International Journal on Minority and Group Rights, **27 (3), 2020, 442-471.**
DOI: https://doi.org/10.1163/15718115-02703003

Development as a Threat to Indigenous Peoples' Rights in Indonesia

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Abstract

This paper examines the hypothesis that the developmental priorities of the Post-Suharto era, in particular three legislative acts that purport to protect indigenous peoples' rights, in fact serve to undermine these rights. The acts under scrutiny are: the Basic Agrarian Act, the Forestry Act, and the Plantation Act. These acts relate to land use for development purposes and also affect the autonomy of indigenous peoples. Despite being crucially important, these acts have detrimental effects on indigenous peoples' lives.

This paper, using a qualitative socio-legal approach, analyses the historical and political contexts of the acts to determine whether they enhance or undermine indigenous peoples' rights and how the government uses the acts for suppression. This analysis identifies reasons for the weak regime, notably that the legislative acts on land-related sectors are used as a political tool to suppress local communities while allowing the government's land market businesses to exploit natural resources.

Keywords: indigenous peoples' rights, legislation, development, natural resources.

1. Introduction

Based on a provision in the Regional Autonomy Chapter of the 1945 Constitution, the Indonesian government recognises indigenous peoples' rights; however this provision also limit these rights by proposing several conditional requirements, including conditions based on societal

development within the State's national interests.[1] Moreover, the provisions of the 1960 Basic Agrarian Act assert similar ideas that traditional customary rights, particularly those over communal (*ulayat*) lands must be adjusted to conform to the national interest.[2] The Indonesian laws purport respect and recognise indigenous peoples and their access to land, however in fact serve to undermine these rights. The conditional requirements hinder minority groups' rights because the government often misinterprets these requirements to fit the State's economic and political interests.

During Suharto's administration, for the sake of rapid economic development, the government misinterpreted legal provisions by granting rights to uncultivated communal (*ulayat*) rights without reaching an agreement with the local communities or indigenous peoples and without giving appropriate compensation.[3] Some of state-arbitrary conducts included granting timber concessions[4] and land allocation policies for transmigration projects.[5] Today, in a post-authoritarian setting, issues on indigenous peoples' rights, particularly their access to land, are still problematic.

This paper examines three important acts, the 1960 Basic Agrarian Act,[6] and the acts aiming to equip the Agrarian Act: the Forestry Act[7] and the Plantation Act.[8] This article argues that these three acts claim to protect indigenous peoples' rights but, in fact violates their rights. These acts affect the autonomy of indigenous peoples by setting up the requirements of recognition for indigenous peoples. They also regulate land use for development purposes, such as timber and other kind of plantation production. Nevertheless, these acts also contain several conditional and discriminatory articles which prioritise investment and establish corruptive linkage between the State and companies. In doing so, they simultaneously negate indigenous peoples' rights and victimize them for the sake of development.

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[1] The 1945 Constitution (as amended), art 18B (2).
[2] Act No 5 of 1960 on Basic Agrarian Law, art 3.
[3] *Ibid*, art 18. The government abused the provision "… for national development interest" to grab local communities' lands, including *ulayat* lands.
[4] M. Colchester, 'The Struggle for Land: Tribal Peoples in the Face of the Transmigration Programme', 2/3 *Ecologist* (1986) p.105.
[5] *Ibid*.
[6] Act No 5 of 1960 on Basic Agrarian Law.
[7] Act No 41 of 1999 on Forestry Law.
[8] Act No 39 of 2014 on Plantation.

This paper embraces a critical legal paradigm which believes that legislation is not merely a legal product; it is both political and historical.[9] This legal paradigm is also part of socio-legal thinking which approaches legal issues with an interdisciplinary approach.[10] Legal scholarship is the core of this article's analysis, but historical and political information about the legislation are also pivotal in enriching the legal analysis. In this regard, legislation should not be taken for granted, thus it should be understood in its political context. This paper, using a qualitative approach, examines not only the 'text' of the legislation but also the 'pre-text.' It analyses the historical and political settings of the acts, and scrutinizes how the government used the acts to suppress indigenous peoples and their rights.

Part two of this article reviews the current literature regarding several arguments on laws involving indigenous peoples, the status of indigenous peoples as a legal entity, and how the government creates the State's definition and requirements in line with developmental purposes while simultaneously diminishing the authority of indigenous peoples. This section presents a theoretical basis of *adat* law, which is Indonesian's customary law,[11] and considers the role of legal pluralism on the issues of indigenous peoples' rights and access to land.

This exercise establishes that the positive law of land management in Indonesia, the 1960 Basic Agrarian Act has many normative flaws. These flaws have been elaborated on by some authors, but this article examines them in a contemporary setting. This section concludes that the government imposed development on indigenous peoples from their very basic aspect: the definition of themselves, their *adat* law and their communal lands.

Part three presents the background of Indonesia's development approach, the Indonesian legislation's structure, and introduces the three acts under scrutiny. Part four analyses the three acts under scrutiny by tracing their historical background. This part aims to examine the underlying political motives of these acts. Both the Dutch colonial and authoritarian contexts are presented to

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[9] A.C. Hutchinson and P. J. Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Though', 36 *Stanford Law Review* (1984), pp.199-245.

[10] R. Banakar and M. Travers, *Theory and Method in Socio-Legal Research,* (Hart Publishing, Oxford, 2005).

[11] The word of '*adat*' is originally taken from Arabic word meaning customary.

visualise the practice of an oligarchy in forestry and plantation management which has significantly affected indigenous peoples.

Part five more forcefully analyses the vested interest arguments from the legislative acts and portrays their drawbacks and controversies. Besides elaborating on drawbacks and challenges, this part also critically examines some possible opportunities for reforms, not only from the existing provisions of the acts, but also from several national and international interventions on forestry and plantation management. Unfortunately, not all of the interventions are effective. Lastly, part six concludes that most of the provisions in the 1960 Basic Agrarian Act are general, thus these provisions can be interpreted by the Executive for the sake of development. To make matters worse, most of the provisions particularly in the Forestry and Plantation Acts are the product of a confidential agreement among the political and economic elite. The 1960 Basic Agrarian Act and sectoral acts must be amended to support a self-determined development approach.

2. State imposed 'Development': indigenous peoples, their *adat* law and lands

Since the 1960s when the newly independent state of Indonesia stipulated the Basic Agrarian Act, land-based conflicts have occurred until recently and a holistic legal reform does not appear to be easily attainable in the foreseeable future.[12] This part of the article demonstrates that the Indonesian government, both in an authoritarian and post-authoritarian setting, still imposes the policy of development to indigenous peoples. This institutional state policy creates several problematic issues, as follows:

2.1. The Validation of Living Adat Law

The first issue is the validity of the *adat* law as indigenous peoples' law in the setting of modern Indonesian law. Despite that the Basic Agrarian Law acknowledges several Western-styles rights and merges them with universal *adat* law principles, the *adat* law is still the fundamental principle of agrarian law. However, the definition of '*adat*' remains contested.

[12] D. Fitzpatrick, 'Disputes and Pluralism in Modern Indonesian Land Law', 22 *Yale Journal of International Law* (1997) p. 173.

There are a large number of diverse definitions relating to the law that could be applied to local Indonesian indigenous peoples. Researchers who embrace common law traditions such as Allot[13] and Forsyth[14] often utilise the concept of 'customary law' to depict the phenomena. On the other hand, civil law scholars such as Vollenhoven use the terms 'living law' (*levend recht*) or '*adat* law.' *Adat* has a broader meaning than customary law. Vollenhoven considers *adat* as 'folk law,' 'people's law,' or 'living law,' with dynamic and flexible characteristics.[15] Hooker adds: "it can mean any one of the following: law … the act of conforming to the usage of society, decent behaviour, ceremonial, the practice of sorcery and ritual."[16]

According to Ehrlich who formulated the sociological concept of the living law, living law is closely linked to *adat* law because it is "the law which dominates life itself even though it has not been posited in legal proposition, nor directly linked to the State."[17] Therefore, living law does not fully depend on recognition by the State. This argument opposes the positivist claim that the only valid law is legislation, stipulated by the legislature or state political power.

