SQUARE PEGS & ROUND HOLES: FITTING MODERN TITLE INTO TRADITIONAL SOCIETIES IN INDONESIA

Timothy Lindsey†

Abstract: In Indonesia, diverse interests in land recognised by dozens, maybe hundreds, of different adat (traditional customary legal systems) coexist with a Dutch-derived system of land title. The most problematic adat interest is traditional communal title, or hak ulayat. Indonesia’s New Order government sees adat rights—and hak ulayat in particular—as incompatible with the demands of economic development. Although some adat rights are recognised in the key statute regulating interests in land, the Basic Agrarian Law, the New Order government has systematically subverted the standing of adat. Likewise, the land registration system has become a corrupt failure, with the consequence that only around ten percent of all rural land is registered. Generally speaking, adat title is vulnerable to arbitrary confiscation by the state and land disputes have become highly politicised. While the Land Administration Project, funded by foreign donors, aims to encourage increased registration and protect adat landholders, it does not take into account the reality of political exploitation of traditional rights in Indonesia. There is a real danger that it will compound the problems of these landholders and hasten the demise of traditional land laws that are well suited to a plural society with diverse traditional communities.

It is not adat regulations that are an obstacle to development,—but the main obstacle is our pigeon-holed thinking. If it is true that we have had difficulty in obtaining land . . . it is the result of excessive tunnel vision which has destroyed a system of values[,] . . . the compact between grandparents and grandchildren and hence between the government and its people.1

I. INTRODUCTION

Over centuries, Indonesia has developed a complex plural2 legal system to cope with the extraordinary diversity of cultural, ethnic, and economic activity in the three hundred or so inhabited islands of this archipelagic state. Today, at least twenty (and perhaps as many as three

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† Dr. Timothy Lindsey is Associate Director (SE Asia) of the Asian Law Centre, and a Senior Associate of the Faculty of Law, at the University of Melbourne, Australia.

1 Anas SH, in Rachel Haverfield, Hak Ulayat and the State: Land Acquisition and Law in Indonesia, in LAW & SOCIETY IN INDONESIA (Timothy Lindsey ed., forthcoming 1998).

2 See generally M.B. Hooker, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAW (1975).
hundred)\(^3\) distinct indigenous legal systems based on adat, or traditional customary law,\(^4\) co-exist. They include laws derived from origins as diverse as syariah, or Islamic law, animist beliefs once common to most Southeast Asian cultures in the Dong Son period, as well as Hindu and Buddhist traditions, still dominant in traditional cultures in Bali today. Parallel to these indigenous legal sources are surviving Dutch colonial laws and an ever-expanding body of legislation and regulation introduced since the proclamation of Indonesian independence in 1945.

Unsurprisingly, land use law in contemporary Indonesia involves an overlapping mixture of laws from all these sources. The intricacies of the interaction of these many and varied legal sources, and, more particularly, the consequences of transactions between persons subject to different legal systems, is determined by a complex body of jurisprudence known as hukum antargolongan or “intergroup law,” an area into which lawyers only venture reluctantly. Generally, however, urban transactions are governed by Western-style laws. Transactions in rural areas, where approximately sixty-two percent of Indonesia’s 200 million people live,\(^5\) usually remain subject to local adat.

This situation is complicated by the operation of the Basic Agrarian Law of 1960 (the “BAL”). This statute introduced a new system of land rights intended to absorb and replace both existing European rights inherited from the Dutch and adat interests. A new group of Indonesian umbrella categories was created under the BAL, and although these categories purport to be based on adat values, they obviously reflect Western models. The BAL also introduced a system of land registration intended to allow gradual certification of these interests so that, in time, registered title would replace the current cocktail of registered European land and largely unregistered but theoretically registrable adat land.

As will be seen, the BAL’s land reforms have largely failed, mainly due to labyrinthine and corrupt modes of implementation that have turned land administration into a bureaucratic rentier activity. The other causes include significant inadequacies in the scope of the statute itself and, perhaps

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\(^3\) M.A. JASPAN, DAFTAR SEMENTARA DARI SIKUBANGSA-BANGSA DI INDONESIA (1958). See also Hildred Geertz, Indonesian Cultures and Communities, in INDONESIA (Ruth T. McVey ed., 1963).

\(^4\) “Adat” is an Arabic term, meaning custom, rule proper behaviour, propriety or law. M.B. HOOKER, ADAT LAW IN MODERN INDONESIA 50 (1978).

most importantly, the extraordinary resilience of adat. Today only around ten percent of registrable land in rural areas—that is, in many cases, areas often still dominated by adat, have been registered. It is perhaps even more eloquent testimony to the BAL’s failure that even in urban areas, the level of registration is only as high as twenty percent. In these circumstances, experts estimate that it will take at least a century, at best, to register every parcel of land in Indonesia.7

In 1981, the Indonesian government introduced a programme to increase registration of land, known as Proyek Operasi Nasional Agraria (“National Agrarian Operational Project”) or PRONA. This initiative focused on reducing costs and the notorious inefficiencies and corruption that had turned land registration into a Byzantine, expensive, and extremely slow process. PRONA has not been a success.

