

As Clear as Mud:

Understanding the Root of Conflicts and Problems in Indonesia's Land Tenure Policy

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Abstract

The Ministry of Forestry (MoF) has designated 120 million ha of forest as state forest (kawasan hutan), corresponding to 62% of the total land surface of Indonesia. The MoF has legal authority to plan and regulate all forest tenure and to use its arrangement in its jurisdiction. Meanwhile, the MoF jurisdiction to designate the state forest plays its part to the confusion paradigm between state rights and customary (adat) rights on controlling forestland. The confusion derived from different perceptions about customary forest from different laws, Basic Forestry Law 1999 (BFL 1999) and Basic Agrarian Law (BAL 1960). The BFL 1999 categorized customary forest as state forest, that is state forest of which the management is delegated to customary communities. Meanwhile, the Basic Agrarian Law 1960 (BAL 1960) provide more recognition by separating the customary rights from the state, equally to other four legal rights such as the right to own (hak milik), the right to cultivate state land (hak guna usaha), the right to build and own building (hak guna bangunan), and the right to use or collect products from state or private land for a certain period (hak pakai).

The government unwillingly to solve this confusion as the MoF has the justification to control all the forestland based on ecology reason such as hydrology, biodiversity and nowadays climate change. The paper argues that these ecology reasons become the foundation for the MoF to designate and control the state forest and help the environmentalist interests to preserve threatened resources and habitats, supporting the MoF's legitimacy to control all forest land, but contributing to the disenfranchisement of customary people to resource claims, the people's poverty and the confusion of customary forest recognition. The more confusing, the more legitimating for the MoF.

I. Background: the Conflict of Forest Land in Indonesia

After the reformation period, forest land conflict emerged and became a national concern in the year 2000. Many scientists regarded this conflict due to the unresolved discourse adat rights within the national agrarian framework. The discourse has started during the colonial period when, in 1932, Van Vollenhoven argued that the state domain has undermined the existence of adat right in Dutch-Indies. His argumentation has been used until today about what one best to understand adat rights within the national agrarian framework.

Even so, it is quite hard to find exactly the numbers of adat people in Indonesia. The government calculated that the adat people were figured between 1.1 million to 1.2 million. Meanwhile, an international NGOs named Working Group on Indigenous Peoples estimated about 30 million people can be categorized as adat people, while AMAN (Aliansi Masyarakat Adat Nusantara) believe that the adat people numbered to 50 million. These different figures basically because on how these institutions categorized

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what adat people are. This paper discusses about the science and political discourse in Indonesia during the Dutch Colonial until recently.

II. Situating Adat Property Rights under the National Law: Historical Discourses and Consequences

The discourse of adat rights in Indonesia started when the Dutch Government enacted the *Agrarische Wet 1870 (AW 1870)* in order to promote the expansion of private investment in natural resource industries, especially in plantation agriculture, and allow them to lease lands from the colonial state³. With the *domeinverklaring*⁴ principle of 1870 for lands, the colonial government has the power to declare all unclaimed land, including forest, as the domain of the state. From then on, more and more forests land came under government control.

The *domeinverklaring* principle eventually derived from Raffles' misapprehensions on native tenure. The British Governor General, ruled in 1811-1816, equated private ownership with western notions of individual title and overlooked diverse native concepts of community based property rights and control. Raffles decided that in the absence of private individual ownership, the native populations held only usufruct rights. In 1813, he issued a proclamation that declared, "Proprietary rights to land in Java were vested in the sovereign and in the European Government as the successor of the Javanese sovereign"⁵. To ensure an expansive interpretation of the Raffles Declaration, any land not currently under tillage or that had lain fallow for more than three years was considered unowned "wasteland"⁶.

The confusion began when this decree, on the other hand, respected the rights of natives under the customary law. Little was known at the time about Indonesian customary agrarian law, for if all the active and dormant rights of the population were respected, no free lands would remain for leasing to Western entrepreneurs and one object of the agrarian law would be defeated⁷.

Misapprehension of native systems of rights, meanwhile, inspired Prof. Van Vollenhoven to establish a Centre of Adat Studies in Leiden. He sought to document community-based legal systems as a strategy for promoting legal recognition of village governance under local systems of adat. One of the principle aims of Van Vollenhoven's adat documentation was to create legally cognizable evidence of the variety of local legal institutions. His aims included an intent to undermine Raffles' assertion that fallow land was not covered by community rights and therefore belonged to the colonial sovereign. His research demonstrated that the highest right to the soil vested not in the individual but

³ Harsono, 2003.

⁴ The first *domeinverklaring* only applied to Java and Madura, but it was later expanded to other areas such as *Domeinverklaring* of Sumatra (Article 1, *Staatsblad* 1874-94f), *Domeinverklaring* of Menado (Article 1, *Staatsblad* 1877-55), and *Domeinverklaring* of Residenties Zuider en Oosterafdeling van Borneo (Article 1, *Staatsblad* 1888-58).

⁵ Lynch and Harwell, 2002; Ball, 1982; Hooker, 1978.

