GOVERNMENT OF THE REPUBLIC OF INDONESIA
National Development Planning Agency
and
National Land Agency

TOPIC CYCLE 4

INDONESIAN LAND LAW AND TENURES - ISSUES IN LAND RIGHTS

Lead Experts :

Jude Wallace, LLB, LLM.
Prof. Dr. A. P. Parlindungan, SH.
Arie S. Hutagalung, SH, MLI.

LAND ADMINISTRATION PROJECT - PART C

Support for Long Term Development of Land Management Policies

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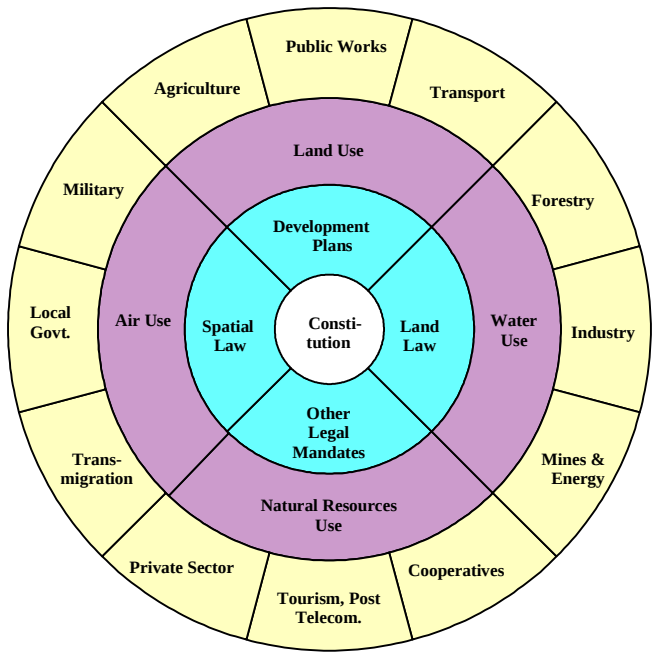

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ABBREVIATIONS

ABRI	Indonesian Armed Forces
AMDAL	Analisa Dampak Lingkungan (Environmental Impact Analysis)
BAL	Basic Agrarian Law
BAKOSURTANAL	Badan Koordinasi Survei dan Pemetaan Nasional (National Mapping and Surveying Coordination Agency)
BAPEPAM	Badan Pengawas Pasar Modal (Capital Market Supervisory Agency)
BAPPENAS	Badan Perencanaan Pembangunan Nasional (National Development Planning Agency)
BAPPEDA	Badan Perencanaan Pembangunan Daerah (Regional Development Planning Agency)
BAPPEDAL	Badan Pengendalian Dampak Lingkungan (Pollution Control and Environmental Assessment Agency)
BKPM	Badan Koordinasi Penanaman Modal (Investment Coordination Agency)
BKPMD	Badan Koordinasi Penanaman Modal Daerah (Regional Investment Coordination Agency)
BPN	Badan Pertanahan Nasional (National Land Agency)
CBO	Community Based Organisations
DGE	Directorate General of Estates
DGT	Directorate of Land and Building Tax
DPR	Dewan Perwakilan Rakyat (Legislative Assembly)
DPRD	Dewan Perwakilan Rakyat Daerah (Regional Legislative Assembly)
FAO	Food and Agriculture Organisations
GIS	Geographical Information Systems
GOI	Government of Indonesia
GPS	Global Positioning System
HGB	Hak Guna Bangunan (Right to Use Building)
HPH	Hak Pengusahaan Hutan (Forest Land Use Permits)
HGH	Hak Guna Hutan (Land Use Permits)
HGU	Hak Guna Usaha (Right to Use)
IBRA	Indonesian Bank Restructuring Agency
INDRA	Indonesian Debt Restructuring Agency
IPEDA	Iuran Pembangunan Daerah (Regional Development Tax)
IPR	Izin Pemanfaatan Ruang (Spatial Utilization Permit) consisting of an IPPT Izin Peruntukan Penggunaan Tanah (Land Use Allocation Permit) and KRPT Keterangan Rencana Pemanfaatan Tanah, (Land Use Planning Statement). This will to replace the Izin Lokasi process.
JABOTABEK	Jakarta, Bogor, Tangerang, Bekasi areas
KANWIL	Kantor Wilayah (Provincial Office)
LAP	Land Administration Project
LASA	Land Administration Systems Australia
LIDAP	Local Institutional Development Action Plan
LIS	Land Information System
LKMD	Lembaga Ketahanan Masyarakat Desa (Village Social Activities Group)
LMD	Lembaga Masyarakat Desa (Village Activities Group)
MoF	Ministry of Finance
NGO	Non-governmental Organisations
NLL	National Land Law

PAM	Perusahaan Air Minum (Water Supply Corporation)
PBB	Pajak Bumi dan Bangunan (Land and Buildings Tax)
PERUMNAS	Perumahan Nasional (National Housing Authority)
PLN	Perusahaan Listrik Negara (Electricity Company)
PP	Peraturan Pemerintah (Government Regulation)
PPAT	Pejabat Pembuat Akta Tanah (Land Deed Officer)
PRONA	Proyek Nasional Agraria (Agrarian National Project)
RT	Rukun Tetangga (Neighborhood Association)
RUTR	Rencana Umum Tata Ruang (Spatial Land-Use Planning)
RW	Rukun Warga (Community Association)
SEKWILDA	Sekretaris Wilayah Daerah (Regional Local Secretary)
SKPT	Surat Keterangan Pendaftaran Tanah (Land Registration Official Statement)
SPPT	Surat Pemberitahuan Pajak Terhutang (Tax Obligation Declaration Letter)
TGHK	Tata Guna Hutan Kesepakatan (Agreed Forest Land-Use system)
TKPRD	Tim Koordinasi Penataan Ruang Daerah (Coordinating Team On Spatial Land-Use Planning at Regional Level)
TP3D	Tim Pembinaan Pengembangan Perkebunan Daerah (Advisory Team for Regional Estate-crop Development)
UUPA	Undang-Undang Pokok Agraria (Basic Agrarian Law)
UDKP	Unit Daerah Kerja Pembangunan (Coordination committee on *kecamatan* to review and coordinate project proposals from the *desa* and *kelurahan*)

GLOSSARY OF LAND TERMS

Cadastre
A map showing results of a survey. Cadastres can support land registration, parcel identification, planning, taxation, utilities and services. A **Juridical Cadastre** establishes the legal titles to land, the **Fiscal Cadastre** deals with land taxation. Separating these cadastres is no longer appropriate, given the use of computers in the developed world, and given the need to finance efficient information systems in the Third World.

Cadastral Survey
A survey that determines boundaries and location of a parcel of land

Chattels
Property which is not land. When chattels are attached to land, they become fixtures and part of the land**.**

Community Title
The right (whether or not formally recognised by the state) of a community to its land used for common purposes (cemeteries, meeting areas, paths, religious places) and for growing and collecting food and resources, including land allocated to an individual or family by the community.

Convey
The formal description for transferring land to another person.

Conveyancing
The method used to transfer land and create interests in land. Writing is always required. Formalities vary: formal deeds made before notaries (Europe), formal deeds made before an ordinary witness (England), simple, one page, easy to complete transfers before an adult witness (Australia), or before a person giving an affidavit of identity (British Columbia).

Deed Registration
Registration or memorialisation of title deeds.

Deed Titles
Titles which are created and proved by the contents of deeds. A deeds system is used in Europe and USA. Contrast a title registration system.

Eminent Domain
The doctrine of ultimate state ownership of land. Contrast Indonesia's claim that land is merely "controlled" by the state.

Escheat
The opportunity of the state to obtain land at the death of an owner who left neither a will nor identifiable next of kin.

Fee Simple
Archaic description of the highest level of estate of freehold tenure in the English feudal system.

Fixtures
Chattels which are so affixed to the land that they are part of it. The ownership of these chattels is then passed to the owner of the land.

Forgery
The act of creating a document which is tells a lie on its face – a false document. In most jurisdictions, forgery is a specific criminal offence. Forged deeds or instruments are void, but in Torrens systems of registration they are effective to pass the title to a good faith buyer.

Freehold
Full private ownership.

Fraud
The act of inducing a person to believe a circumstance is true when it is not so that the person acts to his or her detriment, whether or not the person committing the fraud was motivated to achieve the detriment, or gained as a result.

General Boundaries
Boundaries established by reference to the physical characteristics of the land, such as hedges, waterways or roads

Geodetic Network
The network of fixed points established on land to facilitate a geodetic survey.

Geodetic Survey
Also called a **Georeferenced survey**. A survey that establishes a network (or grid) of points on the earth's surface taking into account its curvature. The points are used as reference points to establish and reestablish the location of parcels.

Geospatial or Geographic Information System (GIS)
Graphic land information, usually with multi purpose layers or data, such as roads, services, parcels, resource tenures, uses, planning zones and so on.

Global Positioning System (GPS)
A system of survey which establishes and can reestablish points on the earth's surface by reference to orbiting satellites.

Immovable Property
Land and attachments in European Civil Law.

Indigenous Tenure System
Tenure of local origin used by original inhabitants.

Land Administration System
The entire systematic treatment of activities, information and allocations in relation to land, including policies, law, professional and regulatory activity.

Land Information System (LIS)
The organised collection of information about land particularly the geographical units and parcels, and sometimes resources and topographical features, usually divided into -

- text or descriptive information, and
- a cartographic or graphic part containing maps.

Land Redistribution
Reallocating the use and ownership of land.

Land Reform
Land redistribution, typically dividing large holdings among many small holders or providing access to landless people. In some cases land reform can mean reconsolidation of parcels to achieve minimum size standards.

Land Registration
Recording the ownership and other property rights in land in a register. The service is usually provided by the Government.

Land Tenure
A legal concept which allocates opportunities to make decisions about land.

Leasehold or Tenancy
A tenure given to a tenant or lessee by the owner of land for a specific period (either a term of years, month by month, or year by year) for payment of rent. The owner can be a State or a private owner.

Lessee or Tenant
The person who takes the lease.

Lessor or Landlord
The owner of land who grants the lease.

Lot
A parcel or plot of land created by a subdivision.

Mortgage
A contract which creates a property right in a lender to secure repayment of a loan to the borrower. The property right can exist in the borrower's land, but sometimes it is given by a third party over the third party's land.

Mortgagee
The person who takes the security over land and lends money in return.

Mortgagor
The person who gives the security over land and borrows money in return.

Multi Purpose Cadastre
In connection with a land information system, this is a parcel based LIS providing a standardised, comprehensive and up to date public record (including maps) of land interests for a particular jurisdiction.

Native Title
The right of indigenous people and their descendants (sometimes nomadic, but not necessarily) to land which supports their existence, whether or not recognised by the state. The jurisprudence on native title is extensive. The United Nations is in process of developing a Declaration on Rights of Indigenous People. The draft appears in Appendix 1.

Parcel
A plot of land, usually capable of being sold, with its own title.

Personal Property
Rights in property which is not real property (land). This property can be ***tangible*** (things which can be seen and touched) or ***intangible*** (things which have value and are capable of being owned but which cannot be seen), such as shares, rights to sue, copyright, trademarks and designs. Similar to Moveables in European Civil Law.

Possession
The actual physical use of the land, resource or other thing.

Private Property
Property held by a legal person, that is by an individual or a group which has legal status such as a company, cooperative, trust or partnership.

Real Property
Rights in land. Equivalent to Immoveables in European Civil Law.

Resource Tenure
A legal concept which allocates the opportunity to exploit minerals, timber, water or other valuable resources on land or in territorial waters.

Registration of land or title, the process of bringing land into the registration system.

Registration of transactions The process of recording a transaction (usually a transfer, lease, mortgage or subdivision) in the land register.

Security of Tenure
Protection of continued possession, use and receipt of income from land so that it cannot be taken away, especially by the state.

Share Rent
A rental arrangement which requires the tenant to give the landlord part of the crop grown on the land in return for its use.

Sporadic Registration
Registration of a land by an owner on his or her own initiative and at his or her expense. In Indonesia, the term also technically refers to programs of subsidised and compulsory registration of title for all land in an area.

Squatter
A person who possesses land without authority of the owner. In most legal systems, the squatter can acquire a title to the land if the owner does not seek to recover the land within the limitation period, that is the period allowed for starting an action in the courts against the squatter.

Systematic Registration
A program of subsidised and compulsory registration of title for all land in an area accompanied by high quality surveys and adjudication of titles.

Subdivision
A division of a parcel into smaller parcels by inheritance, sale of part, or a formal surveyed subdivision.

Survey
Determining the boundaries and fixing the location of a parcel.

Title, Title Certificate
The formal certificate showing land ownership in a land registration system. The owner of land holds the title and passes them to a mortgagee, buyer or new owner when a transaction is completed. Land registration schemes can operate without titles, and in the coming computer future, more will do so.

Title Deed
The document which changes the ownership of land in deeds based systems.

Title Deeds
The bundle of deeds in a deeds based system. The owner of land holds the deeds and passes them to a mortgagee, buyer or new owner when a transaction is completed.

Title Insurance
The insurance of a title through private insurers (as in the United States) or through a public or government fund associated with a registration of title scheme (usually a Torrens system).

Transfer (noun)
The document which conveys or transfers land

Transfer (verb)
The act of conveying or transferring land

Unit
A parcel created by a subdivision, usually a building. Also called a condominium or an apartment.

CHAPTER 1 THEMES OF THE REPORT – EXECUTIVE SUMMARY

1.1 The Choice Facing Indonesia

Indonesia is at a crucial point in its development at which it must determine its fundamental economic direction. Whether the Government of Indonesia, GOI, moves from a highly regulated, centralised state command economy to a market system remains to be seen. Obviously we think that rapid sustained economic growth and social progress can best be delivered and assured by a commitment to a market economy – particularly in land. For this reason, Indonesia's basic land law must be changed. The agrarian model contained in the Basic Agrarian Law (BAL), or *Undang Undang Pokok Agraria* No 5/1960 is thoroughly out of date and unable to bring into being an efficient, effective market system in land. Despite its reliance on *Adat* (customary) principles, many believe it is a source of social conflict, particularly in its failure to recognise broad ownership structures as well as its failure to recognise land rights of communities. It is associated directly with land allocation and acquisition processes which deprived thousands of Indonesian citizens of their land and of decent compensation for the loss. It is probably the most highly regulated system of land entitlements in the world, apart from pure communist regimes.

Land law reform offers a stark choice – does the GOI believe that the current restrictive regime of land rights should be maintained, or is it prepared to allow broader and freer land right entitlements in which ordinary people, communities and business can make decisions about their land as found in other equivalent countries and in all developed countries?

1.2 Report Structure

The report has 8 chapters.

Chapter 1 - Themes of the Report explains the socio-economic and political situation and identifies the key components for the Indonesian land administration system of the future. It argues that the total vision of a land administration system must be set before piecemeal, incremental changes are made. It provides a nutshell commentary on existing land law and practice.

Chapter 2 - Rights in Land deals with the conceptual nature of property rights, titles and tenures. It explains how theories of law and development of legal systems are related to the move away from defining land as physical inventory to an abstract concept of property rights with complex interests and how these are different from personal legal rights. It explains how possession is the key to a sound property system and highlights the seeming paradox that the more market oriented the system, the more it recognises and protects possession.

By developing rights to possession, the legal system begins its unique process of recognising interests in land. When these interests are understood as rights between people, and not merely rights in land, the legal system reaches the mature stage of facilitating a market in property rights.

A strong case is made for Indonesia to improve its legal treatment of possession to protect owners and end stale disputes and to reach maturity in its legal system. The essential tools of tenures, titles, conveyancing and priorities are introduced.

Chapter 3 - Indonesian Land Law describes law and its ideology. The semantics debate between 'control' or 'ownership' of land by the State is discounted by pointing out that 'control' has in any event been used to allow the government to make all crucial decisions about land ownership and use. Privately owned (*milik*) registered land in Indonesia is estimated to be less than 1% of all land.

The debates about the relationship of *adat* and agrarian law are reviewed with the conclusion that the problem lies in the Law, not *adat* principles. At the same time, some clear *adat* principles appropriate for sedentary agricultural communities are identified as inappropriate for modern societies. It concludes that the BAL must be changed to give the degree of protection for land rights expected in a civil society and to provide clear guidance to the market.

Chapter 4 - Registration describes land registration in theory and the changes that registration systems are undergoing, especially those driven by computer technology. These changes are fundamental and will bring changes in conveyancing procedures. Modern systems of title insurance are reviewed and rejected as options for Indonesia, pending substantial reform of the land law and the land administration system.

The Chapter also describes the state of the Indonesian system, its processes, and successes and the opportunities for improvement. It argues that land registration cannot be divorced from land law, especially priorities in interests, and that the system should be made into a positive system as soon as possible.

Chapter 5 - Conveyancing and Priorities points out the deficiencies in existing law, especially lack of clear closures for disputes, even when the land is registered. It examines how proving a land title can be improved by the simple means of providing legal status for possession and evidentiary capacity for tax receipts. It provides a detailed plan of how priorities in interests in land should be firmly identified in an Act of Parliament. A large part of the need for these changes lies in the extent of conveyancing in unregistered land which is officially unrecognised. Improving the standards of documentation and providing clear priority rules will assist the conveyancing, provide much needed security of ownership, and assist conversion to registered land.

Along side these legal changes, administrative changes should focus on developing a uniform parcel identifier ,UPI, in all agencies and for all purposes. A matching process is necessary to further improve the accuracy of records in the land and tax agencies.

Chapter 6 - National Interest versus Land Titles deals with the major problem of balancing communal and native land use with nationally approved land registration, development and resource harvesting. It explains in detail how the nature of rights recognised in the Law excludes definitive legal status for the land rights of *adat* communities. It explains how resource tenures further compound this problem.

The chapter draws on international experiences in recognition of land rights of indigenous peoples and shows how a simple collective title could be created under law and proposes a registration system for *adat* and indigenous communities. It explains the context of international obligations and standards and the status of the international documents which deal with the issue.

Chapter 7 - Property Markets explains how the legal framework is divorced from the operative norms used by the public and by instrumentalities in Indonesia. It contrasts this with market based systems in which land is made a commodity, and how proprietary interests in land are then created, which in turn have their own market. It identifies the existing impediments in Indonesia to the creation of a market in land, let alone the maturing of the system into an equivalent market system. In this, the control of the State over land tenures is the basic issue. The deficiencies of the tenures

as prescribed in the BAL are the single most obvious limitation on markets. Moreover, where tenures are expressly used for social land redistribution purposes, they have failed.

Chapter 8 - The Future gathers together the themes in specific recommendations for changes aimed at creating a decentralised land administration system for Indonesia which works coherently towards a vision for improved and expanded land rights, more efficient land allocation, equitable land taxation and effective public control and participation at the local government level.

1.3 Examination of Land Law

This report examines the policies supporting Indonesian property law, land rights and land use practices in the light of these themes:

1. Formulating a vision and a policy action plan for the land administration system;
2. Improving security of titles to land, particularly for autochthonous people, and;
3. Understanding the unique Indonesian characteristics of titling in the context of modern systems of land tenures and property law;
4. Facilitating a modern property market.

The report contains a legal analysis and assessment of existing land law but does not provide a detailed analysis of the myriad land regulations (some 2000) promulgated by the bureaucracy since the passage of the BAL in 1960. Senior Government officials have indicated that land reform and land rights will inevitably be a priority in the incoming administration.[1]

The report is a timely exercise in this atmosphere of change. It recognises that in the first two decades since its introduction in 1960, the Basic Agrarian Law saw little practical implementation, and in the last decade it has been used as an engine of development. The Law imposed tenures which played a large role in the overlaying of a more or less random nation-state boundary (covering 13,000 plus islands), with a national land policy which attempted to harmonize or unify the different approaches of various and divergent communities to a single framework. However, policy analysis indicates that Indonesia's needs are no longer served by this blueprint of the Sixties. Indeed, the BAL was used as an engine of corruption and disenfranchisement of the people in the past decade. Fundamental reform of land law is essential for social justice and economic growth in the next century.

A policy analysis of land tenures and land administration systems is not equivalent to analyzing policies embedded in social and economic realities. The official or formal system as expounded in the BAL is very different from the practical working system. However, with the caveats that layers of cultural practices, deeply embedded values and corrupt and collusive practices are usually highly concealed, the analysis includes the way the system works in practice.

1.4 The Nation State and National Land Policy

The Indonesian economy has gone from feudal to industrial in a short time. Since 1945, the country has seen revolution, parliamentary democracy, civil war, presidential autocracy, mass murder, military rule, presidential excess, and government restructure.[2] The changes from traditional authority to national authoritarianism, creation of large scale bureaucracies, and centralization of power in an elite were achieved quickly. The last 10 years brought massive changes in land distribution generated by myopic economic growth configured under an authoritarian regime.

[1] Interview with Erman Rajagukguk, Vice Cabinet Secretary April 1999.

[2] Geertz, p 319.

There is no sign of the country developing the stage of capitalism at which rational-legal authority[3] takes over from personal, oblique and repressive authority and norms. The political and economic future is uncertain. Demands for independence and autonomy will change national organisation and potentially jeopardize national unity. Repression and corruption remain regularly reported factors in daily life.

Indonesian capitalism is unique – a form of centralized capitalism in which private ownership and competition are thoroughly and exhaustively state allocated and controlled, pursuit of profit unrestrained, and laissez faire misused to shelter an elite, particularly in their excessive behavior towards the people, but also in their behavior towards international capital.[4]

Transitional processes and pressures on civil peace and good governance are evident in the land law and its administration. Indonesia must now face the problem of establishing and maintaining a sound land administration system. All developing countries experience massive pressure on their systems. They are inherently expensive and difficult to establish, especially because they demand specialist skills. Usually the systems cannot perform at a level capable of supporting national policy and, for poorer nations, they are too expensive to maintain. Indonesia can clearly afford to administer its land better and more efficiently. Its resources are comparatively extensive, especially if the waste inherent in existing administration is retrieved and refocused on productive outcomes. The claim that Indonesia is too poor to establish its own core land administration system is hollow – it has the internal resources to fund a vastly better system than the one it now uses. The explanations for reform inertia lie elsewhere.

Genuine reform is impeded by -

- an underlying and endemic problem of entrenched and multi layered collusion and corruption, and;
- a set of policies (partially articulated) designed to restrict and restrain the market into a manageable mass of transactions which facilitates centralist and elite control.

1.5 *Reformasi* in 1998-1999

On July 11 1997, the Thai Baht was devalued, marking the beginning of the South East Asian economic crisis. Indonesia followed 10 days later by widening its exchange rate band and the Rupiah depreciated significantly. The subsequent monetary crisis (*Krismon)* ended a 32 year period of virtually uninterrupted national growth, real income gains, the emergence of a middle class, and declining poverty. The booming trade and capital flows were suspended and plentiful foreign exchange reserves disappeared. Turmoil followed. The nominal value of the Rupiah fell at one point by 80%, annual inflation almost reached 80%, the economy fell into rapid contraction, real GDP change in 1998 was minus 13.7%, and unemployment and underemployment climbed. Rapid build-up of short-term, unhedged private external debt estimated at US$80 billion, combined with shortcomings in its notably corrupt banking system, left the nation with no credible institutional arrangements. Substantial assistance by the IMF was reluctantly sought and eventually given.

In May 1998 President Soeharto resigned in favour of Vice-President B.J. Habibie who appointed a Reform Cabinet. The Golkar party remained in power under the new President, *Reformasi* began. Malpractice in the land administration system, past excesses in land allocation, unjust compensation to displaced land owners, community claims to land etc became daily news. It became readily apparent that an improvement in land rights entitlements would significantly dampen social unrest and raise the confidence of the business community in land investment. The Government has

[3] Max Weber, Protestant Ethics and the Spirit of Capitalism 1904

[4] The national debt is now estimated by some economists to exceed 100% of GDP.

indicated that land law will be reformed in the aftermath of the election.[5] The key question is the direction of the reform i.e. the continuation of the State as "controller" and supreme power holder or a less rigid, more open and flexible system, capable of supporting the land rights of the Indonesian people and fair markets.

1.6 Undoing Centralism - Autonomy

In the view of the outgoing World Bank Country Director [6], Indonesia's great shortfall was that it had too many weak institutions and one very strong and unsustainable institution. The weak institutions were the legal system, the financial system, the civil service, and an undeveloped democratic process. The strong and unsustainable institution was Soeharto. The country had become the rule of one man not of law. Nevertheless, former President Soeharto did manage to run Indonesia Inc almost singlehandedly for 30 years producing some extraordinary results. From a low base he delivered equitable growth, substantial poverty reduction, increases in literacy, education and health. What was missing in this paradigm was the transition to a civil society based on law.

The dilemma now facing Indonesia is that institutional development and the construction of a civil society may take decades while global capital markets operate at light speed along fiber optic cables. The 1990's decade therefore represents a considerable opportunity lost to Indonesia to develop the institutional and legal base to accommodate the inevitable post–Soeharto transition. Confidence lost is not easily regained. Globalized world developing countries are now expected to operate by a set of rules that require functioning legal systems, appropriate contract law, financial systems that are both transparent and monitored etc in order to participate and compete.

Western educated analysts and advisors working in Indonesia are often accused of importing value laden models based on democratic principles, such as individual rights and transparency, supported by laws replete with remedies and recourse, all aimed at establishing uniformity in markets across a global environment. More and more we find that this market friendly model is anti-thetical to the cultural norms of this country. The question that remains unanswered is there in fact an "Asian" way, with unique characteristics of its own, that can deliver similar results to society? One most notable difference in values pertains to conflict of interest. The concept simply does not yet exist in the Indonesian vocabulary. It is not understood. In fact the opposite appears to be true: it is an obligation to help family members, friends and colleagues to increased wealth[7].

The institutional policies relating to land right entitlements and land allocation typified by the National Land Agency (BPN) and the Ministry of Forestry and Plantations were rigid, centralised, unhearing of complaints and static; the bureaucracies involved were obdurate in the face of suggestions for reform. Far too often implementing regulations were overly bureaucratic, complex, contradictory to basic law and poorly conceptualised. Despite grandiose statements in virtually all preambles in land law (and their implementing regulations) that land and resources on land are under State control to ensure the maximum prosperity and welfare of the people, the opposite has been the case. Collusive and corrupt practices were endemic. The guardians or gatekeepers in the bureaucracy became the privileged facilitators of excessive land allocation deals betraying the public trust.

Furthermore, reform initiatives, where they have occurred, are almost always external to these government agencies in the form of expensive donor loans which have delivered marginal results.

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[5] Erman Rajagukguk, Vice Cabinet Secretary, interview on 22 March 1999.