This article will refer to this law as the living *adat* law which merges Ehrlich's living law with the concept of *adat* law. In this regard, the existence of a living *adat* law should be considered as a manifestation of 'strong legal pluralism'.[18] The living *adat* law reflects the people's legal cultures and is an unwritten and genuine law of Indonesia which has been influenced by religious laws.[19] Ultimately, the living *adat* law is opposed to legal centralism. The definition of what is law and what is not is also a form of 'development' imposed by the State on the indigenous communities.

Despite the fact that Indonesian *adat* law has fundamental similarities with living law theory, it has distinctive characteristics which divide into two categories of laws. The first category is "*adat yang berbuhul mati,"* which literally means the *adat* that is tied to death. This is the strict *adat*

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[13] A.N. Allott, 'The Judicial Ascertainment of Customary Law in British Africa' in A. D. Renteln (ed.) *Folk Law: Essay in the Theory and Practice of Lex Non Scripta* (University of Wisconsin Press, 1995) pp. 295-312.
[14] M. Forsyth, *The Bird that flies with two wings: Kastom and State Judicial System in Vanuatu* (ANU Press, Canberra, 2009).
[15] C. Vollenhoven, *Miskennigen van het Adatrecht* (Brill, Leiden, 1909) pp. 50-51.
[16] M.B. Hooker, *Adat Law in Modern Indonesia* (Oxford University Press, Oxford, 1978) p.50.
[17] E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publisher, New Brunswick/London, 2002) p. 493.
[18] J. Griffith, 'What is Legal Pluralism', 24:1 *Journal of Legal Pluralism* (1986), p. 12.
[19] Soepomo, *Bab-Bab tentang Hukum Adat* [*Chapters on Adat Law*] (Penerbitan Universitas, Jakarta, 1962) p. 34.

law, neither negotiable nor adaptable to changes or context, and is dogmatic in nature.[20] In this first category, *adat* law has a natural law element, because it is enforced by the 'inner order of social association' which refers to internal morality values.

The second category, "*adat yang bertali hidup"* or "*adat pusaka,"* refers to a flexible and fluid *adat* law that passes from one generation to the next and is subject to social change. This *adat* is sociological in nature, a living law which grows and thrives within the community.[21] In this regard, *adat* law differs noticeably from Dutch civil law: civil law is doctrinal and deductive in nature whereas *adat* law is pragmatic, flexible, concrete and inductive in nature, bearing some slight similarities to the common law.

From this description, this article argues that the living *adat* law is a legal system which has both positivistic and morality-driven aspects. Thus, it cannot be judged merely through Western-positivistic perspective which stresses consistency and predictability. The universal principles of *adat* law aim for harmony and equilibrium (*rukun*) among the individual, the community and the cosmos, which is reached through the process of deliberation, consensus (*musyawarah mufakat*) and collective unity or mutual assistance among citizens *(gotong-royong)*. This principle also means that collective interests outweigh individual interest.[22]

Moreover, Benda-Beckmann favours the term 'living law' rather than *adat* law because "it is not old but contemporary law, not law on paper but actually valid and practiced."[23] Even though these terms share many similarities and differences, this article uses living *adat* law as its primary terminology because nothing can accurately reflect and explain original Indonesian values better than in it is our 'own' language and concepts.[24] The term 'living law' is used in order to stress the element of contemporaneity in *adat* law.

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[20] M. Koesnoe, '*Dasar-Dasar Formal Ilmu Hukum Adat*' ['The Formal Fundamental of *Adat* Law'] in *Hukum Adat and Modernisasi Hukum* [*Adat* Law and Modernisation] (FH UII Press, Yogyakarta, 1998) p. 45.
[21] *Ibid*.
[22] Fritzpatrick, *supra* note 12, p. 179.
[23] F. and K. von Benda-Beckmann, 'The Social Life of Living Law in Indonesia' in Marc Hertogh (ed.), *Living Law: Considering Eugen Ehrlich* (Hart Publishing, Oxford and Portland Oregon, 2009), p. 177.
[24] A.B. Messier, *The Voice of the Law in Transition: Indonesian Jurists and their Languages 1915-2000* (KILTV Press, Leiden, 2008), p.10.

2.2. Is Indigenous Peoples 'Legal Entity'?

The second issue is the status of 'legal entity' for indigenous peoples. The characteristics of indigenous peoples in Indonesia's archipelagic state are extremely diverse.[25] In Hindu Bali and Minangkabau of West Sumatra, indigenous peoples are anchored with detailed, sometimes written, prescriptive *adat* law and well-established *adat* institutions. In other areas, the indigenous peoples of Dayak, who are known as shifting cultivators and indigenous Papuans in the eastern part of Indonesia are more 'fluid'; most of the *adat* rules are oral and therefore less predictable and legal certain. This kind of diversity creates problems in determining and classifying which people are considered indigenous.[26] The classification of indigenous peoples will determine whether they are recognized as a legal entity or only respected by the State.

At the national level, Hindu Bali and Minangkabau of West Sumatra indigenous peoples are considered to be the strongest *adat* communities because they are legally-based indigenous communities (*masyakarat hukum adat,*); they have a strict division of labour, they are politically-based and they function within the State structure.[27] Meanwhile, animistic and shifting cultivator communities in some of Eastern parts of Indonesia are considered less legal, thus they are hardly considered as legally-based indigenous peoples. Despite being recognized, the government respects their existence and divides these indigenous groups into the subgroups of genealogical, territorial and a mixture of the two.[28]

The government sets four requirements for legally-based indigenous peoples: (1) the community has well organised groups; (2) the community has its own *adat* territory; (3) the community has its own *adat* institution (in particular a tribal court); and (4) the community has both material and spiritual goods. These requirements are cumulative, therefore meaning that all legal aspects should be accomplished. The new legislation on villages, the 2014 Village Act, regulates that indigenous peoples must have territory and at least one of the facultative criteria.[29]

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[25] Firzpatrick, *supra* note 12, p. 176.
[26] A. Bedner and S. Huis, 'The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation', *Journal of Humanities and Social Sciences of Southeast Asian and Oceania* (2008) p. 170.
[27] B. ter Haar, *Adat* Law in Indonesia (Institute of Pacific Relations, New York, 1948), p. 41.
[28] J. Asshiddiqie, *Konstitusi Masyarakat Desa* [*Constitution of Villagers*], (12 April 2015) Jimly Law School < www.jimly.com/pemikiran/namefile/176/KONSTITUSI_MASYARAKAT_DESA.pdf>, visited on 2 March 2019.
[29] Act No 6 of 2014 on Village, art 97 (2).

Nevertheless indigenous peoples have long been protracted by positivistic requirements and they are still under serious pressure to become more formalized. As a result, indigenous peoples imitate the State law's structures to construct their *adat* institutions.[30] For instance in Central Kalimantan, indigenous peoples have advocated a more formalised *adat* structure in order to fit with the State's parameters. The tribal court has similar concepts to the State Court's structure: it has *adat* 'judges,' 'prosecutors,' and 'lawyers.' Legal positivism, with its modernization and development-driven approaches, contributes to this mindset by dominating almost all aspects of indigenous peoples' lives.

At the international level, there are also many contested definitions of indigenous peoples. ILO Convention No 107 defined indigenous peoples through patronising language, based on assumptions of integration.[31] This resulted in policies aimed at assimilating indigenous peoples into the majority rather than recognising their distinctiveness and uniqueness.[32] In the 1980s, ILO Convention No 169 refined this definition making it more moderate by distinguishing between 'tribal people' and 'indigenous peoples,' though still recognising they are not mutually exclusive categories.[33] As the Indonesian Government has not yet ratified *ILO 169*, it is not legally binding. In 2007, the UN issued the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[34] This article argues that neither convention is sufficient to define indigenous peoples, because like ILO 169, UNDRIP is not legally binding.

This article rejects the current classification between culturally-based and politically or legally-based indigenous peoples, for the following reasons: first, the definition and classification warrant less focus than how it is used to hinder or limit the autonomy of indigenous peoples and how the power of 'defining' is used by interest groups to achieve their 'hidden agenda'. This definition and classification are examples of how the State imposes its developmental interpretation on indigenous peoples.