More recently, the World Bank funded the Indonesian Land Administration Project (“LAP”). This gigantic endeavour has two main objectives, first to register titles in Java and various settled areas; and secondly to attempt registration of land in selected adat areas as a pilot for a future conversion of all registrable land.8 The latter part of this project is to be accompanied by air mapping as the initial stage of another project—a complete cadastral survey of the archipelago, something which all parties agree is necessary, but beyond the scope of the LAP. The LAP is therefore intended as the first step towards the ultimate aim shared by the World Bank and the Indonesian government of resolving the problems of the BAL. By completely replacing adat land with registered title, it is hoped certainty will be delivered to Indonesia’s land market. The assumption underlying these policy objectives—an assumption common to both the Indonesian government and the World Bank—is that adat title is inherently inconsistent with modernity and is an impediment to development.

This Article will consider the policy imperatives informing the Land Administration Project and its likelihood of success in the light of broader issues relating to the tensions between development and tradition in land use in Indonesia. Parts II and III examine the development of adat and, in particular, communal title and Indonesian government hostility toward traditional land rights. Part IV traces the failure of legislative reforms that were intended to replace the diversity of Indonesian land rights with a single, integrated system that reflects adat principles. In fact, these reforms have

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7 Haverfield, supra note 1.
8 Fitzpatrick, supra note 6, at 131.
only eroded *adat* rights and increased uncertainty of title, particularly for traditional communal titleholders. In Part V, the author argues that the current crisis in land titling in Indonesia is a product of the link between the ideology of the development and the political legitimacy of the Suharto Government, with the consequence, explored in Part VI, that the LAP is fundamentally misconceived. The New Order Government has been able to exploit the good intentions of foreign donors in its longstanding campaign against *adat* land rights. In conclusion, the author argues first that the aim of eradicating *adat* is unachievable while Indonesia is a plural society of widely various economic and cultural groups; and secondly that, in any case, *adat* is a reasonable system of land regulation in so diverse a society.

II. ADAT IN GENERAL

*Adat* is largely unwritten. As with myths, local history, and folklore, it forms part of the oral history of most ethnic groups in the archipelago. Protean and dynamic in nature, it changes as the society which uses it changes. As one Minangkabau *adat* maxim has it: "If the river is in spate, the washing place is shifted. With a change of rajah comes a change of *adat*."\(^9\) Rather than being essentially prescriptive of social norms as is most Western law, *adat* is to a greater extent reflexive. In other words, its content is a series of descriptions of what a particular community does, as much as it is a set of commands about what members of the community should do. For these reasons, any written recension of *adat* can become outdated in a relatively short time.

The content of *adat* as it relates to land can and does vary significantly within relatively short distances, as do local cultures and beliefs in Indonesia. Within a few hundred miles the dominant *adat* may alter from, for example, Islam to Hinduism, matrilineal to patrilineal inheritance, or from communal to individual title. The Minangkabau people of Western Sumatra, for example, are strongly Muslim, but practice matrilineal inheritance, although *syariah* prescribes inheritance through the male line. Communal title is still relatively commonplace in their region. Their neighbours a few hundred miles to the north, the Batak people, are divided into Muslim (southern areas) and Protestant Christian (northern) communities, but adhere strongly also to ancient animist beliefs that reflect aspects of Hinduism. They have one of the most rigidly patrilineal structures in Indonesia. The Acehnese, still further

north, are more purist in their devout adherence to Islam and apply orthodox Islamic patrilineal inheritance.

The problems of actually identifying current *adat* laws have been complicated by attempts by Dutch scholars and jurists earlier this century to create generalised codifications or summaries of the major forms of *adat* to be found in what was then the Netherlands East Indies. The leading Dutch *adat* scholar was van Vollenhoven, whose ideas have dominated Dutch and Indonesian legal thinking about *adat* for most of this century. His central tenet was that a uniform and traditional customary law could be permanently established in Indonesia. He identified nineteen chief groups of *adat* communities which he saw as closely related to one another. These he named *adatrechtskringen* (Dutch: "*adat* law region") or *lingkungan hukum adat* (Indonesian: "*adat* law region"). They correspond to the following areas of modern Indonesia: Aceh (North Sumatra); Gaye, Alas, Batak, (Sumatra); Minangkabau (West Sumatra); South Sumatra; Malay areas; Banka and Biliton islands; Borneo; Minahasa (East Indonesia); Gorontalo (North Celebes); Toraja (Central Celebes); South Celebes; Ternate (East Indonesia); Ambon; Irian Jaya; Timor; Bali and Lombok; Central and East Java and Madura; Yogyakarta and Surakarta (Central Java); and Sunda (West Java).

By recourse to ethnographic and anthropological methods, van Vollenhoven claimed to be able to demonstrate what he saw as primordial commonalities among even these nineteen very disparate groups. The basic elements of his overarching concept of *adat* were:

[A] preponderance of communal over individual interests, a close relationship between man and the soil, an all-pervasive 'magical' and religious pattern of thought, and a strong family-oriented atmosphere in which every effort was made to compose disputes through conciliation and mutual consideration.

Because modern scholarship and jurisprudence on *adat* still relies heavily on the work of van Vollenhoven and other now-distant pioneers, it is often outdated and coloured by a colonial perspective. The Indonesian courts of general jurisdiction and the Administrative Courts hear most *adat* disputes that are litigated. They still look to the attempted codifications of van Vollenhoven and his followers for presumptions as to the nature of *adat* in a

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11 Id. at 71.
particular ethnic community. They may then hear oral evidence as to local or historical variations to those laws before making a finding as to what *adat* law applies. The courts are, however, often overly reliant on dated scholarship at the expense of local realities.

