-owned land for a specific purpose as approved by the authorities.</li> <li>• Given exclusively to government institutions or state-owned companies for an unspecified period.</li> <li>• Subject to the agreement of the <i>hak pengelolaan</i> right holder, third parties may be granted rights in the form of <i>hak guna-bangunan</i> or <i>pakai</i>.</li> </ul>

<sup>69</sup> Ade Cholik Mutaqin, Indonesian Cmty. Mapping Network (JKPP), Land Administration Policy in Indonesia, (Oct. 2, 2012), [http://www.landcoalition.org/sites/default/files/publication/1357/2012AsiaLandForum\\_AdeCholikMutaqin.pdf](http://www.landcoalition.org/sites/default/files/publication/1357/2012AsiaLandForum_AdeCholikMutaqin.pdf).

<sup>70</sup> *Id.*

<i>Hak Memungut Hasil Hutan (right to clear land) &amp; Hak Membuja Tanah (right to collect materials)</i>	<ul style="list-style-type: none"> <li>• Right to clear land (<i>memungut hasil hutan</i>) and right to collect forest materials (<i>membuja tanah</i>).<sup>71</sup></li> <li>• Available to Indonesians only.<sup>72</sup></li> </ul>
<i>Hak Sewa (right to lease)</i>	<ul style="list-style-type: none"> <li>• Provides the holder with a right to lease the property.</li> <li>• No fixed term for the lease.<sup>73</sup></li> <li>• Rent can be paid (a) either on a one time basis or on an interval basis and (b) either before or after the use of the land.<sup>74</sup></li> <li>• May be held by Indonesian citizens; foreigners residing in Indonesia; legal entities established under the laws of Indonesia and domiciled in Indonesia, including PMA companies; and foreign legal entities with a representative in Indonesia.<sup>75</sup></li> </ul>

## VI. Forest Land and Communal Tenure (*Hak Ulayat*)

Indonesia has the world's third-largest tropical forest area (after Brazil and the Democratic Republic of the Congo).<sup>76</sup> Approximately 48% of the nation is covered by forest.<sup>77</sup> The government, however, classifies 69% of the country's land area as being forest.<sup>78</sup> The discrepancy is partially explained by the tendency of the Ministry of Forestry to classify as forest all lands that are not classified as agricultural land, thereby maximizing their jurisdiction, and to retain the forest classification even when there has been a loss of tree cover as a result of deforestation.<sup>79</sup> The Constitution does not mention forests; it refers only to the state's control over all "natural resources" of the country. Since passage of the Basic Forestry Law of 1967, the government has regarded all

<sup>71</sup> *Id.* art. 46.

<sup>72</sup> *Id.* art. 46.

<sup>73</sup> *Id.* art. 44.

<sup>74</sup> *Id.* art. 44.

<sup>75</sup> *Id.* art. 45.

<sup>76</sup> USAID, *supra* note 21, at 13.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

areas designated as forest as being regulated exclusively by the forestry laws.<sup>80</sup> The result is that the government of Indonesia owns (though it is called 'control') over two-thirds of the land, administered by the Ministry of Forestry. Constitutional Court decision No. 45/PUU/2011, however, does not accept this. In order to obtain 'forest' status now, a more rigorous and consultative process must be undertaken and there is considerable debate about the impact of this decision on the Forestry Ministry's authority.<sup>81</sup>

Although the BAL (technically) recognizes the *hak ulayat* of traditional *adat* communities, including communities living in and around forests, such recognition actually applies only to communities that "still exist," and only if the interests of the community are not inconsistent with the interests of the Indonesian state.<sup>82</sup> The criteria for determining the validity of a community is set forth in Ministerial Regulation 1999 entitled "Guidelines to Solving Problem of *Adat* Communities '*hak ulayat*'".<sup>83</sup> In practice, the Ministry of Forestry has consistently ruled that the interests of the state trump any interests of *adat* communities to use the trees, timber, or land that the Ministry has classified as state forest. The Ministry essentially treats all such lands as state lands and freely grants concessions to companies to harvest trees or establish plantations of palm oil or other commercial crops.<sup>84</sup> The Ministry requires the concessionaire to deal with any pre-existing traditional rights. Today, only a small proportion of forests in Indonesia are on privately titled land.<sup>85</sup>

As a result, it has been difficult for *adat* communities to maintain land rights in forests controlled by the Ministry of Forestry. However, a new era of decentralization of government authority, from the central government to the *kabupaten* governments, has provided more ability for *adat* communities to

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<sup>80</sup> USAID, *supra* note 21, at 14 (citing STEVE RHEE, DARRELL KITCHENER, TIM BROWN, ET AL., REPORT ON BIODIVERSITY AND TROPICAL FORESTS IN INDONESIA (2004)). The 1967 Forestry Law was replaced by the Basic Forestry Law of 1999.