⁶ Peluso, 1992.

⁷ Muhammad, 2003; van den Bosch, 1944.

in a tribe, a league of villages, or most generally in a village. The supreme right of disposal never rested in an individual. The land occupier was not free to alienate, sometimes he was not even free in the use of his farm lands for rice, sugar, pasture or living quarters; the sale, pledging or bequeathing to non village members was prohibited⁸.

Not only did the supreme right of disposal vest in the village, but the village jurisdiction extended over a much larger area than the soil actually under cultivation. This supreme right of disposal has, according to Van Vollenhoven, six characteristics: 1) the community itself and its member may freely use the wild lands situated within the area of its jurisdiction, reclaim them, found a hamlet, collect produce, hunt and graze, 2) strangers may do this only with consent of the community; 3) members sometimes and strangers always must pay something in recognition of the use of the land; 4) the community is responsible for certain definite misdemeanors committed within the area, the perpetrator of which cannot be detected; 5) the community cannot permanently alienate its supreme right of disposal; 6) it preserves the right to interfere even with reclaimed soil within the area of supreme disposal⁹.

In the sense of providing suitable basis for reclamation of agricultural enterprise on a large scale, Prof. Nolst Trenite has defended the point of view that the only land legally excluded from the state domain is a circle actually and regularly used by the villages. This point of view is rejected by others, such as Prof. Van Vollenhoven, Prof. Logemann and Prof. Ter Haar. According to them it really was the intention of the agrarian legislation to exclude all wild land, if necessary up to the summit of the mountains, from being let by the Government if the population had actual or sleeping rights in it. They also raised a question whether the wild lands which have been given out in concessions actually belong to the free public domain, or whether there does not rest upon much of these lands an adat property right protected by the agrarian legislation of 1870. These experts contend that all the recent literature supports the view that the adat private right has been violated in a large number of concessions¹⁰.

Prof. Nolst Trenite and others contend that although adat law right is recognized as law in the East Indies, it is such only so far as the legislator does not find it necessary to limit it in the general interest. These upholders of the state-domain principle knew that strictly so far as adat law was concerned it would be difficult to find any "no man's land" and that it must therefore be assumed that they intended to respect adat law rights in a restricted sense only, lands as were actually in regular use. Moreover, the adat law rights to lands within the disposal area but not regular cultivation fall within the field of public and not private law¹¹.

The attempt to understand how one can best to understand adat and its precise role in land tenure and natural resources management were not solely studied by these two contradicting scholars and experts. Before that discourse happened, in 1868, the

⁸ Van Vollenhoven, 1932; Van den Bosch, 1944; Holleman, 1981.

⁹ Van Vollenhoven, 1932.

¹⁰ De Kat Angelino, 1931; Van den Bosch, 1944.

¹¹ Van den Bosch, 1944.

government did a survey to 808 villages in Java in order to understand adat rights in Indonesia. It was published into three editions in 1876, 1880 and 1896. The study shows that the people of Java were actually weak in private rights, did not have clear rules on how to solve land conflicts and allow freely for the people to use the wild lands, including forest. Regrettably, this finding did not help enough to understand adat property rights, but however, it gave the government legitimate to take over “waste land” from adat institutions¹².

On 16 May 1928, a government commission was instituted to investigate the whole problem anew. In its investigation, the commission concluded that the *domeinverklaring* policy should be abolished as this policy had threatened the ‘rights of disposal’ of the local people. The commission forwarded a note explaining how recognition of the ‘right of disposal’ of local people related to all existing laws and regulations. It also advised the replacement of all laws and administration regulations, which hampered the recognition of the adat property rights¹³. This report has fumed many people’s concern as the abolition of *domeinverklaring* policy and the recognition of the adat rights would mean that important national interests, such as the public forests, would be turned over to villages, which are unequipped to deal with these interests¹⁴.

During the Independence Period, the new government tried to recognize adat law along with other law: (a) unwritten adat law, which varied from place to place and included both communal and individual rights; (b) land registered according to the Indonesian Civil Code; and (c) state land, which according to the agrarian law of 1870 included all land that could not be proved to be otherwise owned and could be leased for plantations. However, these recognitions did nothing to clarify the situation¹⁵.

It was not until 1960 that the problem of these multiple system of land tenure was addressed. The Basic Agrarian Law (BAL 1960) intended to end the confusion and create a uniform system. Adat property rights were recognized as far as they did not in conflict with state’s law. One of the striking problems on this regulation was that the concepts that deal with public interest were never spelled out and how to provide adequate compensation for landowners whose land has been taken away by the government was not also defined. Another problem is all landholders should register their land and asked for their land certificates from the Agrarian Office. The regulation tries to codify adat property rights into the official land status but the codification process has never been accomplished. Consequently, people were difficult to register their adat property rights to the agrarian office and without having the official land certificate, land in this status was easier to be seized by the government or other parties.

