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TRANSFORMATION OF LAND RIGHTS IN INDONESIA: A MIXED PRIVATE AND PUBLIC LAW MODEL

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Abstract: Transformation of land rights from colonial to post-colonial systems in many developing countries was primarily undertaken by two different models: firstly, it was entirely governed by private law to allow voluntary transformation, and secondly, it was under public law where the state placed a tight administrative control during the transformation process. Both models had benefits and limitations, but they generally failed to develop modern property rights systems. A third regime of a mixed private and public law model has been promoted to create balance between private and public orders experienced within Indonesia. The mixed private and public law transformation creates socio-legal deficiencies causing land rights uncertainty and an entanglement of private and public orders. To some extent this model provides a rigorous mechanism to control the manipulation of land by non-state actors, but it also challenges the development of equitable land systems as the governance capacity is limited. The deficiencies of the mixed private and public law model have primarily been caused by the limited governance capacity and a weak legal framework led by inconsistency and arbitrariness. This article examines the mechanism of conversion of land rights and highlights the causes and implications of the land rights transformation deficiencies in the civil law country of Indonesia.

I. INTRODUCTION

During the post-colonial era, land rights in Indonesia underwent a series of transformative changes to encourage homogeneity of land tenure systems by setting the conversion provisions of the Basic Agrarian Law 1960 (“BAL”). This transformation aimed to avoid creating a legal vacuum as a result of the invalidation of colonial land laws, while at the same time ensuring the protection of existing property rights. The transformation also aimed to protect the existing landholder interests from arbitrary and unjust acts, revocation or land grabbing, and to provide measures against the exploitation and manipulation of land by various interest groups.¹ However, implementation of these transformative changes has been complicated by a weak legal framework and limited bureaucratic capacity.² This shows that a

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¹ See Undang-Undang No. 5, Th. 1960 Peraturan Dasar Pokok-Pokok Agraria, explanatory memorandum, II(6) [Law No. 5, Year 1960 Basic Agrarian Law] (Sept. 24, 1960) [hereinafter Basic Agrarian Law].

² Many developing countries have experienced bureaucratic inertia in promoting law reform. See Jan Michiel Otto, *Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors*, in

transformation of land rights is not simply a process of converting old property rights into new statutory rights under private law, but also involves strong administrative controls to protect against the manipulation and accumulation of land by non-state actors. Hence, the transformation of land rights involves a complex web of private and public law.³

The process of transforming land rights resulted in several problems due to unreliable procedural mechanisms, including: tight administrative controls; an inadequate legal framework; and weak governance leading to arbitrary decisions; inappropriate processes, uncertainty, and discrimination. These deficiencies resulted in land rights extinguishment, state appropriation of land at the end of conversion periods, too much administrative discretion over the validity of land rights conversion, and the incompatibility of individual based statutory rights with the more communal *adat* system.⁴

This article discusses the effects of the conversion mechanism to achieve a unified tenure system under BAL 1960 and further elaborates on the deficiencies of those mechanisms. The transformation of land rights is classified into three different categories based on their differing natures and backgrounds. This includes: Western land rights,⁵ state land, and *adat* land. A variety of legal mechanisms suggest this tripartite division. First, there are statutory rights converted from old rights systems. Second, there are converted land rights not yet registered as statutory rights. Third, there are unconverted land rights. This article elaborates on the transformation process and the deficiencies of the legal framework to adequately facilitate this process.

IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 23, 23 (Jianfu Chen et al. eds., 2002). See also ANN SEIDMAN & ROBERT B. SEIDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS 45-46 (St. Martin's Press 1994).

³ A similar process, where public law greatly intervened in the conversion process from communal tenure systems into individual systems, has also been found in many developing countries. For Indonesian cases, see Daniel Fitzpatrick, *Private Law and Public Power: Tangled Threads in Indonesian Land Regulation*, in *INDONESIAN TRANSITIONS* 75 (Henk Schulte Nordholt & Ireen Hoogenboom eds., 2006). For Latin American references, see Steven E. Hendrix, *Property Law Innovation in Latin America with Recommendations*, 18 B.C. INT'L & COMP. L. REV. 1 (1995). For African countries references, see PATRICK MCAUSLAN, BRINGING THE LAW BACK IN 59 (2003).

⁴ *Adat law* is conceptually defined as "the collection of operative rules of behavior which on the one hand are enforced by sanctions (hence "law") and on the other hand are un-codified (hence "*adat*"). See CORNELIUS VAN VOLLENHOVEN AND J. F. HOLLEMAN, VAN VOLLENHOVEN ON *INDONESIAN ADAT LAW: SELECTIONS FROM HET ADATRECHT VAN NEDERLANDSCH INDIE* 7 (1981).

⁵ A Western land right hereinafter is land right granted by the Dutch colonial government during the colonial period based on *Agrarische Wet* [Agrarian Law] (1870).

II. TRANSFORMATION OF LAND RIGHTS MECHANISMS

The transformation of land rights in the postcolonial era generally involves an action to transform, convert, or alter existing land rights into statutory rights. It is commonly done through two different processes based on two models: the private law model and the state control model.⁶ Both models have their own limitations and advantages, but the private model leads to greater economic benefits due to lower transactional costs than those of the state control.⁷ However, state control might enable greater protection against the manipulation of land by non-state actors, while protecting the interests of the greater community. Regardless of the model chosen, good governance appears to be an important precondition to ensuring legitimacy, accountability, equity, transparency, and efficiency leading to certainty and predictability of tenure.⁸

The private law model simply converts existing property rights into statutory rights with limited intervention from government. This transformation is commonly done through a substitution process, land titling, or a combination of the two.⁹ This model was illustrated in McAuslan's study of some postcolonial Anglo-African countries that transformed communal land into individual land.¹⁰ The primary aim of this exercise was to record existing customary rights and interests in land and change them into *equivalent* common law rights and interests, register them, and provide a legal framework for the operation of a market with these newly minted rights and interests.¹¹ This process incurs low transactional costs in which the transformation involves a simple mechanism without bureaucratic intervention. The transactional cost includes bureaucratic-

⁶ These two models of transformation are derived from the underlying contested property rights systems between Lockean natural law theory and Hobbesian positivist theory.

⁷ The evolution of property rights from communal to private property rights has generally been driven by externalities, such as an increased economic value of land and the need for more efficiency. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1963).

⁸ See Julio Faundez, *Legal Technical Assistance*, in GOOD GOVERNMENT AND LAW 1, 6-7 (Julio Faundez ed., St. Martin's Press 1997). See also Patrick McAuslan, *Law, Governance and the Development of the Market: Practical Problems and Possible Solutions*, in GOOD GOVERNMENT AND LAW 25, 34 (Julio Faundez ed., St. Martin's Press 1997). To guarantee good governance, public participation and representation needs to be guaranteed. See ROBERT B. SEIDMAN, STATE, LAW AND DEVELOPMENT 424-25 (1978).

⁹ The transformation of land rights simply converted the customary communal system into equivalent statutory rights through legislative fiat, a land titling program or both. For references in English colonies, see MCAUSLAN, *supra* note 3, at 59-83. For Latin American references on promoting land titling, see Hendrix, *supra* note 3, at 1.

¹⁰ See MCAUSLAN, *supra* note 3, at 72.

¹¹ See *id.*

procedural costs, processing costs and other additional costs such as bribery, communication, transportation, etc.

The process of conversion of communal land via the private law model is quite similar to the process of land titling in Latin America, which converted communal land into an individual property system.¹² Similar to this substitution model, the transformation of land rights in other Anglo-African countries promoted the *opening up program* for the population to voluntarily obtain statutory land rights.¹³ These models aimed to formalise the customary system with limited state intervention. Transformation of land rights was entirely governed by private law with limited intervention from the State.

In contrast, the state control model promoted mechanisms to integrate existing land rights into postcolonial statutory rights. In general, this transformation model utilized public law systems to convert the existing private property right, and to impose state control for the purpose of protection against exploitation and manipulation of land by non-state actors.¹⁴ This state control model was implemented through nationalization, or through other similar means which appropriated land for social purposes, commonly adopting measures from the populist property regime “land to tiller.”¹⁵

Many developing countries adopt a combination of both private law and state control models for transforming colonial land rights. In many cases, Fitzpatrick argued that the combination of these models has caused ambiguity, the entanglement of private and public law systems, and has resulted in high transaction costs that have led to disputes and conflict.¹⁶

As most developing countries exhibit strong communal tenure systems, the transformation also often attempts to convert communal tenure into individual tenure, which is expected to produce more efficiency.¹⁷ The

¹² See Steven E. Hendrix, *The Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. LAW 183, 185 (1995).

¹³ See MCAUSLAN, *supra* note 3, at 73 (2003).

¹⁴ This is primarily based on the Socialist tenure system and Hobbesian positivist theory to allow state intervention over the land tenure system.

¹⁵ See Hendrix, *supra* note 3, at 1. The concept of “land to tiller” is commonly associated with the distribution of land to the farmers.

¹⁶ Fitzpatrick, a prominent scholar researching Indonesian land law in contemporary Indonesia, found that the importance of complex interactions between *adat*, state, and development, led to multiple systems of governing land law in Indonesia. See Fitzpatrick, *supra* note 3, at 96.

¹⁷ The first World Bank land reform policy in mid 1970s focused on the abandonment of the communal tenure system. However it is currently considering the feasibility of various tenure systems. See Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principle, Experience and Future Challenges*, 14 THE WORLD BANK RES. OBSERVER 247, 248 (1999). See also Hendrix, *supra* note 3, at 2-3.

transformation of land rights posed revolutionary changes between those two extreme socio-legal realities. Transformation of land rights served as an instrument in moving from a pluralistic into a unified system, and from communal into individual tenure.

Similarly, Indonesia followed the mix of private and public control models by allowing administrative control to intervene in the transformation process. This mechanism is complex, as it relies not only on private law systems to convert the existing land rights into new statutory rights, but also uses public law systems to place tight administrative controls against monopolization and manipulation by non-state actors. In many cases, however, state control has benefited the bureaucratic bourgeois rather than society at large.¹⁸ This appears to be the experience of Indonesia, which has failed to protect the interests in land for the entire community, especially vulnerable populations.

Transformation of land rights in Indonesia created a complex system which poses major questions about the reliability of amalgamating the contesting principles of state control of land known as *Hak Menguasai Negara (HMN)* and *adat* communal rights, as well as inadequate administrative mechanisms to guarantee fair, equitable and transparent outcomes. Administrative controls — including proper public announcement, community participation, the protection of occupier's interest, and thorough examination of evidence to protect these rights — are often bypassed.

The following section discusses the general transformation methods of land rights using two different approaches in Indonesia. The first approach relates to state appropriation, such as liquidation, revocation or nationalization of Western property during the revolutionary period. The second approach involves conversion mechanisms under the BAL 1960 comprising two different legal actions: converting the existing land rights into equivalent statutory rights and conferring new statutory rights.

A. *State Action to Transform Western Land Rights*

During the revolutionary period, a series of state actions to confiscate Western property rights were conducted under various regulations. These regulations had differing purposes, such as to prevent the return of the Dutch colonial government, to persuade *adat* communities to support a new

¹⁸ This incident is also found in other developing regions such as Asia, Africa and Latin America. See SEIDMAN, *supra* note 8, at 402-4.

Indonesian state, and to obtain financial support for the revolution.¹⁹ Following the state appropriation of Western properties during the revolutionary period (1945-1950), the nationalization of Western properties and the declaration of abandoned Western property as property of the state occurred in the late 1950's. State appropriation was accomplished by providing compensation to a rights holder. However, this transformation did not take into account whether the state was capable of implementing such a policy in times of political uncertainty, particularly where land records were not available and a land administration system had not yet been established in most cities.²⁰ The following part elaborates upon the deficiencies that emerged from various state actions in appropriating Western properties.

State appropriation started with the first agrarian reform initiative in 1946.²¹ This involved the liquidation of private estates (*tanah partikelir*), autonomous regions (*tanah swapraja*), and conversion rights (*tanah konversi*) granted by the colonial government.²² This land became state land and was distributed to occupiers, and thus returned to native ownership (*hak milik adat*) under the *adat* system.²³ This policy attempted to end colonial influence in villages, to support the new Indonesian nation, and to reduce local resistance and insurgency.²⁴ The transformation of other existing Western land rights, under Law No. 24 of 1954,²⁵ was undertaken by the Ministry of Agrarian Affairs. This law aimed to limit and protect against illegal transfers of Western land rights and to avoid the occupation of abandoned Western lands by a small number of people.²⁶

¹⁹ See PRAMOEDYA ANANTA TOER, KOESALAH SOEBAGJO TOER & EDIATI KAMIL, *KRONIK REVOLUSI INDONESIA* Book IV (2003).