The sheer variety of *adat* laws, their intimidating fluidity, and a consequent perceived lack of certainty as to their content are the source of what is seen as their bewildering complexity. This complexity is a common criticism of *adat* in Indonesia, particularly by Indonesians who live in urban areas and by foreign business interests (although the same comments can, of course, be made of the common law system). Despite these criticisms, the content of *adat* has always, perhaps paradoxically, been regarded as something truly and uniquely "Indonesian." During the “Old Order” period under President Sukarno, for example, it was widely accepted that the commonalities van Vollenhoven identified in Indonesia’s *adat* communities could become the basis for universal legislation that would therefore be intrinsically “Indonesian.” Attempts at reform during this period were led by the *Lembaga Pembinaan Hukum Nasional* (“National Law Development Institute”) which was responsible for developing new Codes intended to embody *adat* principles. These were intended to be expressions of Indonesian national identity, but ironically, actually reduced the ambit of *adat* law. The most notable product of this approach, both in terms of its stated objectives and its problematic actual effect, was the BAL.

III. THE STATUS OF HAK ULAYAT

Perhaps the most important and controversial form of *adat* interest relating to land is the *hak ulayat*, an Arabic term used in reference to land by the Minangkabau people of West Sumatra and now widely used as a catch phrase for communal title. By referring expressly to both *hak ulayat* and to equivalent laws of “*adat* communities,” article 3 of the RAT makes it clear that it intends this broad interpretation of the term.

It is accepted by Indonesian lawyers that *hak ulayat* is a form of what was known in Dutch jurisprudence as *beschikkingsrecht*, that is, a communal right of land alienation. The essence of this right is that the community as a whole determines how to deal with land occupied by the

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12 "Ulayat" literally means “territory,” “realm” or “jurisdiction.”
13 Usually translated as a “right of disposal” or “right of avail.” The word was originally used by van Vollenhoven. See SUDARGO GAUTAMA, INDONESIAN BUSINESS LAW 133 (1995) (on file with author); See also Maria S. W. Surradiono, Ulayat Rights and Their Recognition in the Basic Agrarian Law, (unpublished paper presented at University of Melbourne conference, Indonesian Law: The First 50 Years, Sept. 1993) (on file with author).
community. The decision is not one that can be taken by any individual member of that community, regardless of their connection with the land. The authority of the community in this regard extends to all aspects of use and alienation, whether to persons within or without the community.

Generally speaking, the process of reaching consensus, usually through community meeting and debate, is as important a feature of hak ulayat as are the decisions that the community eventually reaches about the land. This is because adat is predominantly concerned with maintaining or restoring the equilibrium of the community and, ultimately, the cosmos. This goal is usually the principal aim of those involved in settling an adat dispute in the traditional way, rather than the allocation of individual rights and entitlements which is the chief concern of most Western systems. It can therefore be said that hak ulayat, like most forms of adat, is as much concerned with the procedure for dispute resolution as it is with the disputed rights.

The magico-religious aspects of hak ulayat are part of the reason for its profound importance for communities where it has sway. They are also undoubtedly one of the reasons for the hostility to, or at best, lack of enthusiasm for, hak ulayat among the policy-makers of President Suharto’s government, the “New Order” which ruled Indonesia since the mid-sixties until 1998. They see hak ulayat as a rival of the all-pervasive national ideology of economic development (pembangunan).

Another reason for the common disdain so often shown for hak ulayat by the Indonesian government is its communal nature, which is fundamentally at odds with the notion of individuation that informs Western ideas of title, the conceptual basis of the BAL. The government view has been put trenchantly by Sutan Takdir Alisjahbana:

If we still sometimes hear of some modern Asian intellectual praising customary law, it must be considered the expression of a confused man in the face of the tremendous spiritual and material change which is taking place in Asia [or] the nostalgia of a tired man for a more peaceful archaic society.\(^{14}\)

A third reason for negative government attitudes toward adat is Article 33 of the 1945 Constitution, which vests control of all land and natural resources in the state. This principle is reflected in the scheme of the BAL, which, like the Constitution, vests control (if not ownership) of all land in

\(^{14}\) Sutan Takdir Alisjahbana, available in Haverfield, supra note 1.
Indonesia in the state, that is, in practice, the President and his circle. The principle is also manifest in The Basic Law on Forestry, No. 5 of 1967, which essentially renders all forest land property of the state, with no recognition of adat rights. This is an extraordinary model for forest administration, given that forest-dwellers are precisely the groups most likely to follow adat and hak ulayat in particular.

These provisions inform the widely accepted notion that the New Order state ultimately can do what it pleases with land, a view confirmed by the government’s frequent and aggressive appropriation of land for “development” purposes.

Whatever its origins, the state’s hostility to adat is reflected in the uncertain of status hak ulayat in a system that gives formal standing to other types of adat interest in land. Specifically, Article 3 of the BAL states that hak ulayat rights are not converted into statutory rights but are “recognised” where still existing—provided that such rights are “adjusted to conform with the national interest, which is based on national unity.” In practice this usually means that hak ulayat land is simply considered a form of state land, to be disposed of by the state as its development policy dictates; in the meantime, adat communities may occupy such land.

It is significant that the Elucidation to this Article 3 states that hak ulayat “has been an obstacle to regional development in the past.” Although almost forty years have passed since the BAL was enacted, this statement still well reflects government policy towards communal title.