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[30] *See,* Regional Regulation of the Province of Central Kalimantan No 16 of 2008 on Adat Institutions in Central Kalimantan (Indonesia).
[31] Convention No 107, ILO, art 1 (3), and art 2 (1) (2).
[32] V. Tauli-Corpuz, 'Indigenous Peoples' Self-Determined Development: Challenges and Trajectories', in V. Tauli-Corpuz, L. Enkiwe-Abayao and R. de Chavez, *Toward an Alternative Development Paradigm: Indigenous Peoples' Self-Determined Development*, (Tebtebba Foundation, the Philippines, 2010), p. 16.
[33] Convention No 169, ILO, art 1 (a) and (b).
[34] United Nations Declaration on the Rights of Indigenous Peoples, (13 September 2007).

Second, the current classification may lead to a false dichotomy. Indigenous peoples, like any other society, must be constructed culturally; culture is the starting point for every social norm and law in the society. In fact, laws and norms are a reflection of culture.

Lastly, the concept of the legally-based indigenous peoples (*kesatuan masyakarat 'hukum' adat*) currently used by the 1945 Constitution and acts may lead to discrimination because there will be some indigenous peoples whose cultures and traditions are respected but not recognised as legal entities by the State and others whose cultures and traditions are both respected and recognised as legal entities. The concept of indigenous peoples must be generally understood as a cultural, political and legal entity. This article uses the term 'indigenous peoples' (*masyarakat adat*), without the addition of the adjectives 'culturally' or 'legally'-based.

2.3. Lands for the Development

Indigenous peoples are land-based minority group, because they have a strong bond with their communal-ancestral lands.[35] In modern era, the formation of capitalist relation over lands is an unescapable condition.[36] The system of capitalism starts as an economic activity from the core, through unequal exchange and exploitation of peripheral areas. The core derives capital to the periphery by exchanging commodities that require more advance technologies – industrial rather that agricultural.[37] In this unequal relation, indigenous peoples remain periphery, defending their traditional and agricultural values from the so called development (which takes the form of industrialization and individualism). This condition makes land issues become an extremely vested-interest.

The 1960 Basic Agrarian Act was formed as a 'middle way' to fulfill aspirations of *adat* law while also accommodating Western-style rights. The ideal purpose of this syncretic law was to attain justice for indigenous peoples, and to reach legal certainty to keep up with modernization. The 1960 Act acknowledges private ownerships (*hak milik*) and registered land rights. The sct also states that *adat* law should be a fundamental aspiration for those rights.

[35] Tauli-Corpuz, *supra* note 32, p. 10.
[36] T. Li, *Land's End, Capitalist Relations on an Indigenous Frontier* (Duke University Press, Durham, 2014) p. 6.
[37] B. McCormack, 'Fifty Years of Indonesian Development: "One Nation," Under Capitalism …", 5 *Journal of World-Systems Research* (1999) p. 50.

However, this act also states firmly that private ownership is the strongest and fullest right to land. Some provisions state that *adat* law and communal land are recognized as the agrarian law of Indonesia as long as it is not contradicted with national unity, the interest of the State, and legal provision.[38] If indigenous peoples and their communal lands continue to exist, they must be adjusted to conform to the national interest.[39] Moreover, the legal norm of indigenous peoples' rights over their communal (*ulayat*) lands remains absent in statutory law. This is an indication of state law pluralism.[40] This conditional recognition of *adat* law, however, hinders indigenous peoples to maintain their communal (*ulayat*) lands. For the sake of legal certainty, the government, through the Basic Agrarian Act's provisions open individualized land titles on customary land which in fact created more uncertainty and injustice for rural societies.[41]

Consequently, the absence of indigenous peoples' rights and their *ulayat* land registration mechanism are directed at industrialization of land tenure in Indonesia. In other words, the government only uses *adat* principles as 'lip-service,' without regulating how the mechanism works.[42] The government is more inclined to push the Land Administration Project (LAP), which is supported by World Bank to impose individual registration which threatens traditional ways of indigenous peoples and their social structure.[43] Ultimately, the autonomy of indigenous peoples is gradually diminished.

Moreover, in an authoritarian setting, the government used the notion that all lands must have a 'social function' which derives from universal *adat* law principles to legalise the government land acquisition practice for development projects. The government argued that individual rights (including unregistered *ulayat* lands) must succumb to the interests of the community in matters of public interest and in support of the process of national development.[44]

Almost all development projects used the laws on the acquisition of land for development to obtain titles. The Executive issued presidential decrees to allow lands (registered or unregistered) to be

[38] Act No 5 of 1960 on Basic Agrarian Law, art 5.
[39] *Ibid*, Explanatory Memorandum, General Elucidation.
[40] Griffith, *supra* note 18, p.10.
[41] Bedner, *supra* note 26, p.180.
[42] T. Lindsey, 'Square Pegs and Round Holes: Fitting Modern Title into Traditional Societies in Indonesia', 7 (3) *Pacific Rim Law and Policy Journal* (1998), p.706.
[43] *Ibid*, pp.114-115.
[44] Firzpatrick, *supra* note 12, pp.185-186

acquired for development.[45] Despite provisions on presidential decrees that regulate discussion and deliberation with villagers and titleholders, the government arbitrarily evicted villagers from their lands with minor compensation.[46] These practices often happened in the authoritarian setting, not only in indigenous peoples' areas but also in non-indigenous communities. This article argues that the practices of discrimination remain existent in post-authoritarian governments with some slight modifications of strategies. Indonesia's prominent businesses have expanded their role in political parties and penetrated the current government. The capitals are developed from the expansion of their assets in the extractive industries,[47] which are mostly established on land acquisition project supported by the government.

2.4. Review's Conclusion

Despite almost all authors elaborating the normative flaws of the Basic Agrarian Act and slightly exploring its historical origin, this article will investigate the 'pre-text' of the Basic Agrarian Act and other supporting acts and present their political nuances, particularly in the post-authoritarian context, the areas that other authors missed in their examination. Furthermore, government's policies derived from the acts are examined through the optic of legal pluralism, a school of thought that is missing in the current state policies regarding indigenous peoples' rights. This exercise establishes that the government has imposed 'development' to indigenous peoples from their very basic aspects of life, definition of themselves, their *adat* law and communal lands.

3. A Context: Indonesia's Developmentalism Path

During its development era, Indonesia experienced several foreign interventions masked as foreign investment in natural resources-based development projects.[48] In the New Order Era, Suharto's administration elevated its economic powerhouse by capitalising centralism policy and state-corporatism policies. In the post-authoritarianism governments, this condition changed. Today, decentralization policy fuels local elites to play corruptive roles in capitalizing natural resources-

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[45] *Ibid*, p.199.
[46] *Ibid* pp.200-201.
[47] E. Warburton, Resource Nationalism in Post-Boom Indonesia: The New Normal, 27 April 2017, Lowy Institute, p. 10, < www.lowyinstitute.org/publications/resource-nationalism-post-boom-indonesia-new-normal>, visited on 21 February 2019.
[48] G. Poulgrain, *The Incubus of Intervention: Conflicting Indonesia Strategies of John F. Kennedy and Allen Dulles*, (Strategic Information and Research Development Centre, Petaling Jaya, 2015) pp.48-51.

based industries. To make matters worse, national elites also contributed to this debacle by creating a linkage between their political parties with mining and palm oil industries.[49]

Despite being considered a reformist, current Indonesia's President, Joko Widodo (Jokowi) has shown a similar approach to his predecessor. He openly expresses his support on extractive industries. He even promises to establish a Faculty of Palm Oil in several universities in Indonesia.[50] These kinds of development projects have created injustice and discrimination for marginalized people, especially indigenous populations.[51] Judging from these current policies, Jokowi has been considered a new developmentalist leader.[52]

Legally speaking, Indonesia in a post-authoritarian setting, evolved into a democratic and ruled by law country. The reform was started by conducting intensive amendments to the 1945 Constitution. The amendments were then followed by several legal and political reforms.[53] It is also important to note that in Indonesia, in theory, the supreme source of law is the written law. This is a product of the Dutch civil law tradition. Existing legislation, such as the 2011 Legislation Act which regulates the structure of Indonesian legislation, states that the Indonesian legislation system is hierarchically structured, as follows:

(1) The 1945 Constitution (as amended);
(2) The Stipulation of The People's Consultative Assembly (TAP MPR);
(3) Governmental Regulation concerning A Replacement of Legislation (*Perppu*);
(4) Legislation (UU);
(5) Implementing Regulation (PP);
(6) Presidential Regulation (Perpres); and

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[49] M.S. Buana, 'Can Human Rights and Indigenous Spirituality Prevail over State-Corporatism? A Narrative of Ecological and Cultural Rights Violation from East Kalimantan, Indonesia: An Activist Perspective', 1:1 *Journal of Southeast Asian Human Rights* (2017) pp. 21-22.