<sup>81</sup> See *e.g.*, [http://www.daemeter.org/wpcontent/files/Policy\\_Brief\\_Constitutional\\_Court\\_Decision\\_No\\_45\\_PUU/2011.pdf](http://www.daemeter.org/wpcontent/files/Policy_Brief_Constitutional_Court_Decision_No_45_PUU/2011.pdf). Ben Clanchy, January 21, 2013. Telephone interview given to the authors by Ben Clanchy, Foreign Legal Consultant, Makarin & Taira S. (Jan. 21, 2013).

<sup>82</sup> Act No. 5 Concerning Basic Regulations on Agrarian Principles (1960), art. 3, available at [http://okusi.net/garydean/works/UU\\_NO\\_5\\_1960\\_UUPA\\_en.pdf](http://okusi.net/garydean/works/UU_NO_5_1960_UUPA_en.pdf).

<sup>83</sup> USAID, *supra* note 21, at 14 (citing Craig C. Thorburn, *The Plot Thickens: Land Administration and Policy in Post New Order Indonesia*, 45 ASIA PAC. VIEWPOINT 33, 33-48 (2004); ARNOLDO CONTRERAS-HERMOSILLA & CHIP FAY, STRENGTHENING FOREST MANAGEMENT THROUGH LAND TENURE REFORM: ISSUES AND FRAMEWORK FOR ACTION (2005), available at [http://www.rightsandresources.org/publication\\_details.php?publicationID=1338](http://www.rightsandresources.org/publication_details.php?publicationID=1338)).

<sup>84</sup> *Id.* at 14.

<sup>85</sup> Lindsey, *supra* note 43, at 699-719; Contreras-Hermosilla & Fay, *supra* note 83.

assert the right to at least receive compensation for the removal of trees from their land.

While community-managed forest areas have been successful in rehabilitating some degraded forest areas, the newly regenerated forests have attracted the attention of illegal loggers. Local residents, forest advocacy groups and conservationists cite corruption, mismanagement, apathy from local law enforcement, and fear among local residents, as factors contributing to the ability of illegal loggers to operate with substantial impunity.<sup>86</sup> Conflicts are common between forest-dwelling *adat* communities and timber companies, as well as others who want to harvest trees, and such conflicts often turn violent.

The cause of such conflicts tends to be disagreement over the state's authority to harvest the trees or its grant of timber harvesting rights to corporations. Key factors that also add to forest-related conflicts are: (1) direct and indirect involvement of the Indonesian formal security and military forces; (2) fragmentation of natural resource management authority as a result of the devolution of political power from the central government to *kabupaten* authorities; (3) *kabupatens'* government abuse of their newly obtained political powers; (4) selective law enforcement; and (5) the ambiguous land tenure rights.<sup>87</sup> Land classified as forest land (including land now without tree cover) is all administered by the Ministry of Forestry, but the new era of decentralization of powers to the *kabupaten* and the lack of preparation for such devolution has led to confusion. The unclear allocation of authority over forest resources has also led some local government *kabupaten* authorities to adopt aggressive practices—partly to simply gain greater control over forest lands, and partly to exploit them for revenue. Some recent legislation has clarified authority over forests and may lay a foundation for more rational and sustainable management.<sup>88</sup> The newly decentralized electoral process enables governments to become more responsive, but *kabupaten* need improved capacity for working with the public and to better identify and respond to their needs in regards to the land.<sup>89</sup> To be clear, although the laws delineating authority between the central government and the *kabupaten* are gradually becoming more apparent, there is no legislation, and none on the horizon, that would restore, or protect, the *hak ulayat* (customary rights) of *adat* communities living in areas classified by the government as forest.<sup>90</sup>

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<sup>86</sup> Contreras-Hermosilla & Fay, *supra* note 83.

<sup>87</sup> USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 14 (2010) (citing AGRIC. and RURAL DEVELOPMENT, INC, GROWING CONFLICT AND UNREST IN INDONESIAN FORESTS 3 (2004)).

<sup>88</sup> USAID, *supra* note 21, at 15.

<sup>89</sup> USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 15 (2010) (citing WORLD BANK, SUSTAINING INDONESIA'S FORESTS: STRATEGY FOR THE WORLD BANK 50 (2006)).

<sup>90</sup> Interview with Ben Clanchy, *supra* note 81; USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 15 (2010) (citing Sandra Moniaga, CETRI.COM, (last visited Nov. 7, 2014), available at <http://www.cetri.be/spip.php?article1414&lang=fr>).