IV. THE BASIC AGRARIAN LAW & THE APPROPRIATION OF ‘ADAT’

The BAL gave lip service to adat as a fundamental source of Indonesian law, land law in particular. It was drafted at a time when adat concepts were being widely appropriated by state propagandists to justify the autocratic reinvention of the Indonesian parliamentary system as the authoritarian “Guided Democracy” system introduced by Indonesia’s first President, Sukarno, following a Constitutional coup in 1959. Notions such as gotong royong (community shared labour), musyawarah (consultation and debate), and mufakat (decision by consensus) were “lifted” from traditional cultures to support submission to the policies of Sukarno’s “ongoing

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15 Undang-Undang Pokok Agraria [Basic Agrarian Law], No. 5-1960, State Gazette No. 184-1960, arts. 8, 27 [hereinafter BAL].
16 The Elucidation is the explanatory memorandum that accompanies Indonesian statutes and is considered formally part of the statute.
17 This was required pursuant to a decision of Indonesia’s supreme sovereign body, the Majelis Permusyawaratan Rakyat or People’s Consultative Assembly. See MPRS RESOLUTION NO.11/1960.
revolution.” They became slogans wielded to great effect by ideologues like Sukarno and Ruslan Abdulgani to demonstrate both the “Indonesian-ness” of the new political system and its supposed inevitability as an expression of the inner psyche of the Indonesian people.

Today, this ideological appropriation of adat terminology continues, although Indonesian politics moved sharply from the left to the right when Suharto’s New Order replaced Sukarno’s Guided Democracy after 1965. Like most products of the fashion for legal “Indonesianisation,” typical of the leftist and fervently nationalist Guided Democracy period of the first half of the sixties, the obeisance to adat was and remains little more than rhetoric.

The BAL is expressed in its formal Elucidation as creating a national agrarian law that provides “legal unity, simplicity and certainty to Indonesians and prosperity, happiness and justice for the nation and people, including farmers, on the basis of adat law.” This commitment was to be achieved by placing the needs of the community over the individual. In reality, however, much of the BAL was little more than an exercise in reductionism. With its implementing regulations, most notably Government Regulation No. 10 of 1960, the BAL aimed to simplify the kaleidoscopic variety of adat interests in land by dividing them into a limited number of broad categories of registrable interests. The drafters saw these categories as capable of embracing both European interests in land, such as the Dutch eigendom (ownership) and erfpacht (leasehold interest), and indigenous interests in land, such as the hak atas druwe desa (a Balinese form of land ownership). It is clear, however, that the categories owed more to Dutch and Western models than to adat. Gautama and Hornick describe recognition of adat in the BAL as merely “hortatory and symbolic.”

The chief forms of registrable interest in land available under the BAL include the following:

*Hak milik* (“Right of ownership”): This category includes Dutch rights of ownership and similar interests held by peoples previously identified as “Orientals” and “natives” under colonial law, together with other adat rights “resembling these.” The *hak milik* is roughly equivalent to the common law notion of fee simple and may be freely alienated.

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18 See Gautama, supra note 1813, at 123, 133-39; Fitzpatrick, supra note 6, at 183.
20 For a complete list of the categories of interest, see BAL arts. 44-51.
21 “Orientals” includes Chinese, Arabs, and Indians.
22 BAL arts. 4, 20-27.
Hak pakai ("Right of use"): This category applies to possessory rights which do not have a "permanent quality," including adat usufructuary rights. This right has similarities to archaic common law rights of usufruct and to some aspects of leasehold interests, subject to the rights caught by the categories below.23

Hak guna usaha ("Right to exploit"): A form of agricultural commercial lease, a right to cultivate state land, or use for other agricultural purposes.24

Hak guna bangunan ("Right to use a building"): This category applies to rights to use buildings and is similar to Western residential tenancies.25

All these forms of interest in land are registrable. Although in theory unregistered interests are of the same status as those that are registered, in practice the latter are afforded far higher standing. Unregistered interests tend to be regarded by the bureaucracy as a form of state land, albeit occupied. This problem of perception is created in part by Articles 9 and 3026 of the BAL. These provide that the entities that may register relevant interests include individual citizens of Indonesia and resident legal bodies established in Indonesia. This definition does not include adat communities.27

This gives rise to a problem in the case of hak ulayat where land is held by the community and is not alienable by any individual without the community’s consent. The relevant regulatory body, Badan Pertahanan Nasional ("BPN"),28 has consistently refused to allow communal registration, arguing correctly that it can only register interests recognised at law. The usual solution is to allow the head of the community to register interest in the common land in his or her own name, including with the registration papers a list of the community’s members and, often, the nature of their interests.29

This approach presents obvious and very significant difficulties. The head of

23 Id. arts. 41-43.
24 Id. arts. 28-34.
25 Id. arts. 35-40.
26 Similar provisions can be found throughout the BAL.
27 Maria S. W. Sumardjono, Hak Ulayat dan Pengakuanannya oleh UPA, KOMPAS, May 13, 1993. See also Fitzpatrick, supra note 6, at 184, n.82.
28 National Land Body.
29 Fitzpatrick, supra note 6, at 190.
the community may well favour the interests of his family or supporters when preparing the list of interests. If the list is prepared in good faith, there can be no guarantee that the head's record of interests will be accurate. Even assuming accuracy, problems remain. The rights of members of an adat community may vary in nature and extent at the time of registration subject, for example, to contribution of labour or capital; or subject to usufructuary rights, building rights, or a right to have a voice alienating communal land. It is extremely difficult for these very important nuances to be reflected accurately in the record. Likewise, the extent of an individual’s interest may vary according to his or her changing position in the community or contribution to the land.