[6] Dennis de Tray, World Bank Country Director – World Bank's lessons from Indonesian economic crisis, **Jakarta Post**, 14 April 1999, p6

[7] Ibid

In response to the complaint that the national government has exercised too much central control, the Habibie administration proposed major devolution and decentralisation to the regions and local governments. These autonomy proposals[8] are a tentative devolution. The basic apparatus of central control remains and has a two year implementation period. Issues surrounding devolution or autonomy involve -

- Devolution of administrative functions, not necessarily policy control
- Distribution of financial capacity to implement local administration of services
- Sharing of national debt with local administrations
- The right sizing of the civil service at central, regional and local levels.

Autonomy will impact on land administration, but in ways which will only become clear after implementation of the processes. Even then, the reorganisation will take a great deal of time and require substantial resources. There are indications from senior members of government that the major apparatus of land management and administration will change dramatically in the next year. Land affairs is among the areas of competencies mandated to go to *Kabupaten* and *Kotamadya* level under the Local Government Law.[9] There are now clear indications that BPN land office personnel will effectively become *Dinas Kabupaten* or *Kotamadya* employees in the near future – effectively transferred to local government.

Devolution is to be applauded. Land administration can only be successful[10] if it has a strong, and even predominant component of local input and control. Characteristics and social utilisation of land vary from place to place, and existing users prefer consultation and participation in decisions about their future.

Whatever happens, the context in which this report is written will change dramatically. Opportunities have now been created for sensible and meaningful reforms which were inconceivable even last year.

1.7 Ideology – Indonesian Socialism and the Integralist State

Indonesia has had a short life covering parliamentary democracy from 1950-59, Sukarno's Guided Democracy of 1959-1965, and the New Order until May 1998, then *Reformasi*. With the hindsight of history, it is clear that strong presidential rule and an evolving military presence in all aspects of the national endeavour had a continuous and well articulated ideology. The ingredients of the ideology portray authoritarianism as the form of government most suited to Indonesian culture, and liberal democracy as a culturally inappropriate form of government recklessly imported from the West.[11]

> The consistent philosophical and constitutional theme was one championed by integralists (authoritarians, traditionalists or Pancasila-ists). In the mid-1940's the notion of the

[8] Autonomy law, the Law on Local Government, UU 22/1999 and Fiscal Redistribution Law UU 25/1999. The law on intergovernmental fiscal balance supplements the autonomy law and gives specified percentages of the government's net revenue from resources to the local administrations. It sets up production sharing contract systems which give the government (in gas) 85% of the gross oil revenue and 70% of the gas revenue, including corporate income tax and dividend tax payable by contractors to the government. Of the government 85% share, 15% is returned to the local government.

This kind of reform suggests that the GOI is still unhearing of the complaints by Aceh (which produces half the country's oil) and the forest rich provinces for genuine fiscal sharing.

[9] Law 22/1999, Article 10.

[10] Success means permanent, non-conflictual, clearly understood systems, productive of acceptable outcomes in land allocation.

[11] Schwarz, p 6.

integralist state was pushed most strongly by Supomo, a senior judge in the Japanese occupation government. Borrowing from European philosophers, Hegel and Spinoza, and admiring of the governments in Nazi Germany and wartime Japan, the integralists rejected the idea of a separation between rulers and ruled. They specifically rejected the individual-oriented systems of government current in Europe and the United States. *"The traditionalists rejected individualism as the root of colonialism and imperialism. They preferred instead the stylised collectivism of the ancient Javanese kingdom, the mystical sublimation of subject, ruler and realm".*

Supomo likened the state to a large family in which the members of the society were integrated into the whole. In a 31 May 1945 speech to a committee set up in Jakarta to prepare a constitution, Supomo said 'the individual cannot be segregated from the others. Nor can he be separated from the outside world, from groups of humans, not even from other creatures. Everything mixes with other things, every living thing depends on all other forms of life. This is the totalitarian idea, the integralist idea of the Indonesian Nation'.

For the integralists, sovereignty was to be held by 'the people', not by individuals. Individualism was seen as the source of conflict between the government and the people[12]. In an integral state, there was no need for specific guarantees of human rights, as these would imply separation between the state and individuals. In an ideal family, Supomo maintained, children are taken care of and are protected by loving parents: they do not need their 'human rights' protected from the whims of their parents.[13]

Schwarz points out that these perspectives provided the foundation for the construction of large centralist bureaucracies which effectuated a role for the state in the economy, particularly in ownership of land and natural resources, and a strong commitment to cooperatives as a pillar of the economy. The state was linked with 'social justice', not individualism which led to capitalism and its links with colonialism. In the final analysis Indonesia to this day pursues economic socialism.

A principle tool in the implementation the application of the ideology to land lies in the mystifications inherent in *adat* philosophy. Land management is, however, only one aspect of Indonesian life in which mystification, built on effective and extensive administration, has been extraordinarily successful.

"The New Order, which borrowed alike from Japanese fascism and Javanese kingship, was a pragmatic policy designed to hold together a disparate nation under one autocratic ruler. Its heart was a patronage system reaching out to almost every one of Indonesia's 210 million citizens: from the ruling party, Golkar, to the official club for civil servants' wives – *Dharma Wanita*. As social commentator YB Mangunwijaya wrote in 1994, it is nothing less than "an extraordinarily efficient instrument for controlling a whole society". The whole network was known as *Ipoleksosbudhankamling*, or ideological-political-economic-social-cultural defence-security environment. The Japanese, who occupied Indonesia from 1941 to 1945 introduced the system. It was adopted wholesale by President Soekarno after independence, making Indonesia the only country occupied by Japan to formally retain pieces of the Japanese wartime social system. But it wasn't until Mr Soeharto effectively gained power in 1965 that the system became uniquely Indonesian. He wrapped the levers

[12] There is an old Javanese proverb – "The high nail gets hammered down". Low profile and acquiescent behaviour is the accepted norm.

[13] Schwarz , p 8.

of social control in an ideological framework right with the stiff formalities and rituals of the Javanese court and mysticism."[14]

Alternative views, based on good governance, constitutionality, legal order and judicial reform and restriction of the military, are apparent. The interventions of the International Monetary Fund in establishing conditionalities and standards for the forestry sector, the commercial sector and other fundamental reforms during *Reformasi* have produced some results. Likewise the World Bank has attempted to eliminate corruption in the distribution chain of its social welfare funds. There are, in addition, local initiatives. The implementation of autonomy will give a surprisingly clear indication of whether Indonesian socialism can mature into a more market oriented and open environment.

The tenacity of the existing land law is principally sourced in its claims to be *adat* based. Since *adat* cannot be understood by outsiders, no one not already steeped in the culture can understand (or criticise) land law. Because *adat* is inherently flexible, unwritten and community based, it allows the state to justify what it does in relation to land by referring to "*adat* principles", those amorphous but successful principles which allowed agrarian based cultures to survive for hundreds of years, with the implicit consent of the people and with the unchallengable motive of pursuing their prosperity.

The charade is obvious. Adat cannot operate on a national scale because it is simply the unknowable unwritten way small communities traditionally operate. It certainly cannot explain or justify the activities of a nation state, nor a bureaucracy acting on its behalf. In short, adat is not a legal system, and outside its sphere of legitimate operation in the traditional communities, it is not a normative system.

1.8 Land Administration System

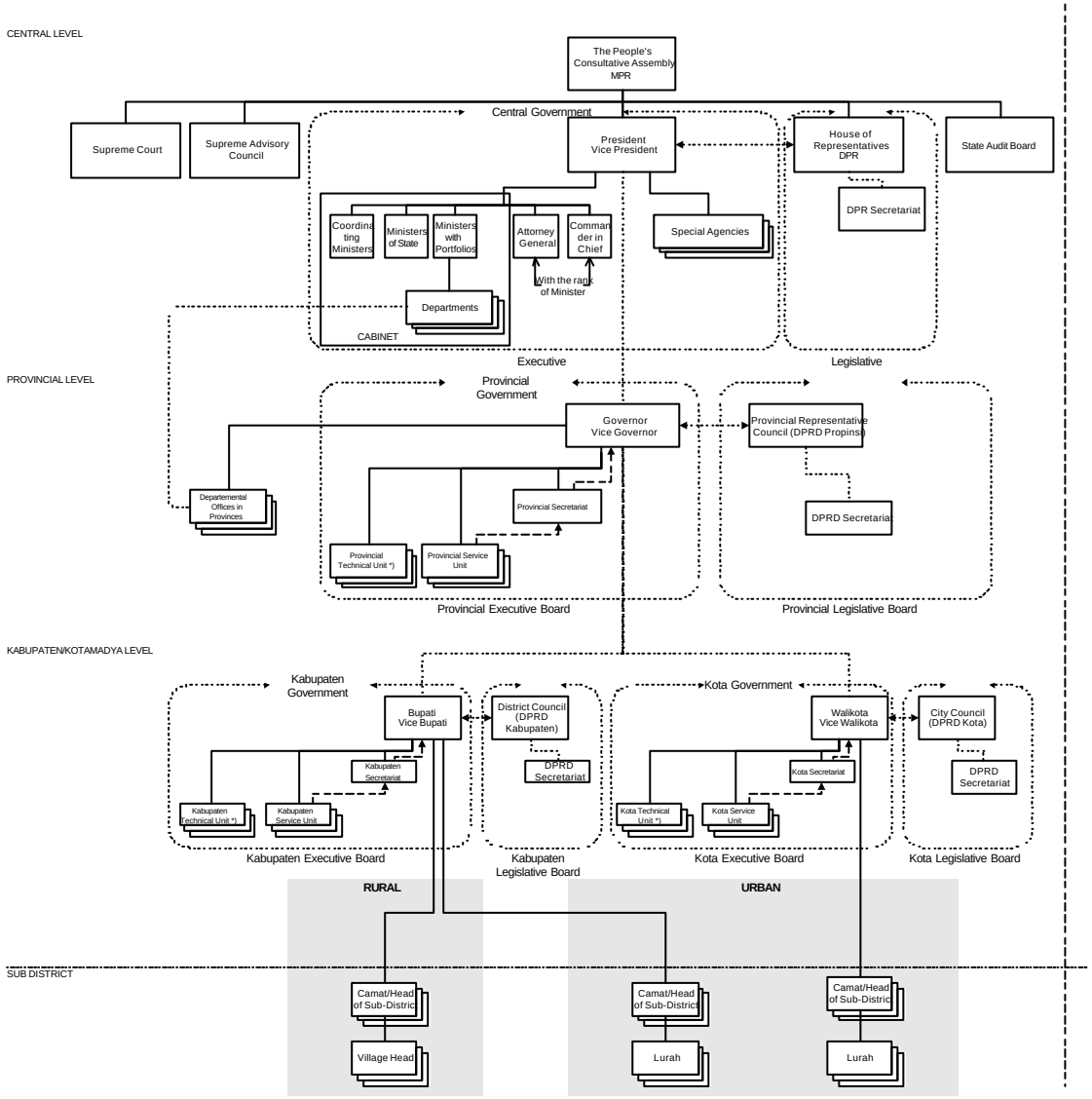
Land administration has always been poorly coordinated. Since 1988 with the creation of the National Land Agency (BPN), land affairs are directly accountable and controlled by the President. The subsequent decade, it should be noted, has witnessed the period of most rapid growth in land based investments. The *Reformasi* administration under Habibie claims that it is unwinding the close relationships between the former President, KKN (cronyism, corruption and nepotism), and land administration. The most tangible evidence of policy change is the devolution of central power to the local authorities outlined in the Law on Local Government No 22/1999 (see Figure 1.1). With this exception, the evidence suggests that the policies under Soeharto remain those driving the current (and probably any future) government.[15]

To be truly effective, reform of land administration and land law must define and control conflict of interest, address the corruption issue directly, establish transparency and accountability of process, create assured and easily understood rights, and allow local (not central) implementation. *This report provides a path to genuine reform designed to increase the realm of private decision-making in relation to land and to redirect land administration away from providing service to the centralist government and the elite towards public service*.

[14] Jeremy Wagstaff, **Asian Wall Street Journal**, 3 May 1999 p 1 and 7.

[15] Jeremy Wagstaff, **Asian Wall Street Journal**, 3 May 1999, p 1: *Real Change Remains Elusive In Indonesia As Election Draws Near*. The extraordinarily efficient system for controlling a whole society established by Soeharto and run by Golkar party members remains in place.

Figure 1.1 Competencies or Functions Assigned by Level of Government under the Local Government Law 22/1999



COMPETENCIES

(Article 7)
¨ foreign political affairs
¨ defense and security
¨ the judiciary
¨ monetary and fiscal affairs
¨ religious affairs
¨ other competencies, consists of:
- macro national planning and macro national development control
- fixed balance between central/local governmental units
- state administration system and state economic institution
- human resources development and empowerment
- natural resources efficiency and strategic high technology
- conservation
- national standards

(Article 9)
¨ competencies in administration sector of a cross District and City character
¨ competencies not yet possible to be performed by a District Region (Kabupaten) and a Municipality Region (Kotamadya).
¨ competencies in the administration sector delegated to the Governor as the representative of the government

(Article 10)
¨ responsible for environmental preservation according to the law.
¨ The competencies of the region in a marine territory:
a. Exploration, exploitation, conservation and management of marine wealth within the boundaries of the marine territory;
b. Arrangements of administrative interests;
c. Arrangement of spatial planning;
d. Law enforcement in respect of regulations issued by the regional government or those have been delegated by the government;
e. Assistance in upholding the security and the sovereignty of the state

(Article 10)
¨ responsible for environmental preservation according to the law.
¨ The competencies of the region in a marine territory (for a distance of one third of the marine boundaries of Provincial territory):
a. Exploration, exploitation, conservation and management of marine wealth within the boundaries of the marine territory;
b. Arrangements of administrative interests;
c. Arrangement of spatial planning;
d. Law enforcement in respect of regulations issued by the regional government or which have been delegated by the government;
e. Assistance in upholding the security and the sovereignty of the state

(Article 11)
Mandatory competencies for Kabupaten/Kotamadya:
¨ public works
¨ health care
¨ education and culture
¨ agriculture
¨ transportation
¨ industry and trade
¨ investment
¨ environment
¨ land affairs
¨ cooperation
¨ labor force

Three basic systems are involved in a land administration system: land use planning, land tax and land tenures. The law is involved in all. Reform must be based on an integrated vision of services, outcomes and the role of government. In this, the land tenure system is fundamental – it is the method by which land use opportunities are distributed within a community or nation. Historically, land tenure systems demonstrate a move towards individual ownership,[16] along with the development of democracy and political sophistication. The trend is intuitive, but also brings demonstrated social and economic benefits in that investment of labor and capital in property increases when people are given permanent rights to their homes and farms, and broad forms of ownership to include the business sector are encouraged. By contrast, Indonesia's tenure system is built on centralised bureaucratic control limited to **individual** titles for personal use, fails to provide adequate security of tenure, and eliminates vast potential areas of market activity.

In their original 1960 design of the BAL, land tenures in Indonesia were the bulwark against deep fears (built of colonial experience, perhaps) of land concentration, land grabbing and abuse of power. Even today, the operation of BPN in granting land use opportunities is seen by its officials and the GOI as directly addressing these perceived woes and containing potential excesses that a freer system would "inevitably" produce. The unfortunate reality is that a tenure system cannot answer these fears adequately, and by focusing on tenures (not taxation and planning, investment controls and allocations), the distortions in the distribution system are replicated and embedded at substantial cost to sensible land allocation systems, denial of existing traditional systems of land use and impediments to ordinary opportunities for sound land acquisition and development.

Moreover, these tenures are combined with land registration and land taxation and imposed on uniquely collective social organisations which make up the typical villages and tribal units, particularly in the outer islands. The sensitivities felt by local people spawned by this national approach are focused on the processes and the agencies which implement them. This misdirects attention to the detail. What is really and fundamentally wrong is the tenure system; the processes are of secondary importance to good land rights policy. Tenures are the weakest part of the institutional structures related to land and land distribution.[17] They must be reformed.

After that, Indonesia must set a vision for 2010 for a computer based land registration system and work backwards, making sensible and detailed changes on the way. Other reforms are also necessary. Indonesia joins a large number of countries, typically those going from planned to market economies, in which legislation relation to land is incomplete and/or inconsistent, and the processes of clarification and closing gaps are both potentially divisive and essential.

The land administration system is defective in a number of key ways, leaving the public sector without an important instrument for the implementation of national land policies and the private sector with uncertainty and insecurity in land holdings. Future planning of land use is ineffective because each tenure grant is seen in isolation. Land transfers are inhibited, changes in ownership are hidden, and other mischiefs are apparent. The significance of informal conveyancing and

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[16] Rowton Simpson, p 228

[17] Dennis De Tray, World Bank Country Director from July 1994 to March 1999, said "Indonesia is an especially clear example of what I would call the curse of success. Indonesia demonstrated that the ability to promote good policy is inversely related to the success of economy. If the economy is booming, the ability to influence policy makers is very low, and when it is crisis period, it is very high. The Bank knew that, as did others, but what we missed was that Indonesia's success did not manifest itself in bad economic policies, but in an inability to influence institutional policies. That is what I view as the major shortfall in our vision in Indonesia. It is not that we did not know that institutions were weak, we most certainly did. It was that we really didn't understand how critical those weaknesses would be in the transition from Soeharto to post-Soeharto." *World Bank's lessons from Indonesian economic crisis*, **The Jakarta Post**, 14 April 1999, p 6

recognition of its place in the titling system is a crucial part in understanding and remedying this. Steps need to be taken to ensure that the substantial investment in systematic registration at BPN are retained, expanded and enhanced. Rationalization of BPN's workforce with an increased emphasis on outsourcing activities such as surveying, mapping and even adjudication require urgent attention.

Furthermore, BPN must immediately develop a decentralization strategy and action plan to fully comply with the spirit of Law 22/1999 on Local Autonomy. Decentralization is no longer negotiable.

1.9 Indonesian Land Law, Administration and Practice in a Nutshell

The legal foundation, the Basic Agrarian Law 5/1960, needs fundamental reform. However its supporters mistakenly regard the BAL as an immutable and perfect framework for expression of national identity. As with the law of marriage, *adat* land law is "non-neutral", meaning it is law that cannot be changed – according to its supporters.

The BAL is "based on *adat* (customary) law", but this leads to unnecessary confusion and complexity.

Under the BAL, land is controlled by the State to achieve "prosperity of the Indonesian people, Indonesian socialism, and *adat* philosophy".

Under the BAL, the State **controls** all land. While supporters of the BAL claim this is less invasive than eminent domain or state ownership, in fact it is tenacious. Private land law is undeveloped and private land rights are severely limited by the BAL.

Land tenures and titles are managed by the National Land Agency (BPN), which reports directly to the President. BPN has land offices in all provinces and districts with approximately 25,000 poorly paid civil servant employees. Many land offices are well equipped, others need new buildings and facilities.

About 70 million parcels are on the fiscal (tax) cadastre. However, only 20 million of these are on the legal cadastre (public land register). In terms of land mass less than 1% of land in Indonesia is privately owned (*hak milik*).

Many implementation regulations stipulated in the BAL have not been promulgated (39 years after the passage of the Law).

Over 2000 pieces of legislation, regulations and directives concerning land and registration have been made. These need to be rationalised and simplified.

Seventy two percent of Indonesian land is held under jurisdiction of the Ministry of Forestry and Plantations under the Basic Forestry Law 5/1967 (new Law pending). Resource tenures are managed by sectoral agencies. There is little cooperation between these and BPN.
There is no private or community land ownership or land rights in forest areas, only forest concessions. BPN only becomes involved in forest land areas when forest land is converted to non-forest use.

Conceptual analysis of property interests is undeveloped.

Indonesian land tenures are restricted and unique. They need to be brought into a more familiar structure of freehold and leasehold tenures common in the Asia Pacific rim countries.

Tenures are flat and aimed at land use (what can be seen). They do not permit a market in interests in land to develop.

Hak milik, ownership, is much more limited than ownership in other systems. It is restricted to individuals. Commercial users are relegated to lesser tenures based on their specific use of the land.

If the use ceases or changes, or passes to a company or foreigner, the title is potentially relinquished back to *tanah negara*, state land. State powers to annul titles are extensive and discretionary.

Land rights issued by BPN are tied to use. This undermines the development of comprehensive land use planning at the local level.

Foreign ownership and collective ownership through village communities, companies and cooperatives is forbidden in the fundamental ownership tenure (*hak milik)* and tightly controlled in the lesser tenures (*hak guna usaha, hak guna bangunan, hak pakai*).

Conveyancing formalities are expensive. Informal conveyancing (even through oral agreements) of unregistered titles is accepted and common.

Priority rules are unclear. Evidentiary standards are unnecessarily vague. The result is large bureaucratic discretions in recognition of land rights.

There are no clear rules for closing off stale land claims and land disputes are increasing. No title is secure.

Adat (customary) principles apply, including the principle of horizontal separation. Objects inseparable from land are not legally part of the land.

When horizontal separation is combined with exclusive land and resource tenures, two thirds of potential interests in land cannot be created.

Foreign aided and government initiated land registration programs have increased the number of registered parcels in recent years. However, these programs are costly supply side (project based) driven initiatives which may not be sustainable.

Initial registration fees levied by BPN under the sporadic program for rights derived from State land (*tanah negara*) are excessive and might be the highest in the world.

The land registration system is excessively complex, manual and paper heavy. It needs reform, especially to provide a basis for computerisation.

Land registration under the BAL is a negative system and does not protect titles. It merely provides stronger evidence of their existence.

Land titles, even when registered, remain uncertain and land disputes are endemic and account for about 65% of administrative court matters.

Tax disincentives discourage registration and encourage concealed transactions.

Possession of land is not adequately protected. Illegal possession (squatting) is criminal and treated as such.

The land administration system is partial and inefficient. Record sets would be substantially improved if they were coordinated.

Corruption and collusion are present in the administration, allocation and acquisition of interests in land.

Due to the hierarchy of rights in the BAL, transfer of title which include an upgrade e.g. *HGB* to *Hak Milik* is both complex and expensive.

Ideological underpinnings of the BAL are: state control is essential; the state is a far better allocator of rights than the market; foreign ownership and absentee ownership must be controlled; private ownership leads to problems; parcel sizes must be restricted to achieve land redistribution; company ownership must be prevented because it leads to exploitation and excessive ownership. The ideology is administered through a large bureaucratic discretionary process, replete with confusing and contradictory regulations, typified by poor service to the public at excessive cost with little accountability.

CHAPTER 2 RIGHTS IN LAND

2.1 Theories of Law

The most persistent debate in legal philosophy is the source of constitutional legitimacy. Whatever the theory, however, it is prosaic to point out that without an operating and visible legitimacy, the state cannot govern.

In jurisprudential terms, an explanation of the relationship between the citizen and the law depends on the particular legal theory and legal philosophy applied. In Western jurisprudence, the basic legal theories are legal positivism and natural law. Under the first, the State's power derives from the sovereign right or from a Grundnorm[1] under which the citizens yield to the state the power to govern them. The source of constitutional power is the citizens themselves, who by their daily behaviour, credit the system with workability and accept its fundamental structures.

Natural lawyers, on the other hand, view the source of authority coming from above or outside the body politic, either in the "natural" logic compelling the laws or their assumed religious source. The laws work because they express the inevitable, right and natural state of affairs or because they are sanctioned by the state acknowledged religion or set of beliefs.

2.2 Land Distribution

Whatever the theory, the practical opportunities of citizens to use land are always with the permission of the state. The arrangements can be complex, even in communities with nomadic and non-exclusive land use patterns.

Every society has a means of distributing the occupation of, or opportunity to take produce from, land. The nature of human organisations, even in the most primitive stage, requires land access to be rationed. Should there be a plenitude, some land is more attractive and desirable; its use must be controlled. How a society allocates is as open as human experience of the various topographies, population demands and climates of the world.[2] Each system develops its local method of distributing land and explaining the relationship between the land owner and the state. *The three major methods are a feudal system, a private property system, and collective arrangements in communist or socialist systems, each with its own particular ideology*. Whatever the system, the state remains the fundamental source of continuing occupation and use by citizens.

In societies with mature legal systems, the derivation of rights in land through the state is expressly acknowledged in the law, usually in the (written or unwritten) constitution of most states.[3] The law

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[1] John Austin and the analytical jurists of England in the 19th century are associated with the English version of legal positivism which saw all law decreed by the political sovereign. Hans Kelsen, a German jurist who wrote extensively about state and international law in the early 20th century, developed a positivistic approach to legal theory, and identified the basic norm (*grundnorm*) as the source of legal authority. At its simplest, this norm is the tacit or effective power attributed by the people of a nation to their government.

[2] Karl Llewellyn, Law Jobs Theory.

[3] The question of whether primitive societies have "land law" was examined by the Australian Courts in the context of claims for Aboriginal land rights. Chapter 6 **National Interests versus Land Titles** contains more analysis of the implications of territoriality for indigenous people.

allocates power in relation to land between governments and citizens. With the demise of feudal systems, the balance is typically in favour of citizens in free market systems and in favour of the state in socialist or communist systems. *Free market systems accordingly have extensive and comprehensive private laws which define land ownership and its consequences, and the collective or socialist systems have little because they rely on administrative allocations by the state apparatus*.

2.3 Personal Rights or Rights *in Personam*

In private law, rights in land or property rights are different from personal rights. When one person makes a contract with another person, he or she is able to hold that person to its terms, ultimately by taking legal action in a court to enforce the arrangement. If a person suffers an injury by the action of another person, he or she is able to ask that person to pay for treatment and loss, ultimately by asking the court to order the person to pay compensation. In these and hundreds of other situations, people are able to enforce their rights against the other people and their assets. Should he or she be missing, or, worse, without assets, the injured person is left to bear the loss or recover from insurance.

The vast majority of legal rights are "personal rights", in Latin, *rights in personam* (against the person) because they are enforceable only against the other party or person (which can be a legal person such as a corporation or co-operative) in the legal relationship.

2.4 Property Rights or Rights *in Rem*

Property rights are quite different from personal rights. Take the simplest case: **A** purchases land from **B**. They agree on the price (or exchange value), when possession will be exchanged, and make the appropriate formalities.

In legal theory, there are substantial differences between property rights, (ownership or a real right less than ownership, eg *usufruct*) and personal rights.

1 The holder of the real right can exert his or her right against anyone who encroaches on it, not merely on the other contracting party.
2 Property rights or *usufruct* have *zaaksgevolg* - Dutch, *droit de suite* – French, or the ability to run with the land in Anglo American systems which means that they attach to the property no matter who is in possession.
3 Where rights in real property coincide, usually the first in existence takes precedence. Personal rights tend to be equal and competing.
4 Real rights are generally not affected by subsequent attachments or bankruptcy proceedings. Hence a bankruptcy results in all the unsecured creditors being paid equally, but the secured creditor takes the property and satisfies the secured debt.
5 Categories of real rights are generally closed and stable,[4] whereas the opportunity to create new relationships and agreements is open-ended.