At about the same time as the BAL 1960, another important law was promulgated, this time specifically relating to forests. This marked the end of the adat property rights. The Basic Forestry Law (BFL 1967) gave the state the legal authority to plan and regulate all forest tenure and to use arrangement to its jurisdiction. Later on, many forest-related

¹² Chef der Afdeeling Statistiek Ter Algemeene Secretarie, 1876, 1880, and 1896.

¹³ Agrarische Commissie, 1930; Burns, 1999.

¹⁴ Galudra and Sirait, 2006.

¹⁵ Thiesenhusen *et al*, 1997.

laws was made during the 1970s and 1980s and most of them were detrimental to the rights and livelihoods of adat communities as commercial timber extraction was privileged over local forest use. Even the result of all sorts of policies that merely spoke of community was that the recognition of the traditional management of adat forests became hazy, and the character and existence of adat forests was sidelined¹⁶. Clearly, this adat communities and its traditional management were merely based on an image of forest dwellers and local forest users as destroyers of the national forest resource and trespassers on state or concession land¹⁷. This image was extremely important in justifying state forest policy and was mainly supported by “politicized science” which will be mentioned below.

III. The Role of “Politicized Science”: Constructing and Reconstructing Indonesia’s Land Tenure Policies

The nineteenth century was a turning point in forest management and the forms of state control over the teak and nontek forests. It was during this period under the Dutch Colonial that they drew boundaries between forest and agricultural land and established police forces to restrict people’s access to trees and other forest products. At this period, the forest policy was justified by the emerging science of forest conservation for hydrological purpose.

At various points in time, the Dutch Forest Service indicated that forests could control floods, maximize river-flow throughout the year and prevent the loss of valuable soils. Based on these claims, the Forest Service advanced reforestation and forest reservation as solutions to hydrological problems. Many scientists used their empirical research to question the theoretical underpinnings to each of these claims, but in turn, their criticism was rejected by most Forest Service officials¹⁸.

In order to influence policy, the Dutch foresters were highly selective in their use of evidence to advance their arguments. For example, foresters often used the most glaring examples of changed river-flows to substantiate their arguments regarding the damaging effects of the removal of forest. An assumption was made that forest cover over these areas must have been extensive in former times and that their current barren state was entirely due to the removal of forest. In all of this, foresters were simplifying the complexity of ecological interactions, thereby enabling a fit between their own theories and an observable phenomenon. Other foresters used soil preservation as their arguments against all human activities inside the forest. The suggestion that all human land use and activities led to deforestation and that deforestation caused bad physical conditions was the major argument used by the Forest Service to exert greater power over forest land¹⁹.

The imaginary of adat people as a forest destroyer is still continued during the New Order. In 1970s, the government’s position on community involvement in any kind of forest

¹⁶ Suhardjito, 1999.

¹⁷ Zerner, 1992.

¹⁸ Galudra and Sirait, 2006.

¹⁹ Galudra and Sirait, 2006.

management was negative and regarded adat people as a threat rather than as partners. This discourse underlay approaches to forest management into the 1990s. For example SK 251/1993 identifies adat people as a potential threat to timber companies and the 1993 Joint Decree of 480/Kpts-II/1993 describes forest dwellers who practice shifting cultivation as destroyers of the forest resource²⁰. The forest reservation policy was still existed during that period until the government decided to remove the word of forest reservation from the recent Forestry Law of 1999 (FL 1999). However, the law itself still imposes to the local government to allocate 30% of provincial land to be a state forest for hydrological purpose. In 1980s, the government even tried to categorize forest and non-forest based on hydrological science by calculating several aspects such as soil types, rain-fall, elevation and slope.

Indonesia's inheritance policy from Dutch Colonial happened in the area of conservation policy. Three major focuses that inherited from the Dutch Colonial are: (1) the protection of individual animal species, (2) the protection of tourist sites and (3) the preservation of biologically rich areas for scientific research. However, it was in the mid-1975 when the attitudes and policy towards conservation became apparent²¹.

In co-operation with the United Nations FAO, the IUCN and the World Wildlife Fund, the Indonesia government began to develop a national conservation strategy which culminated in the declaration of the country's first five national parks in 1980. These were all former reserves, but their transformation into national parks implied a stricter degree of protection than had previously been the case. Since then, a further fourteen national parks have been developed, bringing the total area protected to an impressive 11.9 million hectares, just over 6 percent of Indonesia's land area²². In recent year, the number of protected areas for biodiversity value increased covering 23.2 million hectares and implemented not just at the cost of state budget and the expense of dispossessed peasants but to the detriment of business interests²³.

IV. Conclusion: Finding a Breakthrough to Understand Adat Rights

There are tendencies that in different regimes government still do not understand on how one can best situating adat rights within the national agrarian framework. Many scientists still define what the adat rights are based on past findings and theories especially during the Dutch Colonial. The Agrarian Law instructed to convert these adat rights into the six national land rights, but until today, no efforts from the government to understand adat rights.

²⁰ Wrangham, 2002.

²¹ Cribb, 1988.

²² Cribb, 1988.

²³ Departemen Kehutanan, 2005.

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