Fitzpatrick has described hak ulayat interests as subject to “the ebb and flow of commitment and obligation.” Registration under the BAL, and perhaps registration per se, is obviously incapable of recognising this ancient and subtle dynamism. Given the fundamental importance of interests in land in agricultural communities, reliance on registration to determine communal interests in land such as hak ulayat, without any formal means of accurately recognising and recording them, is likely to lead to gross injustice. For these reasons, the practical solution in most rural communities is simply to ignore the provisions of the BAL relating to registration, which is why ninety percent of rural land remains unregistered.

The BAL has an unfortunate history of impotence. For example, Articles 5(3), 7, 10 and 17 of the BAL provide sweeping and radical land reforms, including the prohibition of absentee landlordism, an obligation on the occupier to cultivate his or her own land, a prohibition on unlimited land ownership, and the fixing of maximum and minimum land holding limits. Bureaucrats simply refused to enforce these controversial provisions once the BAL came into effect in the early 1960s. Attempts by what was then the world’s third-largest communist party, the Partai Komunis Indonesia (“Indonesian Communist Party” or “PKI”), to force implementation of these reforms through aksi sepihak, “unilateral action” or land seizures, became a key factor of confrontation in the early sixties between the PKI and the armed forces who supported Muslim landowners. This conflict eventually contributed to the banning of the PKI by the military and to killings of hundreds of thousands of leftists after a coup attempt in late 1965.

There are other good reasons for Indonesians to ignore the registration of even registrable interests in land in Indonesia. First, under the BAL it is not mandatory to register land except upon transfer and, even then, failure to
register does not render the transfer invalid.\(^3^1\) Second, although the regulations made under the BAL provide for a mechanism by which land interests may be determined prior to registration through village committees made up of local officials, these committees include government appointed administrators. They do not include local adat leaders such as the ketua adat, who in most adat communities is the elder or group of elders authorized to arbitrate adat disputes. In other words, while the BAL purported to follow adat principles, it effectively excluded adat processes which are arguably the essence of adat.\(^3^2\)

While the content of adat may be fluid and dynamic, the procedures and methods for determining content are more stable. Universal to all adat laws are institutional means of consensual and collective decision-making, the essential agents that fix the balance of the equilibrium that is the ultimate aim of adat. The substance of adat rights at any given moment are of relatively less importance than the structures and procedures that define and implement them.\(^3^3\) Yet it is precisely these processes that are excluded by the system created by the BAL. That system relies instead on imposed decision-making systems that are part of a corporatist modernist state’s bureaucracy, and which are therefore beholden to the government of that state for authority. Why register and submit to this alien and famously unreliable system?

The other disincentive to registration is, of course, the complexity and cost of the process. Despite the PRONA project, registration remains notoriously slow, Kafkaesque in its intricacy, and is commonly exploited by corrupt and pettifogging officials. Registration of agricultural land, for example, will even require the signature of a regional governor. The peasant conveying land to a neighbour will thus be obliged to obtain the written consent of the highest authority in the relevant province. In these circumstances, registration of adat land can involve many years, and expenses, both legitimate and illegitimate, which commonly consume much of the value of the transaction. The author has witnessed cases where adat landholders have simply abandoned sale of their land when the purchaser insists on registration.

The quite rational result is, as mentioned, that most transactions are not registered and most urban and rural land in Indonesia therefore remains subject to formally unverifiable adat claims. In turn, the predictable consequence of this is that land disputes are common, either because there is

\(^3^1\) **Government Regulation No.** 10 (1961). See Gautama & Hornick, supra note 19, at 92-100; Fitzpatrick, supra note 6, at 184.

\(^3^2\) Fitzpatrick, supra note 6.

\(^3^3\) Hooker, supra note 4, at 28.
no documentary proof of the interest claimed, or because fraudulent certificates are issued. Similarly, "unlawful" occupancy is rife, especially in newly settled areas where no adat authority has been established or in urbanising areas where adat authority has broken down. Again, although regional governors have the power to issue licenses to such occupiers, this system has been exploited by the corrupt and by unscrupulous developers with financial or political clout.

Most importantly, perhaps, the chaotic state of land law in Indonesia and the widespread failure of adat landholders to register their interests means that developers tend to ignore the title system where possible and rely instead on the government's willingness to compulsorily acquire land. In this way, investors can skirt around the whole problem of establishing title to land. This occurs in virtually all development projects.

The irony, then, is that legislation that was intended to deliver certainty to land title has in fact so confused matters that those it was intended to assist, Indonesians with interests in land, are more vulnerable than they were before the statute. Sutan Takdir Alisjahbana has argued that this was typical of attempts to create national laws based on adat in the Guided Democracy period. He saw the reliance on vague notions of adat as guiding principles for statutes that, in fact, often worked to eradicate or complicate adat, as leading inevitably to:

... a hopelessly confused and tangled impasse. All clearly defined goals were lost sight of; and any rational understanding of the problems of law, as faced by Indonesians in the twentieth century, completely vanished.

A second irony is that the state has reacted to the chaos its "reform" has generated by helping its supporters circumvent the land laws it has established. To repeat a common Indonesian joke, Indonesia has become subject to the "law of the rulers" rather than the rule of law, and this is nowhere more apparent than in the area of land use. It is here where executive fiat and ad hoc administrative decision-making has more or less replaced the statutory system. Why then has the Indonesian government proved so willing to subvert its own legislative scheme?