2.5 Possession

Three Stages: Possession, Ownership and Value Added Rights

First Stage: Mere Possession

Human existence presupposes possession of land, simply as a space to live and exist. Every society, by definition, moves beyond this.

[4] In free market systems, the law changes to admit new interests as needs become apparent.

Second Stage: Ownership

In the theoretical development of a property system, mere possession becomes property or a right *in rem*. The explication of how this happens goes like this. The concept of a society axiomatically implies that the people who use land have "rights" to land. Even in small societies, without markets or developed economies, land use is allocated in a standard way by a chief or decision maker whose pronouncements create expectations at large that a person, family or group is entitled to make use of particular land for a particular purpose.

Bentham identified this point as the move away from *raw possession protected by physical force* to an expected and protected possession announced by a third party. We can speak of a "right to possession" at this stage, but at the earlier stage, there was mere possession, durable for as long as personal power could support it. Hence, even in a relatively primitive community, it is appropriate to talk of "rights" to possession and of the ability of the possessor to protect it by means other than raw force of arms. The essence of a right to possession is its recognition and enforcement on behalf of the possessor by a social mechanism (which can be power of the chief, the wrath of the Sun God, or the law), not by the raw power and prowess of the possessor.

Ownership is a much more sophisticated concept than possession. Alongside recognizable systems of law, societies develop coherent, repeatable ways to allocate entitlements to possess and own land. These can be collective or individual entitlements. They can focus on land surface or all possible uses, or merely on grazing or planting opportunities, harvesting or foraging rights.

In mature systems, the law protects entitlements to possession of owners by ensuring that they can recover the land or land related items after being out of possession. The strength of this protection will influence the ease with which owners put possession in the hands of others and diversify land use patterns. Legal enforcement of the right to be returned to possession is an essential factor in the operation of land markets. A vibrant land market depends on secure and predictable opportunities to gain possession of land. These opportunities are primary land rights. When a society articulates legal concept of individual or close family ownership (that is, a conceptual entitlement verified by an authoritative third party or systemic source other than mere physical force), it must develop ways of identifying who has the immediate right to possession and how others must respect these rights. The property system allows a person (the owner) to demand others (non-owners) respect his or her ownership and to use the land in ways announced by custom or later, in developed legal systems, by law.

These are its land rights. They are integrally related to possession of land. *Possession of land is the core of the property system and is the most significant consequence of ownership. Protection of possession is the most important function of property law*. The most obvious way of providing information about land ownership to the public is through evidence of its use or possession. Hence possession carries the assumption of ownership and is the consequence of ownership.

Third Stage: Value Adding

The transmutation of raw possession to property rights gradually increases the complexity of rights to land in terms of time and opportunity, and of the relationship between the holders of the rights and others in the community. The precise definition of the expectations, their expansion and complexity depend on the state of development of the legal system, the type of authority, the capacity to recall and reinforce the rules, and methods of dispute settlement and conflict resolution. When these are mature, another, more interesting, development is possible. To achieve this, the society needs to be able to conceptualise its analysis of land rights.

The legal concept of property defines the legal relationships between the citizen owner and the state, and between the citizen and other citizens, in relation to the land. The legal relationship is always between people and legal entities in relation to the land, not between a person and the land. Legally, ownership defines what the owner can do with the land vis-a-vis others and the state. In popular usage, ownership connotes the relationship between the owner and the land itself.

The difference is not semantic. *The legal concept of ownership has a broad and open nature because it is relieved from the constraints of a direct relationship with the land. It facilitates the creation of conceptual interests in the land that are diverse and fluid, separate from the land but based on it. These conceptual interests, in turn, are taken by the marketplace and made tradable and valuable commodities in themselves*. By the combined activities of the legal system and the market place, highly valuable opportunities for economic activity are created. The process adds value to the land. The results for market based economies are extraordinary self generating and intense activities which do not exist in systems which focus on land rights as merely rights to land. A detailed explanation of the development of different markets appears in Chapter 7 **Markets**.

2.6 Protecting Possession

Whatever the nature of its legal rights, a society can provide strong or weak legal protection for possession of land. The systems which work best provide strong protection. They also achieve other attractive consequences –

- Elimination of land disputes
- Perfection of bad titles by supplementing defective formal evidence or replacing it entirely
- Encouragement of use of land neglected by owners
- Protection of land developments (buildings, fencing, cropping) even if made by a stranger to the title
- Creation of opportunities to market land otherwise neglected by the owner, and
- In systems which recognise encroachments on boundaries after time has run, preservation of buildings and fences.

In one way or another, possession must amplify legally recognised titles. This indication of ownership is taken to its peak in systems which allow possession adverse to an owner to bar the title of the owner and in effect to vest the ownership in the possessor. This is axiomatic in the most mature systems.

England

English property law has recognised possession as a source of title for hundreds of years. English law ensured that only a person with a superior title could remove or eject a possessor. Possession, of itself, was protected against intrusion by strangers to title, even strangers who knew that the possessor had no claim to a formal title. *The policy behind protection of possession was peace and good order of the realm*. Protection averted the constant mayhem which accrued from a poorly functioning title system by removing self help in land acquisition by all except persons who were sure of their superior or legal ownership. Anyone else had to plead at a court for return of the land. Eventually most self-help by owners was replaced by more orderly arrangements managed by the courts.

Protection of possession matured when the courts limited the opportunities of absentee owners to reclaim their land from a possessor. Time limits during which a true owner could ask the court to recognise his superior right to possession were applied if the possessor was acting as an owner. Historically, these limits were relatively long, but England now uses a 12 year limitation period. This gives the owner sufficient time to bring his action but closes off disputes about land ownership

when time has elapsed. The effect of this closure of suit is that the possessor is no longer susceptible to any other person's claim – and he or she has ownership.

In day-to-day English conveyancing, the possessor can sell the possessory title, a "possessory estate in fee simple" just as an owner with a deeds verified title can sell the title. Sale is possible before and after the time period has run, but obviously the price reflects the strength of the title.

Possession in Europe

In French, German and Dutch law, acquisitive possession is recognised. Actual possession by operation of law turns into *de jure* possession after the specified time has run. In the Netherlands the period is 20 years with a *causa,* a legal relationship tending to transfer title, and 30 without.

Possession in the United States

The protection of possession is even stronger, with shorter limitation periods being common. (See Table 2.1 **Adverse Possession Periods in the United States)**.

Possession in Positive Registration Systems

In English law, the source of title is possession. In a Torrens system, the source is the register. The English land registration system is also a positive system which makes registration the source of title. The relationship between adverse possession and a positive registration system is often debated. While all legal systems allow adverse possession (because otherwise land litigation would never be closed), the registration systems differ as to when they recognise possession and how they record the results.

In some Torrens systems, possessory ownership is not recognised, causing a disjuncture between the claims of a registered owner (who cannot get his land back after time has run) and the user's rights. In others, such as Victoria, Tasmania and Western Australia, the possessor can seek to have the title put in his name. Victoria's Torrens system perhaps contains the strongest protection of possession – not only can a whole parcel be claimed, but parts of land incorrectly fenced within a neigbhour's title can be claimed after time has passed and will be included in the possessor's title. A relatively simple administrative mechanism (not an expensive court application) for altering the register is available to reflect adverse possession of the whole or parts of land in another title. Other Torrens systems require the fences and buildings to be returned to title boundaries. The policies supporting the Victorian position lie in –

- ensuring the defects of poor quality early surveying affecting many of the land parcels are cured by time
- the simplicity and cheapness of conveyancing – what you see is what you get, so if you are worried about millimetres, measure before you buy
- protection of fences and buildings erected over title boundaries in excess of the limitation period, and
- placing the responsibility on owners of land to ensure that boundary demarcation accords with title measurements, under pain of losing part of their land. This is by far the most efficient method of ensuring boundary marking and subsequent buildings are accurately placed and placed once only.

TABLE 2.1: ADVERSE POSSESSION IN THE UNITED STATES

State	Adverse occupant lacks color of title & does not pay the property taxes	Adverse occupant has color of title &/or pays the property taxes	State	Adverse occupant lacks color of title & does not pay the property taxes	Adverse occupant has color of title &/or pays the property taxes
Alabama	20	3-10	Missouri	10	10
Alaska	10	7	Montana		5
Arizona	10	3	Nebraska	10	10
Arkansas	15	2-7	Nevada		5
California		5	New Hampshire	20	20
Colorado	15	15	New Jersey	30-60	20-30
Connecticut	18	7	New Mexico	10	10
Delaware	20	20	New York	10	10
District of Colombia	15	15	North Carolina	20-30	7-21
Florida		7	Ohio	21	21
Georgia	20	7	Oklahoma	15	15
Hawaii	20	20	Oregon	10	10
Idaho	5	5	Pennsylvania	21	21
Illinois	20	7	Rhode Island	10	10
Indiana		10	South Carolina	10-20	10
Iowa	10	10	South Dakota	20	10
Kansas	15	15	Tennessee	20	7
Kentucky	15	7	Texas	10-25	3-5
Louisiana	30	10	Utah		7
Maine	20	20	Vermont	15	15
Maryland	20	20	Virginia	15	15
Massachusetts	20	20	Washington	10	7
Michigan	15	5-10	West Virginia	10	10
Minnesota	15	15	Wisconsin	20	10
Mississippi	10	10	Wyoming	10	10

* In a substantial number of states, the waiting period for title by adverse possession is shortened if the adverse occupant has color of title and/or pays the property taxes. In California, Florida, Indiana, Montana, Nevada, and Utah, the property taxes must be paid to obtain the title. Generally speaking, adverse possession does not work against minors and other legal incompetents. However, when the owner becomes legally competent, the adverse possession must be broken within the time limit set by each state's law (the range is 1 to 10 years). In the states of Louisiana, Oklahoma, and Tennesse, adverse possession is referred to as **title by prescription**. ***Source: Real Estate Principles*** *8th ed, New Jersey, Prentice Hall Inc, P. 98, Author: Charles J. Jacobus*

In New South Wales, the register can be changed if a parcel is acquired by adverse possession, but not part of a parcel. That system emphasises title boundaries and requires boundary marking to be returned to the surveyed lines. Thus about 70% of its transactions are accompanied by survey to verify compliance of occupation with title. Victorians, with their different system, are confident of obtaining title to the land as fenced and built on and do not rely on check surveys. Surveys are used only where developers are concerned about planning regulations and meeting space limitations.

Like New South Wales, Queensland, South Australia, New Zealand and British Columbia all have restrictions on the way the law of adverse possession relates to the land registration system.

The Law Commission in the UK has recommended changes in adverse possession principles relating to registered land which (if accepted) would result in different results between registered and unregistered land, drastic reduction in opportunities to make the registered title accord with possession and use, and complications in the law. Their overriding policy is to see that land registrations are the source of title, not land use in order to encourage voluntary registrations to protect against squatters gaining titles. If accepted, these changes would establish permanent disjuncture between land use and land ownership, and would not lead to more efficient conveyancing which depends on keeping use and ownership as close as possible.[5]

Possession in Indonesia

While mature market systems recognise possession as a tenure and source of title, and as a means of repair of defective or badly evidenced ownership, the less developed system of Indonesia, where these needs are even more evident, hardly accords possession any importance. Possession of land is a significant indicator of the existence of rights in *adat* land. Some unregistered land is held by *hak milik adat* or *girik* rights[6]. The former is uncertified land title with sufficient evidence to support a *hak milik* entitlement and the latter is a title evidenced by tax receipts, protected by the conversion provisions of the Basic Agrarian Law. These titles can be transferred.

Under Government Regulation No 24/1997 on Land Registration, Article 24, possession for 20 consecutive years can found a first time registration if made in good faith, exercised in a transparent way and not questioned by the *adat* law community. The utility of recognizing possession for registration purposes is obvious if the registration program is to be effective in a society in which written instruments are not always available to evidence land transactions. However, some legal observers have claimed that possession needs to be recognized in Law and not by Government regulation to obtain legal status.

Otherwise possession of itself, even in *adat* land, is not sufficient to found reasonable entitlements to compensation when land is acquired through the development or *izin lokasi*, location permit process.[7] *The failure to recognise possession as a source of title or cure of a title defect is a serious limitation of Indonesian land law*. Possession is a primary mechanism by which illiterate people in an agrarian economy acquire land, and destitute people acquire housing. *The failure to accord possessors entitlements to land based on their use creates major social problems of uncertainty. The failure to allow time to improve titles and to quieten disputes is fertile ground for burgeoning land litigation and disputation*. As land grows more valuable, the numbers of cases will increase. The courts are not equipped to handle these cases. A better alternative is to create fair and clear rules in Law which remove stale claims.

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[5] Law Commission, **Land Registration for the Twenty-First Century**, Part X, *Adverse Possession and Prescription*.

[6] Sturyk, Hoffman and Katsura, p 89

[7] The process is described in the Report in LAP C Topic Cycle 2

Legal Recognition of Possessory Titles

Recognition of possessory titles would bring significant other advantages. It would –

- improve certainty in conveyancing, particularly in recognition of the volume of land transactions which lack any formal written evidence
- assist the registration system, not just in initial registrations, but in replacement of lost certificates and land disputes
- cure survey defects
- create a compensable right amongst the poor, otherwise classed as mere squatters, and considerably assist social stability, and
- cure and still claims and disputes about ownership especially if combined with a clear limitation period of 10 years for actions for recovery of land.

Squatting

Squatters are adverse possessors who know they are using someone else's land and who do this despite (sometimes, in politically motivated squatting, because of) the consequences. Squatting, like any other intrusion on land is capable of being dealt with by the owner. *In a system which recognises possession and ostensibly protects the squatter, an owner who ignores the squatting for an extensive time, will allow the squatter to defeat his or her title. The point is that the owner has been given sufficient time to both discover the problem and act on it.* Usually, actions required of the owner are simple assertions of title, such as persuading the squatter to pay a token rent, or to acknowledge the ownership in some provable way, converting the possession into a permitted use or issuing court proceedings to recover the land.

Squatting is not as large a scale phenomena as one might anticipate, probably because owners are frequently assertive about their rights, and the initial act of taking possession is usually an actionable interference with the land.[8] Squatting on state or crown land is another question. In some systems, the squatter cannot acquire a title by squatting because time does not run against the state or crown. The reason for this was to reduce the public cost of management of the land involved in policing adverse possessors. This is not a persuasive argument. The government, like any other owner, needs to manage its resources.

In Indonesia

Squatting must be conceptually distinguished from the process of acquisition of an individual title in *adat* land by possession, recognition and registration based on consensual or permitted use. The amount of squatting on private land is not large, perhaps because the quantity of privately owned land is itself very small. Squatting on government land is illegal occupation and is criminally punishable.[9] The land which is not in private titles is definitionally *tanah negara* or state land. The

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[8] Organised squatting movements have developed in countries with unused houses and offices coupled with significant numbers of homeless. The United Kingdom movement is the most well known.

[9] Gautama and Harsono, pp12-15. Illegal occupation occurred on large plantations and was a feature of Japanese occupation. In 1948, the Government of the Netherlands Indies criminalised squatting on all land. Squatting continued. Emergency Law 8/1954 gave a certain legal status to squatters if they complied with conditions and opened opportunities to estates to build the economy; the use of an entrepreneur's land without permission was prohibited and self help eviction was allowed. Later changes made squatting a capital offence subject to summary execution. In 1957 the provisions were extended to non-agricultural land via a military regulation. Later military regulations included plantations in the central war authority regulation and policed illegal occupation. These regulations were replaced by Government Regulation (in Lieu of Law) No. 51/1960 which applied to all land. This prohibited use of land without consent of person entitled and retained criminal sanctions. On the other hand, land had a clear social function and could not be neglected by the owner for

consequence is an enormous discretion to determine that people who possess land are illegal occupiers.

Squatting in Indonesia does mature if the squatter can obtain "squatters' letters", *surat garap*, that is, a letter from a local official recognizing an individual's right to occupy someone else's land, including public land or land of a state agency such as a railroad or a port, or some other paper (such as a letter of transfer sealed and witnessed if the buyer could afford the fees) not accompanied by the tax receipts or more formal letters from local officials, such as the village head, *lurah* or *kapala desa.* Even the *surat garap* creates a right which is transferred and sold, creating, in effect a class of quasi legal squatters.[10] In these situations, the title matures by consent, and is not derived from adverse possession.

The actual numbers of people with no paper related to their use of the land and who are adverse possessors is very low,[11] despite the need for housing suggested by the population demographics to include the urban poor and relatively poor.

Adverse possession of state land without permission or local recognition is more common in cities and peri-urban areas where it needs to be viewed in terms of desperation and human need. Population growth has seen Indonesian statistics treble since World War 2. In the dense areas of Java, frequently the only available land for housing is state land. Possession on its own does not appear to found a claim. Without anything to support it, possession, even for many decades, offers little security. There is, however, no policy reason for denying these users equivalent titles to users of *adat* land and to allow them the same opportunity to acquire collective titles (should these be recognised, as proposed) in *Kampung* areas, or individual titles in *tanah nagara,* provided the land is capable of admitting a title and is not railway siding, canal edge, or road encroachment and so on. More importantly, these agrarian and urban users of state land should be able to obtain a normal possessory title which matures in 10 years to a *hak milik*, can be sold or transferred before or after registration, and supports applications for registration without written or *girik* evidence.

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personal interests. The right of exploitation and right of building ceased if the land is misused. Jakarta had special regulations under which evictions required the Governor's consent and a regional committee determined compensation for land, buildings, trees seized on behalf of the State or private organisations (Government Regulation No. 51/1960).

[10] Struyk, Hoffman and Katsura, p 93

[11] Struyk, Hoffman and Katsura, p 94. "Another measure can be computed with reference to the population comprising those who say that they do not own the land, nor pay any rent for it, nor have any written documentation to support their possession. This figure is 7.8% of all unit owners. While these figures are approximate and tied to particular definitions of squatting, **the general point is that the number of pure squatters in Indonesian cities is quite small**." (Emphasis added.)

Family evicted after 50 years

Jakarta – City administration officials have evicted a family from the Central Jakarta house where they had been living for more than 50 years claiming the land belongs to a neighbor.

Officials said the head of the family, Gustaf Manarisip, was in the wrong because he did not possess a land certificate to prove his ownership of the property on Jalan Budi Kemuliaan.

The family members were evicted on Thursday afternoon and the house was given to their neighbor Mochamad Noer, who officials said possessed a land certificate for the property.

The eviction followed two warnings, which had been issued to the family since January last year, when Noer was deemed to be the true owner of the land.

Amazon Sinaga, the executor of the eviction order, said the house and land measure a total of 2000 square metres.

Manarisip, through his lawyer Parsaron Marbun, said the eviction order is baseless because the Supreme Court is still deciding who is the true owner of the land.

Marbun told the press the land formerly belonged to the state and was part of a green-belt area. Therefore, he argued, the land does not belong to Noer and the validity of his ownership certificate must be checked.

Legal experts also cite a regulation that states if a person occupies a piece of land for more than 20 years, then he or she is entitled to be regarded as the legitimate owner.

Metro Observer, 8 May 1999, page 4

Key Elements of Land Ownership

Land ownership requires the systematic identification of -

- **where** (the identity of the land) - **the object**
- **what** (the consequences of ownership and the particular title) – **the right**
- **who** (the identity of the owner) – **the subject**.

Where can be defined by mere local reputation, loosely identified boundaries, or by tight and geo-referenced surveys, depending on the need for accuracy and the technology available.[12] Australian Aborigines have a dual system of loose exclusions over sweeping landscapes and rigid exclusion from particular sacred sites.

The **what**, when it refers to ownership, can take up the whole or any part of the components below. Mature ownership includes all these components -

- **Power[13] to exclude others**. This assumes boundary definitions, although these need not be precise.

[12] Guidelines for Improvement of Land Registration and Land Information Systems in Developing Countries, 1990

[13] Salmond Chapter IV "The divisions of the law". The conceptual idea behind differentiating legal powers from legal rights lies in achieving a precise definition of legal rights as involving correlative legal duties of another person or persons, and separating out from this definition opportunities to take action or exercise power within the broad realm of legal opportunity.

- **Power to create, transfer or assign powers in the land** – sell, if there is a market; give, if not. And to create or assign lesser, time or opportunity limited rights, such as rights to possession in the future, collect firewood, fish, grow and harvest crops, graze animals, build and use an office building, create a credit security or a right to future possession, and so on.
- **Power to devolve** – at first societies allow the land to pass on death to selected, usually lineal, heirs through blood or religious lines. Choice comes much later when individual ownership and individuation of powers mature and testamentary capacity is recognised.[14]
- **Power to use** – including the opportunities to fence, build, crop, or let someone else do these. The opportunities include ancillary powers – powers attached to the land, often over another's land or capable of adversely affecting others, for example, to take water as it flows through or near, to burn, to take trees from neighbour's land, to restrict uses of the neighbour's land and so on.
- **Power to make decisions and choices** in relation to the land. All of these powers are unfettered by state or bureaucratic control over the tenure.

The last point is essential to understanding the basic distinction between ownership in a market system and in Indonesian law. (See Figure 2.1 **Rights and Powers of Freehold Owners)**

Acquisition

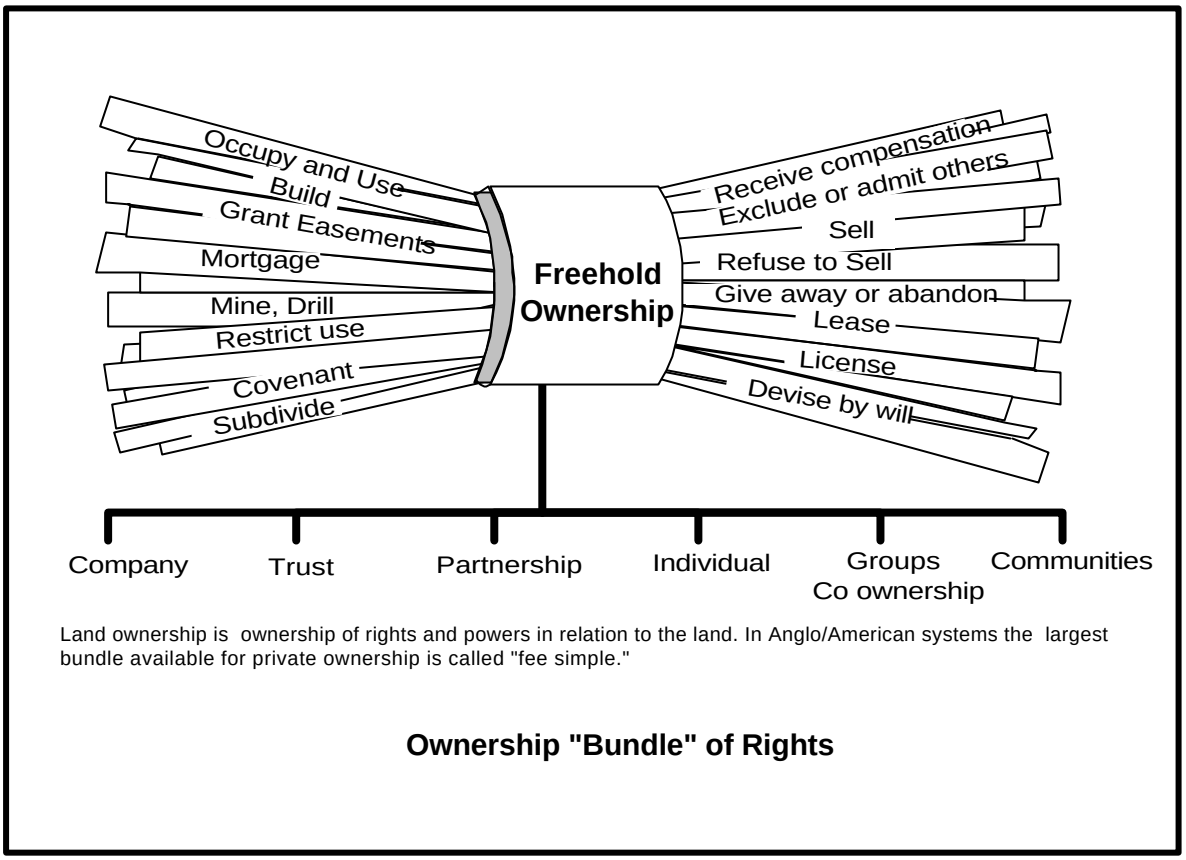
All newly independent, non-communist states must create land rights through their constitutions. This involves recognising existing rights and giving the state the ability to create new rights. This process of **initial acquisition** or grant is the source of land rights in individuals and other legal entities. As land ownership becomes even moderately important in the economic life of the community, its transfer from the owner to another owner will be a significant event. *As opportunities for devolution or transfer of ownership develop, the initial grant of a right becomes increasingly irrelevant, and the assignment, transfer or conveyance of rights between citizens becomes the normal means of acquiring land rights*. The state as the ultimate source of the rights remains the theoretical basis for private entitlements but has little practical implication. Grants of titles and approval of assignments directly by the state are the rare exceptions.

Public Knowledge of Ownership

Land ownership always has public consequences. When a legal system allows a private owner to exclude strangers, the public have an interest in knowing what land is involved and who the owner is, so that they can seek permission to enter. *Good governance requires the state to know who owns what land for public purposes, including planning and service provision, taxation and fiscal management, land distribution policy, and land use management*. A market system requires public acknowledgement of land owners because this facilitates land transactions and reinforces ownership. *In market systems, land records are public and finding out who owns land is a simple and easy exercise of making searches of ownership registers*. Hence extensive formalities are attached to land transactions and public registration systems operate to ensure that land ownership is knowable at all times.

[14] For instance, the English 17th century Wills Act first allowed people to leave land by will, not descent, in England.

Figure 2.1: Rights and Powers of Freehold Owners



In early societies public knowledge was achieved by means of a (sometimes very complex) ceremony. The earliest means of conveyance in English law was feoffment by livery of seisin. This involved a public ceremony between the previous owner and the new owner in which the previous owner presented the new owner with a clod of earth from the land and acknowledged him (it was always a man) as the new owner. The identification of the parcel boundaries was also by public reputation and knowledge. These public ceremonies were effective in stable, agrarian economies.

Development of parchment and paper, combined with general literacy dramatically altered conveyancing methods. *The next stage involved requirements for writing and then for recording of the writing*. The world is about to see another massive change in conveyancing practices as computer technology offers relief from the tyranny of paper and the expensive professional services necessary to make a paper based system work. *Conveyancing will move to standard forms, electronic document exchange, electronic signatures and third party responsibility for including and verifying contents of an electronic public land register*. Any changes to land law and land administration need to be made with this vision in mind.