²⁰ The formal land administration in most districts was formally established in the late 1969. However, in some areas such as Papua and Yogyakarta, the implementation of the Basic Agrarian Law was delayed until 1970's. See Basic Agrarian Law, *supra* note 1, at third (*ketiga*).

²¹ The state appropriation was based on Law No. 13 of 1946 on Liquidation of Autonomous Village (*Desa Perdikan*). See SUDARGO GAUTAMA & BOEDI HARSONO, *THE SURVEY OF INDONESIAN ECONOMIC LAW: AGRARIAN LAW* (1972).

²² *Id.*

²³ *Id.*

²⁴ During the revolutionary period, 1945 - 1948, the new Indonesian government attempted to unify local factions. To gain greater support from local military and community leaders they tried to abolish Dutch influence in rural areas. See PRAMOEDYA ANANTA TOER, KOESALAH SOEBAGJO TOER & EDIATI KAMIL, *supra* note 19, Book IV 740 (2003).

²⁵ See Undang-Undang No. 24, Th. 1954, Penetapan Undang Undang Darurat Tentang Pemindahan Hak Tanah Tanah Dan Barang Barang Tetap Yang Lainnya Yang Bertakluk Kepada Hukum Eropah (Undang Undang Darurat No. 1 Tahun 1952) Sebagai Undang Undang [Law No. 24, Year 1954 on the Transfer of Western Land Rights and Unmovable Property] (Aug. 2, 1954) [hereinafter Law on the Transfer of Western Land Rights].

²⁶ *See id.*

Following the first agrarian reform, the Indonesian government continued to nationalize Western properties. This was due to the failure of Western companies to obtain restitution of existing Western plantations as a result of community occupation. This type of occupation created major impediments in the process of nationalizing Western properties. Nationalization also created uncertainty regarding the legal status of Western plantations when the plantation land was declared state land in 1980.²⁷

State appropriation was also applied to abandoned Western property.²⁸ The abandoned properties were declared property of the state and the occupier needed to satisfy prescribed requirements in order to be granted new statutory rights. This mechanism was problematic where there was a lack of reliable land records in the Agrarian Office due to their destruction during the revolution. It was almost impossible to conduct a thorough assessment of the abandoned Western property due to a lack of evidence and reliable land records.

Under *adat* practices, the occupation of abandoned Western property by Indonesians could be legitimated by the issuance of an *adat* land declaration (*Surat Keterangan Tanah*) by the Head of Village. This abandoned Western land eventually became *adat* land. This is one of the alleged processes used to conceal the nature of Western property, thus avoiding potential disputes and revocation by the state.

Complications in state appropriation of Western properties arose not only from a weak legal framework, but also from an inadequate institutional capacity to attain fairness and transparency. This was due to limited available land records and the low quality of human resources, and undermined the validity of new statutory rights granted by the state.²⁹ The following part outlines the second mechanism of transformation that created confusion and misunderstandings regarding the process of land right conversion.

B. *The Conversion Principle and Mechanism*

Unlike the first transformation process that was entirely governed by public law, the following conversion mechanism intertwines private law and administrative control. The conversion mechanism primarily aims to

²⁷ See *infra* Part III.A. (discussing the transformation of Western land rights).

²⁸ See Peraturan Pemerintah Pengganti Undang-Undang No. 3, Th. 1960 Penguasaan Benda-Benda Tetap Milik Perseorangan Warganegara Belanda, [Regulation of the Government of the Republic of Indonesia, No. 3, Year 1960 on the Government Regulation on the State Acquisition of Abandoned Private Dutch Properties] [hereinafter Regulation on the Acquisition of Abandoned Dutch Properties].

²⁹ See *infra* Part III. (discussing the transformation of Western land rights).

convert the existing Western land rights owned by either Indonesians or foreigners into statutory rights by providing a transitional period with a maximum of twenty years.³⁰ This conversion, however, requires administrative decisions to extinguish the old land rights, to determine the eligibility of landholders, to set the equivalent criteria for conversion purposes, and to grant new statutory rights. The administrative mechanisms also aim to create controls that limit the manipulation and accumulation of land by non-state actors in order to protect the interest of the whole community.³¹ The conversion process thus involves private law systems and tight administrative controls to secure fair and equitable outcomes. The implementation of this mechanism is, however, ambiguous due to the inadequate legal framework and weak bureaucratic capacity. The inadequacies include imprecise law leading to indeterminacy, impractical requirements, and improper procedural implementation.

The conversion provision of the BAL 1960 provided basic measures for converting existing Western land rights and *adat* land rights. Subsequently several regulations were enacted that elaborated on the criteria and requirements for the conversion process. The criteria were based on similarities between the characteristics and the contents of rights, even though in many cases they were difficult to establish or justify. For example, the nature of ownership varied amongst *adat* systems depending on the extent of community control (*Ulayat* rights) over the *adat* land. Not all *adat* systems have the same level of community control, but nevertheless they all exercise rights equivalent to that of individual ownership (*Hak Milik*) under the BAL 1960. Many other *adat* land rights were also incompatible with the new statutory rights, which have a strong emphasis on individual based land rights.³² In the case of Western land rights, discrepancies exist in the nature of state land (state *eigendom*). During colonial times state *eigendom* was governed by private law; in contrast, state land under the BAL 1960 is governed by public law. These two types of state land are therefore not entirely equal, causing ambiguity during the conversion process.

The determination of conversion criteria depends upon administrative decisions during the assessment of an applicant's proposal for conversion. In particular this is based on two considerations: the nature of existing land rights and the applicant's citizenship. Regarding these two considerations, an administrative decision determines the type of the new statutory right to

³⁰ Basic Agrarian Law, *supra* note 1, art. 55(1).

³¹ *Id.* at explanatory memorandum, II(6).

³² See *infra* Part V. (discussing the transformation of *adat* land).

be granted. This mechanism is very different from either private law or public law models used to transform existing property rights in developing countries. Indeed, many principles of conversion in Indonesia are in conflict and impractical. The following subsections further discuss the conversion principles and processes.

1. *The Recognition of Existing Property Rights*

The recognition of existing property rights is a fundamental principle of the conversion process. The conversion principle relating to Western land rights recognises that any previous rights holder's interest in the land can continue for a maximum of 20 years.³³ If a landholder failed to satisfy the citizenship requirement, the land reverted to the State at the end of the lease, or by September 24, 1980.³⁴ After this transitional period of 20 years passed, a new statutory right was granted to the previous landholder unless the landholder was ineligible or the land was subject to use for development purposes.³⁵

In the case of ex-Western land rights being extinguished for a previous occupier, the new landholder had to pay an allocation fee³⁶ (currently the fee is about five percent of the market price³⁷) and other compulsory fees.³⁸ The new landholder must also pay compensation for any buildings or property on the land to the previous rights holder. If an agreement between the previous rights holder and new landholder could not be reached, the Housing Division of District Government (*Kantor Ururan Perumahan*) mediated between both parties to reach a voluntary agreement.³⁹ Failing this, the *Kantor Urusan Perumahan* has authority to make a final binding decision.⁴⁰

³³ Basic Agrarian Law, *supra* note 1, art. 55(1).

³⁴ *See id.* The enactment of Basic Agrarian Law was in September 24, 1960.

³⁵ Keppres RI No. 32, Th. 1979 Pokok-Pokok Kebijakan Dalam Rangka Pemberian Hak Baru Atas Tanah Asal Konversi Hak-Hak Barat, art. 2, [Presidential Decree No. 32, Th. 1979 on Policy Guidelines on Granting New Statutory Right on Previous Western Right Conversion] (Aug. 8, 1979) [hereinafter Presidential Decree on Guidelines Granting New Statutory Rights].

³⁶ Peraturan Menteri Dalam Negeri No. 5, Th. 1973 Ketentuan-Ketentuan Mengenai Tata Cara Pemberian Hak Atas Tanah, Pasal 5(b)(2) [Ministry of Home Affairs Regulation No. 5, Year 1973 on the Guidelines to Grant Statutory Rights] (June 26, 1973) [hereinafter Regulation on the Guideline to Grant Statutory Rights].

³⁷ Undang-Undang No. 21, Th. 1997 Tentang Bea Perolehan Hak Atas Tanah Dan Bangunan, art. 5, [Law No. 21, Year 1974 on Fees Upon the Grant of Rights on Land and Building] (May 29, 1997).

³⁸ *See* Peraturan Menteri Negara Agraria No. 4, Th. 1998 Tentang Pedoman Penetapan Uang Pemasukan Dalam Pemberian Hak Atas Tanah Negara [Ministry of Land Regulation No. 4, Year 1998 on Compulsory Fee Upon the Grant of Land Rights on State Land] (June 22, 1998).

³⁹ Peraturan Pemerintah R.I. No. 223, Th. 1961 Tentang Pedoman Pelaksanaan Pasal 3 dan Pasal 4 Undang-Undang No. 3 Prp Th. 1960 Tentang Penguasaan Benda-Benda Tetap Milik Perseorangan Warga Negara Belanda, art. 3(2) [Regulation of the Government of the Republic of Indonesia, No. 223, Year 1961

Under the recognition principle underpinning conversion, all existing proprietary rights are legally recognised.⁴¹ This recognition extends to existing secondary rights, security rights, and any other interests in the land. This principle guarantees the continuation of existing property rights for twenty years for Western land rights, but for an unlimited time for *adat* and state land. The implementation of this principle is, however, uncertain under various limitations set up by legislation.

a. *The Compulsory Conversion of Colonial Western Land Rights*

Since the BAL 1960 repealed Book II of the Civil Code in relation to land, which provided the basis of colonial Western land rights, applications for the conversion of Western land rights were required to be made within a six-month to one-year period before 1961.⁴² Western landholders were obliged to report their nationality and land assets to the Agrarian Office. Failure to do so led to invalidation of the land holder's entitlement, and the land reverted to the State at the end of the lease or for the maximum of twenty years, whichever came first.⁴³ However, this provision was uncertain as to whether the extinguishment of existing Western rights was to be followed by compensation, as consistent with the recognition principle.

This compulsory conversion process produced contested outcomes. So far, many Western land rights have not been converted, and the Land Registrars Office has been unable to track these claims due to inadequate land records.⁴⁴ According to the law, as of 1980 all existing Western land rights became state land and any landholder entitlement was no longer valid.⁴⁵ Consequently, any transaction on Western land that had not been converted by 1980 was invalid. As stated above, this provision is ambiguous as to whether the extinguishment requires compensation pursuant to the principle of recognition.⁴⁶ The interpretation of this provision seems to use this time period as the basis for extinguishment, and therefore, any legal transaction involving Western land after 1980 was seen as invalid, regardless

on the Guideline of Transfer of Ownership of Abandoned Private Western Properties] [hereinafter Regulation on the Transfer of Abandoned Western Properties].

⁴⁰ *Id.*

⁴¹ Basic Agrarian Law, *supra* note 1, transitional provision, art. 55(1), (2).

⁴² See The Department of Agrarian Affairs Public Announcement (June. 1, 1961) (on file with author).

⁴³ Basic Agrarian Law, *supra* note 1, art. 55(1).

⁴⁴ Interview with the staff of the National Land Agency, in East Java Province, Indonesia, (Dec. 4, 2004) (on file with author).

⁴⁵ Presidential Decree on Guidelines Granting New Statutory Rights, *supra* note 35, art. 1.

⁴⁶ *Id.* art. 3.

of whether the compensation had been paid or not. This imprecision has caused competing interests between occupiers and post-1980 rights holders.⁴⁷

b. The Nationality Requirement

In addition to these time limitations, the process of conversion also required confirmation of the landholder's citizenship. Under the BAL 1960, only Indonesian nationals could be granted ownership rights to land.⁴⁸ Other nationals, for example those who held dual citizenships—Indonesian and another nationality—were only entitled to rights of use (*Hak Pakai*), rights of building (*Hak Guna Bangunan (HGB)*) or rights of exploitation (*Hak Guna Usaha (HGU)*) of the land for a maximum of twenty years.⁴⁹ Foreign citizens were only entitled to rights of use.⁵⁰ Foreign citizens who owned statutory rights other than a right of use as a result of conversion or inheritance had to transfer their entitlements to Indonesia by September 24, 1980 or amend their entitlements to only include a right of use. Failing to do this within the time period would extinguish the right.⁵¹

This principle also applied to legal corporations. Only registered Indonesian companies were entitled to various statutory rights, while foreign companies were limited to a right of use.⁵² The citizenship requirement imposed an obligation on foreigners to determine and declare their citizenship status in order to be granted new statutory rights.⁵³

The nationality requirement is arbitrary in that the extinguishment of a foreigner's ownership is done without compensation. This provision is also inconsistent with the first conversion principle relating to recognition of existing property rights and payment of compensation upon appropriation. Apart from these unclear principles on converting Western land, the main principle for transforming *adat* land is the continuation of *adat* land rights

⁴⁷ The competing interests between the occupier who did not register for conversion and the legal owner who was granted statutory rights upon the ex-Western land based on BAL 1960 have been interpreted differently by the court. See *Atin v. Hadiprayitno*, Civil Court No. 48/Pdt/G/1985 (1985); *Istiwaini Sastroatmodjo v. Kasemi B. Sabji*, Civil Court No. 56/Pts.Pdt.G/1978 (1978); *Josomihardjo v. Gitosuwarno*, Civil Court No.12/Pdt./G/1975 (1975).