34 Basic Law No. 1 (1961); Decree of the Minister of Internal Affairs, No. 38 (1981).
35 Fitzpatrick, supra note 6, at 199.
36 ALISJAHBANA, supra note 10, at 74.
V. LEGITIMACY AND ‘DEVELOPMENT’ AS POLICY IMPERATIVE

The New Order governments of both Presidents Suharto and Habibie regard *adat* as inherently incompatible with the demands of economic development. More particularly, they see the existence of multiple and diverse land law *adats* as a disincentive to the foreign investment which funds Indonesia’s spectacular economic growth. In 1997 this had reached seven percent, and average annual income had climbed to US$1,140.00 per capita nation-wide and was four times higher in the Jakarta region. The so-called “Asian Contagion”—the currency and stock collapses in Thailand, South Korea, and Malaysia that forced the Rupiah to fall to only twenty-five percent of its former value in early 1998, and necessitated intervention by the International Monetary Fund—has now cast doubt on the long-term prospects for Indonesian development. Foreign investors have lost confidence in Indonesia as a destination for their capital.

It nonetheless remains true that, for most of the ‘nineties, Indonesia enjoyed spectacular economic growth and this was fueled in the last REPELITA, or Five Year Plan, by foreign investment totaling around US$400 billion. The current REPELITA is based on the now unlikely expectation that private investors will contribute up to seventy percent of Indonesia’s planned infrastructure investment. Foreign business has been important not only as a source of finance but also as a source of markets for Indonesia’s developing manufacturing sector. In fact, Indonesia has become so reliant on foreign markets that threats by the United States since 1991 to withdraw trade preferences for Indonesia under its Generalised System of Preferences (GSP) put at stake about 14.8% of Indonesia’s exports.

Foreign business’s central role for Indonesia’s continued development means that high levels of uninterrupted foreign investment are also essential to maintaining the New Order regime’s political legitimacy. In ideological
terms, the New Order tied its legitimacy to delivering ever-increasing prosperity to Indonesians. Its rhetoric was laden with an aggressively promoted ideology of pembangunan, or "development," which makes economic growth the sine qua non of political orthodoxy. Suharto frequently referred to his New Order government (born in 1965 and no longer in power) as the "Development Order," peppering public statements with stress on the need for orderly (tertib) and stable (stabil) development to realise progress (kemajuan) and prosperity (kesejahteraan). In other words, security and government authority are equated with economic growth and increased personal wealth.

The Indonesian people's apparent acceptance of the rapacious self-enrichment of the governing elite and their oppressive method of government has been a form of Faustian bargain. The evils of oppressive government are more tolerable when the benefits of economic growth, however limited, are tangible in everyday life, as they had been for at least the last two decades. The importance of this unspoken political arrangement was demonstrated clearly by the speed with which Indonesian leaders began to call for Suharto's resignation (something previously unheard of in Indonesian public life) once the Rupiah fell, the economy seemed to be foundering, and Suharto's side of the deal began to unravel.

In this context, the common criticism made by foreign investors that the uncertainty and complexity of adat land law is an obstacle to development has been a major concern to the Indonesian government, particularly regarding investors linked to major resources, tourism, or construction projects. Legal certainty and transparency are generally of minor interest in a system notorious for a suborned judiciary and widespread corruption. They become a priority only when they are seen as impeding major investment projects and thus threatening the economic policies that underpin the legitimacy of the government and funds the personal wealth of its elite.

The government has explicitly linked the political legitimacy of the ruling military-business complex crafted President Suharto, a billionaire retired General, on the one hand, with economic development, and the eventual removal of adat as a means of regulating land use, on the other. The controversy surrounding the government’s appropriation of land for its Taman Mini project is a good case study. Taman Mini is a huge theme-park outside

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43 For a detailed analysis of the linguistic implications of the rhetoric of development, see Virginia Matheson Hooker, New Order Language in Context, in CULTURE & SOCIETY IN NEW ORDER INDONESIA 272-93 (Virginia Matheson Hooker ed., 1993).

44 For example, Megawati Sukarnoputri, former leader of the Indonesian Democratic Party and daughter of Sukarno, Indonesia's first President; and Islamic leaders, Abdurachman Wahid (Nahdlatul Ulama) and Amien Rais (Muhammadiyah); and even Harmoko, the Speaker of the Parliament.
Jakarta showcasing the diversity of Indonesia’s ethnic groups in collections of ersatz adat buildings and arts and crafts. It was intended as tangible evidence of a prosperous, urban middle-class society and resembles a kitschy, nationalist Disneyland with an expensive Imax cinema, trains, pedal-boats and cable cars. Here museums house remnants of the adat cultures that have been, or, it is hoped, soon will be, abandoned for global-style modern living. Taman Mini was a pet project of the former President Suharto and his wife, and the government pushed through the compulsory acquisition of land, ironically held by local peasants under adat title. The project went ahead despite widespread criticism of the acquisitions, the low level of compensation paid, and the need for such a park. Suharto’s response was clear enough:

What was their real goal? We know what it is, and it is not the Miniature project. Their real goal, in the short term, is to discredit the government and President. And in the long run, they want to kick the armed forces out of executive activities and eliminate the dual function of the armed forces.\(^4^5\)

VI. WHY THE LAND ADMINISTRATION PROJECT IS MISCONCEIVED

As mentioned, the ambitious Land Administration Project is designed to pave the way for the replacement throughout the nation of informal, unregistered adat land with registered title. The project will begin by registering title in Java, Bali and Sumatra, the more urbanised and densely settled islands in Indonesia. Areas will be targeted at the Local Government Level II (Kotamadya/Kabupaten) on the basis of expected growth.\(^4^6\) Attempts will also be made to survey some areas by air.