Two Stages of Conveyancing – Agreement and Assignment

Agreements and Contracts

During the paper stage when formalities for land transactions were extensive and expensive, most legal systems created a two stage land conveyancing process – the agreement to exchange ownership and the formal exchange. Sometimes the formalities associated with the first stage are negligible, especially if the arrangement does not involve creating property rights in the new owner.

If the arrangement has a proprietary effect and creates a new property right (less than ownership), the public and the state are entitled to have reliable information about it. Usually this is provided by countries making a law which requires written evidence of the preliminary arrangement, in addition to the formal conveyance. For instance, should the owner sell the land and complete sufficient formalities to give the buyer a property right, and then give a security over the land to a bank or sell it again to another person without revealing the existence of the agreement, the first buyer's property right will conflict with the lender's or second buyer's property right. The outcome of the conflict depends on the priority rules applied in the system.

Transfers and Conveyances

All successful systems of land allocation have very clear requirements for changing the ownership of land. For historical reasons, the formalities tend to be demanding. Some countries require a special juristic act of conveyancing requiring the execution of an instrument (in most cases a notarial deed) and its registration. Formalities however need not be demanding and expensive to be effective. The most efficient system of conveyancing offers easy to obtain simple forms which any person can fill out, which are then included in the public register to change ownership. Torrens systems offer the cheapest and most effective conveyancing, not just because they reduce title investigations, but because these processes are very simple.[15]

Limitations on Ownership of Land

No system confers absolute opportunities on owners of land. Two kinds of limitations are imposed: privately enforceable limitations and publicly enforceable limitations.

Private limitations are the rights of neighbours to prevent abuse by a landowner which jeopardises support or adversely affects enjoyment of their land. These rights extend to buildings where the fabric is mutually supportive. Some systems recognise rights to light and air which cannot be built out by an adjoining owner, and lately, a right to privacy preventing overlooking.

Public limitations are imposed by the state in order to enforce reservations in the title to the state (such as a particular mineral), collect taxation, to retrieve or compulsorily acquire land in the name of the overriding public interest, to know who is the owner and what rights exist in the land, to control buildings, to limit the use of the land for planning, environmental or other overarching reasons, and to limit the opportunity to sell the land to certain people, typically "outsiders". Sanctions for breach vary. Indonesia imposes another limitation in that it prevents the landowner "abusing" the land or leaving it fallow under pain of annulment (*hapus*) of title and conversion of the private right back to state land[16].

Democratic market systems have well established constitutional protections against intrusion by the state into private land rights apart from obligations to the state for payment of taxes, observance of land use controls in the public interest, and escheat if the owner dies without next of kin or a will. Any resumption of the land is subject to constitutional controls. The state is not entitled to interfere with the rights without due process and just compensation. Hence the conceptual importance of deriving property rights from or through the state lies in the inherent constitutional limitations, not the extensions, of state power.

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[15] These issues are considered in more detail in the Chapter 4 - Land Registration.

[16] See Article 27 – Basic Agrarian Law (UUPA No 5/1960) which states that *hak milik*, the highest form of land right in Indonesia (somewhat equivalent to freehold) can be revoked for several reasons. This is an administrative decision with no due process and all land areas with rights revoked convert back to state land (*tanah negara*).

2.7 Tenures and Titles

Differences between Tenures and Titles

Generally, property lawyers refer to the ways that use and ownership of land are distributed by a system as **tenures** – a tenure defines the length of time the land is used or owned, the rights and responsibilities of use or ownership, and opportunities for transfer and devolution. **Titles** identify the owners of the tenure in particular parcels of land at a particular time.

In ordinary language, "title" identifies the owner and what he or she owns. There is no fine distinction between tenures and titles, and "tenure" is not commonly used. **Ownership** refers to the highest form of tenure known to a particular system.

Kinds of Tenure

Highly developed legal systems have particular local tenures. The English model is a dominant model, being used in ex colonial countries, principally USA, Canada, Ireland, Australia, New Zealand and many developing countries. This model recognises two broad categories of tenures: freehold and leasehold. **Freehold**[17] estates are equivalent to ownership and last for perpetuity. **Leaseholds** are a lesser tenure because they are limited in duration, usually to a term of years. Freehold estates in fee simple are conceptually tenures held of the crown or state, although now this is has no practical consequences because the initial grant to the first owner is irrelevant.[18] A leasehold is conceptually a tenure held of a freehold owner. The crown or state can create leaseholds or freeholds in state owned land at its discretion.

The absorption of international standards of land tenure does not necessarily mean that the local attachments and processes in relation to land allocation and use are overridden, but, when combined with development, it almost always has the effect of heightening the tension between local users and outsiders. The Indonesian tenure system has another point of tension which raises a fundamental ideological difference to Western typologies. In general, there is far less opportunity for individual decision and much more opportunity for state control of uses and titles for land. The consequential impact on the theory of tenure and nature of titles is explored in detail below.

Priorities in Land

In sophisticated systems, a complex structure of tenures and titles allows simultaneous but distinct interests in land. An effective market in land demands clear priorities principles which determine when these interests prevail over each other and facilitates their creation and assignment while minimising disputes. (See Chapter 7 **Markets**.) The rules which allocate these simultaneous and serial rights are called **priorities** of interests in land. In mature market systems, the law of priorities is highly developed, but it is not necessarily complex. For instance, in Torrens systems, priorities rules are eminently simple – priority is given according to the order in which the interests are registered, assuming no fraud or other overriding circumstances.

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[17] Historically, freehold estates included the **fee simple** of unlimited duration and the equivalent of ownership, **fee tail** (for as long as the owner produced heirs of his body) and **life estates** (limited by length of a specified life, usually the holder's). Determinable and conditional fees, and fees in remainder and reversion facilitated a complex structure of future interests. In 1925, the **Law of Property Act**, section 1(1) reduced legal tenures to a **fee simple in possession** and **term of years absolute** thus forming the model for two basic estates: freeholds (ownership) and leaseholds (leases).

[18] The only relevance of the tenure is the opportunity of the Crown or state to retrieve the land should the owner die without next of kin or a will by escheat.

Transaction cost and uncertainty will escalate if priorities are not clear. In India and Indonesia where the larger percentage of matters listed in courts relates to land titles and claims, the mischief is not just paralysis of the court system, but severe economic limitations on the way people and citizens can do business in relation to land.

Even if the country determines that its destiny lies in small holding, sedentary, food-producing agrarianism, and abjures the market in preference for complete central control, the mischief of unclear priorities principles remains apparent. An untidy system that breeds multiple situations of dispute and mass uncertainty about the continuance of land attachments, inevitably experiences adverse social, economic and political consequences. *Uncertainty in interests in land is volatile fuel for civil unrest*. Other mechanisms available to a state must be used to address these secondary consequences – repression is one of them. A better mechanism is a genuine attempt to articulate the points of uncertainty and to address them vigorously and successfully. *Registration is one of the mechanisms of addressing these issues, and if properly designed and implemented, can produce results of value well beyond its monetary cost*.

One of the major issues in a land titling system in an developing economy is to recognise that the poor (who are numerically the majority) are not able to participate in a formal land titling project, and hence a land market. They continue to operate in the informal market. A system which prices the poor out of land rights is unsatisfactory. This issue is addressed in Chapter 5 - **Conveyancing and Priorities**.

Ownership and Land Investment

The human condition encourages people to invest in labour and resources when they derive a predictable and long term future benefit. The effect is greatest where the incentive is directly related to the effort. In relation to land, the more secure the ownership, the more likely the owner is to establish permanent structures and use patterns on the land.

Irish tenants are the best sociological example of a community operating under a titling and land law which placed land fixtures in another person's name. Absentee English owners obtained the title to any buildings on the land even when they were constructed by the tenants. The tenant's fixtures rule in England, on the other hand, allowed tenants to remove fixtures at the termination of their lease, a bargaining position of great practical import. Hence the Irish tenants resisted making permanent improvements. The implications for Irish poverty and unrest are obvious from history.

CHAPTER 3 INDONESIAN LAND LAW

3.1 The Legal Framework

Contract Law

Contracts are governed either by *adat* (customary) law or the Civil Code, principally in Book III. *Adat* law governs relations between members of the indigenous population in a village setting. Other legal relations are governed by the Code. The content of the Code is familiar to the market with rules about formalities, capacity, parties, mistake, fraud, purpose (*causa*), parties, conditions and remedies. Contracts in *adat* law developed only to the level necessary to service a closed agrarian traditional community. Agreements were not recognised, but an action such as delivery of goods, created an obligation. No formalities were needed. An obligation did not so much exist as a matter of law; its force was through honour arising from a person's position in the community and the relationship between the parties. Without the relationship, the sense of obligation did not arise. These arrangements, even in *adat* communities, were recognised as far too fluid for important arrangements with financial implications.

Adat law recognises special contracts, the most important being contracts concerning land. *The community, not the individual, has authority over land transactions*. These can be of two kinds: a transaction which transfers ownership for an agreed time in return for money: if the agreed period is forever, the purchase and sale is called the *jual* transaction. The second kind is an "obligation involving land", transferring the use of land without ownership, for example, share cropping.[1] These loose arrangements for land transactions and creation of enforceable obligations became the foundation for land contracts. The result is confusing in that *adat* principles are now the basis of the new single system of land rights created by the Basic Agrarian Law or BAL. It seems that the certainty of contract law available in the Civil Code was thrown out in an effort to rid land law of dualism (that is, of the remaining Dutch concepts) and that after 1960 land contracts are based on the uncertain and immature standards of *adat*. In fact, the formalists who interpret the BAL emphasise the appropriateness of *adat* standards over the firmer and less confusing Civil Code standards.

In buying and selling land, the agreement is not one governed by Article 1457 of the Civil Code but by *adat* principles. It is a legal action in the form of a permanent conveyance of land by the seller to the buyer completed at the time the transaction is completed, i.e. at the time when the buyer pays the price. As a result, the right of ownership is directly transferred to the buyer. *Of special note is that if the buyer does not pay all the price, adat law assumes that payment is completed and the transaction final. The remaining price is based on a credit relationship having no connection with the sale*. If the sale was in an *adat* community, the transaction was conducted openly before an appropriate person of authority so that the community knew the new owner, and the informal system worked well. In the context of land law for a modern community, reliance on *adat* as a source of appropriate principles and formalities for land transactions is a major source of uncertainty. The BAL therefore apparently created an entirely new conveyancing system about which it said absolutely nothing.

[1] Himawan and Kusumaatmadja, 1973, p.5

Leases

Some land arrangements are not required to be registered under the BAL, principally the lease, *hak sewa*, though Article 53 regulates leases of agricultural land and articles 44, 45, and 50 create the right of lease for building purposes *hak sewa untuk bangunan.* This lease can be noted in the *buku tanah* or land book, especially important if the lease involves structures built by the lessee. "If such a notation or entry were not possible, a third party might suppose that those buildings were owned by the landowner. This presumption could place the lessee in a disadvantageous position."[2]

What law applies is debatable. On one view, a lease can be regulated by *adat* law **or** the Civil Code.[3] "A lease involves not a right of ownership (*hak milik*) but rather a lesser personal right such as a right of building (*hak guna bangunan*). Thus, because the right is personal, the lessee may not sublet without approval of the lessor."[4] Regarding a contract of lease for a house, the law determines that the cost for minor repairs is to be borne by the lessee (Art 1583 CC), and that major repairs are the responsibility of the lessor. A sale of the leased house does not break the lease contract. The new owner is bound by the terms and conditions of the lease made by the old owner (Art 1576 CC). The owner is not permitted to terminate the lease agreement on grounds that he requires the leased goods. (Art 1576 CC).

On the other view, despite the lack of a clear statement in the BAL revoking the application of the Civil Code provisions to leases, they no longer apply and in their stead "regulations based on *adat* law" apply unless the parties determine otherwise.[5] Given its author, this opinion is the one generally accepted.

Commentators agree however that, even if the Civil Code applies, the lease is not a proprietary right. "In view of the fact that a right of lease is of personal character, it may not be transferred to another party unless permitted by regulation."[6] They also agree that leases do not have to be in any particular form. Hence theoretically, an oral lease for any term could be valid.

Because the state does not own land, state lands are not leased but granted with a "use right". The BAL also provides that regulations can be made preventing leases in agricultural land in (Art 53) to reinforce the requirement in Article 10 that the owner be the cultivator. Until regulations are made, lease arrangements must protect the economically weak (Art 11(2)). The BAL also restricts those qualified to be lessees to Indonesian nationals, foreigners domiciled in Indonesia, Indonesian corporations and foreign corporations with Indonesian agencies (Art 45).

- In practice, leases are vitally important and form the backbone of commercial offices and retail premises. Given the restrictions on foreign ownership, private leases are a significant vehicle of foreign investment in the country. Most of the commercial arrangements in relation to land, especially retail and office, utilise this tenure.[7] The arrangement is not regulated by the BAL (although a building lease is recognised and leases of agricultural land are regulated.). Despite the 40 years of operation of the

[2] Gautama and Harsono, 1972 p 80.

[3] Gautama and Harsono, 1972, p 79.

[4] Himawan and Kusumaatmadja, 1973, p 17.

[5] Gautama and Harsono, 1972, p 79.

[6] Gautama and Harsono, 1972, p 80.

[7] *Hak Sewa untuk Bangunan* (right to lease land for building). Homes for foreigners residing in Indonesia can be obtained by *hak pakai* on state land or occupation contract with land owner up to 25 years (made with a PPAT deed), but the right is lost if the foreigner fails to reside in Indonesia for more than a year.

BAL, the question of whether a lease is a personal or proprietary right remains uncertain.[8]

- A more detailed review of the operation and law of leases will be undertaken in Topic Cycle 6, **Commercial Interests in Land**.

Legislation

The **Indonesian Constitution** is the foundation of all law. The derivative law is divided into a set of basic laws, and other legislation, with substantial other documents forming an apparent hierarchy of norms.

At national level, the structure of the laws is:

Undang undang Dasar RI	Constitution
Tap MPR	Decree of the Peoples Representatives Assembly
GBHN	Guidelines of State Policy
Undang Undang or UU	Act of Parliament
Peraturan Pemerintah or PP	Government Regulations (Delegated Legislation made under UU)
Keputusan Presiden or KEPPRES	Presidential Decree
Instruksi Presiden or INPRES	Presidential Instructions
Peraturan Menteri	Ministerial Regulations
Keputusan Menteri	Ministerial Decree
Instruksi Menteri	Ministerial Instruction
Keputusan Dirjen	Director General's Decree
Instruksi Dirjen	Director General's Instruction.

In land law, the basic instruments used are the Acts of Parliament, their supporting government regulations, and ministerial regulations. Since the creation of BPN and especially in the Reform Cabinet under Habibie, a huge number of legal instruments have been created. BPN has become a virtual regulatory machine influencing the production of government regulations (PP's) and ministerial regulations (under the Minister for Agrarian Affairs) which add more and more controls and processes to land administration. This production line is not visible to the public, and according to prominent academics and several NGO's, the results are often in conflict with acts of Parliament governing land and resources, land development and other national legislation. *The regulatory machine in BPN is a major factor in the production of uncertainty and rent seeking opportunities in land administration*. Significant laws are shown in the Table 3.1

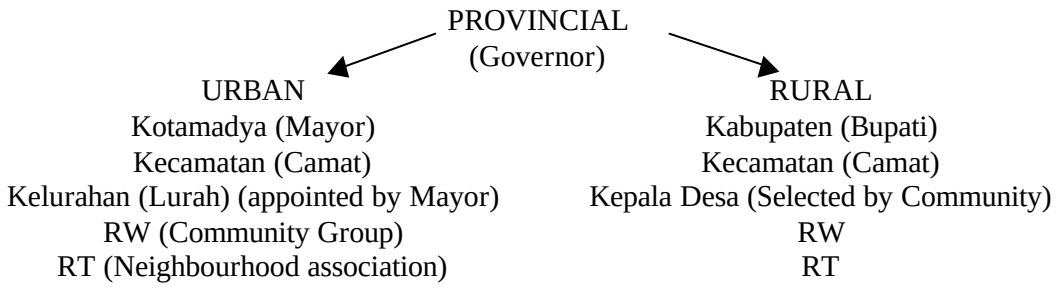
[8] Interview with Sunaryo Basuki, SH, Legal Advisor, April 1999.

Table 3.1 Land and Related Laws

LAND LAWS	RELATED LAWS
Basic Agrarian Law (UU 5/1960)	Basic Forestry Law (UU 5/1967. Bill for new Law pending)
Land and Building Tax Law (UU 12/1985)	Basic Mining Law (UU 11/1967)
Condominium Law (UU 16/1985)	Foreign Investment Law (UU 1/1967)
Security Titles Act (UU 4/1996)	Domestic Investment Law (UU 6/1968)
Land and Building Transfer Tax Law (UU 21/1997)	Basic Transmigration Law (UU 3/1972)
	Irrigation Law (UU 11/1974)
	Fishery Law (UU 9/1985)
	Administrative Court Law (UU 5/1986)
	Spatial Planning Law (UU 24/1992)
	Housing and Settlement Law (UU 4/1992)
	Environment Management Law (UU 23/1997)
	Non-Tax State Revenue Law (UU 20/1997)
	Water Resource Law (UU 6/1996)
	Autonomy Law on Local Government (UU 22/1999)

Autonomy

Existing organisational structure in local urban and regional areas is –



Autonomy is expected to devolve much of the administration to local levels. Thus far, indications of administrative changes have been revealed (see Chapter 1 **Themes of the Report**), but the larger questions of whether the local governments and the local people will be able to **make policy** in relation to their land remain unresolved.

Article 2(4) of the Basic Law allows the "right of control by the State" to be delegated to autonomous regions and *adat* law communities, if deemed necessary and not in conflict with the National interest in accordance with the provisions of Government Regulation. This delegation of authority is not sufficient to found any exact proposals. It is overridden by regulations. If the autonomy law has any impact at all, it must foreshadow the shift from centralist to local control.

The process of delegating meaningful authority and functions to local government will, hopefully, initiate opportunities for substantive land law reform.

3.2 Ideology

Ideology in the Property System

Every system develops an ideology to support its land distribution system. Most claim that their system is unique, historically derived and just, essential and unchangeable except, in undeveloped countries, to achieve fairer distribution. While ideology performs an essential function of interpreting the system for its public, most of the claims made are hollow when tested by empirical reality and a realistic assessment of future needs. No matter how often ideological claims are repeated, if there is serious disjuncture between them and what large numbers of people experience on the ground, the system will not be stable.

Indonesia's ideology claims state control is necessary to achieve prosperity for the people. Strong state control is in part a reaction to the process of moving from colonialism and sultanates to achieve a unitary state by imposing a central presence in all outlying provinces. It is also a reflection of the personalities of the two major leaders, Soekarno, during whose administration the BAL was adopted, and Soeharto who administered it for three decades. The styles of leadership of both Presidents involved a strong centralization of personal power which extracted from the BAL discretions and opportunities for state administrative structures to determine when ownership is obtained and how it is used. Government policy therefore strongly influences granting and operations of both tenures and titles. Under the New Order, the National Land Agency (BPN) was used as the principal permitting agency for all land investments. The focus on land allocation (*izin lokasi*) by BPN appears to have come at the expense of land registration efforts (titling) and systematic registration procedures were first implemented on a pilot project basis in 1994 supported by the World Bank and AusAid. The New Order strove for Economic Development.

By contrast, under *Reformasi*, the goal is now *Welfare and Democracy*. The changes are not merely rhetorical. "Reformation is to strengthen people's rights", the Minister of Agrarian Affairs/National Land Agency, Hasan Basri Durin, noted in February 1999. Land management had not given people fairness and justice in line with the UUPA.[9]. The Minister identified the following proposals for land reform through BPN –

- Intensifying land rights for residential land by elevating HGB or *hak pakai* titles into *hak milik* titles and effectively expanding ownership.[10]
- Introducing fairness of land control/acquisition. *"On the former regime, policy benefited investors and big developers and disregarded land owners of the low economic class. Because of that, BPN has made a policy of land redistribution to people who have small ownership or only sit on the land. Redistribution should be regulated by partnership: for instance, the company can still keep going, but the land is owned by the people." said Durin*. This pattern of "sharing" is also apparent in the proposals for new resource tenures. It puts a heavy price on investment in Indonesia by requiring up front equity (titles or capital) owned by the investor to be given to locals, usually organised through cooperatives. Private sector response has been notably muted.
- Proposed land banking[11]. *"This would advantage former land owners and curb land speculators. In the former regime, Durin said, local government was usually dictated to by developers."* In truth this is remarkable understatement because the role of

[9] This and the following quotes come from *Land Reform: Keep on Going,* **Properti Indonesia** February 1999, p.75

[10] Our information has consistently indicated that use of *hak pakai* in the residential area is either non-existent or minimal, and that HGBs are used mainly for industrial land.

[11] Media Indonesia 25 February 1999

BPN and Regional District Heads (*Bupatis*) was to act as gatekeepers in allocating land for development in the first place. The proposal is built on the assumption that the state will retrieve all the excess land that developers have bought or are entitled to buy through the *izin lokasi* process for a compensation price equivalent to the historic price paid at the original purchase. While the government appreciates finding funds for the land bank will be difficult, there is no suggestion that revoking titles on excess land will be more than an administrative step. *The complicated issue that much of this land was collateralized with banks for project loans now categorized as non-performing and under the jurisdiction of the Indonesian Banking Reconstruction Agency (IBRA) is not mentioned or discussed in the Minister's proposal*.

These proposals indicate that Indonesia will continue to extract a price for investment. The major issue remains – can this ideological commitment to rigid state controlled tenures attract capital to replace the lost millions and to rebuild the economy?

Control and Power over Land in Indonesia

Analysis of Indonesian land law in terms of Western concepts is likely to mislead. Indonesian concepts of ownership and tenure are local and derived from their own experience as original inhabitants of a diverse Archipelago with a myriad of local land use patterns, and as a people determined to express post colonial national identity and pride, overlayed with a rigid bureaucratic system powerful enough to deny entire categories of land rights.

If one embarks on a simplistic exercise of using western labels to describe Indonesian land use patterns, a baggage of preconceptions inherent in language will ensure loss of understanding and confusion will be inevitable.

The 1945 Constitution, Article 33.3, placed land, water and airspace including the natural resources, within the "control" of the state, to be used for the people's prosperity. In 1960, the BAL invalidated the principle of State property rights in land declared in a number of old colonial regulations. *According to this principle, all land within the State was deemed State property whenever nobody else could give sufficient evidence of a right in the land*.[12] In its stead, the BAL amplified the constitution by putting land under the control (*dikuasai*) of the state. The wording in Article 2(1) is similar to the Constitutional provision; "land, water and airspace, including the natural resources contained therein, are in the highest instance controlled by the State, being the Authoritative Organization of the whole People"

The Indonesian theory is that "control" is different from "own". It implies no domain, but that the state should determine everything in regard to land. The Law gives the Government power to define and regulate legal relationships between a person and land water and airspace, and makes the State the source of personal opportunities to deal with and use land, including fixing the rights relating to land, and regulating legal relationships between individuals and their transactions involving land.[13]

By using "control" and not "ownership" to describe the state power, the state implied that the nature of its relationship with the people in regard to land was less intrusive and dominant than under the Dutch. This is not the case. When the balance between state opportunities to control and owner's opportunities to resist are analysed, the Indonesian system is non comparable with market

[12] Gautama and Harsono, 21-22

[13] This legal language is born of a legal philosophy which sees legal rights solely as relationships between people and land. In mature systems, the legal right is the conceptual relationship between people and other people or the state in relation to the land.

driven systems. State control offers a far larger sphere for government action and influence than does ownership or domain in countries which recognise extensive private ownership rights and define, with precision, opportunities for the state to interfere. Moreover, given the tight definition of possible rights in land by the BAL, the vast proportion of land in the country immediately became state controlled and subject to state allocation.

Land Tenures as an Apparatus of State Control

The guidelines of State Policy (GBHN) Decree of Peoples' Representatives Assembly (Tap MPR) No II/MPR 1993 states

> **Land tenure management by the State** is aimed at land being used to achieve social justice for all Indonesians, and land use management is being done to achieve community prosperity. Land use management needs to pay attention to the community's right to the land, social function of land rights, maximum limits of land ownership, including prevention of centralized land tenures which can damage community's interests. Land institutions need to be perfect so that there will be a comprehensive, harmonious, effective and efficient land management system which consists of orderly administration. Land administration and development activities need to be increased and supported by better land analysis and information tools.
>
> Quoted in Government Regulation No 40/1996 regarding commercial tenures. (Emphasis added.)

This espousal of values is undeniably an accurate description of the way the Indonesian Government sees land titling and tenure system working. It is essentially a system of management of land use and tenure by the State. The opportunities for state regulation are multitudinous, repetitive, and pervasive. Thus BPN reflects the political judgment that Indonesia will rely on lease rights of state owned land as a means of preventing land concentration.[14]

The Ultimate Source of Land Titles

In market systems, the terms upon which the owner sells, develops or mortgages is generally left to him or her to negotiate with parties of choice. Normally, the allocation of tenures and titles is backed up by a well organised land registration system, which in turn fits in with a well developed land administration system.

The constitutional announcement of State control of all land in the BAL allowed the GOI to replicate the equivalent powers of countries who claimed eminent domain. The BAL formalized the details of control, and in doing so, fundamentally changed legal and territorial rights of the Indonesian people vis-à-vis their state. The entire country became an enormous common area controlled by the government. The only titles recognised were those established by the conversion provisions (and there were few of these), or those which carried the narrow characteristics of one or other of the highly defined tenures that could be the subject of an application for registration. *Although the BAL claims to be based on adat law, and most land was used through collective arrangements spawned by village and community life, none of these collective rights were*

[14] Israel and Netherlands run successful market economies while relying on lease rights to state owned land. However, in both these countries the share of privately owned land far exceeds the estimated 1% of land in the private market (*hak milik*) in Indonesia. In fact the most common experience of countries which ideologically forbid private owned land in any particular sector is a market confusion. The conditions in which a market can develop, despite state regulated land use, depend on detachment of government from the land use decisions. In most undeveloped countries this detachment is not present, and state control is omnipresent.

recognised. This land became a gigantic area of tanah negara (state land), that is, land available for allocation despite its community owners.