[50] *Jokowi Usulkan Pendirian Fakultas Kepala Sawit dan Kopi* (*Jokowi suggests to establish Faculty of Palm Oil and Coffee Plantation*), 21 November 2018 <www.tirto.id/jokowi-usulkan-pendirian-fakultas-kelapa-sawit-amp-fakultas-kopi-dajN>, visited on 12 March 2019.

[51] C. Duncan, 'Mixed Outcomes: The Impact of Regional Autonomy and Decentralization on Indigenous Ethnic Minorities in Indonesia', 38:4 *Development and Change* (2007) p. 31.

[52] E. Warburton, 'Jokowi and the New Developmentalism', 52: 3 *Bulletin of Indonesian Economic Studies* (2017) DOI: < www.doi.org/10.1080/00074918.2016.1249262> p. 45.

[53] D. Indrayana, *Indonesian Constitutional Reform 1999 – 2002: An Evaluation of Constitutional-making in Transition* (PhD thesis, Faculty of Law, the University of Melbourne, 2005) pp. 3-5.

(7) Provincial Legislation, Regional/District and City/Municipal Legislation (*Perda*).[54]

In regard to the development of indigenous politics, the 1945 Constitution of Indonesia now explicitly recognizes indigenous peoples' rights and their institutions. This recognition is asserted in two chapters: Article 18B (2) of the Regional Autonomy Chapter and Article 24 (2) of the Human Rights Chapter.

> "The state recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law." [55]

> "The cultural identities and rights of traditional communities shall be respected in accordance with the development of time and civilizations." [56]

However, the recognition has a conditional phrase: "as long as they correspond to Indonesia's national law." Those articles recognize indigenous peoples' rights, especially their property rights, but it also limits these rights by proposing several conditional requirements.[57] In this respect, the recognition of rights is not necessarily the same as recognizing indigenous peoples' legal systems and autonomy. Following Griffith's theory of legal pluralism, this condition can be called state law pluralism.[58]

The most relevant legislation that this paper examined is the 1960 Basic Agrarian Act. This is a crucial starting point because the Agrarian Act is the over-arching legislation that regulates land rights, and more specifically, indigenous land rights. The Basic Agrarian Act needs other legislation to interpret and execute its broad legal norms. In forest management, the Forestry Act is crucial to regulate which forest is under the state management authority and which forest can be transferred in concessional. State authority is divided into national and regional authorities. Indigenous peoples also have rights to determine their customary law-based forest areas, but the

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[54] Act No 12 of 2011 on Structure of the Indonesian Laws, art 2 and 7.
[55] The 1945 Constitution of Indonesia (as amended), art 18B (2).
[56] *Ibid*, art 28I (3).
[57] Bedner, *supra* note 26, pp. 165-166.
[58] Griffith, *supra* note 18, p. 5.

implementation is still challenging. Lastly, in plantation management, the Plantation Act regulates rights and duties of national and regional governments and their relationship with private entities. Indigenous peoples have become a legal entity that are often negated by this legislation. The next section will critically elaborate these three acts.

4. Historical-Political Analysis of the Acts

This section scrutinizes the historical and political background of the acts. This part aims to prove that these legislative acts should be understood in their historical and political contexts. Their historical and political background and origin may no longer fit to the current situation. Based on this analysis, future reforms strategies can be constructed.

4.1. The 1960 Basic Agrarian Act – The Antidote of Colonialism

The story of this act can be traced through the Dutch colonial era, the Old Order under Sukarno, and the New Order Regime under Suharto until the current era. The ultimate purpose of the Dutch colonization was to monopolise and control the land. Despite the Dutch recognising indigenous land rights (*ulayat*),[59] the colonial regime classified indigenous lands as 'free-state lands' which meant the Dutch colonial regime had supreme power to handover land title without accord from indigenous peoples.

The colonial laws were pluralistic but malicious. The policy of *domein verklaring* worsened the situation.[60] This policy proclaimed that the land that could not be proven to be private property was part of state ownership.[61] The colonial regime dominated the administration and registration of land while simultaneously victimizing the basic rights of Indonesians.

When Indonesia proclaimed its independence in 1945, the Old Order under Sukarno radically changed the agrarian administration. The Basic Agrarian Act is the oldest existing legislation that regulates fundamental land administration in Indonesia. It was legislated when socialism had

[59] *Regerings Reglement* (RR) [Colonial Government Regulation] 1854, art 64 par 3.
[60] *Agrarisch Besluit* [Colonial Agrarian Law]*, See also, Staatsblad* [State Gazette] No 118 of 1870, art 1.
[61] *Staatsblad* [State Gazette] 1875, art 119a.

momentous effects in the government and it reflected nationalist emotion.[62] The spirit of the Basic Agrarian Act was to give the land to the tiller without absentee land ownership, enact equitable sharing between owner and tillers, and protect marginalized people.[63]

The background of the Basic Agrarian Act is threefold. First, Sukarno released a decree which aimed to bring back the spirit of the Indonesian revolution by unifying the legal system and eradicating colonial legacies.[64] Historically, Sukarno provoked both these political circumstances. The Round Table Conference between Indonesia and the Netherlands in 1949 thwarted Sukarno. One of the resolutions of the conference stated that the government of Indonesia must acknowledge the Dutch cultivation rights (*onderneming*) over Indonesian lands, which after independence, had been occupied by the people. Additionally, Sukarno disagreed with the Indo-Dutch federalist parliament which often ended in deadlock. The conflict between Sukarno and parliament reached its pinnacle when Sukarno abolished the parliament and proclaimed himself as the sole leader of Indonesia. Sukarno called his administration a 'guided democracy' government. Second, Sukarno's presidential decree caused an end to the parliamentary system, which consequently annulled the 1949 Federal Constitution and returned to the pre-amendment 1945 Constitution.[65]

The third motive was a legal one, inspired by Article 33 (3) of the 1945 Constitution concerning natural resources management "The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the benefit of the people (social welfare)".[66] The ambiguous article 33 is the basis of the State's acquisition right. It was inspired by a mix of Marxist, nationalist, and anti-colonialist ideals.[67] The government (in collaboration with companies) has often abused this article. They acquire people's lands, in particular

[62] E. Utrecht, 'Land Reform in Indonesia', 5:3 *Bulletin of Indonesian Economic Studies* (1969) DOI: <https://doi.org/10.1080/00074916912331331482> p.72.
[63] M. Shohibuddin and M.N. Salim, *Pembentukan Kebijakan Reforma Agrarian 2006-2007* [Policies of Agrarian Reform, 2006-2007] (Sayogyo Institute, 2012) pp.23-24.
[64] Presidential Stipulation No 1 of 1960.
The Legislation abolished *Agrarisch Wet* [Agrarian Law] (*Staatsblad* [State Gazette] 1870 No. 55), *Koninklijk Besluit* [Royal Decision] on 16 April 1872 No. 29 (*Staatsblad* [State Gazette] 1872 No.117) and Chapter II of Civil Code regarding ownership. The Dutch used the doctrine of *Domienverklaring* to grab unoccupied indigenous lands. This doctrine is similar to *Terra Nullius*.
[65] Presidential Decree on 5th July 1960.
[66] The 1945 Constitution (before Amendments), art 33 (3).
[67] S. Butt and T. Lindsey, 'Economic Reform when the Constitution Matters: Indonesia's Constitutional Court and Article 33', 44:2 *Bulletin of Indonesian Economic Studies* (2008) DOI: <www.doi.org/10/1080/00074910802169004> pp. 242.

indigenous/communal land. The government simply interprets the article for its pragmatic purpose (‘under the powers of the State’), while disregarding its ideological purpose (‘to the benefit of the people’).

Land-based conflicts in Indonesia started in the early years of independence. When Sukarno nationalised all Dutch companies that occupied the land, he temporarily mandated military units to administrate the land. However, the Peasant Front and the Communist Party (PKI) supported people who occupied ex-Dutch land, and they soon confronted the military (anti-Communist group).