⁴⁸ Basic Agrarian Law, *supra* note 1, art. 9(1). Only Indonesian nationals are eligible for full rights to land, water and air space.

⁴⁹ *Id.* conversion provision, art. I(3).

⁵⁰ *Id.* art. 42(b).

⁵¹ *Id.* arts. 21(3), 30(2), 36(2).

⁵² *Id.* art. 42.

⁵³ The statutory rights to land include the right of ownership (HM), the right of exploitation (HGU), and the right of building (HGB).

until the conversion can be implemented. This principle is, however, unclear because some *adat* land rights are compulsorily converted into statutory rights as a result of the passing of the BAL 1960.

2. *The Continuation of Adat Land Rights*

The transitional provisions of the BAL 1960 validate existing laws and regulations to the extent they are not contrary to the spirit and ideology of the BAL 1960. Article 58 of the BAL 1960 states that, “[a]s the implementing laws and regulations have not been enacted, both existing written and unwritten laws and regulation on land, water, natural resources and existing rights on land are still valid to the extent they do not contradict the spirit and ideology of this legislation.”⁵⁴ Arguably, under this provision existing *adat* land rights that are consistent with the spirit and ideology of the BAL 1960 are still valid. However, to date no further clarification has been made as to which *adat* institutions are consistent with the spirit and ideology of the BAL 1960. The other relevant provision of the BAL 1960 articulates that the status of *adat* institutions will be determined during the reform of village (*desa*) governments.⁵⁵

The relevant implementing regulation states that the conversion of *adat* land rights is to be done in parallel with the initial land registration program.⁵⁶ According to this regulation, the conversion of *adat* land must wait until the establishment of a land registration office in a designated area. No compulsory conversion or time constraints are applied for conversion of *adat* land. It is a voluntary decision based on the landholder’s proposal. Since the *adat* law serves as the basic agrarian law, the conversion of *adat* land right is arguably also voluntary. However, the conversion provision of the BAL 1960 determines that some *adat* land is converted automatically in law as a result of the legislation.⁵⁷ This inconsistency creates uncertainty

⁵⁴ See Basic Agrarian Law, *supra* note 1, art. 58.

⁵⁵ See *id.* at third (*ketiga*). The village *adat* government reform was undertaken by Law No. 9 of 1979. This legislation did not invalidate *adat* institutions. Therefore *adat* institutions are still valid. Currently, regional autonomy has strengthened local government to re-establish *adat* institutions.

⁵⁶ Peraturan Menteri Pertanian Dan Agraria No. 2, Th. 1962 Tentang Penegasan Konversi Dan Pendaftaran Bekas Hak-Hak Indonesia Atas Tanah, art. 1 [Ministry of Agriculture and Land Regulation No. 2, Year 1962 on Determination of Conversion and Registration of Former Indonesian (*Adat*) Land Rights] (Aug. 1, 1962) [hereinafter Regulation of Conversion and Registration of Former Indonesian (*Adat*) Land Rights]. Due to the unavailability of the Agrarian Offices in all of the districts, the conversion of *adat* land will be conducted after the establishment of agrarian offices.

⁵⁷ Basic Agrarian Law, *supra* note 1, arts. VI, VII.

concerning the status of this converted *adat* land where no land registration has taken place.⁵⁸

The most contested issues of *adat* land conversion relate to the incompatible content and background of communal *adat* land rights with individual statutory rights. To overcome this incompatibility, the government established conversion criteria that could be used for converting *adat* land rights as well as Western land rights.

3. *The Equivalent Criteria of Land Rights*

Unlike colonial Western land rights that are similar to statutory rights, *adat* land rights have very different attributes. The conversion process provides conversion criteria to determine the similarities in the content and attributes of *adat* land rights vis-a-vis new statutory titles. The assessment is based on similarities of the content of land rights and the way the land rights are arranged and used. As statutory titles are mostly adopted from individual based colonial Western land rights, their attributes are ostensibly incompatible with communal *adat* rights. This incompatibility has posed challenges to the effectiveness of the conversion of *adat* land rights.

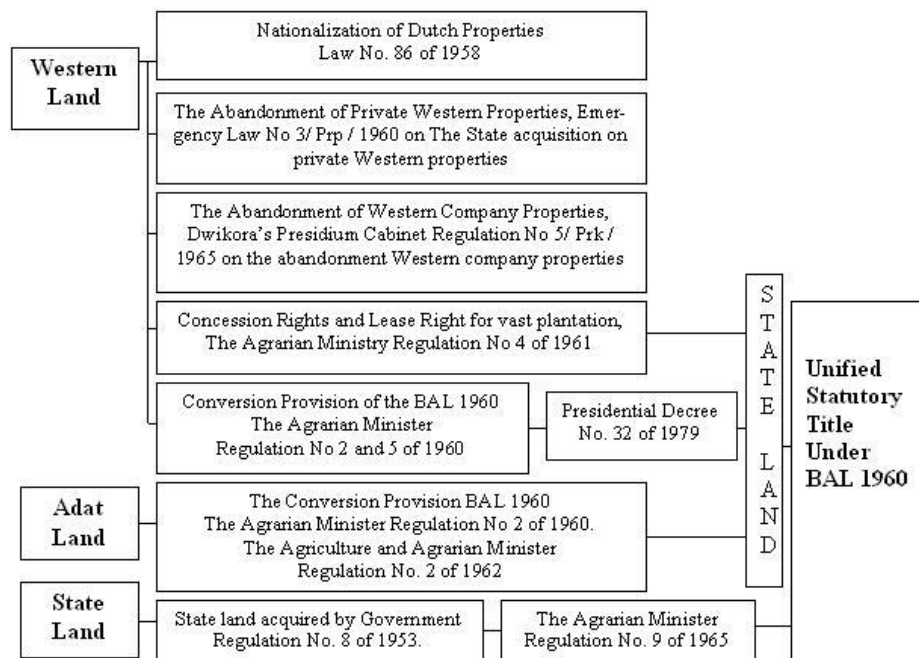
To try and overcome these potential incompatibilities, the Minister of Agrarian Affairs has attempted to determine the conversion criteria by thoroughly assessing and studying existing *adat* land rights. However, to date his assessment has not been conducted. This means that there are no guiding principles, and the conversion of *adat* land rights is currently based only on administrative discretion. Many conversion decisions on *adat* land are imprecise and difficult to be implemented. Converted *adat* land rights, especially in rural areas, still have elements of communal *adat* attributes. This has been one of the obstacles to effective conversion of *adat* land.

In summary, the process of determining the validity of new statutory rights granted to pre-existing land rights is strictly governed by administrative processes. Difficulties with this process arise when evidence of these land rights is insufficient and where most of the land records in the Agrarian Office are also unavailable. Ensuring the accuracy of land rights evidence in the Agrarian Office is nearly impossible due to the destruction of land records during the Japanese occupation and revolutionary period. Furthermore, the transformation of land rights has been uncertain and

⁵⁸ This case was clearly presented by the implication of conversion of communal *gogol* lands which created disputes among *gogol* holders in which the conversion of *gogol* land into registered title did not affect the *adat* provision on *gogol* land, such as regular re-allocation and re-assignment. *Gogol* is a type of collective ownership that contains a regular distribution among villagers. See *infra* Part V. C. (discussing *adat* land rights that bear a regular re-division and re-allocation).

inconsistent due to complex procedures and a weak legal framework to guarantee fair and equitable process. Section III, below, analyzes the transformation process of three different types of land: Western land, state land, and *adat* land. The following diagram presents the general transformation mechanism of land rights from the colonial into the postcolonial system.

THE TRANSFORMATION MECHANISM OF LAND



III. TRANSFORMATION OF WESTERN LAND RIGHTS

The transformation of Western land rights is accomplished through a series of mechanisms and regulations, for example: the Nationalization Law No. 86 of 1958, the Emergency Law No. 3/Prp/1960 on State Acquisition of Privately Owned Western Properties, the *Dwikora's* Presidium Cabinet Regulation No. 5/Prk / 1965 on State Acquisition of Abandoned Western Enterprise Properties, the conversion provision of the BAL 1960, and the Agrarian Minister Regulation No. 2 and No. 5 of 1960. The transformation of Western land created problems in terms of nationalization, compulsory conversion, the transitional time period of conversion and the citizenship

requirement. This section describes in detail the process and mechanism of transforming Western land rights and the implications that have emerged as a result.

A. *Nationalization of Western Properties*

Nationalization meant that designated Western companies located in Indonesia were acquired by the State and became the property of the State.⁵⁹ For this reason, compensation was supposed to be, though rarely was, paid.⁶⁰ Following the implementation of nationalization, several regulations were passed.⁶¹ Nationalization of Western property created ambiguity and deficiencies with regard to the determination of the status of Western land rights. *Adat* communities that claimed the ex-Western plantations as *ulayat*⁶² land have challenged the declaration of Western property as property of the State. Based on this claim, *adat* communities argue that Western plantation lands needs to be returned to the *adat* community at the end of the plantations' leases (*erfpacht*).

Under nationalization, the Western right of ownership (*eigendom*) held by nationalized companies was converted into a right of exploitation (*HGU*) while the Western right of building (*opstal*) and the Western right of exploitation (*erfpacht*) were converted into a right of building (*HGB*) or a right of exploitation (*HGU*) depending on the status of the land.⁶³ Land in residential areas was converted into land with a right of building (*HGB*), but it was converted to right of exploitation (*HGU*) if used for agricultural activities. These new statutory rights were granted to state-owned

⁵⁹ Undang-Undang No. 86, Th. 1958 Nasionalisasi Perusahaan Perusahaan Milik Belanda, art. 1, [Law No. 86, Year 1958 on the Nationalization of Dutch Owned Companies] (1958) [hereinafter Law on the Nationalization of Dutch Companies].

⁶⁰ *See id.* art. 2.

⁶¹ Peraturan Pemerintah R.I. No. 2, Th. 1959 Tentang Pokok Pokok Pelaksanaan UU Nasionalisasi [Regulation of the Republic of Indonesia No. 2, Year 1959 on the Guidance of the Implementation of Nationalization] (May 2, 1959) [hereinafter Regulation on the Nationalization of Dutch Companies]. *See also* Peraturan Pemerintah R.I. No. 19, Th. 1959 Penentuan Perusahaan Pertanian/Perkebunan Milik Belanda Yang Dikenakan Nasionalisasi, appendix, [Government Regulation No. 19, Year 1959 on the List of Western Plantation Companies Subject to Nationalization]; Peraturan Pemerintah R.I. No. 29, Th. 1960 Penentuan Perusahaan Pertanian/Perkebunan Milik Belanda Yang Dikenakan Nasionalisasi, appendix [Government Regulation No. 29, Year 1960 on the List of Western Plantation Companies Subject to Nationalization].

⁶² *Ulayat* rights are the rights of the (*adat*) community to manage the communal (*adat*) land. *Ulayat* rights are primarily defined as the *beschikkingsrecht* consisting of seven attributes by van Vollenhoven which has conflicting definitions: "the right of disposal" or "the right of allocation," *see* VOLLENHOVEN & HOLLEMAN, *supra* note 4, at XLVII.

⁶³ Keputusan Menteri Pertanian Dan Agraria No. Sk.8/Ka/1963 Tentang Pemberian Hak Atas Tanah Bekas Milik Perusahaan, second (*kedua*) (a), (b), [The Minister of Agriculture and Agrarian Affairs Decision No. Sk. 8/Ka/1963] (Feb 28, 1963).

companies—such as the State Plantation Company (*Perusahaan Perkebunan Negara*) or state-owned banks—for a maximum of twenty years.⁶⁴ In theory, a grant of new exploitation rights (*HGU*) to state plantation companies should not include land that was disputed by a local community.⁶⁵ Disputed land was to be resolved by Law No. 51/Prp/1960, considering the interests of the local community. The grant of new *HGU* to state plantation companies did not, however, prevent claims from other parties.⁶⁶

About 205 Western companies with more than 1200 affiliates were subject to nationalization in the first cohort.⁶⁷ Another thirty-four companies were nationalized by subsequent Government Regulations No. 29 and No. 33 of 1960. Of the total 239 Western companies, about ninety-eight percent were plantation and agriculture companies and about seventy-four Western enterprises were located in East Java.⁶⁸ Many plantations were under long leases (*erfpacht*)⁶⁹ granted by the Dutch colonial government. These covered about seventy percent of plantation areas while short leases from local communities comprised about twenty-nine percent of plantation areas. Less than one percent of plantation areas are State land or held under a Western right of ownership (*eigendom*).