All settled societies produce and allocate property rights. In developed societies, the activities are highly ordered, institutionalised and resource intense, but the structures involved are private and beyond government. Indonesia, by contrast, vested and institutionalised production and allocation of property rights in a national bureaucracy. This is itself a major issue in economic theory. *"Some institutional allocations have efficiency advantages over alternatives. …. [W]hen the methods of defining and enforcing private rights are devised through residual claimant action there is greater incentive to conserve on resources used in the process than when that process is imposed exogenously by non-claimants. The definition of property rights generates rents to resources which would otherwise be dissipated under communal ownership."*[15]

The nature of modern bureaucracies adds another factor. The bureaucracies legally cannot claim a share of economic rents derived from increased efficiency, so they must seek alternative forms of payment.

"Corruption is one possibility, but this may simply be one way of collecting a proportion of the rents. Another possibility is that the bureaucrat can gain power and command over political resources if the definition process necessitates an even larger bureaucracy. Thus the controlling authority may require activities that dissipate rents in order that it can be given command over some political resources. Competing claimants to common property resource may have to prove themselves "worthy" of having rights bestowed upon them, with, of course, the bureaucrat needing considerable allocation of funds in order to make judgements of "worthiness". Or the bureaucrats may find that they can require activities that produce positive utility for bureaucrats. Hence, rather than there being no incentive to reduce resources expended in the definition of property rights, there may actually be an incentive to increase such expenditures."[16] Bureaucratic allocation is bound to produce substantial inefficiencies.

3.3 Basic Agrarian Law

Changing the Basic Agrarian Law

For some (the formalists), the BAL holds an equivalent position in Indonesian psyche as the Constitution. Reverence is attached to its clauses as the source of great Indonesian wisdom and national identity.

Meanwhile political realities have dramatically changed. While even discussing the BAL was taboo under Soeharto, it is now possible to raise issues about its fundamental principles and the tenure and titling systems. However, while the formulaic and stylized politics under Soeharto are disappearing, their legacy of a formulaic and stylized land law remains. Movements in Government for land law reform are more akin to jockeying by existing institutions to protect their position rather than genuine, substantive reform.

But whatever the incentive, four basic issues are on the change agenda –

- Recognition of community use of land as a source of titling or tenure (see Chapter 6, **National Interest versus Land Titles**)
- The impact of autonomy on the national administration

[15] Anderson and Hill 375-7.

[16] Anderson and Hill 377

- Informal conveyancing and its consequences (see Chapter 5, **Conveyancing and Priorities**)
- Market responsiveness of the land tenure and titling structure (see Chapter 7, **Property Markets**).

The formalists remain convinced that the BAL cannot and will not ever be changed. The final outcome of the political and restructuring processes cannot be predicted. To some observers, the demands for change are overwhelming. They are coming both from the indigenous populations and from the markets. That is, both the poor and the economically powerful are saying the same thing: the BAL must be changed into a document suitable for the Indonesian nation in the 21st Century. They are both right.

The Dutch Influence

Before the BAL, two separate systems operated: a civil code introduced in the middle 19th century modelled on the Netherlands code, and *adat* law (mostly unwritten) based on the customary native law[17].

Two categories of land were recognised: Land possessed under Dutch colonial land rights regulated by the civil code: *eigendom, erfpacht, opstal*, *gebruik*, and land subject to *Adat* law which identified a right of disposal, ownership exploitation, *gogolan* right, and rights created by the Dutch colonial administration for indigenous groups (right of *"agrarische eigendom"*, or for the Oriental-group "*landerijen bezitrecht*").

Dutch colonial rights were registered and certificates of evidence issued. Native rights, although they covered a larger area, were registered only in much smaller part. Indigenous groups could possess land subject to the Dutch Civil Code. Foreigners could obtain native land rights, although there were regulations limiting freedom to transfer land from autochthonous Indonesian to non-autochthonous parties. The government also introduced administrative regulations which applied to all land.

Up to 1870 opportunities for private entrepreneurs to operate in the agricultural field were very limited. In 1870 a new agrarian policy was applied by *Agrarische Wet*, which favoured establishment of agricultural estates by private Dutch entrepreneurs. Prior to 1870 agrarian activities were monopolised by the Colonial Government within a framework of compulsory land cultivation. Under the new policy private entrepreneurs were granted state-lands with a title, a "*erfpacht*" right with 75 years duration. Leases could also be obtained from native owners. Outside Java, the entrepreneurs were granted land with "a right of concession" which had long term duration.

One of the implementing regulations of the *Agrarische Wet* was a Decree of the King of Netherlands, "*Agrarisch Besluit*", a provision of which became the foundation for the establishment of the administrative land law which applied until the Basic Agrarian Law in 1960. Article 1 of this Decree stipulated that all land which could not be proved to belong to a party was assumed to be State land. The first "*domein*" statement applied only to areas in Java and Madura. In 1874 it was applicable to all directly governed areas. This structure obviously influenced the details of the new tenures created by the framers of the Basic Agrarian Law.

[17] A more complete review of *Adat* and Dutch colonial law is provided in LAP-C's report entitled Topic Cycle 4 – Evolutionary Change in Indonesian Land Law – Traditional Law (*Adat*) Perspectives, September 1999

Ending the Dutch Legacy

The Basic Agrarian Law has operated since 24 September 1960. With its inception, dualism was purportedly abolished, and unification was established on the basis of *Adat* law, modified to meet the requirements and developments of modern society. The significant changes of Basic Agrarian Law were –

- Abolition of conversion rights[18] in self governing regions of Jogjakarta and Surakarta
- Liquidation of private estates[19], and lands encumbered with *eigendom* (Dutch proprietary right)
- Land lease for cultivation of sugar cane and specified corps produced for the world market[20]
- Illegal land occupation[21] and
- Licence system for transfer of immoveables[22].

Fundamental Principles in the Basic Agrarian Law

The Basic Agrarian Law defined its purposes. These are only a guide to the intentions of its framers. On analysis, despite its articulated purposes, the Basic Agrarian Law sought to -

- assert a nationalism founded on a modern unitary state with a strong central administration
- create a myriad of opportunities for state and administrative intervention in the land tenure and titling system

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[18] A conversion right was a right in rem created by Vorstenlands Land Lease Regulation (Principalities Land Lease Regulation) which allowed the Dutch entrepreneur of an estate to receive the land, labour and water for the benefit of the enterprise, supplied by the Prince or feudal Chief. The entrepreneur paid an annual sum, and the conversion rights at the beginning were granted for 50 years. The purpose of creating this right was to allow the business the opportunity to register the right and to obtain credit from hypothecation. At independence, the right was abolished and the lands became the individual property of the local peasants.

[19] Private estates were a relic of the Dutch and English East India Companies. Vast tracts of land were granted by *eigendom* to Dutch owners with substantial landlord powers rivalling government power. Governments over time tried to abolish these estates. In 1911, a regulation allowed the government to repurchase them for judicially settled compensation. Most were relinquished without resort to the regulation. At independence only few remained. Estates outside Java were dealt with under different law, but these were not completely liquidated. Law No 1 of 1958 declared that all private estates automatically reverted to the State and became state land. Compensation was to be fixed and paid subsequent to seizure.

Private estates had one of two titles:

Tanah usaha (land with a right of use) which was converted into *hak milik* to which the Minister of Agriculture could attach conditions to guarantee best possible use and prevent owner from transferring his new right too easily. Foreigners had to release the right within a year to Indonesian nationals or to the state. Foreign Orientals (even Indonesian nationals) could only get a *hak pakai*.

Tanah kongsi which was placed directly under the control of the Minister of Agriculture.

[20] The Netherlands Government at first prevented private agricultural enterprise to limit the competition for its own efforts. After 1870 land lease to foreigners became possible. Governments since have tried to regulate the amount of land devoted to a crop and the amount of rent with a view to controlling the market for the crops. The length of leases was reduced from long periods (up to 21 and a half years) to a single season. The Basic Agrarian Law was used to implement the government's program to be self supporting in food and clothing and to achieve balance between crops important to the farmer (tobacco made the most money) and the State.

[21] Illegal occupation is covered in Chapter 2, **Rights in Land**.

[22] Transfer to foreigners is covered in Chapter 7, **Property Markets**.

- convert communal land into land controlled by the state, despite the reliance on *adat* principles
- embed small holdings – particularly by restricting land ownership to individuals, restricting the amount of land, and removing tenures (particularly leases of agricultural land) seen as capitalistic
- adapt *adat* law to a modern unitary state operating in an international world, particularly by overriding it when the interests of the centralised state demanded
- remove the legacy of colonialism by restructuring Dutch titles and converting them into rights under the Basic Agrarian Law
- prevent capitalistic land uses and interests, particularly by restricting the amount of land a person could own, refusing corporate ownership and controlling absentee ownership
- place severe restrictions on foreign ownership.

Despite its purported philosophical origins based on the flexible and ever changing *adat* law, the Basic Agrarian Law produced a system of titles and interests which were limited, rigid, use and time delimited and discretionary. Given that *adat* communities had generally not developed a concept of ownership, the attempt to develop a national superstructure with *adat* features was disingenuous.

Socialising Land

The Basic Agrarian Law was designed to implement Indonesian socialism[23] by two basic strategies:

1 Allocating use through tenures, ostensibly to replicate *adat* principles.

The division is simple –

Ownership:	limited to personal tenure: *hak milik* – roughly equivalent to freehold
Specific commercial tenures:	*hak guna usaha*, *hak guna bangunan* and *hak pakai* based on the concept of duration or equivalent to leasehold.

This theoretical separation of a limited personal tenure and a use based commercial tenure is fundamental, and a principle reason for the failure of the tenures to meet the needs of a modern land market.

2 Tying land ownership to occupation and use by one person and limiting ownership -

- Article 7 prohibits unlimited ownership which would violate the people's interests.
- Article 10.1 requires every owner of a right in land to cultivate it personally. Absentee landlordism of agrarian land is forbidden, in principle.
- Article 17 allows the Government to fix the maximum and minimum land areas that can be possessed by one person. This control predated the Basic Agrarian Law and was used in 1958 as a means of abolishing the large estates. Regulations continue to define limitations on ownership of amounts of agricultural land which vary for specific regions. Prior to the national election on 7 June 1999, the Minister for Agrarian Affairs proposed tightening limits on the size of residential parcels. Highly detailed proposals to reduce existing residential sites (that is, *hak milik* titles) were formulated.
- All relationships with the land are controlled by the Government, especially for commercial owners and users.
- Article 21.1 forbids corporate ownership (with narrow complex and uncertain exceptions).

[23] In the Preamble, the Basic Agrarian Law is stated to be based on the Five Principles of the *Pantja Sila* (State Philosophy), the fifth principle being "social justice".

The principles of socialism of land are usually referred to as "land reform"; hence the imposition of the restriction on areas of land capable of being owned, and interests in land (leases of agricultural land) were seen by drafters of the Basic Agrarian Law as substantial improvements over the previous law. The policy of limiting opportunities for outright ownership of land is one of the most spectacular failures of the Law.

Ownership, Hak milik

"Ownership" or *Hak milik* absolutely requires three elements –

Object	a known and identified parcel. The level of land identification varies depending on the process by which it was brought under BPN purview
Subject	person or individual Indonesian(s)
Right	the tenure and use.

Hak milik is the principle tenure by which Indonesians obtain their rights to live on and/or farm land. The right is seriously prescribed. Generally, the owner must use land personally for residential or small agricultural purposes, and holdings are subject to limitations of area and number of parcels. Compared with ownership in the market based systems, which conceptually allows the owner to make any decisions about how the land will be used and developed, this is a highly proscribed tenure. [24]

The BAL and Agriculture

The Law embeds small holder, sedentary agricultural practice. Article 10 requires an owner of agricultural land to cultivate the land actively. Despite Article 10, the owner can rent, pledge the land or share the product with a sharecropper because regulations have not been made to remove these rights. Article 24 provides that the use of land by a person other than the owner should be restricted and regulated. Articles 35, 36, 41-45 and 53 contain specific restrictions about who is permitted to possess land, duration of secondary possession and relationship between the owner and the possessor. Further amplifications of the BAL have extended these types of restrictions and pushed commercial use of the land into plantation titles (*Hak Guna Usaha* or *HGU*).

Commercial Tenures

There are three commercial tenures usually derived directly from the State: a **right to build and use structures**, *Hak Guna Bangunan* or HGB, **a right to exploitation**, *Hak Guna Usaha* or HGU, and a **right to use**, *hak pakai*. They are all limited in two fundamental ways: by terms of years (more or less in trenches of 20-30 years which can be extended on application to BPN), and by continuous use of the land according to the tenure. Since 1996 the allotment of the time can be made at the beginning, to increase certainty of use.[25]

Despite the existence of the commercial tenures, there is strong anecdotal information from commercial real estate brokers that methods are found to have *hak milik* status in commercial and industrial land. The usual method involves putting the name of a nominee Indonesian in the

[24] The formal application of the constituents virtually means that a great deal of communal land is non classifiable because its boundaries are imprecise, and that investment by foreigners or multiple parcel (over 5) ownership by Indonesians in housing must utilise avoidance measures. Indonesia dramatically restricts corporate ownership of land. Even local companies cannot own *hak milik*. The individualisaton of land tenures is a substantial detriment to the Indonesian economy.

[25] Government Regulation 40/1996.

paperwork that is submitted to BPN and which achieves a certificate. While this practice is regarded by many as necessary, it is highly uncertain and productive of rent seeking.

State Projects

For State companies and regional governments with large projects on State land, a *hak pengelolaan* (right to manage) is available. In PERUMNAS projects, which produce thousands of low-cost houses, the prevailing practice until 1998 was that BPN issued HGB certificates on sub-division with 20 years duration. However, the *hak pengelolaan* stays omnipresent over the entire development area to permit further redevelopment should the state require, with consequential displacement of the existing residents. Since 1997 with the issuance of Ministerial regulations Nos 9 and 15 (Agrarian Affairs) all right holders in low cost housing projects with *HGB* titles can have their title elevated to *Hak Milik*. The status of *Hak Pengelolaan* one *Hak Milik* titles are issued is not addressed creating further legal uncertainties.

3.4 *Adat* Principles and the Basic Agrarian Law

The framers utilized *adat* principles as a means to achieve two objectives -

- to express Indonesian nationalism
- to secure the rights of the native population under agrarian law, and address their comparative insecurity of title under colonial law.

Table 3.2

***ADAT* PHILOSOPHY IN THE BASIC AGRARIAN LAW**[26]

Basic principles - Eternal relationship between man and land, religious nature of the relationship and the understanding of land including water, forests, environment and resources in and on land

ARTICLE	CONTENT
2(1)	Land is controlled by the state
2(2)	Authority of the *ulayat* bond – called "state control"
3	*Ulayat* bond applies, as long as it exists, and does not conflict with national law and higher regulations
4	State's right of control – similar to the *adat* bond. Theoretically converting the states right onto a national *ulayat* bond equivalent.
5	*Adat* law is made the agrarian principles in earth, water and airspace
6	Land has a social function
8	Exploitation of natural resources must be regulated
9(1)	Community members only can possess the land not own
9(2)	Gender equality applies
10	Land must be exploited directly by its owner
13(2)	Private monopolies of individuals and organisations in agricultural land must be prevented (to prevent land being over harvested).
14(1)	Land use must be managed according to principles
15	Soil's fertility must be maintained

The role of the Basic Agrarian Law in establishing an Indonesian national identity is debated. On one view, much of the Dutch conceptual framework on land rights survived despite the formal removal of European interests because the concepts are reflected in the framework of new rights. On the other view, the Law expressed the fundamental identity of the Indonesian people by giving supremacy to *adat* law.

[26] Soesangobeng 1998.

In the final analysis, Indonesia's land use patterns and the culture dependent on them remain in spite of, not because of the Law. How this happened requires complex analysis. Meanwhile, to the Western mind, the fluidity of *adat* law and its amorphous nature (the very characteristics that make it so attractive to a national Indonesian psyche), raise questions about its ability to influence the interpretation and operation of the Law. Its inherent flexibility (and consequent unknowability) made it a blunt tool for a unitary government trying to make local cultures look alike in a national identity seeking process. Three features of the new system contributed -

1. By using *adat* law as the basis of all rights in land, water and air, the Basic Agrarian Law reverted from the European model of tightly written law, to the Indonesian model of oral law.
2. The Law traded the loss of certainty in legal source and expression for an attempt to gain security for native people, a trade which must be reassessed in the light of subsequent experience. As will be seen in later parts of this report, security of title remains illusive and local people have tended to approach land rights delivered by the central government with a healthy scepticism.
3. The Basic Agrarian Law was only fundamental principles, not an effective system of land law. The Legislature at the time was aware of this.[27] The uncertainty inherent in the Law is a major impediment to the land titling and administration system. While the drafters thought that the Law would be amplified by further enactments and regulations (frequently foreshadowed in the Law itself), these amplifications have neither clarified nor amplified provisions to create a satisfactory infrastructure of written and accessible norms.

Adaptation of *adat* law by the Basic Agrarian Law

In any event, the spirit of nationalism led the drafters to adapt *adat* law so that it conformed to -

- National interest of the State based on national unity
- Indonesian Socialism
- Regulations of the Basic Agrarian Law
- Other prevailing regulations
- Stipulations based on Religious Law.[28]

Two claims were made for the Law to establish a popular base of support –

1. That it provided opportunities for *adat* communities to continue to manage and use their land according to their own interests, and
2. That it served as an instrument for land redistribution.

Another support base was the simplistic replication of the familiar village model of social organisation, complete with its paternal leader or a village elders who determined land distribution and uses on behalf of a faithful and thankful community. Even if allowances were to be made for the village based system of land allocation, it is highly specious to maintain that the same function can be carried out by a central state bureaucracy – viz BPN. The model remains unworkable. Given anonymity and diversity of the nation, the state eventually had to off-set the loss of consensus in land distributions decisions with use of power. See Chapter 6, **National Interest versus Land Titles.**

The *Adat* Heritage

There are at least three different views expressed about the relationship of *adat* principles and the Basic Law. The formalists, led by Budi Harsono, see the Law as protecting *adat* entitlements

[27] Gautama and Harsono, 25.

[28] Basic Agrarian Law Article 5

(whatever they are) and expressing a national spirit through a mechanism so sacred that it is incapable of being changed.[29]

From another view,[30] *adat* has not sufficiently influenced the Law or its interpretation, in large measure because of a failure to understand *adat*. On this view, features of *adat* philosophy are –

- A holistic unit viewing nature, man, land and surrounding elements, observable or not, and spiritual or tangible, as part of a whole influencing each other
- The bond between man, land and surrounding nature is not a right, but a relation which can mature into a right
- The source of the right is the intensifying relationship between man and land, not a decision of an official
- If the relationship becomes everlasting, it is recognized by the society and becomes a legal relationship.

The community union is an organization creating relationships between community members and the land relating to occupancy and usage. These do not amount to collective ownership which gives the group authority to possess together, because the process allocates use and harvest opportunities to individuals and families in agricultural plots, while maintaining collective entitlement to *ulayat* or community land such as bathhouses, paths, meeting places and graveyards. Even if detailed explanation was available, it is hard to see how these ideas could systematically allocate rights in land for an industrialised nation.

The third and more convincing opinion sees the Law as instrumental in destroying its very foundation: by requiring *adat* rights to yield to national interest, the Law has paved the way for their eradication and modification.[31] The Law expressly overrode existing land uses. *Adat* rights are secondary to the rights of the State. Should the Government wish to grant a right over *adat* land, the right of disposal of that land in the community yields to the "national interest". Article 6 states that "all rights in land have a social function", meaning that land cannot be used merely for the benefit of the owner.[32] However, there is an even more obvious explanation. Because it created individual titles, the Law expressly denied formal recognition for communal land uses and these were never raised to the level of a "new land right": See Chapter 6 **National Interest versus Titles**.

3.5 Limitations of the Basic Agrarian Law

Tenures as the Basic Tool

The unique land tenures in Indonesia were justified as a bulwark to address deep fears (built of colonial experience, perhaps) of land concentration, land grabbing and abuse of power. The operation of BPN in granting land use opportunities is seen by its officials as directly addressing these perceived woes and containing potential excesses that a freer system would "inevitably" produce. Unlike other countries, Indonesia uses its tenures as primary social and economic policy tools to prevent foreign ownership of land, to limit the amount of land available to an individual, to prevent ownership by groups and companies and to allow state managed allocation on a case by case

[29] Law relating to marriage and land are based on *adat* principles and are seen as so close to the cultural base that they cannot be changed. These are "non-neutral", that is not capable of being changed. Other law is "neutral" and can be updated and adapted.

[30] Herman Soesangobeng, Cultural Advisor LASA/ILAP, Conference celebration 38th Anniversary of the Basic Agrarian Law, Jakarta 13/10/98

[31] Fitzpatrick, pp.176-189.

[32] Sudargo Gautama and Budi Harsono, **Agrarian Law**, p.28

basis. Other social policy and economic tools are either underdeveloped or contradicted. The reality is that a tenure system cannot answer these fears adequately. Chapter 7 **Markets** examines the implications of this in more detail. (See Figure 3.1 **Comparison between International and Indonesian Land Tenures)**

Planning

The relationship between the Law and land use planning has two aspects. First, Indonesia uses tenures as a planning tool (a very bad one), when other countries use local comprehensive planning processes and growth management principles as planning instruments. Land planning is impeded because each title is use proscribed and its grant is an isolated, particular bureaucratic decision. Second, the Law, combined with the land development approval process using *izin prinsip* and *izin lokasi*, was instrumental in moving masses of people from selected land in favour of state sanctioned development or transmigration schemes. It has therefore created an avalanche of detachment from and distrust of government, especially in the outlying provinces. Anecdotal information suggests that BPN is among the most distrusted central agencies. [33]

Inflexibility

A mature legal system develops its tenures with subordinate proprietary interests in land which flesh out opportunities to create specific rights by allowing people other than a title holder or owner to make decisions in relation to the parcel.

Even in nations with stable economies and legal systems, changes in land use patterns continually demand developments of the vocabulary of available interests in land. Some examples of mutations are-

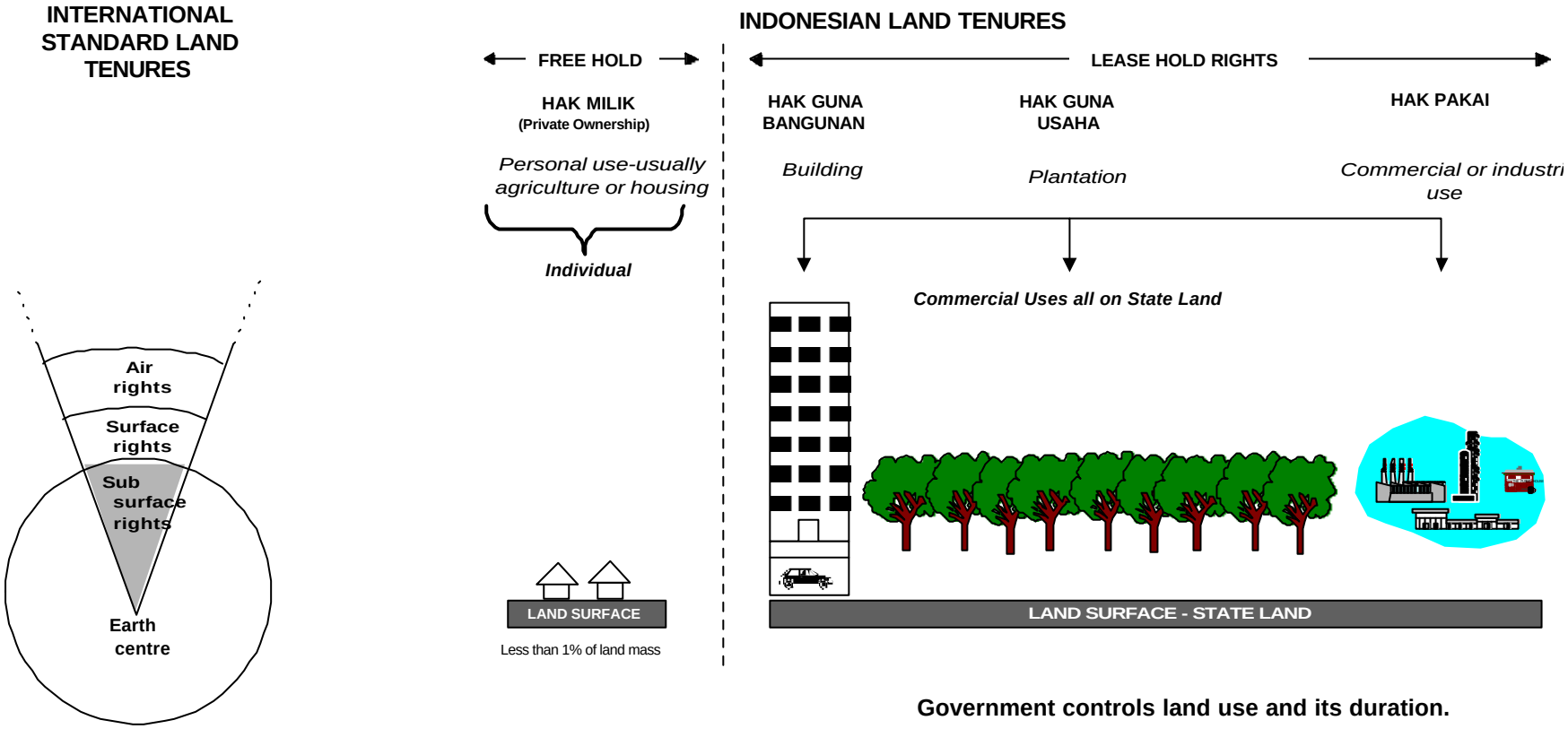
- development of marketable rights to high rise buildings in Manhattan, which are traded among potential developers
- the elimination of prescriptive entitlements to rights to light and air, which was essential to gain maximum usage of expensive inner city land
- high rise living and working, which created novel ways of assigning occupancy opportunities to ownership
- timeshares which attract capital for resort development

rationalization of public planning, by controlling or overriding the private covenants restricting land use.

The legal sources of these mutations are variable – from common usage and subsequent recognition in the legal system, to energetic statutory law reform. The long term experience in Indonesia has been a much more static structure of tenures, titles and interests. Excessive state control limits opportunities for social and economic changes to impact back on the system. Bottom up changes are not permitted.

[33] The government is rethinking the planning process. A Spatial Utilization Permit issued by the Head of a Region is proposed to replace the BPN issued Izin Lokasi and all the permits related to it. The Spatial Utilization Permit will consist of a Land Use Allocation Permit and a Land Use Planning Statement. The IPR must be obtained by every individual or legal entity that will benefit from land more than 5000 square metres in urban areas or more than 2 hectares in non-urban areas. **Bisnis Indonesia** 10 May 1999 p.1

FIGURE 3.1 - COMPARISON BETWEEN INTERNATIONAL AND INDONESIAN LAND TENURES



Overall, the structure does not permit growth of flexible legal tenures which reflect use changes and economic needs. Despite the complexity of land uses in a developing economy, the Indonesian structure forces each land user into one or other of these tenures or for the vast majority no tenure at all. In practice, sophisticated Indonesian owners adapt and manipulate land titles to satisfy market demands and personal interests.