Under Sukarno’s administration, for the sake of development and national interest, the State could use the lands whether they were under private or concessional rights.[68] However, the government issued a regulation for fair compensation for the land with appeal mechanisms for disappointed parties.[69] Sukarno established a land reform court that aimed to resolve all agrarian disputes.[70] These policies were indeed progressive strategies, but they did not last long.

Under Suharto’s regime the central government was corrupt and mismanaged the land. For the sake of judicial unification, Suharto closed down the land reform court.[71] His administration anchored its land management on government-centred resources control, creating a hierarchical relationship between the State and its people. The spirit of land reform then declined; civil society movements were silent while the state power became too strong.

The government issued a statement in the 1979 Broad Outlines of State Policy (GBHN) that “reorganisation of land use, land control and land ownership should be implemented.” Nevertheless, the policy was only ‘lip-service,’ aiming to temporarily ease the friction with pro-reform activists.[72]

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[68] Act No 20 of 1961 on Revocation of Land Rights.
[69] Implementing Regulation No 39 of 1973 on Appeal Mechanism for Land Revocation Compensation.
[70] Act No 21 of 1964 on Land Reform Court.
[71] Act No 7 of 1970 on Revocation of Land Reform Court.
[72] A. Lucas and C. Warren, ‘Agrarian Reform in the Era of *Reformasi*’, in C. Manning and P. Diermen (eds.), *Indonesia in Transition: Social Aspects of Reformasi and Crisis* (Institute of Southeast Asian Studies, Singapore, 2000) p. 222.

After the collapse of Suharto, the discussion of land management and its relationship to human rights in general and the right of indigenous peoples in particular has been seriously discussed. The Basic Agrarian Act was imbued with the spirit of reconciliation and anti-colonisation, and there was less political-economic interest.[73] This legislation answered social demands, particularly at its inception and its early establishment. To equip the Basic Agrarian Act, the government issued several acts including the Forestry Act. The next section elaborates this act's origin.

4.2. Forestry Act – The Legitimacy of Destruction

The first act that regulated forest management was the 1967 Forestry Act, enacted under Suharto's administration. Based on this act, forests were segregated into two categories: the state forests, which were managed by the government, and concessional forests, which were forests granted rights.[74] This act did not regulate indigenous peoples' rights and their lands at all.

Then, Suharto's administration issued the Implementation Regulation which ended districts' authority, particularly in the eastern part of Indonesia, of forest management and moved the authority to the provincial government.[75] It can be assumed that before Suharto's era, forest management in the eastern part of Indonesia was decentralized.

The 1967 Law asserted that forests were under the absolute control of the State.[76] Article 5 did not mention the noble aim of the state's acquisition right, "to the benefit of the people," as Article 33 of the Constitution stressed. It merely claimed that "all forests within the territory of the Republic, including the natural resources within, are to be controlled by the state."[77]

Through this act, Suharto's administration exploited forests and natural resources without giving any consent to local and indigenous peoples who live within the forests. The 1967 Law classified 70% of Indonesian land area as state-owned forest. It brought the forest under the sole control of

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[73] Shohibuddin, *supra* note 63, p. 25.
[74] Act No 5 of 1967 on Forestry, art 2.
[75] Implementing Regulation No 6 of 1968, art 7.
[76] Act No 5 of 1967 on Forestry, art 5 (1).
[77] *Ibid*.

the Ministry of Forestry.[78] To make things even worse, the government regulated the Plantation Act which is origin discussed below.

4.3. Plantation Act – The Legacy of Colonialism

The history of the Indonesian Plantation Law is correlated with the 1960 Basic Agrarian Act. It began when the Dutch colonial regime obliged Indonesian peasants to cultivate only economically expensive crops. In 1830, the Governor General of East Indies, Van den Bosch, proposed this exploitative policy named, *cultuurstelsel,* which literally means 'forced planting.' The policy obliged that 1/5 or 1/3 of all village land must be planted with sugarcane, indigo and coffee. This policy benefited the Dutch financially, because during the Java War the Dutch underwent massive military expenditure.[79] Clearly, *cultuurstelsel* discriminated against and violated the fundamental rights of Indonesians in general and indigenous peoples in particular.

Cultuurstelsel was a state-centered policy. The liberal wing of the Netherlands Parliament contested this policy by proposing a privatization policy to replace *cultuurstelsel;* this was accepted. The Netherlands Parliament then issued the 1870 *Agrarisch Wet*, which was slightly different but even worse than *cultuurstelsel*. This policy is characterized as "a free fight competition to exploit Indonesians."[80] The policy consented multi-national companies to exploit Indonesia's soil, while giving them a solid land rent right (*erfpacht*) for a maximum of 75 years. This policy interlinked with the policy of *domein verklaring,* and as a result, by 1938, there were roughly 2,500,000 hectares of Indonesian land occupied by approximately 2,400 companies.[81] Soon after independence, Sukarno issued the 1954 Urgent Law[82] which was in the spirit of the Basic Agrarian Act that abolished the *1870 Agrarisch Wet.* It legally allowed Indonesians to re-occupy ex-Dutch cultivation areas.

After the demise of Sukarno, Suharto adopted a different policy. He exalted free-market ideology by accommodating foreign investment. This sparked the beginning of 'the Suharto palm oil

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[78] B. Beckert, C. Dittrich and S. Adiwibowo, 'Contested Land: An Analysis of Multi-Layered Conflicts in Jambi Province, Sumatra, Indonesia', 7 *Austrian Journal of South-East Asian Studies* (2014).p. 85.
[79] ELSAM, *Sawit Watch and PILNET, Undang-Undang Perkebunan: Wajah Baru Agrarisch Wet* [*The Plantation Law: The New Face of Agrarisch Wet*] (ELSAM, 2012), p. vii.
[80] S. H. Gie, *Di Bawah Lentera Merah* [*Under the Red Lantern*] (MA Thesis, University of Indonesia, 1964) p. 7.
[81] ELSAM, *supra* note 79, p.viii.
[82] Urgent Act No 8 of 1954 on Plantation Land for People, art 2 (1).

oligarchy.'[83] Suharto's administration initiated the cultivation system, 'The Core and Plasma System,' which is still implemented today. In this system, the core is a company, and the plasmas are smallholders. Farmers are given two hectares of land on which to grow crops, as well as credit to plant it, which they must repay. The farmers are forced to buy fertilizer from the company and accept the company price for their harvested fruits. There is a complete absence of the participation of the people involved in this policy.

The mismanagement of natural resources, which causes severe human rights violations and injustices, cannot be separated from the history of colonialism, capitalism and modernism. In the era of colonization, commodities were sugarcane, coffee, and indigo. Now, the trend has changed. Crude Palm Oil (CPO) has become the most crucial export commodity. As a result, it converted Indonesia's second largest rainforest into a palm oil jungle. It is obvious that modernization in Indonesia has caused false development.

5. Drawbacks and Controversies of the Legislation

This section analyses the acts further by stressing the political vested-interest arguments and their controversies. The arguments shed light on possible solutions to overcome their drawbacks. This section also points to some relevant, present avenues that could be used as instruments of reform.

5.1. Basic Agrarian Law's Drawbacks and Controversies

The Basic Agrarian Act regulates many 'agrarian' aspects. Thus, the analysis is divided into three (3) sections. The first section analyses the generality of its legal provisions in which the aims are too ambitious. This generality of legal provisions opens the act to political interpretation by the Executive power. The second section analyses the lack of explicit provisions on indigenous peoples' rights. Lastly, the analysis stresses many of the unsystematic legal provisions that are worsened by the inconsistency of the government's policy regarding land management.

5.1.1. Too general and ambitious legal provisions

[83] S. Brainard, 'The Impact of Indonesian Agricultural Policies on Indigenous Population, Natural Resources and the Economy: The Limit of Democratic Self-Determination under Capitalist Regimes 43: 1 *The University of Miami Inter-American Law Review* (2011) p. 168. *See generally,* Act No 1 of 1967 on Foreign Investment.