Most long plantation leases (*erfpacht*) were granted under the domain principle, which may infringe *ulayat* rights. However, the Indonesian government has never clearly determined whether the Western plantation land infringed *ulayat* land. In fact, the government adopted the domain principle to declare the plantation lease (*erfpacht*) as State land during the nationalisation process. This declaration still incites community claims that Western plantation land should have been returned to the *adat* community when the plantation lease ended in 1980.

These controversies stem from an uncertain explanation as to the ownership rights of the land. It is unclear whether the Western plantation land vests under *ulayat* rights at the end of the lease, or if it has been

⁶⁴ *Id.* at second (*kedua*). See also Basic Agrarian Law, *supra* note 1, art. 55.

⁶⁵ Keputusan Menteri Pertanian Dan Agraria No. Sk. 37/Ka/1964 Tentang Memperpanjang Jangka Waktu Pendaftaran Tersebut, first (*pertama*) (a), (b), [The Minister of Agriculture and Agrarian Affairs Decision No. Sk. 37/Ka/1964] (Apr. 6, 1964).

⁶⁶ See Peraturan Pemerintah Pengganti Undang-Undang No. 51, Th. 1960 Tentang Larangan Pemakaian Tanah Tanpa Izin Yang Berhak Atau Kuasanya, art. 2, [Ministerial Regulation No. 51, Year 1960 on the Grant of the Right of Exploitation to State Plantation Companies] (1960).

⁶⁷ See Regulation on the Nationalization of Dutch Companies, *supra* note 61. The nationalization of Western property was done in two groups: the first group was Western property located in the islands of Java and Madura, and the second group was those located in places other than Java and Madura.

⁶⁸ See *id.* at appendix.

⁶⁹ The *erfpacht* is a secondary right to use and exploit land either under the rights of ownership, with or without time limits, or state land. *Burglijk Wet Book* (BW) Book III, arts. 767-87. The *Agrarische Wet* stipulated that the *erfpacht* long lease may last for seventy years.

formally acquired by the Dutch colonial government under a domain declaration and hence has become the domain of the state. The latter argument seems to be applied by the Indonesian government to acquire Western plantation land.⁷⁰ This declaration seems inconsistent and incompatible with the nature of Western plantation rights given that they may have derived from various land rights, such as the Western right of ownership, Indonesian right of ownership, or *ulayat* land.

Other problems arose as a result of Western plantation areas being reoccupied by the community during the Japanese occupation and during the Indonesian revolutionary period. To try and combat these problems, the government enacted the Law No. 51/Prp/1960 to exclude Western plantation lands that had been occupied by the community. The grant of new rights of exploitation (*HGU*) to plantation companies would be determined when the problem of community occupation was resolved. Plantation areas, either entirely or partially occupied and cultivated by the community, would be suspended from the nationalization process, and priority would be given to the grant of land rights to the occupiers.⁷¹ The validity of these mechanisms was challenged, on the grounds that the implementation of this regulation was unfairly conducted during the New Order Government (NOG) period.⁷²

The process of assessment of plantations during the NOG seems to be critical to this unfairness. Political pressure and military involvement during the assessment may have threatened village communities and challenged the fairness and transparency of the process. Local community participation was often bypassed, and land mapping and determination of plantation land was also done without the consent of the local community.⁷³

B. *Abandoned Western Company Properties*

During the Japanese occupation most Westerners returned to their home countries. This left several abandoned Western company properties. This phenomenon continued through the revolutionary period. During this time of political uncertainty, major Western company properties were nationalized. However, properties not covered by the nationalisation policy

⁷⁰ Regulation on the Nationalization of Dutch Companies, *supra* note 61, art. 1(1)-(2). The nationalization of Western properties covers any property and reserved capital, both mobile and immobile property including all incoming debts and revenue.

⁷¹ Presidential Decree on Guidelines Granting New Statutory Rights, *supra* note 35, art. 5.

⁷² A number of villagers in the Kalibakar plantation in the Malang District support this proposition. Land mapping by the National Land Agency only asked for the endorsement of the head of village. Interviews with AG and SG (villagers who live in Kalibakar Plantation, East Java, Indonesia) (Nov. 23, 2003), (interview on file with author).

⁷³ *Id.*

were illegally occupied by individuals, local government, and military officials. In order to protect against further illegal occupation and to determine the status of the occupiers, the government attempted to regulate these abandoned Western company properties.⁷⁴ The main purpose of this regulation was to extinguish the abandoned Western company properties by December 22, 1965. This abandonment is also mentioned in Article 27 of the BAL 1960 as one of the reasons for land right extinguishment without compensation.⁷⁵ The occupiers of abandoned Western company properties were not automatically entitled to the acquired land, but an administrative decision was first required to grant a new land right. This mechanism reveals strong administrative intervention in the conversion process, rather than a court decision to determine the legality and justification of the occupation.

In addition to this law, the Director General of Agrarian Affairs enacted Directive No. 3 of 1968 on the Guidelines for the Acquisition of Abandoned Western Company Properties. Under this directive, a team (Team) for the acquisition of abandoned Western company properties was established in each province.⁷⁶ The main role of the Team was to examine and to recommend the eligibility of an applicant (occupier) to be granted new statutory rights to the abandoned Western land.⁷⁷ Priority was given to existing (actual) occupiers or other eligible Indonesians if the occupier was not entitled to the land.⁷⁸ In the latter case, if a dispute arose between the real occupier and the new right holder, the Housing Division of the District Government resolved the dispute by passing a binding final decision.⁷⁹

In order to determine the status of abandoned Western properties, the factual status of abandonment had to be determined by the Team. The Team's decision assessed whether the factual conditions of abandonment were present. The factual conditions were as follows:

⁷⁴ See Peraturan Presidium Kabinet Dwikora Republik Indonesia No. 5/Prk, Th. 1965 Tentang Penegasan Status Rumah Tanah Kepunyaan Badan-Badan Hukum Yang Ditinggalkan Direksi Pengurusannya [Presidential Decree No. 5, Year 1965 on the Confirmation of Status of the Abandoned Lands and Houses Owned by Western Companies] (Dec. 11, 1965).

⁷⁵ Basic Agrarian Law, *supra* note 1, arts. 27 (a)(3), 34 (e), 40 (e).

⁷⁶ This team is named *Panitia Prk 5*, and consists of a Head of the Provincial Agrarian office, a Head of Registrar Office, a Local Government Official, the Tax Office Representative, an Official of the House and Building Division, and an Official of the Immigration office.

⁷⁷ Peraturan Direktur Jenderal Agraria R.I. No. 3, Th. 1968 Tentang Pelaksanaan Peraturan Presidium Kabinet No. 5/Prk/1965, art. 2(a), [Ministerial Directive No. 3, Year 1968 on the Implementation of the Regulation on the Acquisition of Abandoned Western Company Property] [hereinafter Ministerial Directive on Acquisition].

⁷⁸ *Id.* art. 4.

⁷⁹ See Pendjelasan Peraturan Pelaksanaan Penggantian Rumah Bekas Milik Belanda Gubernur Kepala Daerah Djawa Timur Tertanggal [East Java Governor Circulation Letter No. BH/998/G/Drh], July 2, 1962.

- The Western company never proposed “conversion” as required by the BAL 1960;
- No evidence of the transfer of ownership;
- During five consecutive years, the Western landholder did not pay tax;
- The Western company/landholder did not collect lease/renting fee from the occupier for five consecutive years; or
- The landholder(s) and the management staff of Western company has left Indonesia and has been confirmed by the designated authorities—such as the Immigration office or other relevant institutions.⁸⁰

Only by confirming these five conditions were Western company properties determined to be abandoned property, thus reverting to state land.

If the requirements of abandonment were met, The Director General of Agrarian Affairs made a decision regarding the purchasing of houses and the granting of new statutory land rights. This decision was based on the “Prk5 Province” team’s recommendation. This administrative process determined the status of land and the eligibility of an applicant. Similar mechanisms were undertaken for abandoned private Western property as described in the following part.

C. *Abandoned Private Individual Western Properties*

During the Japanese occupation, most private Western properties were vacated by their owners or occupied by Japanese authorities. After independence this occupation was taken over by Indonesians. During the revolution period, the returning Dutch attempted to restore Western properties to their previous owners and attempted to prosecute illegal occupiers.⁸¹ This attempt, however, was difficult to implement due to political uncertainty and community resistance. These circumstances led the Indonesian government to attempt to control the abandoned Western private property.

For this purpose, the government enacted Emergency Law No 3/Prp/1960 on the State Acquisition of Abandoned Private Western Properties.⁸² This law aimed to control and administer the abandoned

⁸⁰ Regulation on the Transfer of Abandoned Western Properties, *supra* note 39, art. 5(1).

⁸¹ See Undang-Undang Darurat R.I. No. 8, Th. 1954 Tentang Penyelesaian Soal Pemakaian Tanah Perkebunan Oleh Rakyat [Emergency Law No. 8, Year 1954 on the Occupation of Land without Permission of the Owner or Legal Proxy].

⁸² Peraturan Pemerintah Pengganti Undang-Undang No. 3, Th. 1960 Tentang Penguasaan Benda-Benda Tetap Milik Perseorangan Warganegara Belanda, Mem. [Emergency Law No. 3, Year 1960 on the State Acquisition of Abandoned Private Western Properties] [hereinafter Law on State Acquisition of Abandoned Western Properties]. The control of government in this case is different from the nationalization that revoked the designated Western properties into state possession. The control of the

private Western properties, which were illegally occupied by Indonesians. State control was imposed to protect against the accumulation and manipulation of Western properties by only a few people.⁸³ Since the passing of this law, abandoned private Western properties were directly controlled by the Minister of Agrarian Affairs. Occupiers of abandoned private Western properties were required to release the occupied property to the government within two months of the enactment of this law.⁸⁴ Failure to do this meant that any legal relations between occupier and land were retroactively invalid upon the enactment of this law on February 9, 1960.⁸⁵ This provision was unrealistic, as two months was not sufficient to properly make public announcements during this period of political uncertainty. Furthermore, appropriate procedures to implement this regulation were not available.

Government Regulation No. 223 of 1961 in lieu of the Emergency Law No. 3/Prp/1960 was created to provide a guideline of transfer of ownership for abandoned private Western properties. Under this guideline, priority to purchase abandoned property was given to civil servants who had occupied the property and owned no more than two houses.⁸⁶ In the case of the occupier being ineligible to purchase the abandoned private Western property, the new landholder was under an obligation to provide a reasonable substitute house and land to the occupier.⁸⁷ Any dispute between the parties was resolved by the District Housing Division.⁸⁸

D. Colonial Concession Rights and Leases for Large Plantations

Article IV of the conversion provisions of the BAL 1960 applies to the conversion of colonial concession rights and leases for large plantations under state land (state domain). Unlike plantations under a right of use (*erfpacht*) that were automatically converted into a right of exploitation (*HGU*) by the law,⁸⁹ the colonial concession rights and leases for plantations were converted at the discretion of the landholder. Failure to propose a conversion resulted in a refusal of conversion altogether. The landholder was then only permitted to use the land until the end of lease or for a

government was intended to manage the transfer of ownership to the eligible Indonesians without invalidating the rights of the owner.

⁸³ *Id.* explanatory memorandum, para. 3.

⁸⁴ Law on State Acquisition of Abandoned Western Properties, *supra* note 82, art. 3(1).

⁸⁵ *Id.* art. 3(2).

⁸⁶ Regulation on the Transfer of Abandoned Western Properties, *supra* note 39, art. 3.

⁸⁷ *Id.* art. 3(1).

⁸⁸ *Id.* art. 3(2).

⁸⁹ Basic Agrarian Law, *supra* note 1, conversion provision, arts. III(1), (2).

maximum of five years until September 24, 1966.⁹⁰ After five years, the colonial concession right was extinguished.