High Rise Developments

The inflexibility of tenures is apparent with high rise developments. Most countries which introduced a separate titling structure for multi storey buildings did it without having to change the fundamental tenure available for elevated parcels. If freehold was available in land, it was made available in a strata space created by the four dimensional building boundaries. *Hak milik* titles are available for condominiums in Indonesia but are restricted to private Indonesians.

In an attempt to facilitate investment by the expatriate market resident in Indonesia the new legislation offered the tenure type of *Hak Pakai* for condominiums which is equivalent to leasehold. The market response has been predictably dismal. Complicating the matter further, the *hak pakai* title has often been restricted by BPN to less than 10 years duration and even this limited right is forfeited if the expatriate becomes a non-resident measured as a 12 month continuous absence. In the meantime the condominium market is in severe recession and a significant contributor to the non-performing loans of commercial banks assigned to IBRA.

(See Figure 3.2 **United States Estates and Interests in Land**)
(See Figure 3.3 **Australia Estates and Interests in Land**)

The Doctrine of Exclusive Tenures in Indonesia

The doctrine of exclusive tenures developed in 1967 to allow uninhibited access to resources and establish separate administrative structures for land and resources. Under this doctrine, no private land titles exist in land devoted to resource harvesting under the Basic Forestry Law 5/1967 or can be newly created in mining areas under the Basic Mining Law 11/1967.

The segregation of the administration of land, forestry and mining tenures implements this doctrine with dramatic effect in immediate limitation of land available to land tenures. The effect of this is explained in Chapter 7 **Property Markets**. (See Figure 3.4 **Tenure Models**)

The Principle of Horizontal Separation

Reversal of the Fixtures Rule

Adat communities separated conceptual rights to surface of land, trees, and produce of trees and allowed "ownership" of each as a means of rewarding productive effort with resulting gains.

> "National Land Law is based on *Adat* (Customary) Law, which subscribes to the principle of horizontal separation. In view of this, National Land Law also subscribes to the principle of horizontal separation in so far as such structures, plants and works are concerned. Within the context of the principle of horizontal separation, the objects which form inseparable part of a land parcel is legally not part of the land parcel. Thus a legal action on a land right does not necessarily cover such objects".
>
> Elucidation of the **Security Titles Act 4/1996**, Para 6.

Figure 3.2 United States – Legal Rights and Interest in Land

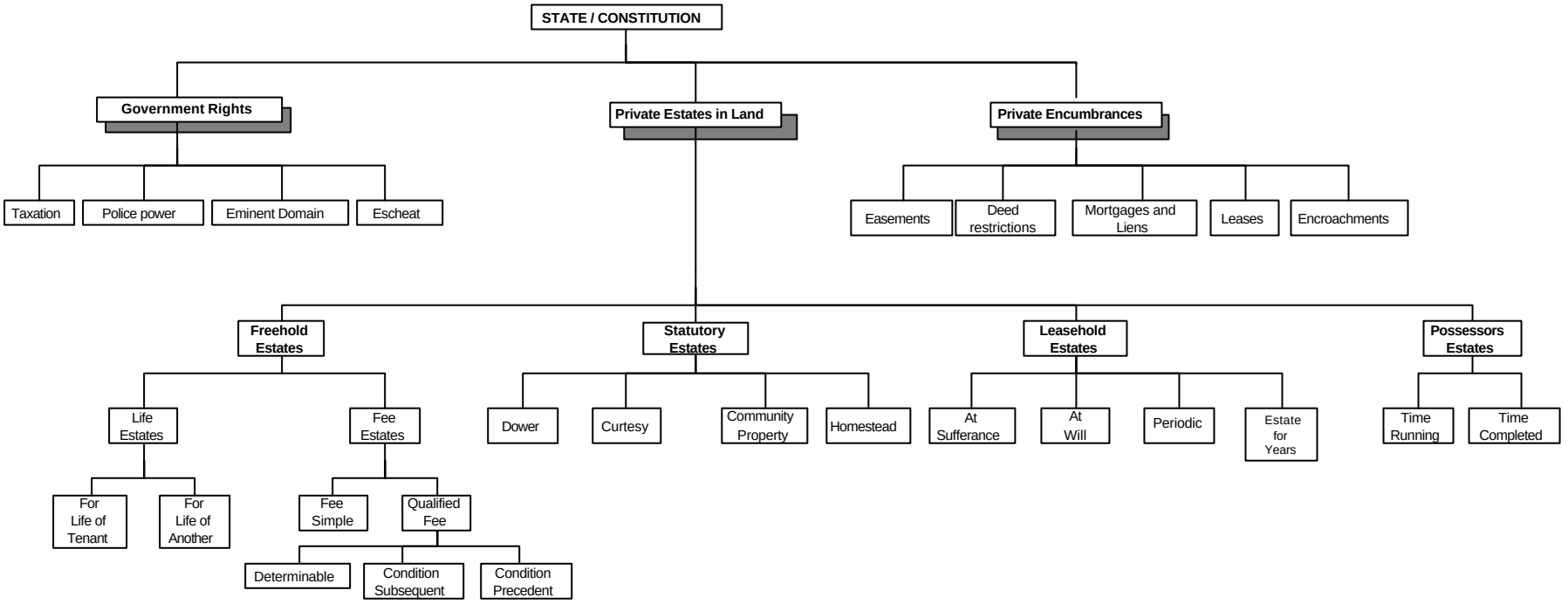


Figure 3.3 Australia – Legal Rights and Interest in Land

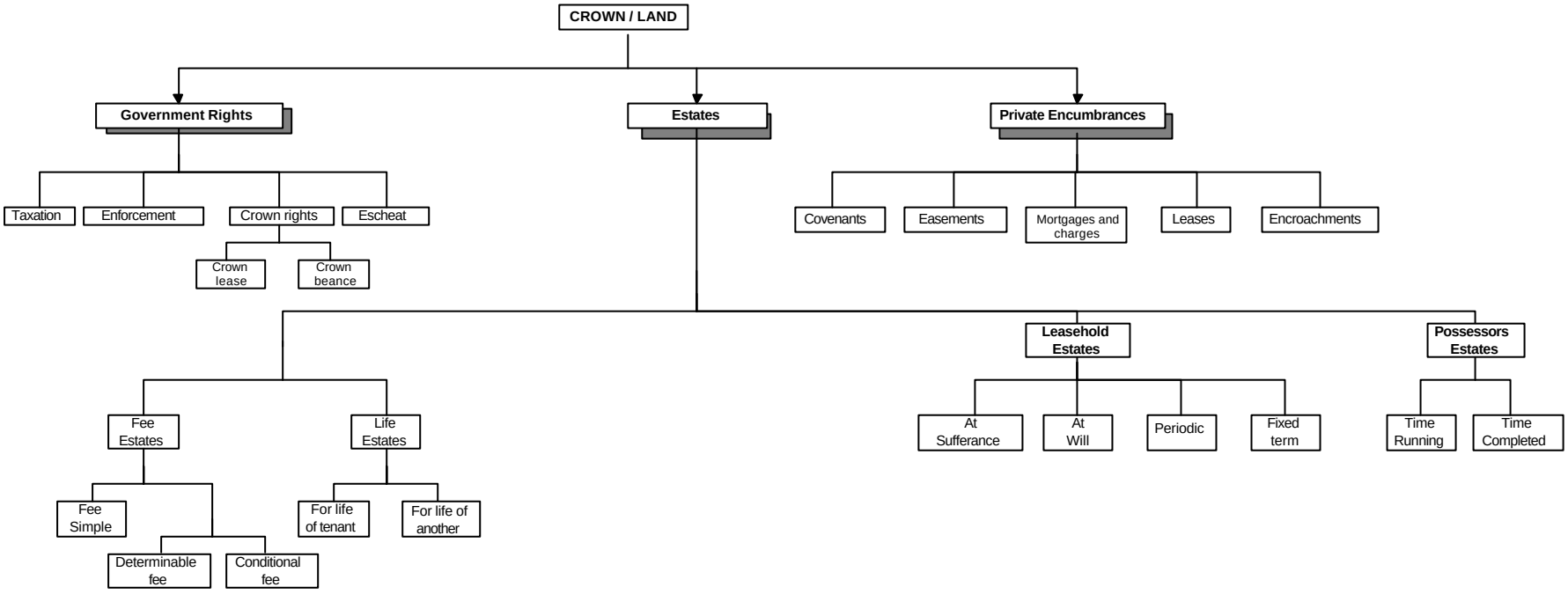
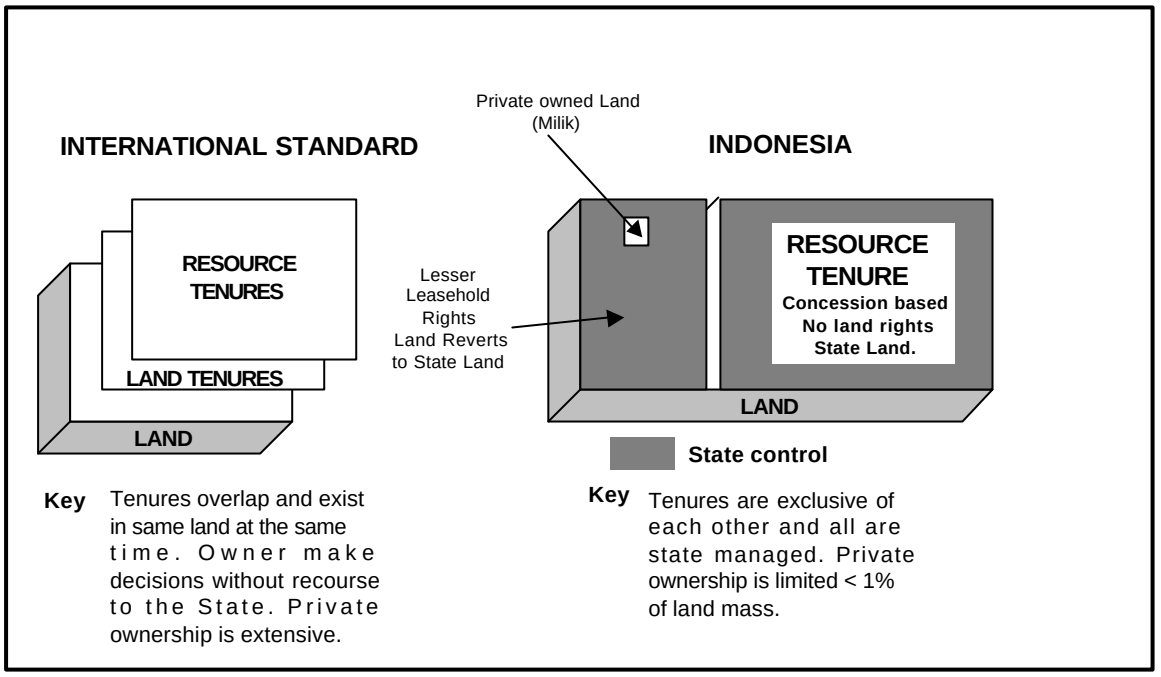


Figure 3.4 TENURE MODELS



The *adat* principle may make sense in a small static agricultural community, but not in a modern society which needs to encourage investment in capital stock (real estate) and creation of permanent resources. To relieve the fundamental uncertainty in conveyancing of land, specific Indonesia titles and conveyancing documents must expressly make provision for additions to be included e.g. security titles include things permanently affixed and expressly included in the Security Title Conveyance Deed by all parties concerned, even third parties. For other more general purposes, the consequential uncertainty about who owns what remains unabated and unresolved.

Separate Building Titles

Because buildings, and so on, are not legally part of land and because ownership is a personal not commercial title, Indonesian law had to create a separate building title, the *hak guna bangunan* or HGB for commercial buildings. The concept was borrowed from countries which used fixtures rules as their fundamental property law and for which the title was a curiosity or an exception. The building tenure in Indonesia therefore has a much more restraining impact on development because it is the only mechanism available for large scale commercial development and on its termination by effluxion of time or annulment, the building's fate is determined by the owner. Presumably people do not remove buildings. Civil law countries permit a separate tenure by which one person can own a building on another's land. Specific Dutch rules for transfer of ownership in register property, previously immoveables, apply to land, buildings, ships and aircraft above certain tonnage. As rights in land are derived rights from *eigendom* (private ownership), the owner can arrange for a building to be put on land by granting the builder a right of *opstal*, right to have buildings on another's land.

The building right in Indonesian law is a means of allowing building on state land by forcing the builder to take only a limited right. The right can be created on private land, but by 1970 there was no implementation regulation, so the procedure of creation (deed made out by a Land Deed Official) was not used.[34] Whether the Law is simply a reflection of the Dutch system or a necessary corollary

[34] Gautama and Harsono, 70, 71

of its *adat* ancestry is an open question.[35] *Adat* communities had no developed building tenure for creating permanent and extensive land developments. They simply did not need one. On the other hand, the Dutch certainly did.

As in the Netherlands, in Germany buildings are part of the land. An exceptional special interest is available of an Hereditary [or Inheritable] Building Right which allows the holder to construct a building, which is then owned separately from the land. The building rights are registered in a separate register, and can be mortgaged etc. The right is purchased and also a form of annuity can be agreed. The owner retains a reversion, and the conditions of termination are to be specified. This was developed in the Weimar Republic to enable home ownership by people of modest means – these building rights are regarded as a peculiarity in a doctrinal sense. This peculiarity is found in communist regimes. The old Soviet system separated building and land ownership. The State owned the land and the citizens owned their homes as personal property. The reason for this is obvious – why else would anyone dream of expending time, labour and materials in developing someone else's land.

Anglo American legal systems do not create separate tenures for buildings. This is because the basic tenures, leaseholds and freeholds, allow flexible opportunities for owners to negotiate leases under which they allow a stranger to enter on and improve their land. Even though a building tenure giving a removal right is theoretically available, leases which allow removal of significant developments at their end are unknown. The assumption always is that permanent developments of land remain. In case of office and retail premises, the tenant's fixtures rule allows the tenant to remove items associated with the business on ending the lease. Meanwhile, the landlord can use the freehold, and the tenant can use the lease as security for a mortgage.

The insistence on a separate building title to cover the universe of commerce extracts a high economic cost. Normally, the commercial sector invests in buildings on land it owns. The land right involved is a substantial asset, unrestrained by its current use. It is highly saleable and standard security proffered for development funds to the largest range of possible lenders, including the most conservative, long term and low cost lenders. A time limited and nationally designed tenure simply cannot compete. While a major economic study would be needed to quantify the real losses incurred by the Indonesian economy, intuitive analysis and anecdotal information suggest they are large.

Tenure Limitations

Even if collusive and corruptive practices were eliminated within BPN and the agency became an objective and efficient government office, the structure of tenures in the BAL would remain imperfect and incapable of founding a satisfactory market in property. The major limitations of the tenures are:

- Collective ownership, whether by communities or corporations, is not allowed.
- Tenures assume a static agrarian economy in which land is principally used by an owner with buying and selling an exception.
- Tenures do not provide the flexibility and functionality necessary for a modern economy.
- *The system is counter intuitive. It requires people who wish to make the greatest expression of ownership by investment in a permanent building, a large scale plantation, or significant manufacturing plant, to acquire a lesser tenure than ownership.*

[35] *Erfpacht* is a long term lease and the basis of the plantation system under the Dutch. *Hypotec* was the Dutch security interest. These both following independence in 1945. Security titles replaced *hypotec* in 1996

- The balance of power between state and owner in relation to the land use and tenure is weighted heavily towards the state.
- The tenures create titles which are unique to Indonesia and not globally competitive. They are confusing, idiosyncratic and capable of being manipulated.
- Grant of a tenure is axiomatically approval of a land use. The uses are embedded in the tenures. Should the use be changed, the tenure must be relinquished for re-approval by BPN. The operations of a market in titles is highly constrained.
- All titles, with few exceptions, are held directly of the State, not of private owners.
- Grant of titles is discretionary. They are not available as of right. They can also be revoked in a variety of loosely defined situations without due process or just compensation.
- Titles, even when registered, are inherently uncertain, breeding a high level of social dissention and protracted court litigation.
- In all economies, land use changes are driven by externalities and pressures on owners, and by the owners themselves as they respond to opportunities. In market based systems, these changes in use are normally within the opportunity set of an owner. In Indonesia, land use change requires surrender of the title to the state and re-issuance of another title. The systemic capacity for flexible and opportune development is obviated by central state control.
- Some of the titles are little used. Systematic registration by BPN has revealed no *hak pakai* in those areas. This is confirmed by large commercial real estate agents.
- The tenures require an allocative land agency which is merely reactive to project proposals and which has no planning competence or power, to implement spatial planning. In fact, BPN cannot plan effectively under this system. As a result, even the planning function of government fails.
- The tenures breed distortions which separate the land law and specific titles from what owners do with land: To achieve normal level of land use flexibility commensurate with the changes inherent in a modern economy, the public must manipulate the tenures. Many examples exist of farmers using state land (and believing it is theirs, with good reason), absentee ownership, owners who exceed spatial limitations, use of nominees by foreigners and corporations (even banks), and builders and developers using *hak milik*s. These distortions are opportunities for rent seeking.
- The tenures give rights in the surface (BAL Article 4(2)). Air and subterranean space belongs to the state and local government. Land owners may utilize air and subterranean space according to their need. The result is far less certain than in comparable legal systems which permit ownership in air and under the ground to follow ownership of land.
- Because the state is so involved in land allocation and titling, a market in property interests does not develop with consequential problems for setting land values. The land valuation system is imperfect and relies on artificially ascribed values which affect the taxation and credit systems.
- Impact of the tenures on credit availability and price cannot be accurately calculated, but it is definitely negative.
- The titles, and the security title derived from them, do not provide adequate security of credit investment.
- The normative system established in the formal law is not the operative control over land titles. Rather what controls land use and titles is a sub-legal and often contradictory normative system which makes the public vulnerable to bureaucrats' power and rent-seeking, and makes disputes inevitable.

INDONESIAN LAND TITLES at 1972

Right	Substance	Source	Duration	Private /State Land	Registered/formality	Security	Transfer
Registrable Rights							
Hak Milik **Ownership**	Individuals who are Indonesian nationals can own and, if agricultural, must use. Can source building, use, rent, land pledge, sharecropping, lodging rights, and security rights. Can be sold, auctioned, given inter vivos or on death. Subject to severe limitations for area. Must be released to state if a large corporation wants to build on it so new direct title can be created.	Conversion by BAL Grant by Govt *Adat* law	Unlimited	In *Adat* land In State land	Ownership in State land begins with registration. *Adat* land can be registered, but exists anyway if converted by BAL. Must be registered but few are.	Hypothec or credietverband	Sell (PPAT document) Exchange Capital invest Grant Inheritance
Hak Guna Usaha **(HGU)** **Cultivation**	Individuals who are Indonesian nationals and Indonesian companies can own. For agricultural, fishery and breeding purposes Derived from Dutch plantation system	Conversion by BAL Grant by Govt	Severe time limits	State land only 5 hectares minimum, no maximum	Must be registered	Hypothec or credietverband	Sell (PPAT document) Exchange Capital invest Grant Inheritance
Hak Guna Bangunan **(HGB)** **Use of Building**	Ownership restriction as for HGU. Right to erect and possess a building on another's land for fixed time. (Could also achieve this by lease, Hak Pakai or right of lodging)	Conversion by BAL Grant by Govt **Grant by owner**	Severe time limits – Can be extended.	State land if Govt Grant Private land if owner grants, but by 1970 none existed	Article 37.1 allowed for deed by Land Deed Official but by 1970 none was approved	Hypothec or credietverband	
Hak Pakai **Use**	Right to use, and take product from, land. Entry money required – previously annual fee. Used when buildings are owned by stranger to the land title. Can be granted to an Indonesian company, resident foreigners, Indonesian and foreign companies with Indonesian reps	Conversion by BAL Grant by Govt decree	In state lands, 10 years 1967 30	Private (rare) **State land**	State land –must be registered. Private land – advisable not compulsory	No – BAL silent No - Govt Reg 10 of 1961 But later, it could be secured if on state land.	
Hak Pengelolaan **(HPL) Land** **Management**	??/1965 States right of control delegated to state owned companies and regional governments. Usually for planning and development of state land	State created	For time land is used for intended purpose			Cannot be used as collateral Can be used as collateral with HGU by end developer	Source of right to build and right to sue for developers.
Hak wakaf **Edified Land**	Religious purpose land						

Right	Substance	Source	Duration	Private /State Land	Registered/formality	Security	Transfer
Hypotheque	Civil Code Book II provisions were continued by Basic Agrarian Law. Up to 1970 few new hypotheques were registered because of the high cost of registration and protection of post war occupants prevented foreclosure or sale. Creditors therefore obtained power of attorney from the debtor, and registered only when the debtor's financial situation was disastrous.	By agreement with owners of hak milik, *Hak Guna Usaha,* and *Hak Guna Bangunan*	Western		Registration essential, for the notarial deed of hypotheque and withdrawals, changes of gradation and other changes.		
Credietverband Security for credit arrangements	From native Indonesians living under *adat* law.	By owners of land with customary rights, including govt land, cultivated land, inseparable rights of families in land, houses buildings plants (present and future)					
Unregistrable Rights							
Hak sewa Lease	Controlled by Basic Agrarian Law, A 44,45,50 building Transfer of possession in return for payment on terms agreed between the parties. Commonly used for commercial retail and office purposes. Lease is enforceable against subsequent owners,can be passed to legal heirs and specifies who owns buildings at termination Are to be prohibited in agricultural land, but by 1970 no prohibition had been made. A 53. Regulated under *Adat* law, but was there any for leases? Generally not registered or controlled by BPN Can be granted to foreigners domiciled in Indonesia, coys, and foreign coys having agencies in Indonesia	By agreement between parties		Private land Not in state lands - *hak pakai* is used	Not included in titles which must be registered under Govt Reg 10 of 1961. Entry of lease can be made in Land Book and Certificate of Title to leased land to protect leaseholder esp where buildings are owned by lessee.		
Sharecropping	Use of land for growing crops in return for proportion of yield to owner of land, under *Adat* for only 1 year. Law No. 2 of 1960 added new controls. Regulations fail because demand for land exceeds supply and the landowners are able to extract a better than fair return.	By agreement between parties	*Adat*				
Lodgings	Customary right among natives created when a person allows another to build a house in a yard. No payment is necessary but help must be provided when landowner needs it. Regulated by *Adat* law	By agreement between parties	*Adat*				

Right	Substance	Source	Duration	Private /State Land	Registered/formality	Security	Transfer
Hak Gadai Land pledge	Not a security for debt, but a transfer of possession for money, till the money is returned. Return of land depends on the land owner whose rights are not extinguished by time. Transaction is informal. Pledgee can create a sub-pledge or have landowner accept a new pledgee. Generally for agriculture but also for housing or hard plants such as coconut and mango trees.	By agreement between parties	*Adat*		Provision in Gov Reg 10 of 1961 provides for formalities and registration have not been implemented by 1970.		

Formal categories of Indonesian land titles as at May, 1999

Right	Substance	Source	Duration	Private /State Land	Registered/formality	Security	Transfer
Hak Milik	**Proposals to reform by limiting amount of non agricultural land which can be owned.**					*Hak Tanggungan*	
HGU	**Govt Reg 40/1996** **Application, extension and renewal can be done at inception.**	Minister or appointed officers	35 yrs, ext for 25 yrs. < 90 years available for investment		Must be registered	*Hak Tanggungan*	
HGB	**Govt Reg 40./996**		30 + 20 + 30 < 90.	State land, Hak Pengelolaan and HM	Must be registered	*Hak Tanggungan*	
HGB Induk							
Hak Pakai	**Govt Reg 40/1996** **Available for individuals, legal entities, govt, religious and social bodies, foreigners living in Indonesia and foreign legal entities with representatives in Indon.** **The renewals/extensions can be obtained at inception.**		25 + 20 + 25 < 70.		Must be registered	*Hak Tanggungan* but not yet on *Hak Milik* land.	
Hak Pengelolaan	**Development right**						
Hak Tanggungan	**Replaces old security titles.** **Act No 4 if 1996. *Security title***	By deed between parties					
Apartment Ownership	**Act 16, 1985**	By separation deed akta pemisahan				*Hak Pakai* under the Apartment legislation could be encumbered by *fidusia. Hak Tanggungan* is now available.	

CHAPTER 4 REGISTRATION

4.1 Theories of Land and Title Registration

Land Administration System

Land distribution in any socio political order is inherently political, a fact which cannot be ignored in any analysis. To manage distribution, every settled society has a land administration system, albeit some are very primitive and do not even rely on written records. *A land administration system is, simply, the combined mechanisms by which use of land is distributed, rights are exchanged and protected (typically through a tenure system) and recorded, and information about land and users is generated.* In more developed systems, a land information system (LIS) is a core component of the administration system and land registration system is a core component of a LIS. **Figure 4.1** shows the architecture of a basic land administration scheme for a developed country. The interrelationships between the mechanisms in land administration are different in every country. While the detail varies a great deal, in the ideal system, the functions are highly integrated. The achievement of integration requires both a commitment from government and a structure to oversee the processes of change.