The 1960 Basic Agrarian Act has both broad and narrow applications. In the broadest sense, the act encompasses not only land, but also water management (excluding seas and rivers) and the natural resources within. In its narrow scope, the act mainly focuses on land management and agriculture. The act blends customary *adat* law with Western style titles, the rights defined by the act are: the right to own (*hak milik*); the right to use (*hak pakai*); the right to rent (*hak sewa*); the right to cultivate (*hak guna usaha*) and the right to build or develop (*hak guna usaha*). Yet, the rights of indigenous peoples, in the sense of recognition of property rights, are lacking from this act, as it only recognises private rights and other concessional rights which are qualified to be registered, transferred or mortgaged.[84] As a result, indigenous land cannot be registered and indigenous peoples have no enforceable legal right to it.[85]

The National Land Agency (BPN) revisited this problem by stipulating an internal regulation to acknowledge the rights of indigenous people as territorial, genealogical, and a mixture between territorial and genealogical. The recognition will be obtained by the district or provincial government through Regional Legislation which should be based on empirical research.[86] Nonetheless, this regulation is ineffective as there are many procedural-political steps that indigenous peoples need to undergo to obtain formal recognition.

The act has several weaknesses; it is too general and ambitious.[87] The act comprises of a few articles which can often be misinterpreted by political-economy interests.[88] As a result, the government has issued many acts and internal regulations which support investment and exploitation of the natural resources underneath the land, such as the Forestry Law and the Plantation Law. These two laws aim to seal the gap in the Basic Agrarian Act's broad scope.

5.1.2. The absence of explicit provision on indigenous peoples' rights

The government plays a vital role as a regulator. Society (particularly when it comprises of indigenous peoples) is merely considered an object of regulation.[89] The government, especially

[84] Lucas and Warren, *supra* note 72, p. 234.
[85] Act No 5 of 1960 on Basic Agrarian Law art 16. *See also*, Governmental Legislation No 24 of 1997 on Land Registration.
[86] Internal Regulation of Land Agency No 5 of 1999.
[87] Fitzpatrick, *supra* note 12, p. 182.
[88] Shohibuddin, *supra* note 63, p. 26.
[89] Act No 5 of 1960 on Basic Agrarian Law, art 2 (2).

under Suharto's administration, paid little awareness to people's participation and their involvement. This is in despite that, on paper, the legislation acknowledges that all Indonesian land has 'social purposes.'[90] Furthermore, the problem with the act is that it has over-emphasised written and tangible evidence as a proof of ownership, which indigenous peoples are lacking.[91]

The act also conditionally recognises indigenous peoples as a legal subject as long as their rights are not in conflict with the state or national interest and legislation.[92] Clearly, it is an unbalanced relationship, as the legality of indigenous peoples merely relies on government approval. This is the policy of state law pluralism.

The act recognises indigenous rights but does not explicitly allow for their registration.[93] Suharto's administration abused this drawback by promoting the Land Administration Project supported by the World Bank.[94] The purpose was to unify land titles. Indigenous lands impede the government in commercialising land and natural resources. The government encouraged local and indigenous peoples to register their land, not as an indigenous title, but as private property. This policy caused many indigenous peoples to lose their land because once the new land status was granted, the status was irreversible in law. In order to obtain legal certainty, the indigenous lands that had been privately owned prior to the enforcement of the regional regulation could no longer be reclaimed.[95]

With regard to indigenous politics movement, the Basic Agrarian Act has an idealistic aim to combine and strengthen the advocacy to protect indigenous rights and agrarian reform. Yet, exploiting customary *adat* land as the vehicle for agrarian reform may provoke future tension between indigenous peoples and non-indigenous peoples who are mostly immigrants. To make matters worse, local and indigenous elites exploit struggles over *adat* land to leverage their own political agendas. Clearly, access to land is highly affected by vested interests.[96] Opportunistic

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[90] *Ibid*, art 6.
[91] Lucas and Warren, *supra* note 72, p. 234.
[92] Act No 5 of 1960 on Basic Agrarian Law, art 2 (2), art 3 and 5.
[93] *Ibid*.
[94] Government Regulation No 24 of 1997 on Land Registration, art 3.
[95] Internal Regulation of Land Agency No 5 of 1999, art 3 and 5.
[96] Beckert, *supra* note 78, p. 84.

locals and indigenous elites often escalate confrontation and sometimes violence because they manipulate indigenous status as a commodity that can be used and sold.[97]

Ideally speaking, advocacy for the rights of indigenous peoples should not be identical with an anti-migration mentality and discrimination. Yet, Indonesia's transmigration program that commenced in Suharto's administration also needs to be criticised. This program creates social and environmental problems including deforestation in which the remaining rainforest was destroyed by transmigrants (mostly from Java Island), and the forced assimilation of indigenous peoples. Resettlement was political, aimed at removing the indigenous peoples from modernisation.[98]

5.1.3. Unsystematically constructed legal provisions and government's inconsistence policy

Another vital drawback of the Basic Agrarian Act is that it is unsystematic. It needs to be holistically reconstructed, particularly in its implementation. With regard to other concessional rights, there are many overlapping layers of authority. The act must parallel the Regional Autonomy Law which was a crucial mandate of the reform movement. The People's Consultative Assembly (MPR) stated that regional autonomy should be implemented in: "the framework of increasing the capacity of communities, economic, political, legal, religious, and customary *adat* institutions as well as empowering civil society."[99] Decentralisation aims to diminish the drawbacks of Suharto's top-down development approach. Initially, according to the Regional Autonomy Law, authority over land tenure has to be decentralised. However as a concept, it has some conceptual and implementation drawbacks, because it is a highly contested political process.

Furthermore, concessional rights also have their own legislation, and technical and regional regulations which often conflict with the act. For instance, with regard to the Cultivation Title (HGU), both the Basic Agrarian Act and the Plantation Law have stated that the maximum duration of land title is up to 35 years, with 25 years renewal.[100] In contrary, the Foreign Investment Law

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[97] *Ibid*, p. 76.
[98] Transmigration in Indonesia, 13 September 2015, Geography AS Note <https://geographyas.info/population/transmigration-in-indonesia/>, visited on 3 January 2019.
[99] Stipulation of MPR No IV/1999 on the State Planning Guidelines for The Next Five Years (1994-2004) sec G.1.A.
[100] Act No 5 of 1960 on Basic Agrarian, art 29. *See also*, Act No 18 of 2004 on Plantation, art 11.

states that land title can be used up to 95 years and after that the title can be renewed for up to 35 and 60 years.[101] Beside the Foreign Investment Law, there are several specific pieces of legislation that significantly weaken the act, particularly the 1967 Forest Law issued by Suharto's administration.

According to the Basic Agrarian Act, the State's acquisition right to manage land can be transferred to the local government and to indigenous peoples,[102] but in practice the right is transferred to another state institution which emasculates the rights of indigenous peoples. This policy expands the boundary between the state and its people. Clearly the government prioritises investment and other interests such as mining, and plantations and it often disregards local people's interests in their lands.

This essay argues that the article on transfer policy could provide an opportunity for legal reform by devolving agrarian matters to the regional governments.[103] This transfer policy should be modified by mixing it with a self-determined and human rights-based development which encourages indigenous peoples to construct their own idea of development and provides consent mechanism to indigenous peoples. This policy may benefit indigenous peoples by giving a right and method to assert authority over land and natural resources.

Yet, inconsistently, the fourth President of Indonesia, Abdurrahman Wahid strengthened the central government's authority on land issues.[104] Following that, the fifth President of Indonesia, Megawati Soekarnoputri partly assigned regional governments to administrate land matters.[105] These contradictory policies made an ineffective bureaucracy between central and regional governments.

According to the Basic Agrarian Act, the state institution which has the power to administrate land issues in Indonesia is the National Land Agency (BPN). The authorities have national, regional

[101] Act No 25 of 2007 on Foreign Investment, art 22 (1) (a).
[102] Act No 5 of 1960 on Basic Agrarian, art 2 (4).
[103] *See generally*, The 1945 Constitution (as amended), art 18 (5). *See specifically*, Stipulation of The People's Consultative Assembly (MPR) No IX of 2001 on Agrarian Reform and Natural Resources Management art 5 (j). *See also*, Presidential Injunction No 10 of 2006 on National Land Agency/BPN.
[104] Presidential Injunction No 10 of 2001 on Regional Autonomy on Land Management, art 3.
[105] Presidential Injunction No 34 of 2003 on Regional Autonomy on Land Management, art 2 (1).

and sectoral jurisdictions.[106] However, because of decentralisation, the authority has been distributed to the provincial/regional/districts levels. As a result, local governments can establish a regional land agency which has the power to offer services on land issues.[107]

Under the act, both central and regional governments have authority over land administration and its services. The central government through the BPN mostly focuses on national or macro policies.[108] Meanwhile, the local (provincial and regional) governments are concerned with administrative matters.[109]

This paper argues that this overlapping authority hinders legal certainty because the two legal regimes have different scopes. The Regional Autonomy Law is designed as a public law which cannot be effectively implemented in land issues because some of the issues are private matters. Furthermore, in regard to land registration, authority should be given to the central government only, not the regional government, as the regional government might prefer regional rather than national interests. This ambiguous and unsystematised authority often creates inconsistency in practice which creates delays in the land administrative services; therefore this means justice is then delayed.