In addition to this provision, the Ministry of Agrarian Affairs passed the Ministry Regulation No. 4 of 1961 on the Implementation of the Conversion of Concession Rights and Leases of Vast Plantations.⁹¹ A vast plantation was defined as a plantation covering more than 25 hectares of state land.⁹² The plantation leases were granted under individual ownership, but *adat* lands were excluded from this regulation. The conversion, therefore, was only applicable for colonial concession rights and leases of vast plantations, which were granted under the colonial state domain. The conversion of these rights into a right of exploitation (*HGU*) was granted for a maximum of twenty years.⁹³ By the end of twenty years, the plantation land reverted back to the state and new landholders were granted new statutory rights. In practice it was quite difficult to distinguish the different natures of plantation land where the land records were unavailable.

E. The Conversion of Colonial Western Land Rights Under the BAL 1960

Aside from those previous transformation mechanisms, another transformation of Western land rights was based on the conversion provision of the BAL 1960 and its implementing regulations.⁹⁴ This mechanism was particularly applied to individual (private) Western land rights including any existing secondary land rights. This conversion provision was mainly used for converting individual Western property into new statutory rights. The conversion mechanism was governed by strong administrative intervention to determine the validity of conversion rights and the eligibility of new landholders.⁹⁵ This administrative control created uncertainty, discrimination, and ambiguity as the conversion mechanism was inadequate and reliable evidence was largely unavailable.

⁹⁰ *Id.* conversion provision, arts. IV(2), (3). Sept 24, 1966 is the five-year period since the enactment of Basic Agrarian Law on Sept. 24, 1960 effective one-year later.

⁹¹ Peraturan Menteri Agraria No. 4, Th. 1961 Tentang Pelaksanaan Konversi Hak-Hak Concessie Dan Sewa Untuk Perusahaan Kebun Besar [Ministry of Agrarian Affairs Regulation No. 4 of 1961 on the Implementation of the Conversion of Concession and Leases for vast plantations].

⁹² *Id.* art. 1.

⁹³ Basic Agrarian Law, *supra* note 1, art. 55(1) (the conversion of Western land rights into statutory rights are only temporarily valid until the end of the lease or for a maximum of 20 years).

⁹⁴ *Id.* conversion provision, art. I.

⁹⁵ The conversion of Western land rights needs to comply with the requirements articulated by the Basic Agrarian Law, such as the citizenship requirement, and the obligation to convert Western properties into statutory rights.

1. *The Right of Ownership (Eigendom)*

The colonial right of ownership (*eigendom*) was the strongest colonial property right, consisting of full powers of ownership.⁹⁶ The *eigendom* was directly converted into a right of ownership (HM) if a landholder held only Indonesian citizenship at the time the BAL 1960 was passed.⁹⁷ Article I(1), Section IV of the Conversion Provision states that, “[t]he *eigendom*, under this law becomes right of ownership (HM), unless the right holder is not eligible as stated under Article 21.⁹⁸”

A landholder who held dual citizenship (Indonesian and another) could be granted a right of building (*HGB*) for a maximum of twenty years.⁹⁹ However, during the one year after the passing of the BAL 1960, the landholder had to declare Indonesian nationality; otherwise, the landholder was only eligible for the right of use. Under the law, a foreigner was only eligible for the right of use.¹⁰⁰ By 1961 foreigners who owned statutory rights (except the right of use—*hak pakai*) as a result of the conversion provision or any land transfer had to transfer their entitlements to eligible persons, or release the land to the state. Failure to do this would mean that their right entitlements were extinguished.¹⁰¹

The conversion of *eigendom* was compulsory. This is supported by a sanction of revocation after one year after the enactment of the BAL 1960, September 24, 1960.¹⁰² *Eigendom* landholders had to propose conversion to the Land Registration Office, Directorate of Agrarian Affairs within one year.¹⁰³ If the landholder was Indonesian, the *eigendom* was converted to a right of ownership (HM).¹⁰⁴ It was converted to rights of building (*HGB*) for a maximum of twenty years to landholders who held dual nationality or who failed to report their entitlement within a one year period.¹⁰⁵ If a landholder was refused Indonesian nationality within one year from the passing of the

⁹⁶ Kitab Undang Undang Hukum Perdata, art. 570, bk II, ch. III, [Indonesian Civil Code] [hereinafter Indonesia Civil Code].

⁹⁷ Basic Agrarian Law, *supra* note 1, conversion provision, art. 1.

⁹⁸ *Id.* conversion provision, art. I(1), sec. IV.

⁹⁹ *Id.*

¹⁰⁰ *Id.* art. 42(4).

¹⁰¹ *Id.* arts. 21(3), 30(2), 36(2).

¹⁰² *Id.* art. 21(3).

¹⁰³ Peraturan Menteri Agraria No. 2, Th. 1960 Tentang Pelaksanaan Ketentuan Undang-Undang Pokok Agraria, art. 2(1), [Ministry of Agriculture Regulation No. 2, Year 1960 on the Implementation of Some Principles of the BAL] (Oct. 10, 1960) [hereinafter Regulation on the Implementation of BAL].

¹⁰⁴ *Id.* art. 3.

¹⁰⁵ *Id.* art. 4.

BAL 1960, the landholder had to transfer his or her entitlement to an Indonesian individual, otherwise the land reverted back to the state.¹⁰⁶

This provision also applied to the property of foreign diplomatic representatives. *Eigendom* held by a foreign institution was converted to a right of use as long as the land was consistently used for diplomatic purposes.¹⁰⁷ This right of use may be granted for an unlimited time.¹⁰⁸ This conversion is, however, exempted from time limitations and compulsory conversion.

Similarly, *eigendom* owned by Indonesian legal corporations and social or religious institutions had to be reported within a six-month period after the passing of the BAL 1960. The *eigendom* held by social and religious institutions, which were used for social and religious activities, was converted into a right of ownership (*HM*).¹⁰⁹ This provision, however, only applied to land that had been owned before September 1960 and had been confirmed as being used only for social and religious purposes by the Minister of Agrarian Affairs.

The state appropriation of the *eigendom*, due to a failure to comply with compulsory conversion, or to satisfy the citizenship requirement, is inconsistent with the principle of recognising existing property rights and compensation upon appropriation. Moreover, setting a time limit for conversion could be futile since landholders may not be aware of this obligation. The mechanism of appropriation is also unclear, as it only relies on a state declaration. This mechanism is more likely to lead to arbitrary and discriminatory decisions, leading to uncertainty with regard to Western land right transactions completed after the time period.

2. *The Right of Exploitation (Erfpacht) of Plantations*

Article III of the conversion provision of the BAL 1960 states that all *erfpacht* for plantations granted by the Dutch colonial government must be converted into a right of exploitation (*HGU*) by September 24, 1960. The right of exploitation (*HGU*) as a result of conversion could be granted until the end of the plantation lease, or for the maximum of twenty years if the landholder was eligible.¹¹⁰ A foreigner who owned *HGU* as a result of conversion had to transfer his or her ownership to an Indonesian or

¹⁰⁶ Basic Agrarian Law, *supra* note 1, art. 36(2).

¹⁰⁷ *Id.* art. I(2).

¹⁰⁸ Regulation on the Implementation of the BAL, *supra* note 103, art. 7.

¹⁰⁹ Basic Agrarian Law, *supra* note 1, art. 49(1); Regulation on the Implementation BAL, *supra* note 103, art. 6.

¹¹⁰ Basic Agrarian Law, *supra* note 1, arts. III(1), 36(2).

voluntarily release his/her entitlement to the state and retain the right of use (*hak pakai*) instead.¹¹¹ The provision is unclear. The right of exploitation (*HGU*) under the BAL 1960 is a primary right granted under state land, whereas the *erfpacht* is a secondary right that may be granted under various primary rights under colonial law, such as Western rights of ownership (*eigendom*), Indonesian rights of ownership (*Agrarische eigendom*) or under colonial land domains. This is another one of the imprecise conversion mechanisms of plantation land that has been challenged by *adat* communities.

The colonial right of exploitation (*erfpacht*) on plantations mentioned in this provision was universally assumed as an *erfpacht* grant based on the domain principle. Therefore the primary right was determined as state domain. This was supported by the implementing regulation that, by the end of conversion period in 1980, this land was to revert to the state. The BAL 1960 and implementing regulations seem to overlook the various backgrounds of *erfpacht*. This imprecision was exacerbated further by unfair processes during the postcolonial plantation assessment period.

3. *Western Colonial Secondary Land Rights: Rights of Building (Opstal) and Rights of Exploitation (Erfpacht)*

The other colonial Western land rights required to be converted into statutory rights are secondary rights granted under rights of ownership (*eigendom*). The secondary rights under the Dutch Civil Code¹¹² comprise two different types: rights of building (*opstal*) and rights of exploitation (*erfpacht*). The existing *opstal* and *erfpacht* rights according to the conversion provision Article I(4), were converted into a right of building (*HGB*) if the primary right was converted as right of ownership (*HM*).¹¹³ All colonial secondary rights, *opstal* and *erfpacht*, granted for housing were converted into a right of building (*HGB*) until the end of the lease or for a maximum of twenty years.¹¹⁴ The conversion provision did not further articulate the conditions if the primary right was converted to anything other than a right of ownership.¹¹⁵

¹¹¹ *Id.* art. VIII(1)-(2); Regulation on the Implementation of BAL, *supra* note 103, art. 25.

¹¹² The possessor (*bezitter*) has the authority to hold and enjoy any benefits of the use of property from subsequent and derivative rights to ownership, Indonesia Civil Code, *supra* note 96, art. 529, Bk. II, Ch. III.

¹¹³ Regulation on the Implementation of BAL, *supra* note 103, art. 12(1).

¹¹⁴ *Id.* art. 13(1).

¹¹⁵ See *supra* Part III.E.1. on the conversion of the colonial right of ownership. The colonial right of ownership could be converted into *Hak Milik (HM)*, *Hak Guna Usaha (HGB)*, or *Hak Pakai (HP)*.

The inconsistency and the imprecision of this mechanism were seen in the conversion of the secondary rights of exploitation (*erfpacht*) into rights of exploitation (*HGU*). Under the BAL 1960, *HGU* is granted on state land, therefore the primary right to this land is state-owned land.¹¹⁶ Under this law, by the end of an *HGU* lease, the land reverts back to the state. Whereas colonial secondary rights (*erfpacht*) could be granted under state domain, Western rights of ownership (*eigendom*) and Indonesian rights of ownership (*Agrarische eigendom*) could not. Again, the conversion mechanism tended to generalize the underlining attributes of Western land rights.

F. The Transitional Period of Western Land Right Conversion

The conversion provision of the BAL 1960 provided a transitional period for converted Western land rights of a maximum of twenty years.¹¹⁷ By September, 24, 1980, the converted Western land rights reverted to the State and became state land.¹¹⁸ As a consequence, any entitlements of the previous landholder were extinguished. For this reason, Presidential Decree No. 32 of 1979 was enacted, followed by other procedural regulations.¹¹⁹ This decree was arbitrary and unclear, as the extinguishment only required an administrative decision without any further determinations by a court. Another ambiguity arose when the validity of a land transaction and its transfer by an occupier extended beyond the date of invalidity by law. This resulted in complications, especially in the competing interests of the real occupier who presently occupied the land, and the new legal owner who acquired the land from a state grant. This section elaborates on the mechanism of land rights extinguishment and the grant of new statutory rights after the transitional period has passed.

Under the law, by September 24, 1980, converted Western land rights were reassessed by accounting for their level of use, and also based on ownership criteria, including:

- consistency with the existing spatial and land use planning;
- sustainability of natural resources and livelihood support;
- the condition of the plantation and the surrounding community;
- consistency with local development planning; and
- the interests of the previous landholder, occupier and tenants of buildings.¹²⁰

¹¹⁶ Basic Agrarian Law, *supra* note 1, art. 28(1).

¹¹⁷ *Id.* arts. I(3), I(4), III(1), V.

¹¹⁸ Presidential Decree on Guidelines Granting New Statutory Rights, *supra* note 35, art. 1(1).

¹¹⁹ *Id.*

¹²⁰ *Id.* art. 1(2).

Based on these criteria, the Minister of Agrarian Affairs determined whether the land would be granted to eligible individuals or designated for development purposes. In the case of previous occupiers being evicted for development purposes, they were compensated with an amount determined by an Assessor Team established in every province.¹²¹

If the land was not subject for use in development, it could be granted under a new statutory right to either the occupier or another eligible individual. In order to be granted a new statutory right, the occupier needed to make a proposal for a statutory right to the Agrarian Office by September, 24, 1980.¹²² Previous landholders or occupiers were given priority to be granted new statutory rights. The converted Western rights of exploitation (*HGU*), which were occupied by local communities, would be redistributed to the occupier. This was also applied to other converted Western land rights that were occupied by the community, in particular with regard to the right of building (*HGB*) and the right of use (*HP*).¹²³ The converted Western land rights held by government institutions would be given new statutory rights.