Public Knowledge

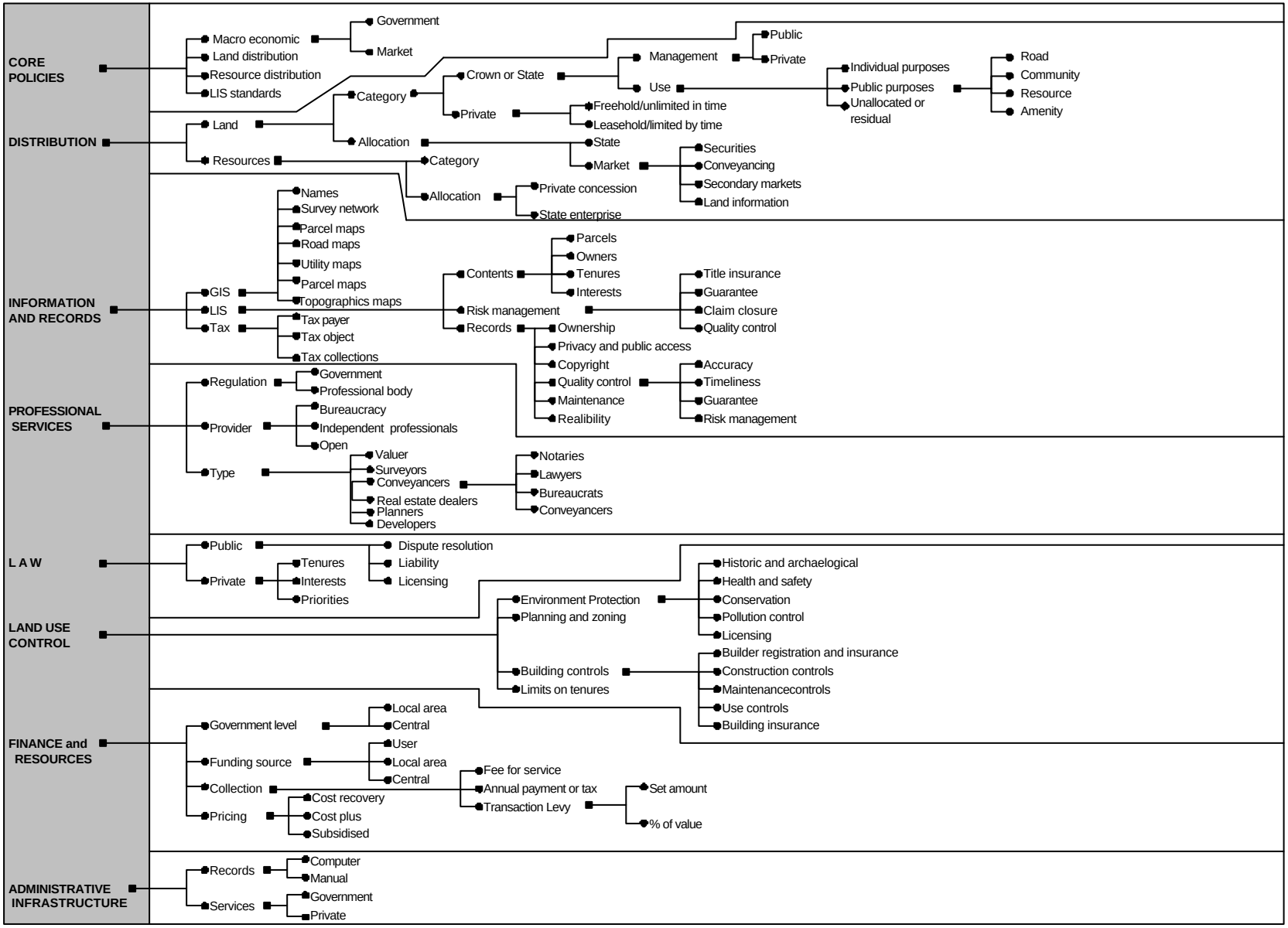
In human history, registration is a relatively modern phenomena, depending as it does on writing, institutional management and organisation of information. Historically, many systems developed to still disputes by making land ownership transparent. With some exceptions, the systems are not just evidentiary, merely indicating the owner and the interests; they provide answers to questions of entitlement and prevent disputes, especially where competing claims are based on unregistered documents or actions.

Developed legal systems inevitably introduce some form of public recording of interests in land, usually after private interests have become established in order to put a public face on private ownership. *The fundamental, indeed trite, result of registration is that people other than the owner know about the ownership*. Generally, one cannot have assured ownership without letting the registration system know, and to the extent that the register is public and available for search, letting others know. Most registration systems are designed to allow the public, as well as the state, access to information about land use and ownership. They express the community's interest in land and land information. If the community is still small, passive agrarian and stable, everyone knows who has what rights over land anyway, and registration is insignificant. *Where communities consist of strangers, as do most large cities or mass populations, the registration system forms a valuable function of social management of its major resource - land*.

What Transactions and Events should be Registered?

Registration systems do not record all land information. To a greater or lesser extent, they concentrate on the transactions between private individuals, especially those made for consideration or value. Land ownership can change without a contract and without value, by operation of law. All legal systems deal with devolution of property on death, some by automatic inheritance or specified devolution, survival of a co-owner or an owner's testamentary instructions. Legal systems can also require forfeiture of estates and interests, compulsory acquisition, or taking land to satisfy a court order.

Figure 4.1: Land Administration Architecture



Some registration systems (such as Torrens systems) record changes to title made by operation of law. Others do not. Generally, if these non-consensual changes are adequately formalized and publicly evidenced by other systems such as court records, duplication in the land register is unnecessary. If there is no other adequate system, if the register is the source of title (as in Torrens systems), or just for sheer completeness, land registration performs an important role of tracking all changes of ownership.

Importance of Land Registration

In the modern world of large anonymous societies, high demand on land availability and open market trading of land use opportunities, a land registration system is essential for stability and security of land titles and interests. *In developing economies, land registration can serve an essential goal of providing certainty in land use patterns and a basis for land trading and credit security*. It can also provide a redress of the inevitable uncertainties inherent in unpredictable development paths.

There is a lively debate about whether land registration is appropriate for Third World countries. On the one hand, registration is expensive and developing countries are little able to justify resource diversion away from, for instance, food, housing, health and education into a bureaucratic system. Registration is also a contributor, among many others (the principle probably being access to modern media), to the pace of change experienced by traditional communities as the 20th century influences attach themselves to their lifestyles. On the other hand, registration provides advantages, and is especially important for the poor. The advantages usually claimed for land registration are -

1. Certainty of ownership
2. Security of tenure
3. Reduction in land disputes
4. Improved conveyancing
5. Stimulation of the land market
6. Security for credit
7. Monitoring of the land market
8. Facilitating land reform
9. Management of state lands
10. Greater efficiency in land taxation
11. Improvements in spatial land use planning
12. Support for land resource management.[1]

There is no doubt that these advantages are apparent in well established systems. The debate about appropriateness of registration in the Third World is centred on how far these advantages manifest in non market environments. They are clearly experienced differently and with differing success in these environments.[2] However, often the failures (as in Indonesia) lie in inherent faults in of the

[1] Dale and McLaughlin, p 26

[2] World Bank Development Report, Knowledge for Development, p124. The report notes the success of land titling and registration programs as increasing the value of land as collateral, thus reducing lenders' enforcement costs, and the provision of tenure creates incentives to invest in land to increase its productivity, citing the Thailand experience, and noting similar experience in countries in Asia, Latin America and the Caribbean. The Report also notes that the Paraguay experience suggests that titling must be accompanied with rural financial reform before it improves the condition of the poor. A 1993 study of 10 regions in Ghana, Kenya and Rwanda found that land registration had no effect on credit.

The Report noted that land registration in any case seldom supplants traditional land use rights based on custom, and conflicts between the two systems are frequent in Africa. The conclusion was that other measures would improve the ability of the poor to pledge collateral. More transparent property laws, fewer restrictions on property transfers, and better court systems, can all make the few assets available to the poor more useable as collateral.

local property law and tenure system, not in registration. The schemes are more or less successful according to the myriad of factors, including funds and human resources available, acceptance in the local community, and maturity of the national land law. Most of all, if the property law is coherent and efficient, success of registration is more likely. Land registration, of itself, cannot off-set the way land tenures and titles are organised. It can provide a sound basis for tenure reform by identifying owners and parcels with precision, at more or less acceptable levels.

The penetration of land registration into the Third World is in part driven by the wish of the national government to set international standards for security of tenure and transactions. Sometimes registration is done to facilitate a land market to meet the desire of the international community to facilitate a level of order and predictability in land interests. Donor assistance for land administration projects is also being considered, given the various experiences with schemes, including a number of failures. Donor assistance for land distribution reform, land tenure reform and security of tenure remain essential. When registration is a component of these fundamental strategies, it will remain an appropriate object of aid in developing countries.

Market Driven Registration

If land registration is put in its practical context of servicing the market, the question of systematic land registration in poorer countries can be addressed by using the inchoate land markets as the driver for registration programs, and focusing development of the system on land where it provides a fillip to the market, charging a sufficient premium for services to allow gradual extension of the system beyond market needs. In the meantime, security of tenure for the poor in temporarily non marketable land remains an overriding goal for any land administration system, and if it is not provided by land registration, it should be provided by some other mechanism, for example protection of possession under the law.

International Trends in Registration

Registration is the expression of a mature system of land use allocation, and when combined with a developed tenure system and a market in land rights (not merely a market in land), it facilitates the market. The registration of itself is not normally associated with government allocation of land use and ownership: it merely records entitlement.

Registration can function in communist countries which do not have private ownership. However, in its most developed forms, it is an expression of a vibrant market economy in property interests, and of the trend towards individual and/or corporate ownership.

Land registration creates a by-product of land information, of especially high value when land parcel records are linked to essential information (ownership, restrictions, tenure, interests, boundaries, planning, tax, value, resource tenures, sale price, historical transaction records, and so on). The information provides a stable base for making and implementing policies about land use, distribution, value and developments. A well organised land registration system contributes immeasurably to implementation of social and economic policies, as well as providing the public face of land ownership and ensuring stability in land distribution.

Registration combined with a tenure and titling structure which facilitates individual and corporate ownership together with a legal system which facilitates corporate and collective development of

land, provides vital order and stimulation in the property market. While, theoretically, a market can function without registration,[3] markets certainly work a great deal better with registration.

At the very minimum, registration can identify land as "no-go" land, survey or identify its boundaries and provide public information of its protection. (Ultimately protection depends on enforcement, however). In the middle ground, it can facilitate negotiations between existing users who are trying to access compensation for removal and intending users who require possession. At its peak, it is backed by a market and property rights and provides a legally recognised title that can be priced at a market level (including opportunity costs) permitting consensual exchange.

Registration is used in all market economies and is a necessary (but not sufficient) condition of a functioning market. *Registration brings order, knowledge and information. It allows owners and prospective owners not only to identify what they are buying and who the owner is, but also to close out third parties' claims, to get clear titles, and to inform the public, including the state, of their interest.*

Multi Purpose Land Registration Systems

Most Western registration systems were designed for and by lawyers, and concentrated on serving narrow legal objectives, particularly increasing security of title and imposing the local tenure system. The systems generally did this extremely effectively. However, at the same time, in many countries, land registration systems produced unhappy results. They supported high cost and inefficient monopolies of conveyancing, notary, insurance and surveying services. They were used to prevent and resist change, especially simplification of conveyancing. They were run by narrow, highly inefficient, very expensive government or private bureaucracies largely immune from government policy and control and impervious to consumer generated demands for change. All of these secondary outcomes were reinforced in their operational power by legal mystique and lack of transparency and accountability.

This focus has dramatically changed in the last twenty years for the following reasons.

- Registration is always expensive because it must be timely, accurate and complete. Its bureaucratic overheads are heavy. This has forced governments to examine its value for money and to demand more strategic outcomes than mere recording of land interests. Systems have become multi-purpose, particularly by supporting other government functions such as macro financial planning, taxation and land use planning.
- Computer technology offers huge labor cost reductions and vast improvements in information quality for high capital investment and recurrent licensing fees. The opportunities for massive improvements in accuracy, timeliness, completeness, and usefulness of information, coupled with the removal of paper inefficiencies, have broadened the outlook of land record keepers and their masters. Technology forces fundamental rethinking of how registration is done and what it can achieve. *It is also making comparisons between Torrens and other systems look favorably on Torrens because the simplicity if the system and its conveyancing process lends it to effective computerisation and even cheaper conveyancing by delivering title information on-line and allowing electronic filing of registration information.*
- The growth in the consumer movement has dropped the scales of mystique from many eyes. Influential demands for simplification of conveyancing, record management and competitive service provision have been articulated.

[3] Property markets developed after the Industrial Revolution in England, and preceded registration. The Yorkshire and Middlesex Deeds Registry Acts of 1846 were a response to demands for clarity and permanency to assist the conveyancing associated with growing markets.

- The growth in anti-competition policies and improved consciousness of how professional groups attract areas of activity to their closed doors, and in determination to extend the opportunities for competitors, have lead to influential demands for simplification of registration procedures and conveyancing.
- The idea that land registration and its satellite functions of surveying, conveyancing, and recording should be inevitably the realm of government has been seriously discussed. According to some, a registration service can be entirely provided by private contractors. However, in practice, while many parts of the land registration activities such as surveying, conveyancing and provision of computer services are private, a *government run and democratically accountable system of land recording as a core of the land market* remains. The balance of opinion is strongly that land registration is too fundamentally important to the social and economic activities of a community and to the essential role of government to be privatised.
- Where land value and trading has stripped ahead of the capacity of the local land registration system, a vast increase in the level of land disputation has resulted. The improvement in land registration, of itself, is an essential component in removing these dispute sites.
- The growth of competitive registration models for other high value property, particularly shares, ships, airplanes, and even cars, has given societies alternative working models which provide stark comparisons with land registration systems. Ultimately decision makers realise that while land is important, registration of title to land is the same as registration of title to other valuable property. Indeed, the claimed basis for much of the mystique, "the law", is now seen as requiring change and simplification to reduce mystery and improve opportunities for social organisation and asset management.
- Paperless computer run registration systems work in the capital markets of shares and futures (with no certificates being issued similar to scripless trading), creating a model for reform of land registration by eliminating unnecessary paper and consequential tracking.
- Opportunities for electronic document exchange and third party data entry (for instance, banks taking the primary responsibility for keying in transfer and mortgage information) are being examined.
- Land identification systems have matured and provide cheaper and more reliable methods of identification. The physical identification of land is expensive, but can be addressed in a number of ways – making possession and existing boundaries legally effective, and choosing the most appropriate methods (e.g. land maps, community recognition right through to a fully operational global positioning system with supporting network).
- Stunning developments in computer mapping technologies have focused attention on the information resource inherent in land information.[4] With data matching capacities and large scale databases, land information is capable of being used for a much wider variety of applications.[5] Land ownership and transaction record keeping is being influenced by demands for higher quality information.
- The coordinated conceptualisation of registration of all property interests which, in the public interest, are registered: land, ships and airplanes. The Dutch Civil Code introduced a concept of *registergoederen* (register property) which is defined as 'property that can only be transferred, or created, by way of registration on the public

[4] Tracking of moving vehicles and assets is now possible, provided digital maps are available.

[5] In mature systems, land information from integrated land registration and other databases is used in drawing electoral boundaries, health service provision, voting, provision of emergency services, historical recording, prediction of business and housing needs, and many other functions.

register kept for this purpose.[6] The conceptualisation effects the categorisation of property as movables and immoveables by introducing new categories, although there was no move to integrate the respective registers. All immovables now belong to the category of register property, together with a few classes of movables (ships and airplanes over a certain value). The distinction between register and non-register property has taken over the function of one between immovable and movable property.

- The idea that a registration system is only for collecting information about private ownership is being challenged by the opportunities to include much more land related information in the "register". Hence inclusion of information about planning, mines, tax, public land (such as schools, hospitals, police facilities and so on), national parks and forests and even roads is being talked about, parallel with the capacity for map generation through titling, and with capacity for integration or accessing through computers. The future will see land registration becoming multi purpose, but concentrating on offering the public an open easily accessed information base about land.
- Visions of integrated land administration systems in which land records perform a variety of tasks are now realistic, thanks to the uniform parcel identifier and computers.
- The integration of land and tax information is becoming an obvious solution to duplication of records, and funding of an infrastructure of land information. The development of unique parcel identifiers which operate throughout land administration systems is central to these processes.

In short, land registration systems are undergoing major changes to make them more responsive to a community's broader economic and social needs and less focused on servicing narrow legal or narrow viewed market needs. Once completely "stand alone", they are now becoming more and more integrated with other information systems. The market dynamics in land registration systems will change.

Functions of Registration Schemes

The usual features of registration systems are –

1. **Identification of the land.** This can be without survey and without locating the parcel in a map. The earliest recordings of land information depended on the reputation of ownership and local knowledge of the name attributed to a parcel. More recently, maps or plans have accompanied text recording so that the parcel is identified by its boundaries. This can be by description of general boundaries, without survey. With the growth of surveying as a science and computers, sophisticated means of identifying the land include placing it accurately on the surface of the earth – geo-referencing the parcel. All modern systems use geo-references. Third World countries generally do not, because of initial cost and lack of skills.
2. **Identification of the owner.** While many systems adopt the identity shown on transfer papers at face value, even highly democratic systems which place a high value on privacy are becoming concerned to guarantee the name on the title accords with the individual claiming ownership. Whether the conveyancing and/or the registration process includes production (with or without recording) of personal details such as social security or other identification numbers or photographic identification is now a real consideration in the quest for making the register accurate and preventing fraud.[7] Certainly, with registration of legal persons such as corporations, formal identification requirements are axiomatic.[8]

[6] Art 3.1.1.10

[7] Use of ID numbers in Indonesia raises a fundamental problem of racial discrimination because the numbers code in racial and religious characteristics. The number 1933 is applied to indigenous Christians and 1917 to citizens of foreign extraction. With the adoption of the Convention Against Racial Discrimination in April

3. Specification of the interest obtained, the time and mode of its acquisition (important for resolving competing claims).
4. Increase of the proprietary protection available to the interest. The act of registration generally improves the opportunity to assert interests against third parties, not just by proving it exists, by increasing the measure or influence of the protection. At peak, in the positive registration systems, registration creates the interest and turns it into a property right protected against any other claim (with minor exceptions usually in favour of the State's right to collect taxes).
5. In title registration, an investigation or an evidentiary formality prior to initial land registration ensures the existence of the title claimed to the satisfaction of an official according to generally accepted legal and business norms.
6. Verification of the title of the person conveying land. In a deeds system this is a laborious investigation of the deed chain. In Torrens systems, it is a search of a simple title. This is the most attractive feature of a Torrens system – it virtually eliminates most of the transaction costs associated with sale, development and securitisation of land.
7. Proof of registration available to the owner. Many systems provide the owner with a record of the entry, though this is not essential. The proof can be a notation on the instrument or deed indicating its registration identification numbers, a certificate issued by the registration authority (as in Indonesia), a receipt for payment of registration fees, or (in digitised systems) a print out of the computer record supported by electronic signatures.Indeed some systems are moving away from the paper recordation prior to introducing fully digitised administration.

4.2 Registration Schemes

Types of Registration Systems

There are a variety of registration systems, the basic ones being **deeds registration**, subdivided into notarial systems in Civil Code countries and deeds based systems in Anglo/American law, and Torrens **title registration**. However, pure systems are rare. Most working systems are adaptations of the pure types to suit their history and needs.

Registration systems are also divided into systems with **negative** effect (registration does not guarantee the title and, in some systems such as Indonesia's, merely provides evidence of it) and **positive** effect (registration confers a higher degree of security of title and protection against adverse claims, or sometimes in peak systems creates and protects the title). Deeds registration can be positive or negative. Title registration is always positive.

Deeds Registration

Notarial Systems

The German notarial model has been strongly influential. The German principle that the register is conclusive in both positive and negative senses - that is, entries in the register are presumed to be correct (positive sense) and the register is presumed to be complete (negative sense), or in other words a registered transaction cannot be affected by an unregistered transaction [except presumably those which bind the conscience of the registered party]. Land title registration systems of the Germanic legal family are used in Germany, Austria and Switzerland. Most of the former eastern

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1999, this issue needs to be addressed. There is no reason to keep this information unless it is to facilitate different treatment of the identified groups. We strongly recommend that identification numbers which differentiate religion and race be deleted.

[8] Corporations are conceptual creations of the legal system. They have no physical existence. They cannot be photographed. Hence the numbers and registration systems.

bloc is following the German idea. The English system is also very similar, and Fortescue-Brickdale[9] actually argued for the Germanic model when it was being developed.

The Dutch property system involves compulsory deed registration, but is similar to the German system.[10] *That is, a separate notarised agreement is required to complete the proprietary transaction and this must be registered to effectuate the transaction. This aspect is not greatly different from the Torrens system, (except that these are much more elaborate)*. The identity and understanding of the parties must be verified by a notary. The Dutch register is conclusive only in the negative sense, *negatief stelsel.* That is, registration does not guarantee that the transferee has indeed become the owner. Having only negative correctness, registration does not elevate the validity of the transaction itself beyond making it capable of taking effect. However, just like the German system, the Dutch have a principle protecting good faith acquisition from the person with actual control (possession).

In this system, the *hypotheekbewaarder*, the public official who keeps the register has a passive task: he must register any instrument presented to him even if he suspects that someone acting as transferor lacks actual power of disposition. In that case there is nothing for him to do but to inform the person he supposes to be the party really entitled. Usually the *hypotheekbewaarder* has no means to find out, particularly, if the *causa*, or the instrument giving rise to the legal relationship which creates the obligation to transfer the title, happens to be void or voidable.[11]

The notarised juristic act [German: *das Rechtsgeschaeft*] [Dutch: *levering* or *traditio*] the "real property agreement" does not really have a strict English law equivalent.[12]

Deeds Systems

England, US, and many of the ex-British colonies use a deeds registration system. England and the former colonies also use land registration, and, like Indonesia, are converting unregistered into registered land. The US is not converting its deed system to land registration, though Torrens systems are available in some states.

Conveyancing and Registration

The "real property agreement" and notarisation ceremony, certainly in North Germany, grew directly from a public ceremony, the records or minutes of which became the register. This system depends on the execution of a deed to evidence or make a change of the legal status of the land: change of owner or credit security in particular. It is also capable of dealing with changes that occur through operation of law: marriage, death, and forfeiture. The German registration process generally involves a notation in an official record of a deed. The official sights the deed, and the essential information contained in it is recorded in a permanent way. Depending on the process, the recording can be detailed and extensive.

Systems which rely on notarised deeds usually require investigation of the capacity of the person making the deed by the notary or official. In Indonesia, the PPAT (land deed official) is authorised by BPN to make the deed.

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[9] See Fortescue-Brickdale 1914 for historical analysis of conveyancing and land titling systems.

[10] W M Kleijn p.73

[11] Kleijn p 86-7

[12] Murray Raff, Senior Lecture in Law, Melbourne University is acknowledged as the source of analysis of system types and historic information.

Deeds have a different history to the notarisation ceremony. *Deeds are about chains of title*. Secrecy, poor drafting, forgery or executing a "use upon a use" could cause a link in the chain to fail. *In deeds systems, the deeds themselves remain the source of the title or the legal change and registration is not essential. The registration is for convenience, although in mature systems a substantial advantage is obtained – usually the registered deed stands supreme against interests that are not embodied in writing or are embodied in an unregistered or later registered deed.* Conveyancing is complex. The deeds are retained in a bundle held by the owner or the mortgagee. An abstract of the deeds is prepared reflecting the transactions with the land over its history. A transaction requires investigation of the past transactions through the deeds, the abstract of the deeds and the official registered records.

The investigation covers the history of the land since its grant from the crown or state, or a lesser period back to a *good root of title*, (in America a title *marketable of record* as shown by public records or *marketable in fact* as shown by adverse possession) usually a deed evidencing a transaction made for with a stranger for market value (a transfer or mortgage) of substantial duration (usually 15-30 years) which involved thorough investigation of the title at that time, and all the intervening changes of title both in the deeds and other land related papers (such as wills and probates), and in the official registry. This process requires expertise and time to track the title and is relatively fallible.

In the Anglo American deeds system, the parties execute a formal deed under seal or other substantial formalities. The deed operates on its face and conveys the title to the new owner who has rights enforceable against third parties. Registration occurs when a memorial of the deed is lodged in the register and bound into books (Anglo system) or the deed is recorded or copied and entered into books or records (American system). Some systems hold different registers for owners and mortgagees, and may provide a name index to assist searching. Registers are open for public search, but usually the process is far too complex and left to professionals. In all systems the deed is returned to its owner. In the Anglo system, the owner or lender holds the chain of original deeds, called the “chain of title” or “deeds chain” each of which is marked with notations of their registration numbers and passes the chain on to the next owner.

Registration significantly improves the legal impact of the deed, the extent varying with the system. Some give protection according to the time the deed is recorded (the race to the register), others provide protection to bona fide purchasers who do not know a prior unregistered interest existed (the notice system). Others combine both these priority rules. Generally in Anglo systems interests created by a registered instrument take priority over interests created in unregistered or unregistrable instruments, documents or agreements. No separate certificate is issued, proof of registration being endorsed on the deed itself which is returned to the owner or the mortgagee.

Consequently, in the USA title insurance backs up the results and the lack of other intruding interests affecting the land. In England the deeds conveyancing system operated for centuries without title insurance and without any perceived need for title insurance. Likewise with the notarial systems in Europe. The land administration systems accompanying deeds conveyancing are usually in need of substantial reform encouraging a move towards positive systems.

Priorities

In the Anglo/American deeds complex rules determine priorities of interests depending on the category of the interests as legal or equitable and on the doctrine of notice. If interests are of the same category, the first in time prevails. In a competition between a higher or legal interest and a lower or equitable interest, the later legal interest is protected if obtained bona fide, for value and without notice of the equitable interest. In order to prevent frauds, notice includes constructive and implied notice to cover situations where a person deliberately avoids appropriate searches in order not to discover an existing interest.

The narrower European models of registration have complex priorities. The Dutch principle seems to relate to acquisition from the person in possession - the German principle relates to acquisition from a registered party and possession plays virtually no role. The principle resembles the English doctrine of actual notice, so that if one acquires even a registered interest with actual knowledge of incorrectness in the register (i.e. that the register does not reflect the true situation) one has not made a good faith acquisition. This principle was introduced to the German system after the Torrens system inspiration was obtained. A related point is that (at least) the German principle of conclusiveness of the register applies to transfers and assignments, but not to an original acquisition. So a person who receives a transfer of ownership is protected, but a mortgagee is expected to make detailed investigations and cannot be protected by the principle of good faith acquisition if it turns out that there is an unregistered interest (other principles can come into play). An assignee of the mortgage makes a good faith acquisition.[13]

Title Registration

Title registration involves a different concept in that the title to the land is derived from the event of registration, not from the execution of the document to be registered. The system provides simpler mechanisms for transfer and creation of interests, title verification, and subsequent title searches by people interested in finding out who owns what interests in the land. Like the deeds system, registration is a choice and not a requirement. An owner need not register his document, but if he or she does not, the instrument has no proprietary effect against people who register later.

Of these systems, Torrens systems are the most familiar. There are three basic Torrens principles that ensure simplicity of the system.[14]

1. Mirror – the interests in the land are mirrored by what appears on the title register
2. Curtain – interests behind the title do not affect the owner
3. Guarantee – the registration system provides a guarantee, in some systems sourced out of state revenue, and in others out of a fund built up from reserves from fees charged for registration.

The Torrens system is probably the brainchild of Dr Ulirch Hubbe, who never obtained the credit for his work and who based his ideas on the German land registration system and who took into account the messy equitable interests generated by the English system. One of its principle aims was to get these messy interests out of the system so that land marketing and security of title were given preeminence. It is named after the South Australian politician, Robert Torrens, who championed its passage through that parliament in 1858.