The problems the LAP faces are immense. For example, the choice of more densely settled areas as the focus of the preliminary stages of the registration project is inherently problematic. These are areas where it could be expected that hak ulayat, the most problematic form of adat title, is least likely to be widespread. Indeed, some commentators argue that hak ulayat is virtually extinct in much of Java and Bali.\(^4^7\) This means that the LAP pilot project will not be dealing with the complex conditions that prevail in more

\(^{45}\) Available in Timothy Lindsey, Concrete Ideology: Taste, Tradition and the Javanese Past in New Order Public Space, in CULTURE & SOCIETY IN NEW ORDER INDONESIA, supra note 43, at 166, 172. This article provides a detailed analysis of aspects of the Taman Mini project.

\(^{46}\) Haverfield, supra, note 1.

\(^{47}\) See Fitzpatrick, supra note 6, at 182.
remote, often-unsurveyed areas. Accordingly, the pilot program is hardly a pilot. It may largely avoid the very issues that will ultimately test its worth and that must be effectively resolved if land use in Indonesia is to be reformed.

If the project does encounter adat land, for example in Sumatra, it will face different but equally significant problems. It is understood that the project will aim to record unregistered adat interests in these areas, including formally unregistrable hak ulayat interests—indeed, the project would be largely pointless were this not the case. As mentioned, however, records of adat ownership of land are often oral and mythic or magico-religious in nature. They are therefore not easily understood or recorded, no matter how well-meaning the investigator. Further, even if community records of communal title are located and understood, they may not fully detail interests in hak ulayat lands. These interests are generally not clearly defined or universally agreed upon, even among the communities that occupy the lands in dispute. The problems are therefore as much anthropological and ethnographic as they are cadastral and legal. The likelihood that the project can produce an accurate survey and listing of adat interests without substantial inaccuracies and injustices, even in the limited pilot areas, are therefore remote. It can also be expected that these problems will be aggravated by the deep-seated corruption endemic in the bureaucratic administration of land in Indonesia, particularly at the village level where those affected are relatively powerless.

The problems the LAP faces reflect broader problems in contemporary Indonesian society. One is the tension between government-backed “developmentalism” and rural communities. The vast Indonesian hinterland has benefited only marginally from Indonesia’s spectacular economic success. Rural resentment and poverty tends to politicise land issues, making them a lightning rod for dissent.

Likewise, major resources projects are invariably linked to members of the New Order elite. The New Order has a history of pushing through major projects to the benefit of the elite and to the detriment of local adat communities and their land claims. Notable examples of this tendency include the Kedung Ombo dam in Java, the Freeport mine in Irian Jaya, the Taman Mini theme park in Jakarta, and the Tanah Lot condominium project in Bali, all of which involved direct disputes between central authorities and local communities with adat entitlements. These disputes have turned land rights and, in particular, hak ulayat rights into volatile political issues.

See id. at 199-202 (giving details of the Kedung Ombo case).
This politicising of land disputes has linked rural grievances to popular criticism of the Indonesian legal system and, more particularly, to the corruption and cronyism with which the current government is increasingly identified. In part, this is a consequence of Article 11 of Basic Law No. 14 of 1970, which authorised the Minister of Justice to determine judicial appointment, promotion, salary, and dismissal. The effect of Article 11 is that judges are politically dependent; they do not enjoy any guarantee of tenure but effectively have the status and job security of public servants. Likewise, although the Chief Justice is no longer formally a minister and member of cabinet, the tradition of close cooperation and consultation between the executive and the Supreme Court bench continues. These factors have contributed to the so-called “two-hat” controversy, whereby judges are seen as owing conflicting duties to the government and the judiciary, at the cost of their impartiality. In deciding cases, judges are in effect subordinate to the Minister rather than the law, with predictable results for the integrity of their decisions. This institutionalised political collusion is matched by widespread bribery (a reflection of low judicial salaries) and the low status afforded judges since the Guided Democracy period began. With the exception of some judges of the Administrative Courts, the judicial system is seen as incapable of providing just resolutions of land disputes.

The dysfunction of the legal system means that land-related litigation often becomes a political circus, as in the Kedung Ombo case, with peasants confronting the government with radical and dissenting critiques adopted from urban political opposition groups. Alternatively, it can mean that the frustrated rural poor choose the traditional rural means of expressing dissent: rebellion and rioting. This was seen in 1996 and 1997 in bloody land-related racial violence between Dayaks and Madurese immigrants in Kalimantan.