## VII. Title and Registration of Land

A land title deed is known in Indonesia as a *Sertifikat Tanah*, and is always accompanied by a survey certificate known as a *Surat Ukur*, which documents the location and dimensions of the land. Land transfer deeds are drafted by a land deed official known as a *Pejabat Pembuat Akte Tanah* (PPAT). PPAT's work in privately managed offices (usually run by a notary) authorized by the National Land Agency. Most of a PPAT's work involves registrations and land transfers. As mentioned earlier, the vast majority of land in Indonesia has not been registered by the BPN and is still held under traditional titles (called *hak adat*).<sup>91</sup>

Most private urban and rural land rights are unregistered in Indonesia. Many people acquire their rights to land by inheritance, and neither they nor those who purchase are inclined to register the land because they do not want to deal with the cost and time required for registration.<sup>92</sup> Although Article 56 of the BAL refers to the validity of rights derived from *adat* law, the right-holder cannot register the right, and the right is not fully recognized by the state until he or she obtains confirmation, as required by the National Land Agency, that the land is privately held. Thus, although the right originates in *adat* law, it must be registered under current law, and BPN officials impose a presumption that all unregistered land is state land until proven otherwise.<sup>93</sup> Out of approximately 85 million privately held parcels, BPN and its predecessor agencies have managed to register at most forty-five percent, leaving at least 47 million unregistered.<sup>94</sup>

The leasing of privately held land is common, especially with respect to prime agricultural land. Although Article 10 of the BAL requires owners of agricultural land to cultivate the land personally, bureaucrats have refused to enforce this provision since the 1960's.<sup>95</sup> Nevertheless, since leases for such land are technically illegal, most leases are informal. An agricultural land tax is

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<sup>91</sup> Gary Dean, *Hukum Agraria Indonesia* [Indonesian Land Law], GARY DEAN- ESSAYS & ARTICLES (1998), <http://okusi.net/garydean/works/hukumagraria.html>. The land ownership document issued by the Dutch is known as a *incik*.

<sup>92</sup> See Section IX.

<sup>93</sup> *Id.*

<sup>94</sup> An estimate of 33% comes from USAID, *supra* note 21, at 8 (citing Mitchell, Prosterman & Safik, *supra* note 21; Thorburn, *supra* note 83). An estimate of 45% comes from Joyo Winoto (head of the National Land Agency), in Taking Land Policy and Administration in Indonesia to the Next Stage and National Land Agency's Strategic Plan, Workshop in International Federation of Surveyors' Forum, Washington, D.C., March 2009, at 17.

<sup>95</sup> USAID, COUNTRY PROFILE PROPERTY RIGHTS & RESOURCE GOVERNANCE – INDONESIA 8 (2010) (citing TIMOTHY LINDSEY, SQUARE PEGS & ROUND HOLES: FITTING MODERN TITLE INTO TRADITIONAL SOCIETIES IN INDONESIA 11 (1998).)



collected from land users rather than owners, with no questions asked by the tax authorities regarding who owns the land being taxed.<sup>96</sup> Ownership records for agricultural land are closely guarded by village officials, and the National Land Agency has no access to ownership records for much of the individually held agricultural land nominally within its jurisdiction.<sup>97</sup>

Different communities experience differing levels of tenure security. In settled agricultural or residential areas, people whose families have occupied particular land for generations usually have documents showing payment of land taxes or documents showing that they or their ancestors purchased the land. In areas where systematic titling of rights is performed, there is often a high demand for land titles, but it is not clear if this is the result of tenure insecurity per se. Where systematic titling is not undertaken by the state, citizens may find it difficult and expensive to register their rights.<sup>98</sup> According to a recent USAID report, Indonesia ranks 107<sup>th</sup> out of 177 countries analyzed with regard to the difficulty of registering private land transactions and the cost of registration in Indonesia is *three times* the average cost throughout East Asia and the Pacific.<sup>99</sup>

The system that has been in place has functioned like a deeds registration system. Registration of ownership by deed is not conclusive evidence of ownership, but does serve as “strong evidence” of ownership. Legal registration was established by the BAL, but the process for registration is governed by Government Regulation No. 24 of 1997 “On Land Registration.” Here are some observations applicable to it:

- 1) The BAL reflects the drafters’ intention of having *adat* gradually change so that it becomes consistent with national law, or is replaced by national law as discussed in Sections IV and V above. *Adat* land can only be registered and certified (e.g., titled) after having been rendered into one of the private law land rights recognized in Art. 16 of the BAL.
- 2) Regulation No. 5/1999 of the Minister of Agrarian Affairs/Head of National Land Board concerns Guidance for Resolution of Problems of *Ulayat* Rights of *Adat* Law Communities. This Regulation provides some respect for, and a bit of protection for, *ulayat* (community-held) rights. It provides some general criteria for the existence of *ulayat* rights and provides that, following identification, *ulayat* land that still exists will be recorded on base maps used for land registration. Determination of boundaries of *ulayat* land, followed by registration

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<sup>96</sup> USAID, *supra* note 21, at 8 (citing Mitchell, Prosterman & Safik).