Land-related disputes in Indonesia are extraordinarily complex. Resolving Indonesian agrarian conflicts and their power relationship would be ineffective without a deep understanding of several pieces of specific acts including the Forestry and Plantation Laws which weaken the Basic Agrarian Act.

5.2. Forestry Act's Drawbacks and Controversies

In the 1999 Forestry Act, the Ministry of Forestry categorized 143 million hectares of Indonesian land as state-owned forest, while completely ignoring the rights of the indigenous peoples on these lands.[110] It is widely known that forest-based industries are highly beneficial for the government

[106] Presidential Injunction No 10 of 2006 on National Land Agency/BPN, art 2.
[107] Act No 32 of 2004 on Regional Autonomy, art 10, 13 and 14. *See specifically*, Internal Regulation of Land Agency No 5 of 1999. *See also,* Presidential Injunction No 34 of 2003, art 2 (1) and (2) (f).
[108] Governmental Legislation No 38 of 2007 on Work Division between Central Government, art 2 (4) (i).
[109] *Ibid*, art 7 (2) (r).
[110] Beckert, *supra* note 78, 86.

because they have contributed around USD 21 billion to Indonesia's GDP, or roughly 3.5 per cent of the national economy.[111] In this regard, economic growth became the main state's credo, leaving social justice and equality behind.[112]

The existing act, the 1999 act explicitly recognized the rights of indigenous peoples and their indigenous forest.[113] Yet, the indigenous forests were still part of the state-owned forest. Thus, customary *adat* rights remained legally invisible within areas mapped as 'state-owned forest'.[114] However, the Constitutional Court changed this classification; the Court moved indigenous forests from state forests to concessional forests.[115]

The legislation recognized the rights of indigenous peoples over their forest. However it limited their activities within the forest to daily needs only and forbade them from commercializing their natural resources.[116] Article 67, however, contradicted article 37 which states that indigenous peoples can commercialise natural resources (profit oriented) as long as they have a legal permit.[117] This procedural mechanism still hinders indigenous peoples' rights to exploit their natural resources.

As part of Indonesia's decentralization program, supervision of the forest changed from the central government to the provinces and regional/districts.[118] As a result, there is disharmony between the Forestry Act and Regional Autonomy Act; the Forestry Act upholds the assumption of a top-down relationship between levels of government. The act failed to specify the government institutions or levels of government that had authorities for particular administrative services. The act allowed the Ministry to retain decision-making powers over large-scale decisions regarding the forestry

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111 *The Economic Contribution of Indonesia's Forest-Based Industries*, December 2011, ITS Global <www.static1.squarespace.com/static/562c7435e4b01a45f69f18f9/t/5725d87707eaa04b68665481/1462098045495/The+Economic+Contribution+of+Indonesia%E2%80%99s+Forest-Based+Industries+-+Report+Annex+%282011%29.pdf >, visited on 12 March 2019.

112 *Two decades of economic growth benefitted only the richest 20 per cent. How severe is inequality in Indonesia?,* 28 August 2018, Opinion, <www.theconversation.com/two-decades-of-economic-growth-benefited-only-the-richest-20-how-severe-is-inequality-in-indonesia-101138>, visited on 12 March 2018.

113 Act No 41 of 1999 on Forestry, art 4 (3) and 5 (2).

114 Beckert, *supra* note 78, p. 86.

115 *Indigenous Forest Law Case,* Judicial Review (2012) 35.

116 *Ibid*, p. 27 para 3.

117 Act No 41 of 1999 on Forestry, art 67.

118 Act No 22 of 1999 on Regional Autonomy, art 36(1).

estate (HPH).[119] For example, a division of the authority between central and regional power is still uncertain in deciding which of the three statuses of a forest applies: protected, conservation or production forest.

Local governments manage protected forests. The local government may suggest the status of protected forests, but its enactment is subject to central government consent. Protected forests do not necessarily mean 'virgin' forest, because the central government still has the power to issue a mining exploitation permit in that forests.[120] A protected forest area can still be turned into a land with no trees.[121] Production forests come under the Ministry of Forestry authority, but the regional government can apply technical considerations for exploitation permits. Under the regime of state-owned forests, the central government, through the Ministry of Forestry, has a stronger role in deciding a forest's status. Clearly, the Ministry of Forestry has a vested interest in the centralized control of the country's vast forestry estate.

Furthermore, local governments have greater roles in forest management.[122] The head of a district can issue several small-scale exploitation permits, including the Small-Scale Permit of Logging (IPK and IPPK), and the Small-Scale Permit of Forest Exploitation (HPHH). The small-scale permits cover 100 ha within the regime of state-owned forests. This policy triggers the decentralization of corruption. District officials suddenly found that it was politically and economically beneficial to assert far-reaching administrative authority over forest resources located within their jurisdiction.[123] This was the beginning of the cycle of corruption.

Many small-scale concessions (HPHH) are granted that often overlapped with large-scale concessions (HPH) or with national parks and conservation areas issued by the central government. Both the central and regional governments exploit the forests; as a result the rights of the indigenous peoples are suppressed. The massive exploitation of the forests and the marginalization of indigenous peoples have undergone only minor changes since Suharto's regime.

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[119] P.O. Ngakan, '*Menerawang Kesatuan Pengelolaan Hutan di Era Otonomi Daerah*' ['*Visioning Forest Management in Regional Autonomy*'] (Report, Governance Brief, January 2008) p. 38.
[120] Government Regulation No 24 of 2010 on Utilising of Forest Areas, art 2.
[121] IPAC, Mesuji: Anatomy of an Indonesian Land Conflict, Institute for Policy Analysis of Conflict (Report No 1, IPAC, 13 August 2013) p.3.
[122] Implementing Regulation No 25 of 2000 on Central and Provincial Authorities on Regional Autonomy art 2 (4).
[123] Beckert, *supra* note 78, p. 86.

To address forestry mismanagement and to tackle deforestation, several international donors have worked on this issue. The most notable donor was the Kalimantan Forest and Climate Partnership (KFCP) which was part of the REDD+ project.[124] However, this project failed to address the core over-arching problem. With a weak law enforcement and uncertainty in land tenure, this policy can aggravate existing land and resource-based disputes, particularly when local governments allocate carbon rights that conflict with the communal lands.[125] The underlying cause of deforestation and land conflicts is over-consumption by wealthy oligarchs in local and national circles.

Even though the Forestry Law offered little opportunities for the recognition of indigenous land, the Village Law opens opportunities for indigenous peoples to be recognized under the concept of *adat* (indigenous) villages with more moderate requirements than the Forestry Law.[126] Despite the fact that on paper this act regulates a decentralized-based recognition, in practice, there rarely are local governments that have good intentions to recognize indigenous peoples' rights. The logic of the local government is still dominated by the developmentalism paradigm. To make matters even worse, the steps for recognition in local government are highly political, bureaucratic and time-consuming. As a result, the recognition of an *adat* village is a vested-interest.

5.3. Plantation Act's Drawbacks and Controversies

The purpose of the 1998 reform movement was to minimize foreign investment in Indonesia. The Ministry of Forestry and Estate Crops responded to these reforms by limiting the size of plantation concessions operated by a single company.[127] Nonetheless, this policy was ineffective.

The 2004 Plantation Act[128] was initiated by the *Stipulation of the Ministry of Plantation*.[129] This legislation aims to fill the gaps in the Basic Agrarian Act. While the 2004 Plantation Act offers

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[124] The Kalimantan Forest and Climate Partnership (KFCP) < www.redd-database.iges.or.jp/redd/download/project;jsessionid=F5414B40A100A330B258A615F97995C8?id=57>, visited on 17 April 2019.

[125] C. Lang, Nine reasons why REDD is a false solution: Friend of the Earth International, < www.redd-monitor.org/2014/10/15/nine-reasons-why-redd-is-a-false-solution-friends-of-the-earth-international/>, visited on 18 April 2019.