Under the transitional period provision, converted Western plantation land reverted to the state in 1980 and became state land.¹²⁴ Based on this interpretation, the government granted new rights of exploitation (*HGU*) to plantation companies. However, if, at that time, there were local communities claiming that this plantation land was *ulayat* land, it should have been returned to them at the end of the transitional period. Recently, unilateral reclamation of land by local communities is based on this argument to claim plantation land.¹²⁵ In reality, the causes of such incidents are more complex and delicate than simple legal disputes.

The conversion of Western land rights was accomplished entirely through strong administrative control. This control included the prohibition on the transfer of Western land rights without the registration or permission from the National Land Agency (NLA). This required permission from the NLA for the transfer conflicts with the provision on the transfer under the BAL 1960 itself, which allows transfers under *adat* law or by deed. This

¹²¹ *Id.* art. 3; see also Peraturan Menteri Dalam Negeri No. 3, Th. 1979 Tentang Ketentuan-Ketentuan Mengenai Permohonan Dan Pemberian Hak Baru Atas Tanah Asal Konversi Hak-Hak Barat, art. 8(4), [Home Affairs Ministry Regulation No. 3, Year 1979 on the Grant of New Statutory Rights under the Previous Western Land Right Conversion 1979] (Aug. 22, 1979) [hereinafter Regulation on the Grant of New Statutory Rights under Western Land Rights Conversion].

¹²² See Presidential Decree on Guidelines Granting New Statutory Rights, *supra* note 35, art. 3(2).

¹²³ *Id.* arts. 4, 5.

¹²⁴ *Id.* art. 1(1).

¹²⁵ Under the *adat* law, the customary (*ulayat*) land is inalienable, therefore after the end of lease, the community assumes that the land should be returned to community. See VOLLENHOVEN & HOLLEMAN, *supra* note 4, at XLVII.

process resulted in different court interpretations to reconcile competing legal claims between the interests of occupiers, who received the land through a land transaction without registering with the NLA, and legal owners, who were legally granted new statutory rights by the state.¹²⁶

In summary, the transformation of Western land rights into statutory rights was accomplished through the application of various laws, regulations, and processes involving strong administrative discretion. State control created conceptual flaws in the recognition of the underlying property rights and the extent of the justifications upon which the state acts as a sovereign authority. The state appropriation of Western land rights and the declaration of Western plantations as state land were critical processes confronting local communities, particularly during decentralisation, where a revival of *adat* institutions was taking place. The complex and inadequate transformation mechanisms also created problems. These arose as a result of a lack of adequate land records, weak administrative procedures and political uncertainty in performing fair, equitable and transparent processes.

IV. TRANSFORMATION OF STATE LAND

Another complex issue involves transforming state land into statutory rights. The transformation of state land was not successfully conducted until recently. Though this difficulty in transformation may have been caused by the lack of a time limitation, a greater deficiency causing competition between government authorities can be attributed to the failure of legislation to clearly define state land.¹²⁷ Other reasons include impracticality and a reluctance to transform land as a result of limited benefits and complicated outcomes. Due to an unclear definition of state land, the rights, allocations, and uses of state land remain uncertain. Therefore the rights are often subject to arbitrariness and inefficiency. Section IV discusses the mechanisms of the transformation of state land.

¹²⁶ By the end of the twenty year transitional period in 1980, the existing Western land rights were extinguished and reverted to the state by the law. In practice many Indonesians still continued to occupy Western land and many Western land rights were transferred under *adat* practices. However, the National Land Agency assumed that the Western land had already been state land since 1980 and granted new statutory rights to the new land holder. The competing interests between the real occupier who occupies the land, and the legal owner who is granted a new statutory right by the NLA, arose in many ex-Western plantations.

¹²⁷ Up until now, there has been a continuing debate concerning the definition of state land, which has not been resolved by the legislation. The definition then refers back to the Peraturan Pemerintah Republik Indonesia No. 8, Th. 1953 Tentang Penguasaan Tanah-Tanah Negara [Government Regulation No. 8, Year 1953 on State Acquisition of Land] (Jan. 27, 1953) [hereinafter Government Regulation on State Acquisition of Land]. This decree was enacted during the revolutionary period before the Basic Agrarian Law, and should be amended to be in line with the spirit of Basic Agrarian Law.

Transformation of state land happened under the Minister of Agrarian Affairs Regulation No. 9 of 1965.¹²⁸ The state land referred to by this regulation is land that is acquired by Government Regulation No. 8 of 1953.¹²⁹ According to this regulation, state land is defined as land that is fully held by the state.¹³⁰ This is further described as land with no proven evidence of property rights based on either *adat* law or the Indonesia Civil Code.¹³¹ This elucidation seems to support the colonial domain principle and interpret state land as free-state land acquired by a domain declaration. This definition has, however, never been clarified, causing uncertainty as to what attributes and content can be included in state land. Based on the elucidation of this regulation, free-state land is classified under two different categories:

- Land that is free from *adat* rights (native Indonesian land rights), based on purchase, compensation or revocation, and held by government institutions; and
- Land that is not directly occupied by government institutions, but is presumably under the control of the Department of Agrarian Affairs based on the colonial domain principle.¹³²

Under these classifications, state land (*tanah negara*) refers both to land that is physically occupied by government—as stated in the first provision—and any untitled lands that are presumably under the control of the Department of Agrarian Affairs based on the domain principle.

The first provision is inadequate where *adat* land has never been completely alienated by any land transaction. Under *adat* law, *adat* land is inalienable. Thus the purchase of *adat* land or providing compensation for the use of *adat* land has never justified the alteration of ownership. Even though possession is held by an individual, the ownership is always vested in a communal (*ulayat*) right.¹³³ Similarly, the second provision is inaccurate. The domain principle was repealed by the BAL 1960 and therefore, land acquired through the domain principle may have to be returned to its original status as *adat* land, rather than state land. Indeed, the denial of *ulayat* rights by this law may be worse than colonial land

¹²⁸ See Peraturan Menteri Agraria No. 9, Th. 1965 Pelaksanaan Konversi Hak Penguasaan Atas Tanah Negara Dan Ketentuan-Ketentuan Tentang Kebijakan Selanjutnya [Ministry of Agriculture Regulation No. 9, Year 1965 on the Implementation of Conversion of State Land Domain] (Dec. 6, 1965) [hereinafter Regulation on the Implementation of Conversion of State Land Domain].

¹²⁹ Government Regulation on State Acquisition of Land, *supra* note 127.

¹³⁰ *Id.* art. 1.

¹³¹ *Id.* general elucidation, 1-3.

¹³² *Id.* general elucidation, 3.

¹³³ See BAREND TER HAAR, ADAT LAW IN INDONESIA 93 (E. Adamson Hoebel & A. Arthur Schiller eds., 1948).

acquisitions under the domain declaration that in some way sought to protect *ulayat* land.

State land under the first category, held by a departmental ministry, government institution, or autonomous regions (*daerah swatantra*) is converted into right of use (*HP*) as long as the use of the land is still consistent with the role of that government institution.¹³⁴ If state land held by the Departmental Ministry or other government institution is intended to be leased or granted a secondary land right to other parties, this land is converted to a right of management (*Hak Pengelolaan*).¹³⁵ *Hak Pengelolaan* is currently defined as *Hak Menguasai Negara (HMN)* in which a part of the *HMN*'s authority is delegated to the government institution while the other part remains with the state.¹³⁶ The use and allocation of rights of management is required to be consistent with the main role and function of the government institution.¹³⁷ The Minister of Agrarian Affairs Regulation No. 9 of 1965 states that:

If any state land defined in Article 1 (except for land designated for internal government use) is to be granted secondary rights from another party, that state land is converted to a right of management (*Hak Pengelolaan*), providing the use of the land is consistent with the objectives of the government institution.¹³⁸

The rights of management (*Hak Pengelolaan*) under this regulation may include the rights to:

- Plan the use of the land;
- Use the land in accordance with the roles of the relevant government institution;
- Divide the land into several sections to third parties, and to grant the right of use to them for a maximum of 6 years; and
- Receive any fee and payment from the lessee.¹³⁹

¹³⁴ Regulation on the Implementation of Conversion of State Land Domain, *supra* note 128, art. 1. Currently much of the state land held by government institutions is designated for business activity. However, there is no legal framework that could impose sanctions or punishments for misused state land.

¹³⁵ *Id.* arts. 2, 5.

¹³⁶ Peraturan Menteri Negara Agraria Kepala Badan Pertanahan Nasional No. 3, Th. 1999 Tentang Pelimpahan Kewenangan Pemberian Dan Pembatalan Keputusan Pemberian Hak Atas Tanah Negara, art. 1(3), [Ministry of Land Regulation No. 3, Year 1999 on Distribution of Authority on the Grant of Land Rights Among the Central Office, the Provincial and District Offices] (Feb. 19, 1999) [hereinafter Regulation on Distribution of Authority among the Central, Provincial and District Offices].

¹³⁷ *Id.* art. (2).

¹³⁸ Regulation on the Implementation of Conversion of State Land Domain, *supra* note 128, art. 2.

¹³⁹ *Id.* art. 6(1).

The authority to grant a secondary right to third parties by a government institution is, however, only permitted once for a maximum of six years.¹⁴⁰ After this period the authority to grant secondary rights has to be returned to the Ministry of Agrarian Affairs.¹⁴¹ This is because providing secondary rights lessens the authority of the government institution to manage the state land.¹⁴²

If the remaining right of use (*Hak Pakai*) or right of management (*Hak Pengelolaan*) is more than five years, then the transformation of registered state land is done by the head of the Registrar's office.¹⁴³ If there is no time period stated, it is to be greater than five years.¹⁴⁴ Meanwhile, unregistered state land must be converted based on the occupier's application. For this purpose, there is no time limit to lodge a conversion proposal for state land. This may discourage the conversion of state land where there is no time constraint. Another reason to delay conversion of state land may be due to the impracticality of conversion and registration. For example, state land permanently used by government institutions is recognizable so that registration may not be necessarily required. The cost of conversion and registration, and the limited rights of the right of use from converted state land, are other impractical deterrents.

Another obstacle to converting state land is competition among government institutions based on contested interpretations regarding their authority over the administration of state land. The administration of forest land, coastal land, mining land, cultural conservation land, and railway and military land, is governed by specific legislation and administered by particular government institutions. These types of state land are therefore beyond the jurisdiction of the NLA; thus, they are not subject to the BAL 1960. However, the NLA argues that they have the right to administer these types of land as the BAL 1960 is overriding in regard to land, water, and airspace.¹⁴⁵ These conflicting arguments have not been resolved. This may

¹⁴⁰ See *id.* art. 6(2).

¹⁴¹ See Regulation on Distribution of Authority among the Central, Provincial and District Offices, *supra* note 136, arts. 13, 14.

¹⁴² See Basic Agrarian Law, *supra* note 1, art. 43(1), the right of use (*hak pakai*) gives the holder limited rights as determined under the declaration of rights; the right of use is unable to be transferred unless permitted by the prescribed authority.

¹⁴³ Regulation on the Implementation of Conversion of State Land Domain, *supra* note 128, art. 3(1). The right of management (*Hak Pengelolaan*) or the right of use (*HP*) of state land is granted for an unlimited time so long as the use is consistent with the prescribed acquisition, and that any land transaction upon those types of land endorsed by a prescribed authority or Minister of Agrarian Affairs.

¹⁴⁴ *Id.*

¹⁴⁵ All state land held by government, local government, and *adat* communities was attempted to be assessed for providing more accurate data regarding the state land. See BPN Badan Pertanahan Nasional, *Hasil Rapat Kerja Badan Pertanahan Nasional 1994*, 45-47 (1994) [National Land Agency, Minutes of the

become an obstacle to converting existing state land held by other government institutions.

In East Java, for example, only a small amount of state land under the first and second categories has been converted, either under the right of use or the right of management. A lot of state land currently occupied by government institutions is held pursuant to executive decision—either by the Ministry of Agrarian Affairs prior to the BAL 1960, the Minister of Home affairs relating to land acquisition for government institutions during the Old Order Government, or Military authority during the revolutionary period.¹⁴⁶ This state land includes state land administered by the Department of Transportation, the Department of Defence, the Department of Forestry, the Department of Education and Cultural Heritage, the Department of Marine and Fisheries, and the local government. State land held by the Department of Transportation (State Railway Company) and the Department of Forestry currently causes the most disputes in East Java.¹⁴⁷

Unconverted state land held by the State Railway Corporation (*Jawatan Kereta Api*) includes infrastructure such as railway facilities, staff housing, and train service stations. A great amount of railway infrastructure is not protected from public access. This has attracted squatters who build temporary housing, which often becomes semi-permanent housing, located along railway owned land. Once the squatters are permanently settled, the State Railway Company has difficulty evicting them due to limited evidence relating to the land.¹⁴⁸ Evidence of railway land is still reliant upon documents issued by the Dutch colonial land administration that is now obsolete.¹⁴⁹ Land disputes relating to squatters and illegal occupiers of railway land are one of the major types of land disputes.¹⁵⁰

Another problematic issue concerning state land involves forest land. This was triggered by competition between authorities—namely, the Department of Forestry, the NLA, the *adat* community, and local

National Meeting]. See also Keputusan Presiden Republik Indonesia No. 34, Th. 2003 Tentang Kebijakan Nasional Di Bidang Pertanahan, art. 1(2)(1), [Presidential Decree No. 34, Year 2003 on National Land Policy] (May 31, 2003).