<sup>97</sup> *Id.*

<sup>98</sup> USAID, *supra* note 21, at 8 (citing ROBIN NIELSEN & AKHMAD SAFIK, LAND CERTIFICATION AND RURAL FINANCE: FINAL REPORT (Rural Development Institute (RDI), for International Finance Corporation 2007); SOCIAL MONITORING AND EARLY RESPONSE UNIT (SMERU), AN IMPACT EVALUATION OF SYSTEMATIC LAND TITLING UNDER THE LAND ADMINISTRATION PROJECT (LAP) (2002); Thorburn, *supra* note 81).

<sup>99</sup> USAID, *supra* note 21, at 10.

in the land register, could help provide certainty of the existence of the *ulayat* right. One limitation of this Regulation is that it reduces the content or scope of *ulayat* rights by defining it merely as a right to 'reap the benefits of the natural resources, including the land, in the said area, for survival and livelihood.' That is, it limits it to a usufruct right, rather than a right to land.

- 3) The promulgation of various acts, such as the Forestry Acts (Act No. 5 of 1967 and Act No. 41 of 1999), Mining Act (Act No. 11 of 1967) and the Protection of Biological Natural resources and the Ecosystem (Act No. 5 of 1990), has led to further marginalization of *adat* communities. While the BAL and Regulation No. 5/1999 provide recognition of *adat* communities and their *ulayat* right, the Forestry Acts tend to ignore the existence of those communities and their *ulayat* rights.

The Agrarian, Forestry, Mining and National Resource laws cited in paragraphs (1) and (3) above, juxtaposed with Regulation No. 5 cited in paragraph (2) above, is an example of the conflict in the regulatory scheme. Indonesia's conflicting goals and legal rules are causing conflicts on the ground, and are negatively affecting development and efficient use of *ulayat* lands.

### VIII. Regional Variations

Each indigenous group in Indonesia has a system of *adat* laws and traditions, developed over time that meets the individual needs of the particular community. No single form of *adat* is national. Customary tenures are so diverse from region to region that even basic principles cannot be standardized across the whole country. Similarly, land comprising *hak ulayat* (communal rights) is very difficult to measure because boundaries can be natural, such as mountains or rivers.<sup>100</sup> Under various regulations,<sup>101</sup> relevant proofs of the conversion of *adat* rights to new rights under the Basic Agrarian Law were limited to documentary evidence which can include tax receipts dated pre-1960, an official grant from the Sultan or relevant official, a verifying letter from the village head, or a letter of confirmation from the Assistant District Chief and proof of citizenship.<sup>102</sup>

<sup>100</sup> Rachel Haverfield, *Hak Ulayat and the State: Land Reform in Indonesia*, in INDONESIA: LAW AND SOCIETY 42, 64 (Tim Lindsey ed., 1999),

<sup>101</sup> Government Regulation No 2 of 1962 regarding Conversion and Registration of Ex-Indonesian Rights to Land: Decision of the Internal Affairs Minister No SK 26/DDA/1970 (Art. 9). Government Regulation No 24 of 1997. Note, many villages are not registered as citizens, so this criterion provides a serious impediment to the recognition of their rights. For example, after the eruption of Mt. Merapi in 1994, many thousands of farmers were forced to flee their properties. After the disaster, those who had not gone to government shelters, or did not have identity cards were deemed dead or non-existent and their land appropriated as state land.

<sup>102</sup> Haverfield, *supra* note 100, at 63-64.

The practices of the Kalimantan Dayak people in West Kalimantan and the Acehnese in Aceh are briefly discussed below to provide a comparison of two *adat* systems in practice, and how they operate within the legal framework.

#### A. *Adat* and National Law among the Dayak people of Kalimantan

The majority of Dayak live by shifting agriculture on the land owned either by individuals or the community under *tanah adat*, their customary land ownership system.<sup>103</sup> In West Kalimantan even after decades of central government insistence on formal titling under Western-style laws, few farmers have applied for official title to their customary lands because the application process is complex and the registration fees are prohibitively high. This lack of paper title, however, exposes Dayak lands to government claims of ownership under the Basic Agrarian Law.<sup>104</sup>

Under Dayak *adat*, two different forms of interest in land exist: i) communally owned lands, *tanah milik kelompok*, and ii) individually owned lands, *tanah milik perorangan*.

- 1) Communally owned lands (*tanah milik kelompok*) – are cleared by the community for crops such as rubber, fruit and other collective uses. Outsiders may receive permission from *adat* leaders to harvest these crops. This land is reserved for tree-crops and may not be used for husbandry.<sup>105</sup>
- 2) Individually owned land (*tanah milik perorangan*) – belongs to the individual who cleared the land and may be bequeathed to his or her descendants. The land remains theirs to use for as long as they continue to use it. If they cease to farm it, and allow the forest to reclaim the site, the land becomes available to whoever next chooses to cultivate the land. There is no formal mechanism for enforcing a particular family's claim to a vacant plot. This reflects the idea that the land never truly 'belongs' to a family—only the (*usufruct*) right to tend to and use the land and its products can be acquired.<sup>106</sup>

In contrast to the *adat* rules in paragraph (2) above, under the BAL, fallow *adat* land is classified as 'abandoned,' and thus available to be registered to the state and used for mining or timber. The rules applicable to fallow land under the national law versus the tradition rules highlights the inconsistencies that can exist and the conflict that can be generated between the two systems of law, and for people trying to adhere to them.