[126] Act No 6 of 2014 on Village.

[127] Plantation Use Permit Regulation No 107/Kpts-II/1999.

[128] Act No 18 of 2004 on Plantation.

[129] The Stipulation of the Ministry of Plantation No 357/Kpts/HK.350/5/2002.

better solutions for plantation management, the maximum term of 95 years for the Right of Use (HGU) that a company can request does not diminish the risks of deforestation and massive ecological destruction.[130]

This act recognised the fundamental rights of indigenous peoples over their communal-ancestral land. In regard to the land transfer process from indigenous land to cultivation rights (HGU), the act stresses the importance of a deliberative meeting (*musyawarah*) between stakeholders and indigenous peoples. However, the act gave insufficient detail on how the land transfer mechanism was to take place. Clearly, there was no Free, Prior, Informed, Consent (FPIC) mechanism.[131] Thus this act continued to discriminate against indigenous peoples.

The most significant drawback of this act was its criminal section which regulated punishment for those who trespass, damage or occupy cultivation areas. Article 21 regulated the conduct, and article 47 detailed criminal punishments.[132] While these articles may be expected from a formalistic perspective, from a socio-legal perspective they have the potential to lessen the rights of local farmers and indigenous peoples to peacefully assemble or demonstrate against the company, and worse, they can criminalise those rights. These articles were the product of a confidential agreement among the political and economic elite. Fortunately, the Constitutional Court reviewed the articles and declared them unconstitutional.[133]

As a consequence of the Court's judgment, the Legislature then stipulated the current legislative act: the 2014 Plantation Act. Similar to the previous act, the Plantation Act recognises both indigenous peoples' existence and their communal lands.[134] In regard to the mechanisms of issuing plantation permit in nearby indigenous peoples' areas, the government must conduct a deliberative meeting (*musyawarah*) between stakeholders and indigenous peoples prior to the execution of project.[135] However, the mechanism of FPIC is still absents in this act. Additionally, despite indigenous peoples being respected, their rights of the land must not contradict the legislation and

[130] ELSAM, *supra* note 79, p. xii.
[131] Free, Prior, Informed, Consent, < www.fao.org/indigenous-peoples/our-pillars/fpic/en/>, visited on 11 March 2019.
[132] Act No 18 of 2004 on Plantation, act 21 and 47.
[133] *Plantation Law Case,* Judicial Review (2010) 55, 26-27.
[134] Act No 39 of 2014 on Plantation, art 1 (5) and (6).
[135] *Ibid*, art 12.

regulations. In other words, the existence of indigenous peoples and the recognition of their rights must be legally recognised by the government through inquiries on written evidence. This is the drawback of indigenous peoples: these communities merely rely on unwritten or oral agreement. The government capitalises this drawback to suppress indigenous peoples' rights.

Multi-national companies control over 60% of the plantation sector, a situation that is referred to as the 'post-Suharto palm oil oligarchy.'[136] This system is closely similar to the colonial system under the 1870 *Agrarisch Wet*. Today, Indonesia has evolved into the largest producer of palm oil in the world.[137]

In 2018, Jokowi's administration stipulated a policy of moratorium of palm oil plantation's permits.[138] During the three year moratorium period, the government will postpone the issuance of forest release forms.[139] The government will also review all palm oil plantation permits that have been issued, including Location Permit (*Izin Lokasi*), Plantation Business Permit (IUP), Cultivation Right (HGU), Registration for Plantation Cultivation and Forest Release Permits (STDB).[140] The government will also prioritize the fulfillment of palm oil fruit supplies to the industry through land productivity improvement efforts, rather than land expansion.[141]

However, this article argues that this policy is merely a lip-service or procedural policy. First, the Presidential Instruction only applies to lands controlled by the central government (the Forestry Ministry) and it does not cover lands controlled by local governments. Second, the Presidential Instruction has less power than legislative acts, thus it has a lack of sanctions for non-compliance. Third, the three-year moratorium is too short to remedy and restore nature; it is only drop of water in the ocean. The ideal moratorium should be for 25-30 years, and it should be integrated within the framework of agricultural reform.

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[136] Beckert, *supra* note 78, p. 86.
[137] *The Economic Benefits of Palm Oil to Indonesia*, *World Growth,* February 2011, A Report by World Growth <www.worldgrowth.org/site/wp-content/uploads/2012/06/WG_Indonesian_Palm_Oil_Benefits_Report-2_11.pdf>, visited on 21 January 2019.
[138] Presidential Instruction No 8 of 2018 on the Delay and Evaluation of Palm Oil Plantations Permits.
[139] *Ibid*, art 1.
[140] *Ibid*, art 2 (a).
[141] *Ibid*, art 3 (b).

In the possibility of reform, the Indonesian government, through the Commission of Human Rights (Komnas HAM) stipulated a soft law: the National Action Plan on Business and Human Rights. It comprises of many provisions stressing both State and corporate responsibilities in three important aspects: protection, respect and remedy on human rights framework. [142] In protection, the plan stresses the obligation of the State to protect human rights. Regarding the aspect of respect, corporations have the responsibility to respect human rights. In remedy, both parties (government and corporations) have obligation to provide access for victims of human rights violation to remedy. [143] This aspect includes industry led-initiatives to address land rights.

Unfortunately, this soft law approach from Komnas HAM is ineffective in practice because the Action Plan has no effective legal sanctions both for government and companies that choose to ignore it. This policy only stresses the important role of government and corporations, while ignoring the empowerment of indigenous peoples themselves. Indigenous peoples have been victims of development aggression for centuries.[144] The human rights-based approach should focus on the right of determination of indigenous peoples[145] which is a foundational right.

This article argues that self-determined development is a paradigm that should replace the current development aggression. This is 'the development from below' that stresses the importance of public participation and cultural-driven aspects in development projects. Culture should not be considered as a hurdle of development; it is in fact one of the capitals of sustainable development. This policy is in line with the provision on cultural rights on the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR),[146] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[147]

Moreover, this policy also corresponds to the General Recommendation XX111 in 1997, stipulated by the Committee on the Elimination of Racial Discrimination, which states: "… provide indigenous peoples with conditions allowing for a sustainable economic and social development

[142] Komnas HAM and ELSAM, *National Action Plan on Business and Human Rights*, (KomnasHAM, 2017) p. 11.
[143] *Ibid*, p. 24.
[144] Tauli--Corpuz, *supra* note 32, p. 11.
[145] *Ibid*, p. 68-69.
[146] The International Covenant on Civil and Political Rights, art 27.
[147] The International Covenant on Economic, Social and Cultural Rights, art 15.

compatible with their cultural characteristics,"[148] and "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interest are taken without their informed consent."[149]

By implementing this policy, the government will distribute the 'fruit' of development equally. Development is not alien to society, but closely related to their activities and interests. No one would be left behind in this form development. However, it is a rather idealistic vision for a country with extensive vested-interest like Indonesia.

6. Conclusion

The 1960 Basic Agrarian Act has survived for more than three generations without a single revision. Due to its unspecific provision on indigenous peoples' rights, these rights remain marginal to expropriation with no or inadequate compensation. The government seems reluctant to amend the act, perhaps because several gaps in the legislation benefit the government land market business to extract and exploit natural resources. Political and economic interests mutually intertwine in the implementation of the Basic Agrarian Act, Forestry Act and Plantation Act. The current land management paradigm is an investment regime which extols the principles of development and free-market ideology. This paradigm allows 'the have' people to profit while marginalising communities.

This paper argues that the Basic Agrarian Act, Forestry Act and Plantation Act must be amended to make the implementation of legal pluralism clearer, provide remedies for grievances and be more society and environment-friendly. Moreover, the amendment of the Basic Agrarian Act must provide an explicit provision for indigenous peoples' rights beside other western-style rights. The Forestry Act and Plantation Act must follow this significant change. Lastly, the requirement of indigenous peoples in the Constitution and other acts should be interpreted 'as long as their laws and land remain in existence.' The requirement of 'accordance with the societal development' must be interpreted in the context of self-determined development. Neither national interests nor development projects can derogate the inherent rights of indigenous peoples.

[148] The General Recommendation XX111 (1997), The Committee on the Elimination of Racial Discrimination, art 15 (g).
[149] *Ibid*, art 15 (h).

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