¹⁴⁶ Personal interview with BJ (the NLA staff, in East Java Provincial Office), (Feb. 15, 2004) (on file with author).

¹⁴⁷ See BPN Badan Pertanahan Nasional, *Permasalahan Tanah Rawan Strategis Dan Penanganan Perkara*, (2002) [National Land Agency, *The Sensitive Land Cases and The Possible Resolution* (monthly report)].

¹⁴⁸ See SURYANTO ET AL, STUDI IDENTIFIKASI DAN INVENTARISASI MASALAH PERTANAHAN 33 (2001).

¹⁴⁹ Personal interview with BJ (the staff of the NLA in the East Java Provincial Office), (Jan. 5, 2004) (on file with author).

¹⁵⁰ See SURYANTO ET AL, *supra* note 148, at 34-35.

governments. These conflicts are based on different interpretations of administrative authority and roles. In colonial times, forests in Java were formally administered by the Dutch Colonial Forestry Division, which in 1940 controlled about 3.1 million hectares and 1.2 million hectares located in East Java.¹⁵¹ This forest land was acquired under the domain principle, *Agrarische Wet* 1870 and the colonial Forestry Law (*Dienst van het Boschwezen*, 1948). This role was taken over by the Department of Forestry in the post-colonial period.¹⁵²

The main issues facing forest lands are similar to those of other state land held by government institutions. These issues arise from the unclear interpretation of the role and authority of the relevant government institutions in relation to the roles of the NLA. The Department of Forestry argues that the Forestry Law has priority (specific) legislation for forest land, superseding the BAL 1960 as a piece of general legislation.¹⁵³ Forest land, therefore, is not subject to the BAL 1960. Conversely, the NLA claims that the BAL 1960 is the priority (an umbrella) law of all land, water, airspace, and natural resources that should prevail over any other legislation. These conflicting interpretations continue without clear guidelines regarding the administration of state land in forest areas.

Due to these circumstances, all forest land, except land declared as non-forest land by the land reform program, is still under the authority of the Department of Forestry. Similarly, state land under other government institutions, such as mining land, coastal land, highway, railways, and cultural conservation land is temporarily excluded from the NLA's authority until it has been formally converted under either a right of use or a right of management (*Hak Pengelolaan*).

V. TRANSFORMATION OF ADAT LAND

Transforming *adat* land rights into statutory rights is a most complex process. It causes the greatest amount of ambiguity and inadequacies due to the incompatible nature of communal *adat* land rights and individual statutory rights. According to Articles II, VI and VII of the conversion provisions of the BAL 1960, *adat* land rights may be converted into rights of

¹⁵¹ In 2003, the total area of forests in Java was 3.3 million hectares, of which 1.4 million is located in East Java. BADAN PUSAT STATISTIK, STATISTIK INDONESIA [STATISTICAL YEAR BOOK OF INDONESIA] 216-17 (2003).

¹⁵² See Undang-Undang Republik Indonesia No. 41, Th. 1999 Tentang Kehutanan, [Law No. 41, Year 1999 on Forestry] (Sept. 30. 1999).

¹⁵³ This argument is commonly based on the legal maxim *lex specialis derogat lex generali* (specific law supersedes the general law).

ownership (*HM*), rights of building (*HGB*), rights of exploitation (*HGU*) and rights of use (*HP*), depending on the nature of the *adat* land.¹⁵⁴ As part of the initial land registration, the Registrar's Office will determine the most appropriate rights conversion process (*penegasan hak*).¹⁵⁵ For this purpose, the Head of the NLA district office determines the conversion criteria to assess the similarities in the nature of the rights, and issues new statutory rights accordingly. The transformation of *adat* land is based entirely on administrative decisions to determine the equivalent statutory rights and to confer new statutory rights.

In practice, the conversion of *adat* land rights into statutory land rights is undertaken according to the feasibility and the necessity of local conditions. The conversion is only carried out once the landholder applies, and the whole conversion process is intertwined with the initial land registration program.¹⁵⁶ The conversion of *adat* land rights is therefore only conducted after land registration has been completed.¹⁵⁷ In regions where land registration has been implemented, the conversion of *adat* land rights will be conducted based on the registration of land transactions. Prior to a land transaction, a landholder has to initiate a land rights determination (*penegasan hak*) for the purpose of conversion. Then the head of the NLA district office decides the proposed rights and grants a new statutory right accordingly.

After the land registration office has been established in an area prior to land transactions, *adat* land needs to be converted and registered under the NLA district office. According to the implementing regulation, failure to do this results in *adat* land rights being voluntarily converted to a right of use (*hak pakai*) for a maximum of five years.¹⁵⁸ After this five year period, the previous Indonesian land rights become state land. This regulation is, however, imprecise and inconsistent with the conversion provisions found in Articles II and VI of the BAL 1960. These provisions contain no time limits or a condition of revocation upon the conversion of *adat* land rights.

Another inconsistency is that under the BAL 1960, land transactions are governed by *adat* law and are thus legally warranted even without land

¹⁵⁴ Basic Agrarian Law, *supra* note 1, arts. II, VI, VII.

¹⁵⁵ Regulation of Conversion and Registration of Former Indonesian (*Adat*) Land Rights, *supra* note 56, art. 1.

¹⁵⁶ See Peraturan Pemerintah No. 10, Th. 1961 Tentang Pendaftaran Tanah [Government Regulation No. 10, Year 1961 on Land Registration] amended by Peraturan Pemerintah No. 24, Th. 1997 Tentang Pendaftaran Tanah [Government Regulation No. 24, Year 1997 on Land Registration].

¹⁵⁷ Regulation of Conversion and Registration of Former Indonesian (*Adat*) Land Rights, *supra* note 56.

¹⁵⁸ *Id.* art. 8.

registration. The obligation of registering *adat* land transactions in order to determine the conversion of *adat* land is therefore inadequate. This process creates deficiencies in converting and administering *adat* land, as in most rural areas this land is still governed by *adat* law. The conversion attempts of *adat* land rights done in parallel with the initial land registration needs to consider the exiting socio-cultural backgrounds.

The initial registration of *adat* land could be proposed with any evidence that will subsequently be examined by the Land Adjudication Committee “Team A”¹⁵⁹ followed by compulsory public notification.¹⁶⁰ This process is difficult because most *adat* communal land lacks adequate evidence. Some village functionaries, understanding this deficiency, allegedly produce a land right declaration (SKT) on communal *adat* land to evidence individual possession for conversion purposes. Another problem is that the continuous occupation of village land by village officials is critical in distinguishing *adat* communal land from individual *adat* land. In many cases, major alleged conversions of communal (*adat*) land involve village officials and NLA officials.

The conversion of *adat* land rights could be classified into three different categories based on the nature and the content of the rights: 1) *adat* land rights that contain an incident of ownership; 2) an incident of possession; and 3) an incident of neither ownership nor possession but reliance upon the unique regular re-allocation and re-division of land parcels amongst community members.

A. *Adat Land Rights that Bear the Nature of Ownership*

Adat land rights stated in Article II of the conversion provision of the BAL 1960—including *agrarische eigendom, milik, yasan, andarbeni, hak atas druwe, hak atas druwe desa, pesini, grant sultan, landerijenbezitrecht, altijddurende erfpacht, hak usaha atas bekas tanah partikelir* and others¹⁶¹—were converted into rights of ownership (HM), unless the landholder was unable to satisfy citizenship requirements. If the landholder was not an Indonesian citizen or a legal corporation, these rights were converted to a right of building (HGB) for housing, or a right of exploitation

¹⁵⁹ “Team A” is a land adjudication team that was established in the NLA provincial office. “Team B” is at the NLA district office.

¹⁶⁰ Ministry of Agriculture and Land Regulation No. 2, Year 1962 on Determination of Conversion and Registration of Former Indonesian (*Adat*) Land Rights, *supra* note 56, art. 7.1.

¹⁶¹ The other *adat* rights will be determined by the Minister of Agrarian Affairs. Basic Agrarian Law, *supra* note 1, conversion provision, art. II(1). Until now, the other land rights have not been determined by the Ministry of Agrarian Affairs. Therefore the conversion relies on the basic attributes of ownership, such as: an inheritable land right and strong individual authority.

(HGU) for agriculture.¹⁶² This conversion is problematic where the attributes of *adat* land rights are different from the statutory land rights.

These *adat* land rights have quite different attributes that are not equivalent to the statutory rights. For example, *hak atas druwe*, *hak atas druwe desa* are the communal rights relating to village land in Balinese society. Under this law, these *adat* land rights are converted into rights of ownership (HM) but the owner of this land is unclear. Until recently Balinese *adat* (village) institutions were not determined as eligible legal institutions to be granted the right of ownership. The conversion of these lands is still unclear and imprecise, which means that *adat* communities are left to administer these lands.¹⁶³

The other deficiency relates to the different attributes of *hak milik adat* which contains elements of communality and the statutory right of *hak milik* under the BAL 1960.¹⁶⁴ *Hak milik adat* is an adoption of the Arabic word for ownership, and lacks clarity in the Javanese language, which often associates ownership with *duwe* or *gadah*, which refer to possession.¹⁶⁵ As mentioned earlier, the meaning of the property right in Java originates from control over people (*gogol*) who work for the elite (*sikep*). The allocation of land to *gogol* — a person who is eligible to cultivate rice field land (*sawah*) — constitutes the right to use over communal village land. *Hak milik* is associated with the possession of inheritable land, which may be subject to the village *ulayat* right. The holder of *hak milik* has a limited right to alienate the land and needs to act consistently with village *ulayat* rights.¹⁶⁶ These attributes are therefore conceptually different from the *hak milik* as mentioned by the BAL, which provides for a strong individual power to alienate land.

Similarly, other types of *adat* land rights, such as *yasan*, originated as a way of paying compensation for the clearing of forest in Java. By clearing forest under the permission of the head of village, villagers are entitled to cultivate the cleared forest land. This land is inheritable but is subject to village *ulayat* rights. The *yasan* attributes are less powerful than *milik* because *yasan* rights may be extinguished by the village authority. *Yasan* is therefore similar to rights of use under village land.

¹⁶² Regulation on the Implementation of BAL, *supra* note 103, art. 6(1).

¹⁶³ See CAROL WARREN, ADAT AND DINAS: BALINESE COMMUNITIES IN THE INDONESIAN STATE (1993) (discussing the status of Balinese Customary Land after the enactment of the Basic Agrarian Law).

¹⁶⁴ Basic Agrarian Law, *supra* note 1, art. 20(1).

¹⁶⁵ See VAN VOLLENHOVEN, ON INDONESIAN ADAT LAW 185 (J.F. Holleman ed., 1981).

¹⁶⁶ *Id.*

B. *Adat Land Rights that Bear the Nature of Possession*

The second category of *adat* land has a characteristic of possession. The *adat* land rights stated by Article VI of the conversion provision of the BAL 1960 such as *hak vruchtgebruik*, *gebruik*, *grant controleur*, *bruikleen*, *ganggam bantuik*, *anggaduh*, *bengkok*, *lungguh*, *pituwas* and others are converted to rights of use (*HP*). This provision is erroneous in terms of the different attributes of these *adat* rights vis-à-vis the statutory right of use. The right of use under the BAL 1960 is a secondary right that may be granted under a right of ownership or over state land.¹⁶⁷ A critical question is what the primary right is if those *adat* lands are converted as a secondary right of use.

The legislation assumes that the primary rights of those *adat* land rights are state land. This assumption might be derived from the interpretation of Article 8, of The Ministry of Agriculture and Agrarian Affairs Regulation No. 2 of 1962 regarding the determination of the conversion and registration of former Indonesian land rights. It states that, “[i]n the region where land registration has been implemented, within five years of the passing of this regulation, any Indonesian land rights which had not been confirmed through conversion become state land.”¹⁶⁸

This provision lacks legal justification as it overrides the basic principle of the BAL 1960, which is to recognise *adat* law. It also contravenes Article 58 of the transitional provision of the BAL 1960 on the continuation of *adat* practices.