Since independence from the Dutch in 1945 and, more particularly, since the transfer of sovereignty in 1949, the Indonesian government has had a long tradition of what might be termed “social engineering.” Positive examples include the universal adoption of a national language, bahasa Indonesia, the virtual elimination of illiteracy, and a spectacularly successful

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49 As was the case in the Guided Democracy period.
50 See Mahkamah Ali Yang Dipreteli, TEMPO, July 18, 1992 (former Chief Justice Ali Said highly critical of government measures limiting judicial independence in 1992). Other criticisms have been voiced by other judges of the Mahkamah Agung, including Adi Andojo (discussed below), Bismar Siregar and Muhammad Djaelani. See Courting Corruption, INSIDE INDONESIA, IRIP News Service (Jan.-March 1997).
52 See Fitzpatrick, supra note 6, at 199-202 (giving details of the Kedung Ombo case).
family-planning campaign based on the slogan “Two children are enough.” More controversial examples include the transmigration of Javanese and Madurese families to less populated outer regions such as Irian Jaya and Sumatra, a programme which has given rise to long-standing ethnic and religious divisions and fuels social unrest in target rural areas such as Kalimantan and Timor. Likewise, the extrajudicial eviction of slum dwellers from kampung (“village”) areas in inner Jakarta to make way for housing and shopping complexes has caused deep resentment in poor sectors of urban society. Indonesia’s institutionalised ideological indoctrination programme, which equates “development” and the ruling Javanese elite’s political vehicle GOLKAR with the state ideology of Pancasila and “Indonesian-ness,” is also a source of subtle but growing resentment in marginalised groups throughout Indonesian society.

However good the intentions of the World Bank, the LAP should be viewed in the context of these elaborate attempts at social engineering. The government’s express policy and the implicit motivation of the project is to “unify” Indonesian land law by reducing and ultimately removing any role for adat in land titling. This is an attack on the viability of adat communities through a re-invention of “traditional” Indonesian values that serve the state’s ends. The state has the specific intention that the communities and systems that originally developed those values will be discarded as impediments to “development.” These aspects of the project are socially destructive, unnecessary, and regressive, given the slow and often painful movement back towards a recognition of adat-style land interests in developed countries.

Indonesia’s rural community has a long history of resistance to reform and an even longer history of political instability and potential radicalism. There can be no doubt that the land titling project will eventually give rise to disputes, if not in the course of implementing the project pilot, then certainly in the future when information obtained through the pilot is actually tested. These disputes will take legal form and could translate quickly into political, cultural, and, ultimately, social conflicts of major significance for the Indonesian state. The growing gulf between the more affluent and “modernised” urban population and the increasingly impoverished “traditional” rural masses is at the heart of differences over how to deal with

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53 Dua anak cukup.
54 Golongan Karya, literally, “Functional Group,” GOLKAR was, under Suharto, the government’s political party although it was officially a social grouping rather than a political party. This distinction allowed it to avoid the prohibitions on campaigning between elections, etc., that restricted activities of the only two legal political parties, the Partai Demokrasi Indonesia, the Indonesian Democratic Party (Christian and nationalist) and the Partai Persatuan Pembangunan, the United Development Party (Muslim).
land and, more particularly, adat title. The former are backed by the state, as is usually the case when "development" is involved. In Indonesia, "development" has generally been read as code for the political and economic dominance of the Presidential family and their circle. In this sense, disputes over adat land are debates about the future of the Indonesian state itself and the value of current policies. A sense of resentment and frustration in land disputes has made them a tinderbox in a time of political tension.

The Land Administration Project is fundamentally based on yet another of the many bitter ironies that typify the present state of Indonesian land law. The World Bank sees the project as empowering poor, rural communities by giving them clearly defined title. With their interests protected, rural communities will be better able to obtain financing and ultimately claim a role in the sustainable development of rural resources—so-called "defensive modernization." Of course, the project, if it extends into hak ulayat areas, will achieve precisely the opposite end. Communal title will be displaced and new individual titles will be created. In the process, the project will disenfranchise precisely those whom it is intended to help and at the same time re-invent land interests in Indonesia in a fashion far more compatible with government development policy.

The cynic might say that this would be an outcome that would be perfectly satisfactory to the World Bank, given its natural interest in ensuring its loans to Indonesia are repaid. In fairness, however, it should be acknowledged that the Bank has urged recognition of hak ulayat in draft legislation it has prepared. The Indonesian government has so far rejected its proposals. The test for the World Bank will be its reaction to the government's position.

VII. CONCLUSION

Government attempts to obliterate adat in Indonesia have largely failed. It is unlikely that Indonesia’s predominant rural sector, where adat is most influential, will be significantly reduced in size in the near future. The economic base that underlies the social and cultural superstructure of adat will persist far into the next century and perhaps the one after. It is also likely that the current diversity of cultures among Indonesia’s rural communities, while perhaps waning, will remain largely intact. Indonesia in twenty years will have much larger cities and the majority of Indonesians will live in them.

56 Haverfield, supra, note 1.
Nonetheless, if current population growth predictions are accurate, by 2020 the lifestyle of well in excess of a hundred million Indonesians will still be largely regulated by *adat*.

In these circumstances, is the pluralism, dynamism—even the obscurity (to outsiders)—of *adat* really such a mischief? Indonesia’s ancient, complex, and sophisticated system of *adat* land law is a far from inadequate solution for one of the most ethnically and culturally plural nations on earth. The technocrats of New Order “developmentalism” are attempting to force the square surveyor’s peg into the ancient and holistic “round” hole of *tanah air*, Indonesia’s traditional land and water. Are they manipulating the good intentions of international aid donors in doing so? Either way, the result has been a dysfunctional land law regime.

One solution is for the World Bank to take its attempts to obtain the recognition of *hak ulayat* one step further. As a priority, it should halt funding for the Land Administration Project until the Indonesian government agrees to formally recognise *hak ulayat* as a registrable interest. Once this is achieved, the Bank should also shift the focus of the project to exploring means for accurately assessing and recording *hak ulayat* interests through registration.