<sup>103</sup> Szczepanski, *supra* note 7, at 237.

<sup>104</sup> Daniel Fitzpatrick, *Beyond Dualism: Land Acquisition and Law in Indonesia*, in *INDONESIA: LAW AND SOCIETY* 224 (Tim Lindsey ed., 2d ed. 2008).

<sup>105</sup> Szczepanski, *supra* note 7, at 237–38.

<sup>106</sup> *Id.* at 238.

## B. *Adat*, Sharia, and National Law in Aceh

In Aceh, written land records are usually generated as a result of land sales (*akte jual-beli*), gifts (*hibah*), and inheritance, or divorce-related divisions (*pembagian hak bersama*). They are often based on a so-called *sporadik*, which consists of letters acknowledging physical control and customary ownership of land. These documents are prepared either by the village head (*keucik*) or the sub-district head (*camat*), and are often witnessed by representatives of the parties involved. If the *camat* is involved in his capacity as the local land notary (PPAT), the transfer documentation will usually take the form of a formal notarized document (*akte*). While in theory the *camat* should forward copies of these notarized documents to the BPN (National Land Agency), in practice, parties involved often forego BPN involvement to limit the costs of the transaction. As a result, a large number of localized land documents exist that are not a part of formal land agency records. While this type of local, customary, land documentation system exists across Indonesia, it is particularly strong in Aceh.<sup>107</sup>

Even BPN officials acknowledge that local mechanisms are the primary form of land administration in Aceh, with relatively few Acehnese understanding or trusting the formal BPN system. Some claim there are many advantages to decentralized land administration, including its low cost and proximity to participants. But events in Aceh have shown that local land administration structures in Indonesia are multi-layered, fragmented and vulnerable to external shocks such as the 2004 Indian Ocean tsunami. This is because local record-keeping tends to be incomplete, and lacks effective mechanisms for duplication of records for regional or national systems. The post tsunami result in Aceh was the irretrievable loss of local land records in affected areas.<sup>108</sup>

Individual land ownership seems far more common in parts of Aceh than in other parts of Indonesia - particularly the highly communal areas such as Bali and West Sumatra. Family-based customary ownership rights (*hak milik adat*) are the predominant form of land tenure in the tsunami-affected part of Aceh. They are the norm not only in relation to residential land, but also rice fields and gardens. These individual and family land rights are most likely a result of the strong generational effects of Islamic inheritance principles in Aceh. Sharia law divides deceased estates among direct family members according to bilateral principles of inheritance; it does not devolve estates to the extended family or clan, or require reversion of unused land to the local community.<sup>109</sup> As a result, most ownership structures center on the nuclear

<sup>107</sup> DANIEL FITZPATRICK, MANAGING CONFLICT AND SUSTAINING RECOVERY: LAND ADMINISTRATION REFORM IN TSUNAMI-AFFECTED ACEH 9–10 (University of Singapore, ARI Aceh Working Paper No. 4, 2008), available at [http://www.ari.nus.edu.sg/docs/downloads/aceh-wp/acehwpso8\\_004.pdf](http://www.ari.nus.edu.sg/docs/downloads/aceh-wp/acehwpso8_004.pdf).

<sup>108</sup> *Id.* at 10.

<sup>109</sup> *Id.*

family in Aceh's strongly Muslim areas rather than the local clan or community.<sup>110</sup>

This is not to say that customary ownership rights in these parts of Aceh are the same as statutory land ownership. Rural communities, for example, still have a greater say in the way in which customarily owned land may be used and transferred than would be the case for land under national statutory rules. Acehnese experts and extensive field interviews conducted by, among others, T.I. El Hakimy, suggest that in rural areas a customary ownership right:

- may only be sold if offered first to the neighbors (and possibly other community members as well);
- cannot be sold to community outsiders (although it may be leased with community approval);
- is subject to neighbors' and other community members' legitimate rights of access;
- may (in theory) be appropriated by the community for community purposes.<sup>111</sup>

Also, in Aceh the vast majority of land disputes are resolved (or managed) at the village level by the village head. In dealing with land disputes at the local level, the village head will (in theory) apply custom as modified by Sharia law.<sup>112</sup> In certain Sharia-affected *adat* systems, the village government has the authority to resolve all civil disputes by reference to custom as modified by Sharia law.<sup>113</sup> The documents that are kept in *keucik* offices include letters confirming land rights, letters of land sale and inheritance-related land subdivisions. But the records held at this level are rarely complete and there is relatively little coordination with the sub-district offices and BPN in relation to record keeping.