This conversion is misleading. For example, in East Java, *lungguh* and *bengkok* give permission to use or cultivate village land with certain considerations and limitations. *Lungguh* is a permission to cultivate and use land under a sultanate land grant, given in regard to person’s appointment as an official of the sultanate. In many areas, this land has been transferred to become village land based on previous regulations. Similarly, *bengkok* is land used by village functionaries as a substitution for a salary. This land is returned to the village when the functionary is dismissed from an appointment.

If these types of *adat* land are converted into secondary rights of use, the question remains: what is the primary right to this *adat* land? Under the law, village governments are not considered an eligible legal subject for the

¹⁶⁷ See Basic Agrarian Law, *supra* note 1, art. 41(1).

¹⁶⁸ Regulation of Conversion and Registration of Former Indonesian (*Adat*) Land Rights, *supra* note 56, art. 8.

right of ownership (*HM*).¹⁶⁹ Therefore, the conversion of *bengkak* into right of use would be misleading, since the primary right of ownership has not been clearly determined. Until now, most *bengkak* land has not been converted and still remains under *adat* practice.¹⁷⁰

C. *Adat Land Rights that Bear a Unique Nature of Regular Re-Division and Re-Allocation*

The conversion of *adat* land is a most intricate process. The particular attributes of regular re-division and re-allocation of *adat* land rights is a tenure system unique to most parts of Java. This tenure system was originally developed during pre-colonial times, and still exists in post-colonial times. These land rights include *gogolan*, *pekulen* and *sanggan*. The *gogolan*, *pekulen* and *sanggan* contain particular attributes of regular re-division and re-allocation of land among members of the community. Under Article VII of the conversion provisions, these land rights may be converted as either rights of ownership or rights of use. However, this process creates complex problems.

Article VII was further articulated by the Joint Decision between the Minister of Agrarian Affairs and the Minister of Home Affairs No. Sk. 30/KA/1965 jo 11/DDN/1965. This regulation prohibited the continuation of the existing *gogol* system.¹⁷¹ This provision is unrealistic as the *gogol* system did not only regulate the relationships between people and the land, but also served as a system to impose obligations and duties for compensation of *gogol* allocations upon community members. The *gogol* system determined sanctions and penalties for *gogol* holders in relation to maintaining village harmony and order. The *gogol* system also consisted of comprehensive provisions on how *gogol* allocations contributed to village order, succession and obligations of villagers to maintain equality and harmony.¹⁷² The conversion of the *gogol* system never eliminated it in

¹⁶⁹ Only designated state owned companies are eligible to be granted the right of ownership (*HM*). See Peraturan Pemerintah Republik Indonesia No. 38, Th. 1963 Tentang Penunjukan Badan-Badan Hukum Yang Dapat Mempunyai Hak Milik Atas Tanah, art. 1, [Regulation of the Government of the Republic of Indonesia, No. 38, Year 1963 on the Determination of Legal Persons].

¹⁷⁰ Personal interview with KR (the head of Bumi Rejo village) and BR (the head of Kepatihan village), (Feb. 5, 2004). According to those heads of villages, *bengkak* land in most villages has been clearly recognized by villagers, therefore conversion may not be necessary.

¹⁷¹ Keputusan Bersama Menteri Pertanian Dan Agraria Dan Menteri Dalam Negeri No. SK. 40/KA/1964, Th. 1964 Tentang Penegasan Konversi Hak Gogolan Tetap, first (*pertama*), [Joint Ministerial Decision Between Minister of Agriculture and Land and the Minister of Home Affairs No. Sk. 40/KA/1964, Year 1964 on the Conversion of Fixed *Gogol* Land] (Apr. 14, 1964) [hereinafter Joint Ministerial Decision on the Conversion of Fixed *Gogol* Land].

¹⁷² See *Gogol* Regulation, Ngampungan village, Jombang, East Java (on file with author).

practice, and today some village governments have confirmed the *gogol* system through village regulation.

Article VII of the conversion provisions of the BAL 1960 classifies these *adat* land rights into the following two different categories: *gogol* with fixed allocation and *gogol* with regular distribution and allocation.

1. *Gogol, Sanggan or Pekulen with Fixed Allocation*

The fixed allocations of *gogol*, *sanggan* and *pekulen* contain quite similar contents and attributes. These *adat* land rights comprise two main attributes to differentiate from other types of “not-fixed *gogol*.” *Gogol* holders continuously occupy the same land area, and their land allocation is inheritable. These types of *adat* land rights were converted into *hak milik* at the passing of the BAL 1960.¹⁷³ By 1960, these land rights were no longer subject to any limitations from *adat* (*gogol*) regulations, including compulsory working for the village, a compulsory levy and compulsory contributions for land.¹⁷⁴ Since the passing of the BAL it was presumed that the *gogol* system was extinguished and that holders of *gogol* land with fixed allocations should fully enjoy statutory rights of ownership. The conversion of these *adat* land rights was collectively conducted by local government and the NLA district office to avoid complex and costly processes. This program was done through the district land reform program, but much converted *gogol* land has not yet been registered.

2. *The Gogol, Sanggan or Pekulen with Regular Re-Division and Re-Allocation*

These types of *adat* land rights are different from fixed-*gogol* land. *Gogol* holders do not continuously occupy the same patch of land and land allocation is usually not inheritable. The *gogol* land returns to the village when the time period has passed or when the *gogol* holder dies. These types of land allocations are classified as “not-fixed *gogol*” subject to re-division and re-allocation. Under Article VII(2) of the conversion provisions, these *adat* land rights were converted into rights of use but could be upgraded into rights of ownership (*HM*).¹⁷⁵ The village regulation regarding this type of

¹⁷³ Basic Agrarian Law, *supra* note 1, conversion provision, art. VII(1).

¹⁷⁴ Joint Ministerial Decision on the Conversion of Fixed *Gogol* Land, *supra* note 170, second (*kedua*).

¹⁷⁵ Keputusan Bersama Menteri Agraria dan Menteri Dalam Negeri No. 30/Depag/65, Th. 1965 Penegasan Konversi Menjadi Hak Paki Dan Pemberian Hak Milik Atas Tanah Bekas Hak Gogolan Tidak Tetap, fifth (*kelima*) [Joint Ministerial Decision Between Ministry of Land and Ministry of Home Affairs

adat land rights may still be valid as long as they are consistent with the spirit of the BAL 1960.¹⁷⁶ In practice, the “not-fixed *gogol*” comprises three different types. The differences between the types rely on the allocation and the status of the *gogol* holder. The types of “not-fixed *gogol*” can be classified as follows:

- Inheritable rights of cultivation or occupation in which the parcel of land changes over time (*atok sirah gilir galeng*);
- Inheritable rights of cultivation or occupation in which every occupier (*gogol*) is regularly allocated parcels of land based on time periods such as one harvest season (*gogol musiman/gogol geblakan*); and
- Where the allocated parcel of land is fixed but is not inheritable. The allocated land returns to the village when the *gogol* holder dies (*gogol gilir mati*).¹⁷⁷

If there is another type of “not-fixed *gogol*,” the district land reform committee will determine under which of these three categories it most closely falls. After the conversion of “not-fixed *gogol*” into rights of use, this right could be upgraded into a right of ownership (*HM*) based on the landholder’s application to the head of the District Agrarian Office.¹⁷⁸ The problem is how to determine the most eligible person who entitles the statutory right since the “not-fixed *gogol*” is subject to regular reallocations to different people. The eighth provision of this regulation states that the most recent *gogol* holder or *gogol* candidate who occupied and cultivated land since 1960 was the preferred person for a right of ownership. This is inconsistent with the existing practices where the longest serving *gogol* should have priority.¹⁷⁹ This is a source of conflict in the conversion process. The village assembly (*rapat desa*) will come to a resolution where any disputes emerge from decisions of eligibility.¹⁸⁰

In practice, the characteristics of *gogol* land vary across *adat* communities, and not only as they appear under these classifications. In Sidoarjo in East Java, categories of *gogol* are based on the amount of privileges granted to an individual. For example, *gogol* first class constitutes people who are granted the rights to a house, garden, and communal

No. 30/Depag/65, Year 1965 on the Determination of Conversion of Not-Fixed *Gogol* into Right of Use and Right of Ownership] [hereinafter Joint Ministerial Decision on the Conversion of Not-Fixed *Gogol* into Right of Use and Right of Ownership].

¹⁷⁶ *Id.* second (*kedua*).

¹⁷⁷ *Id.* third (*ketiga*).

¹⁷⁸ *Id.* fifth (*kelima*).

¹⁷⁹ Personal interview with KS (the village secretary of Bumi Rejo village) Malang District (Nov. 10, 2003) (on file with author).

¹⁸⁰ Joint Ministerial Decision on the Conversion of Not-Fixed *Gogol* into Right of Use and Right of Ownership, *supra* note 174, eighth (*kedelapan*) (b), (c).

irrigated rice field (*sawah*), while *gogol* second class constitutes those eligible to house and garden without a rice field (*sawah*). Another type is also seen in Jombang, East Java, where the allocation of *gogol* land is divided into three main categories: first, *gogol gledegan* is the person who is eligible for *gogol* land from the village, *gogol yasan* is the person who is entitled to irrigated rice fields (*sawah*), and lastly the *anggaran* is the person who is entitled to *gogol* land with both a house and garden.¹⁸¹

In trying to accommodate these various types of *gogol* land, Article VII(3) of the conversion provision of the BAL 1960, provides discretion to the Minister of Agrarian Affairs to decide the closest attributes of *gogol* land during the conversion process.¹⁸² This authority was delegated to provincial and district NLA offices. The conversion of these types of *adat* land rights have created discrepancies and imprecision. This is particularly so in dealing with “non-fixed *gogol*” rights which are subject to re-division and re-allocation. In many cases, even though the conversion has been determined, the practices of re-distribution and re-allocation of *gogol* land continues. This often results in continuous changes of land divisions to different people. These changes have rarely been followed and updated in the land records in the NLA district office, or by changes in the conversion of land rights determination. This has led to discrepancies between actual conditions and the land records.

Major issues to do with the conversion of *adat* land rights raise the different nature and attributes of *adat* land rights vis-a-vis statutory land rights. The conversion of *adat* land rights appears to create different outcomes since *adat* practices still govern village tenure systems. Despite the successes of converting less communal *adat* land rights, the conversion of more communal rights seems not to significantly affect *adat* practices. Land transactions, purchases and administration in rural areas continue to be based on *adat* law. This is also applicable to new statutory rights converted from *adat* land.¹⁸³ In short, attempts to unify existing *adat* land rights also needs to transform the existing social and cultural phenomena that are commonly attributed to village tenure systems.

¹⁸¹ See *Gogol* Regulation, ch. II, art. 6 (Dec. 27, 1953) (on file with author).

¹⁸² Basic Agrarian Law, *supra* note 1, art. VII(3).

¹⁸³ See BADAN PERTANAHAN NASIONAL AND UNIVERSITAS ATMA JAYA, POLA PENGUASAAN TANAH MASYARAKAT TRADISIONAL DAN PROBLEMA PENDAFTARAN TANAH, (2), (3), xii-xvii (1998).

VI. CONCLUSION

The public and private transformation of land rights in Indonesia has caused complicated problems and deficiencies. Instead of being a system governed by private law systems and determined by court decisions, it is instead one that is directed by tight administrative controls. Major inaccuracies are derived from the uncertain recognition of existing property rights and the strong administrative discretion used to determine the validity of the transformation process. It is apparent, therefore, that weak institutional capacities are one of the main causes of this failure to promote good governance as suggested by various legal developmentalists. These failures have resulted in imprecise, uncertain and often discriminatory decisions. The inadequate implementation of these processes is due to a weak legal framework and inadequate administrative procedures.

The transformation of land rights involved enormous state involvement to control the process, and to grant new statutory rights. In some ways, the state did attempt to create a fair and equitable transformation process and to prevent the accumulation of land by interest groups. However, the deficient mechanisms and procedures, and limited administrative capacity created unpredictability and discrimination toward non-state interests. Furthermore, the process has failed to protect the interest of vulnerable communities at large.

Administrative deficiencies, the inconsistency of statutory interpretation, competing authorities among government institutions and the incompatibility of the existing social and cultural system with the nature of an individual system of statutory rights under the BAL 1960 have all contributed to create a transformation system which has failed to unify the existing pluralistic nature of land rights in Indonesia. Therefore, it is imperative that the transformation of the land system employs not only the law, but most importantly adequate governance that consistently promotes an equitable system, transparency and accountability to protect the interests of the entire community in the land.