Given that the local institutions remain the predominant means of asserting land rights in Aceh, individuals without officially registered title are exposed to the risk of having their title diminished or not acknowledged by village heads or by imams.

## IX. Titles and the Securing of Credit

Formal land titling can be effective in unlocking information and the credit value of otherwise unusable assets, as "it is a formal land title's ability to serve as collateral that transforms fixed assets into liquid ones and back again with ease."<sup>114</sup> It has been shown that having a clear land title increases the size

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 20.

<sup>113</sup> *Id.*

<sup>114</sup> Paul Dower & Elizabeth Potamitesz, *Signaling Credit-Worthiness: Land Titles, Banking Practices and Access to Formal Credit in Indonesia* 32 (Ctr. for Econ. and Fin.

of loans on average in Indonesia by 22%. Offering the land as collateral increases the size of loans on average by 30%.<sup>115</sup>

After formal land registration, the most formalized of the informal rights to land is a land deed (*akte*) that is stamped and notarized, representing the purchase of the land. A less formal but perhaps locally beneficial right is the *girik* or *petok*, which is a use claim on land derived from customary law.<sup>116</sup> Documents evidencing customary rights are often guaranteed by the village leader and can be inherited.<sup>117</sup>

Formal land titles provide applicant information to a knowledgeable lender. Such land titles can support the credit market by improving the amount of information available to the lender,<sup>118</sup> including information that helps the lender assess the character and relative sophistication of particular borrowers. Even though formal land titling is the most direct means of credit, Indonesian banks with a strong rural lending experience can proceed without the aid of formal land titles by gathering personal information. Indonesia has an extensive rural banking system, mostly supplied by the Bank Rakyat Indonesia ("BRI"). BRI is the fourth largest bank in Indonesia with 10% of the market share as measured by the total assets held by banks. It has over 4000 offices, reaching roughly a third of all households in Indonesia.<sup>119</sup> BRI, and other banks in Indonesia, accept as "collateral" informal land documents that demonstrate ownership but cannot be used for transfer. In one study, on average, only 42% of loans that were collateralized used a land title certificate. Almost 40% of all loans are not collateralized at all, instead they are guaranteed by deductions from future salary (having a fixed income).<sup>120</sup>

In one survey, 82% of survey respondents, who are BRI banking unit managers, indicated personal character of the individual as the most important factor in considering whether to grant a loan. Moreover, when determining the size of a loan to be granted, which is premised upon loan repayment ability of the applicant, the single most important factor was income or cash-flow (66%), followed by character (20%).<sup>121</sup> Those who offered income as security appeared to be "better" borrowers than those who offer title

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Research, Working Paper No. 155, 2010), available at <http://www.cefir.org/papers/WP155.pdf>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 35.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 9.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 9–10.

as security.<sup>122</sup> In one survey, no respondents indicated that collateral was the most important factor in considering whether to grant a loan.<sup>123</sup>

However, when asked if having a land title would increase the likelihood of success for a loan application, 60% of those surveyed answered in the affirmative, while 29% said that having a formal land title would increase the likelihood of receiving a higher loan amount than someone without a land title.<sup>124</sup> A bank's reliance on personal data and personal relationships, however, is not of much value to new bank clients. For new clients, land title will be of greater importance.

In a survey of BRI lending activities, it was found that almost 40% of loans are not collateralized (e.g., unsecured), rather they are personally guaranteed by the borrowers, with debt service paid by automatic deductions out of their salaries.<sup>125</sup> In the case of loans secured by real property interests, BRI employs a general policy of not using foreclosure as a means of ensuring repayment because of the slow and costly foreclosure process in Indonesia. The survey disclosed that many banks view the foreclosure process as borrower friendly and somewhat unpredictable. Instead of foreclosure, BRI and other banks will encourage the borrower to sell/transfer their land rights to a third party to pay back their loans with the proceeds. Because registered property is more transferable, having registered property can enhance a borrower's ability to transfer land and obtain financing.<sup>126</sup>

The process of getting an acceptable title is both lengthy and costly.<sup>127</sup> The usual procedure requires a letter from the village head verifying that the land is in one's possession. The applicant then needs to have a survey conducted, which entails paying the cost of finding the boundary markers, a survey fee, and all transportation costs. After the survey is completed, the document must be verified, mapped and certified. In total, the process can easily take one year. Once the certificate is obtained, a tax must be paid on the right to receive title on a piece of land. This is a one-time tax; it is not a property tax or tax on the sale. But there are other significant costs in accomplishing this. For example, the stated (official) fee for a land certificate was around \$35 in 2004. Yet standardization is lacking in this area as well. When asked what the actual cost was in 2004, respondents' answers ranged from \$116 to \$232.<sup>128</sup> Securing property titles to obtain secured loans may not be practicable if the transaction costs are too large relative to the size of the loan request.

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<sup>122</sup> *Id.* at 20–21.

<sup>123</sup> *Id.* at 10.

<sup>124</sup> *Id.* at 11.

<sup>125</sup> *Id.* at 9.

<sup>126</sup> *Id.* at 10–11.

<sup>127</sup> *Id.* at 11–12.

<sup>128</sup> *Id.* at 12. See also AM. BAR ASS'N (2012), *supra* note 20, at 35 (in addition to the stamp fee and the administrative fee, which are both relatively small, there is a registration fee and it requires payment of 1/1,000 of the property value).

## X. Recent Advances in the Registration System

Up until 2005, BPN registered an average of about 1 million parcels per year. Now, according to data provided by the head of BPN, the registration pace has been picking up noticeably. In 2007 it jumped to 2,691,167 and held nearly that level in 2008.<sup>129</sup> A collective land registration program for low-income communities, nicknamed “PRONA”, was able to register 5.2 million parcels through 2010.<sup>130</sup> The PRONA target for 2011 was 560,000 parcels.<sup>131</sup> On the other hand, a self-financed group registration scheme that shares costs on a collective community basis has not been successful at all.<sup>132</sup> The reason for the recent improvement appears to be the result of PRONA and a new registration system known as LARASITA. LARASITA, which stands for the “People’s Land Titling Service”, was started by the Karanganyar Land Office in 2006.<sup>133</sup> Karanganyar created an interactive information system that uses vans with large roof antennas and computers acting as mobile offices. The vehicles have internet services and are fully connected to the Karanganyar Land Office.<sup>134</sup> The LARASITA system also makes use of motorcycles and boats equipped with modern technology.<sup>135</sup> This allows the registration system to come to people’s homes in more remote villages, thus by-passing the need for brokers.<sup>136</sup> The program is perceived by the public as “easy, transparent, fair and inexpensive” and is engendering “public trust” into the land registration system.<sup>137</sup> The program was adopted by the National Land Agency in 2007 as the national model and was projected to be in use by about 256 land offices by

<sup>129</sup> Winoto, *supra* note 94, at 10–11.

<sup>130</sup> Deddy Koespramoedyo, Mia Amalia, Uke Mohammad Hussein, Zaenal Arifin, Idham Khalik, Khairul Rizal & Raffli Noor, Directorate of Spatial Planning and Land Affairs, National Development Planning Agency, *Evaluation on Land Registration Strategies in Indonesia*, Section 4.2, Paper Presented at the 23<sup>rd</sup> Pacific Conference of the Regional Science Association International (RSAI) & the 4<sup>th</sup> Indonesian Regional Science Association (IRSA) (July 3, 2013).

<sup>131</sup> *Id.* at Section 4.5.

<sup>132</sup> *Id.* at Section 4.3.

<sup>133</sup> *Id.* at Section 4.5.

<sup>134</sup> Robin McLaren, *Technology to Promote Transparency around Land Acquisitions*, EVIDENCE ON DEMAND 13 (Feb. 6, 2013).

<sup>135</sup> Winoto, *supra* note 94, at 18.

<sup>136</sup> *United Nations Public Service Award for Improvement of Quality Public Service on Land Utilizing Information Technology Model of The LARASITA, the Karanganyar Regency Land Office, Indonesia*, [United Nations Public Service Award] [http://unpan3.un.org/unpsa/Public\\_NominationProfile.aspx?id=525](http://unpan3.un.org/unpsa/Public_NominationProfile.aspx?id=525) (last visited Nov. 7, 2014).

<sup>137</sup> *Id.*



2010, which would cover more than half of Indonesia's regencies and cities<sup>138</sup> and reach people in a quarter of the area of the country.<sup>139</sup> LARASITA, being still a start-up program, is constrained by a number of things: weak internet, lack of computer trained staff, road limitations, a lack of public awareness, and a preference on the part of some officials for the older PRONO program.<sup>140</sup> For developing the LARASITA system, the Karanganyar's Land Office has won a United Nations Public Service Award.<sup>141</sup> It is an important improvement which may have substantial impact in establishing land rights, reducing disputes, and promoting land based financing and economic development.

## XI. Conclusion and Practices

The traditional land tenure system, *adat*, allocated substantial rights to the community at large and set up a variety of user rights. The *adat* system worked to satisfy the needs of the community and custom, but did not provide certainty, public access or knowledge, transferability, or legal relationships. These factors, as well as lack of land registration, were all seen as a significant impediments to development. The Indonesian state therefore sought to transform the existing system into a more modern form that would aid development. Although the 1960 BAL, the Forestry Laws, and numerous other laws and regulations were intended to move matters forward, the legislative process exposed and also gave rise to legal, governmental, and interpersonal conflicts.

At the same time, the post-independence national government has sought to maintain national (rather than personal, local or communal) control of the country's natural resources. The national government has been trying to maximize its land control by attaching the label of "forest land" to as much land as possible. This practice has led to conflicts between villages and the national government, between villages and corporations seeking rights to "forest land", and between villages and those engaged in illegal logging activities. In addition, although not discussed in this paper, Jakarta enacted a new eminent domain law in 2011, called the Land Acquisition Law, to fill the existing void and with the intent of improving Indonesia's infrastructure in order to facilitate development. But the law again prioritizes "the needs of the

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<sup>138</sup> *Id.* Implementation of LARASITA varies greatly. For example, in 2010 it accounted for over 73 percent of the total of land certifications in Karanganyar where it started, and less than 4 percent in Lombok Barat in 2001 where it was started only the year before, and was suspended in 2012 in Lombok Barat due to insufficient staff. *Id.* at Section 4.5.

<sup>139</sup> Winoto, *supra* note 94, at 10.

<sup>140</sup> Koespramoedyo, et al., *supra* note 130, at Section 4.5

<sup>141</sup> United Nations Public Service Award, *supra* note 136.

public over an individual or community”.<sup>142</sup> The local communities, as a result, see their traditional rights to control the land and its produce, as being eroded again.

In strongly observant Muslim areas, such as in parts of Aceh, the application of Sharia law produces an additional layer of rules, resulting in more individual and family ownership as well as more complexity, than is the case in areas where Sharia law does not apply. Sharia traditions in such areas continue to limit land transfer to, access to, and use by, outsiders.

The current (and very understandable) practice of lenders in dealing with these complex mixes of laws and customary rights is to accord limited value to land titles as collateral, not nearly as much credit as is generally given in Western countries. Nonetheless, having clear land title will increase the size of the loan and offering such land as collateral will increase the loan size even more. Having formal legal title, by itself, serves to bolster the perception of the borrower as a person who is able to navigate Indonesia’s difficult legal system, and who is able to comply with the loan agreements. Having informal land ownership documents can serve a similar function, albeit at a lesser level.

It is recognized by knowledgeable lenders that the procedure, time, and cost of securing a registered title (the most accepted form of title) are still beyond the capacity of many landowners. As a result, they rely on other factors in deciding loan applicants’ creditworthiness. Having a fixed income is one such factor, especially where the lender can obtain guaranteed deductions from the borrower’s income to cover debt service. But as is the case with microfinance in many countries today, knowledge of the borrower, including his or her dependability and overall character, is often the most important factor.

Complete registration of land, as we have observed, has been slow in coming. While *adat* rights are said to be recognized by state law, the national government imposes a presumption that land that is not registered is part of its domain. Yet, at the same time, the National Land Agency does not have possession of, or even access to, records of agricultural land ownership held at the local level for agricultural land. The national “registration” system, having started virtually from scratch, records deeds that it receives, but due to the lack of prior registration, these deeds can be based on uncertain legal rights and thus cannot be taken as conclusive evidence of ownership. The complexity and expenses of the registration process, including the fees required and the costs of complying with the law, are still hindering title registration. In some regions such as Aceh, land ownership documents are rarely provided to the National Land Agency; they are done by hand and kept locally, making them vulnerable to fire, flood, and other mishaps. Fortunately, however, the pace of registration has improved markedly in recent years.

Thousands of unresolved land conflicts continue to generate clashes.<sup>143</sup> The head of the National Land Agency has said that “the growing number of

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<sup>142</sup> AM. BAR ASS’N, *supra* note 20, at 18–19. (The government also began issuing regulations to improve the condemnation process, starting with Law No. 2 of 2012 regarding the Procurement of Land for Development in the Public Interest.)

land disputes and conflicts infest the Indonesian economy.”<sup>144</sup> A way of limiting disputes under agrarian laws, or speed their resolution, has yet to be found. How the laws are drafted can be either a cause of disputes or a way to reduce them. As agrarian reforms elsewhere in South Asia have seen, the legal profession and the courts may actually be aggravating the problem. Thus, adjusting the roles of lawyers and courts may lead to better dispute management. Having sufficient governmental officials on the ground is another important aid in implementing land reform and dispute resolution.<sup>145</sup> In this regard, Indonesia’s new LARASITA system is an innovative, effective, and potentially very important step in the right direction.

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<sup>143</sup> *Id.* at 36.

<sup>144</sup> Winoto, *supra* note 94, at 3.

<sup>145</sup> MARTIN E. GOLD, *LAW & SOCIAL CHANGE, A STUDY OF LAND REFORM IN SRI LANKA* 89–96, 209–218 (1977). “Law is not a magic instrument that can be waved to produce a more modern society.” *Id.* at 218.



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