The great charm of the system is the simplicity of its priorities and operations. It is a "race to register", protecting the person who registers first over later and unregistered interests. Even a person who has notice of an unregistered interest and who registers with the intention of destroying it is safe. Notice is not fraud. Systems allow people with unregistered interests to freeze the register or to lodge a caveat to prevent registration without permission of the caveator as an ancillary process. Even these stalling procedures ensure the register mirrors existing interests in the land.

The system gained its popularity in Australia as a response to antagonism towards lawyers, extravagant deeds conveyancing costs and complexity of the deeds process. *Its implementation included a substantial deregulation of the processes of conveyancing, removing the monopoly of lawyers and creating a less trained, but perfectly able, group of professionals who charged much less for conveyancing*. Originally lawyers were removed in two states: South Australia and Western Australia. Victoria and New South Wales have broken the lawyers monopoly only recently, Victoria around 1983, and New South Wales, in 1997 (but only after great pressures were brought to bear

[13] Murray Raff provided information about good faith acquisition in German and Dutch land law.

[14] Theo Ruoff, An Englishman Looks at the Torrens System

on the well organised legal fraternities who saw conveyancing as a "bread and butter" income resource). The process of using land registration to reform conveyancing is little understood, but very obvious. A good registration system should be simple enough for the public and for relatively trained and not expensive professionals, to manage their affairs within it. *If a registration system is hijacked by a professional group which monopolizes access to the system, it is not performing effectively*.

The success of the system lay in its ability to generate public confidence. The two elements in this process were its **simplicity** – every one could understand it, and its **risk distribution** – everyone was protected: a person either got the land or, if there was fraud or defect caused by the registration process, compensation. *In the long run, a third element is also vital to public confidence: detached, non-political and accurate administration*.

Torrens systems migrated from Australia to Canada, Northern Ireland, and some US States, (including Colorado, Georgia, Hawaii, Illinois, Massachusetts, Minnesota, New York, North Carolina, Ohio, Pennsylvania, Virginia and Washington, where they are statutory schemes operating parallel with deeds registration schemes). Another eight US states have repealed their Torrens systems.[15]

In the US, Torrens systems are not used because administrative overheads and delays make them burdensome. In Canada and Australia, the systems are well run and deliver fast registration, guaranteed titles with few claims against the insurance fund, and efficient title conversion from the deeds to the registration system (in those countries where deeds registration still exists). Even in Australia, however, the systems are undergoing streamlining driven by impending computerisation. Eventually this process will eliminate duplicate titles or separate certificates being delivered to owners as proof of their ownership and authority to deal. Certificates will be replaced with printouts which are not returned to the office as proof of authority to deal with the land. An electronic signature unique to the owner will be used in its stead. One of the great advantages of the Torrens system is its ready capacity for computerisation and simplification, and its simple conveyancing.

4.3 Registration Processes

Essential Activities

There are three points of activity in any new title registration system:

1. **Registration of initial grant by the state -** Grants of land by government to owner, individual or group, are made under the system. Registration of land granted by the state creates the legitimacy for the system necessary to found public trust.
2. **Initial registration by choice or government program** – State owned parcels, individually owned parcels, and group owned parcels existing before the system is implemented or created outside the registration system are brought into the system. This is the most used method of bringing land into a system.
3. **Transaction tracking by registration** – The acceptance of the registration process in day to day conveyancing by voluntary and universal registration of transactions in registered land.

Initial Registration by Choice. Programs for advancement of registration can proceed on a voluntary or choice basis, with governments subsidizing the individual cost for bringing land into the system. Costs can be heavy depending on the price and quality of survey and level of information required to prove title. Or programs can require compulsory registration in selected areas of land.

[15] Jacobus, p 263

In England, the conversion of the conveyancing system from general law deeds conveyancing to registered land was done by selecting areas and requiring all transactions in those areas to be made under the land registration system. In Australia, the general law or deeds titles systems atrophied as individuals converted to the title registration system, but this was helped by schemes of compulsory and subsidised conversion. Very little general law land is left in Australia.

Transaction Tracking. All schemes must contain strong incentives to achieve a universe of registration of transactions derived from and subsequent to initial registration. A registration system which fails to track party-party transactions in the short or long term will fail. The great attraction of land registration over other systems is that an unregistered document is ineffective to change title to the land, although it will create personal legal rights between the parties. The incentive to register is the incentive to become owner – without registration, a person who takes a transfer or conveyance is simply not recognized as the legal owner of the land.[16]

Effect of Registration

If the registration system offers a security of title and protection from claims made by people off the register, it will succeed even in a relatively incipient property market. To achieve this, however, the registration system must examine the title of the applicant when the land is brought within the system. This examination should be formal and precise, depending on the application of well understood objective standards (not discretionary choice) in order to establish public trust in the system.

Deeds registration systems vary in the effect they give to registration because the deeds or notarised documents are effective to pass the title before registration. *In the Indonesian system, registration does not have a proprietary impact. Its effect is to improve the bundle of evidence available, not to declare priorities. The registered interest remains vulnerable to a range of claims, quietening only those relying on later registration. A registration system, like Indonesia's, which does not offer security of tenure and protection against outside off-register claims has a fundamental flaw in its appeal to the public*.

Registration and Law Reform

Where foreign aid and loans are made available to a country, the donors are interested in measuring the level of certainty and security available in the donee's basic systems – hence the interest of the aid community in land registration projects, especially in Third World countries where land rights are incohate or where the market is beginning to form. Where foreign investment is encouraged by a country, the investors are also highly interested in the level of security available in the land tenure system, most of all because land is the basis of all primary economic activity.

Historically, land registration and, at the lower level, land information has become a natural focus for the international community interested in delivering assistance to a country which is both capable of stimulating a market and delivering a basis for a country to undertake meaningful land distribution reform. A good registration system aims at creating **information about land** for the state and **information about titles** for the public for land use and land trading. However, a focus on mechanical registration is too narrow. Good governance requires a systemic and fair balance to

[16] Unregistered interests sometimes create property rights of less strength than the legal title. For example, in Anglo American law, the registration priorities are subject to the rules of equity permitting property rights off the register, for example a trust can exist between a registered trustee owner and a non-registered beneficiary under the trust. The beneficiary can claim the land against the trustee owner, but should the trustee owner deal with the land for value to a third party who registers, the beneficiary's rights are only in the personal opportunity to sue the trustee, not the new owner of the land. In short, the advantage of the Torrens system is that it removes land disputes by its operation.

be struck between the powers of the state over land and the rights of the owners. Failing the appropriate balance, measures of repression and control must be substituted for a natural and reinforced normative order. *Given the Indonesian experience, the focus on recordation and registration misses the fundamental point. One can provide an exact database of who owns what tenures without giving security. Security of ownership only comes about when land registration is combined with land law which delivers tenures producing the comfort level necessary for a civil society, whether or not it encourages local and foreign markets.* ***Registration without meaningful rights is self-defeating and costly***.

The drive behind registration should be establishment of the balance between rights of owners and the state that is capable of delivering good governance and civil peace. Land policy must be an integral part of any registration program, but especially when the program needs to operate in regions which generate palpable unrest emanating from land deprivation and misallocation.

4.4 Title Insurance

Kinds of Insurance

Land registration systems can be accompanied by insurance of the quality of the title. At its simplest, title insurance covers the risk of a person believing they obtain an interest in land and going through the correct processes but finding, for some unanticipated reason, that the title did not materialize.

United States Title Insurance

In the US, private insurance backs up a deeds registration system and the verifications of title provided by abstractors and lawyers. The insurance is done through private title companies who add additional protection (apart from the indemnity insurance and bonds carried by the professionals) for purchasers and lenders by providing title services and opinions and who are insured by state authorized insurance companies. The contract indemnifies the buyer or lender from any insured loss if the title fails for a defect prior to the date of the policy. A new policy must be issued for each transaction. In many states, the government sets the premium. Some states set their own title insurance forms. Others rely on the forms of the American Land Title Association.[17]

The insurance generally covers the policy holder against loss or damage and attorney's fees and expenses that the insured may become obligated to pay by reason of-

- Title to the estate or interest being vested otherwise than stated in the policy, subject to stated exclusions
- Any defect in, lien or encumbrance on the title
- Unmarketability of the title
- Lack of right of access to and from the land.

The exact terms of cover vary from state to state and the particular company. Exceptions usually include discrepancies or conflicts in boundaries, shortages in area, encroachments or overlapping of improvements, property taxes for current and subsequent years, liens, right of parties in possession and rights under leases or easements.[18] Sometimes these can be covered if additional premium is paid.

The insurance is negotiated by a buyer or mortgagee at the time of the transaction and attracts a substantial fee for cover for each separate transaction. Usually there are two types of insurance,

[17] Jacobus, p 275

[18] Jacobus, p 279

lenders and owners. These are usually issued simultaneously because most buyers finance their purchase with a mortgage. The lender's insurance premium is then nominal.

Torrens System Insurance/Assurance

In Torrens systems, the state provides a guarantee or assurance (very narrowly defined) of title and pays damages to people who lose their land through the operation of the system. There is no magic in the terminology of "insurance" or "assurance" – they both connote an opportunity by an individual who loses an interest in land to receive the value of that interest as compensation from a fund. The biggest issue is coverage against risk of boundary mismeasurement or errors in land identification. Many schemes do not cover these risks unless the registration process created the error.

In many Torrens schemes, the insurance system has been successful in providing psychic security at little outlay. The theory behind the insurance system was enticement of people to move their old law titles into title registration which reversed the operation of the forgery rules. Under old law no owner could ever lose their land in the event of a forgery: *nemo dat quod non habet* – a person who did not have a title could not give a title. The very point of title registration was that the owner should lose their land if someone acquired registration in good faith through a third party forgery or fraud. Registration passed title of itself, whatever the nature of the defects in the instrument, provided the new owner was not tainted with the fraud.[19] Hence the system included a compensation opportunity for the deregistered owner if he or she did not contribute to the fraud.

Insurance does not cover the self assumed risk of loss of land by someone who fails to register. In Australia, the risks covered were so tightly defined, claims process so complex, and the premiums collected in such great excess that the accumulated capital in the pool was eventually written into ordinary state budgets.

Necessary pre-conditions

Title insurance only works well if the following preconditions are satisfied –

- Registration is accurate and mistakes are rare. Many claims against the funds are made to recover losses caused by maladministration
- Fraud and forgery are successfully and completely policed by the criminal justice system
- Priority rules in land disputes are clear and consistently applied by the courts (thus minimising the creation of competing interests)
- Conveyancing systems reliably check that the person purporting to convey is identical to the owner
- Mapping systems which verify the identity of the land
- Initial registration eliminates unregistered claims by standard cut-off measures, title examination prior to registration or a combination of these
- Related systems of insurance, especially professional indemnity insurance for negligence and guarantee funds for criminal fraud, reduce the risk overhead to the pool by being first port of call[20]
- Priorities of interests in land must be clear and neglected claims must be closed off by an effective system of possessory title and limitation of actions.

[19] Subject to the doctrine of deferred indefeasibility which operates in some schemes and which corrects the defect on the next registration of a dealing made for value and in good faith.

[20] The title insurance of NSW is being made first call, with rights of subrogation in the scheme against other insurers who might cover the same risk.

If these preconditions exist, the insurance system can be a successful loss distribution system where the losses are precisely and narrowly defined and directly related to the operation of the scheme.

Risks Covered

Standard Provisions for United States Private Title Insurance

Private title insurance covers risks related to the title and to the boundaries of the land.

One Californian title insurance policy covers the following risks -

1. Someone else owns an interest in the title.
2. A document is not properly signed, etc.
3. Forgery, fraud, duress, etc.
4. Defective recording of any documents.
5. Restrictive covenants affect the land.
6. There is a lien on your title because:
   a) there is a Deed of Trust.
   b) there is judgement, tax or special assessment.
   c) title is unmarketable.
7. Mechanic's (Builder's) Lien protection.
8. Forced removal of structure other than a boundary wall or fence because:
   a) it extends onto other land or onto an easement.
   b) it violates a restriction in Schedule B.
   c) it violates an existing zoning law.
9. Planning rules prevent use.
10. Inflation protection.
11. No legal right of access.
12. Matters disclosed by a survey.
13. An unrecorded lien by a Homeowners' Association.
14. Rights under unrecorded leases, etc.
15. Unrecorded easements.
16. Other defects, liens or encumbrances.

The policy compensation includes rent for substitute land and facilities.

Example of provisions for title assurance for Torrens system

The Transfer of Land Act 1958 (Victoria) provides –

Extract

110. Entitlement to indemnity

(1) Subject to this Act any person sustaining loss or damage (whether by deprivation of land or otherwise) by reason of-

(a) the bringing of any land under this Act under Division 2 of Part II or by the creation of a provisional folio under Division 3 of Part II;

(aa) a legal practitioner's failure to disclose in a legal practitioner's certificate a defect in title or the existence of an estate or interest in land;

(b) any amendment of the Register;

(c) any error omission or misdescription in the Register or the registration of any other person as proprietor;

(d) any payment or consideration given to any other person on the faith of any recording in the Register;

(e) the loss or destruction of any document lodged at the Office of Titles for

inspection or safe custody or any error in any official search;

(f) any omission mistake or misfeasance of the Registrar or any officer in the execution of his duties;

(g) the exercise by the Registrar of any of the powers conferred on him in any case where the person sustaining loss or damage has not been a party or privy to the application or dealing in connexion with which such power was exercised shall be entitled to be indemnified.

(1A) ….

(3) No indemnity shall be payable under this Act--

(a) where the claimant his legal practitioner or agent caused or substantially contributed to the loss by fraud, neglect or wilful default or derives title (otherwise than under a disposition for valuable consideration which is registered in the Register) from a person who or whose legal practitioner or agent has been guilty of such fraud neglect or wilful default (and the onus shall rest upon the applicant of negativing any such fraud, neglect or wilful default);

(b) on account of costs incurred in taking or defending any legal proceedings without the consent of the Registrar, except any costs which may be awarded against the Registrar, except any costs which may be awarded against the Registrar in any proceedings in which the Registrar is a party;

(c) in consequence of the Registrar's not inquiring as to whether a power of attorney was in force when anything purporting to have been done under the power and falling within its scope was done;

(d) where the Registrar, under section 22(1AC) of the **Subdivision Act 1988**, has treated a consent or request made on behalf of the person whose consent to the registration of the plan is required as being the consent of that person, in consequence of that consent being given or that request being made without lawful authority.

(4) Any indemnity paid in respect of the loss of any estate or interest in land shall not exceed--

(a) where the Register is not amended, the value of the estate or interest at the time when the error omission mistake or misfeasance which caused the loss was made;

(b) where the Register is amended, the value of the estate or interest immediately before the time of amendment.

(5) If in any action under this section judgment is given in favour of the Registrar or the plaintiff discontinues or is nonsuited the plaintiff shall be liable to pay the full costs of the Registrar in the action, but save as aforesaid the Court may make such order as to costs as it thinks fit.

(6) Any sum by way of indemnity or costs awarded against the Registrar under this section shall be paid from moneys available for the purpose.

111. Application to Registrar for indemnity without bringing action

(1) Any person who under the last preceding section is entitled to bring an action for indemnity against the Registrar may before commencing such action apply for compensation by a claim to the Registrar in writing supported by affidavit or statutory declaration.

(2) If the Registrar admits the claim or any part thereof and certifies accordingly and the Treasurer of Victoria signifies his approval the amount so certified shall be paid from moneys appropriated by Parliament for the purpose.

Administration

Title assurance associated with Torrens systems is entirely run by the Land Registry and the government. In practical terms, the Victorian Land Registry no longer collects premiums except when it replaces lost titles, sometimes when land is initially registered and for some other risk related dealings. The premiums and resources previously accumulated have been paid over to general state revenue. Administration, including claims payment, is now handled as a normal part of the state annual budgetary process. Claims are paid out of the general state budget. The Land Registry always managed its business with extreme caution and risk minimization (despite the enormous administrative overheads this entailed) in order to protect the fund with the result that few claims have been made. Of the claims that were needed, the larger individual claims arose because of forgeries. *The category which has required the most aggregated compensation is administrative failures of the office, particularly misplacement of the original title and consequential delays in settlement which result in the buyers or sellers having to pay their other party interest for the time between the appointed and actual settlement dates*.

With title insurance, the claims process is arduous and requires prior exhaustion of all other opportunities for compensation. In NSW, access to the fund is being made a first point of claim, with the fund in turn being able to seek compensation from other insurers, for example, professional indemnity insurers and lawyers and estate agents guarantee funds.

Title Insurance in the UK

The most recent law made on title insurance is the UK provision below. This shows how careful and detailed the insurance proposal needs to be in order to fairly collect and distribute the insurance pool, even when all the preconditions described above are satisfied.

Extract

2. Land Registration Act 1997 replaced the previous provision -
Indemnity for errors or omissions in the register.
83. –

(1) Where the register is rectified under this Act, then, subject to the provisions of this Act-

(a) any person suffering loss by reason of the rectification shall be entitled to be indemnified; and

(b) if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified.

(2) Where an error or omission has occurred in the register, but the register is not rectified, any person suffering loss by reason of the error or omission shall, subject to the provisions of this Act, said person shall be entitled to be indemnified.

(3) Where any person suffers loss by reason of the loss or destruction of any document lodged at the registry for inspection or safe custody or by reason of an error in any official search, he shall be entitled to be indemnified under this Act.

(4) Subject to the following provisions of this section, a proprietor of any registered land or charge claiming in good faith under a forged disposition shall, where the register is rectified, be deemed to have suffered loss by reason of such rectification and shall be entitled to be indemnified under this Act.

(5) No indemnity shall be payable under this Act-

(a) on account of any loss suffered by a claimant wholly or partly as a result of his own fraud or wholly as a result of his own lack of proper care;

(b) on account of any mines or minerals, or the existence of any right to work or get mines or minerals, unless it is noted on the register that the mines or minerals are included in the title; or

(c) on account of any costs or expenses (of whatever nature) incurred without the consent of the registrar, unless-

(i) by reason of urgency it was not practicable to apply for the registrar's consent before they were incurred, and

(ii) the registrar subsequently approves them for the purposes of this paragraph.

(6) Where any loss suffered by a claimant is suffered partly as a result of his own lack of proper care, any indemnity payable to him shall be reduced to such extent as is just and equitable having regard to his share in the responsibility for the loss.

(7) For the purposes of subsections (5)(a) and (6) above, any fraud or lack of proper care on the part of a person from whom the claimant derives title (otherwise than under a disposition for valuable consideration which is registered or protected on the register) shall be treated as if it were fraud or lack of proper care on the part of the claimant (and the reference in subsection (6) to the claimant's share in the responsibility for the loss shall be construed accordingly).

(8) Where an indemnity is paid in respect of the loss of an estate or interest in or charge on land, the amount so paid shall not exceed-

(a) where the register is not rectified, the value of the estate, interest or charge at the time when the error or omission which caused the loss was made;

(b) where the register is rectified, the value (if there had been no rectification) of the estate, interest or charge, immediately before the time of rectification.

(9) Subject to subsection (5)(c) above, as restricted by section 2(2) of the Land Registration and Land Charges Act 1971-

(a) an indemnity under any provision of this Act shall include such amount, if any, as may be reasonable in respect of any costs or expenses properly incurred by the claimant in relation to the matter; and

(b) a claimant for an indemnity under any such provision shall be entitled to an indemnity thereunder of such amount, if any, as may be reasonable in respect of any such costs or expenses, notwithstanding that no other indemnity money is payable thereunder.

(10) Where indemnity is paid to a claimant in respect of any loss, the registrar, on behalf of the Crown, shall be entitled-

(a) to recover the amount paid from any person who caused or substantially contributed to the loss by his fraud; or

(b) for the purpose of recovering the amount paid, to enforce-

(i) any right of action (of whatever nature and however

		arising) which the claimant would have been entitled to enforce had the indemnity not been paid, and
	(ii)	where the register has been rectified, any right of action (of whatever nature and however arising) which the person in whose favour the register has been rectified would have been entitled to enforce had it not been rectified.
(11)	Subsection (10) above does not prejudice any other rights of recovery which by virtue of any enactment are exercisable by the registrar where he has made a payment of indemnity.	
(12)	A liability to pay indemnity under this Act shall be deemed to be a simple contract debt; and for the purposes of the Limitation Act 1980, the cause of action shall be deemed to arise at the time when the claimant knows, or but for his own default might have known, of the existence of his claim.	
(13)	This section applies to the Crown in like manner as it applies to a private person.	

4.5 Indonesian Registration

Registration of Indonesian Land prior to the BAL

Before independence, the Dutch colonial administration had introduced registration principles, but these applied solely to Dutch colonial land which was not extensive. The principles and operation of this registration system reflected European standards in concept and operation. Most unregistered land was *adat* land used by indigenous groups according to the pre-colonial usage patterns and incapable of being reconceptualised into one of the new tenures.

Registration systems for *adat* titles were insignificant. Before World War II, the colonial government required certain *Adat* titles which carried the right of "perpetual tenure" (*eeuwigdurende-erfpacht*) to be registered. From 1913, land granted to Foreign Orientals on private estates which had been repurchased by the government could also be registered. In practice, it seldom was. This right was subsequently replaced.

Registration under Basic Agrarian Law

Article 19 provides that, in order to achieve legal security, the Government should undertake registration of all Indonesian land. One should appreciate language here – usually registration of land is a phrase associated with positive registration systems. While one should be guarded about confusion, we will continue to use the normal phraseology and will refer to Indonesian land which has been subject of **any** registration process as registered land.

The regulatory structure implementing registration required owners of the new "real" rights to register them. Certain transfers and terminations were also required to be registered.[21]

While the Government was obliged to provide a registration system, the practical implementation of a program awaited funding (the cost, even of a minimum scheme, was enormous), skills development and human resources. The natural priority for the registration program was in areas

[21] Government Regulations made immediately after the Law amplified the registration scheme. After some quiet decades, regulations and subordinate documents are now made constantly. The most important is Government Regulation 24/1997 which contained a preliminary attempt to move towards positive titling.

where land values were commensurate with expenditures. *The Explanatory Memorandum accompanying the Basic Law made registration in the cities the priority*. Even after prioritizing efforts, the Government's dedication to the principle of registration was much less than would have achieved a workable system or the extended public knowledge of and support for a scheme.

There was, however, an even more fundamental problem with the Indonesian scheme. The policy behind the registration scheme appeared to be an intention to build a cadastral system covering all Indonesia and to conform local law to the standards used by modern states.[22] The incentives for owners to register were less compelling than is usual in deeds registration schemes: registration "guaranteed rights of individuals on land by enabling third parties to ascertain easily whether or not a certain right existed, and by facilitating the creation of security interests".[23] These results of publicity and facilitation of securities are the trite and inevitable results of any registration process. They are not enough to secure registration in the game of competing property rights. **To equate with modern schemes, registration must confer a better property right than is obtained without registration.** According registration only an evidentiary, and not a proprietary impact ensured that registration, of itself, was not an attractive proposition for an owner.

It is not surprising then that the Explanatory Memorandum stated it was the obligation of Indonesians to register their interests, and that Article 52 allowed criminal sanctions to be imposed for failure to register. Apparently, none were.

After 1960

Land Registration is a fundamentally important idea in Basic Agrarian Law. Government Regulation No 10 of 1961 made it the responsibility of the Directorate of Land Registration, Ministry of Agrarian Affairs. Land Offices were established to supervise the implementation of registration in their areas throughout Indonesia. A committee headed by an official from the Land Office could make a survey of all the lands in the village, i.e. private land and land under control of the state. They determined boundaries, category of title and the owner.

If the land was held by an appropriate title (rights of ownership, exploitation, of building, land pledge, use of state land and *pengelolaan* right), the land was subsequently measured and a map drawn. The map was published for 2 months, allowing anyone in the village time to file a complaint. The committee considered the complaint, and if it was found justified, the alteration was made. Intractable complaints went to the Courts. After 2 months, the map became a "registration map". If the land was subject to a dispute, the map was issued anyway.

A copy of the map was made of location, measurements, boundaries and significant buildings: copies were called "certificates of areal measurements", made in duplicate, one for the owner and one for the Land Office kept in the *Buku Tanah* or Land Book. The Land Book is a catalogue of the category of titles registered, owner's identification, location of the land, and subsequent alterations – for example changes of ownership on transfer or collective ownership changes, and changes of title (nullification, application of another title, security rights, and alteration of possessed land if split or consolidated with another parcel). Separate books are kept for each of the titles.

Security interests (originally the *hypothec* and *credietverband*, and since 1996 security titles, *hak tanggungan*) were also registered, identifying the holder of the security interest, the debtor, the amount of the loan, the land and the land owners. The creditor was issued with a certificate of *hypothec* or *credietverband*, or security title without a copy of the measurements.

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[22] Sudargo Gautama and Budi Harsono, **Agrarian Law**, 31

[23] Sudargo Gautama and Budi Harsono, **Agrarian Law**, 31

Because it was possible under the BAL to have different titles on one parcel at the same time, (private land could have a right of building and a mortgage), more than one certificate could be issued in relation to one parcel. If private land had a right of building and a mortgage, three certificates would be issued in the name of their respective holders.

Fees were fixed at one percent of the valuation of the land including buildings based on the standard local price (in practice only about 10% of this price). If the certificate of areal measurements did not reflect the position at the time of registration, an additional amount was payable. *This has led to the highly inefficient practice of surveying the land on change of ownership*.

The holder of a registered title is only obliged to request a certificate if a change has been made to the title. For example, to the holder of the title, the land, the title, a transfer to another party, conversion of the land into collectively owned land, part of the land is split off and joined with another parcel, or there is an application for another registered title on the land.

Registration Implementation

Since Government Regulation No 24 of 1997, registration has been made easier to obtain and more effective. Article 13 provides for first time registrations by sporadic (request of interested parties) and systematic schemes determined by BPN. Systematic registration has been well designed to deal with the exigencies of identification of boundaries and identification of owners. An adjudication process deals with the inevitable disputes.

The regulation requires registration of every land parcel and apartment as well as every transfer, encumbrance, and nullification concerning a right in a parcel or an apartment.

The Elucidation of this regulation remarked –

> "although the administration of land registration under Government Regulation No 10 of 1961 has been going on for over 35 years now, it has not achieved satisfactory results. Of about 55 million land parcels which qualify for registration, only 16.3 million have actually been registered".

The reasons quoted were lack of funds, equipment and personnel, the lack of appropriate evidence of title, and the registration provisions. Detailed research on the structural and social reasons for the failure of registration at this stage has not been done. However, the research in this project indicates other reasons are also significant, perhaps more so. These other reasons centre around the mistrust of central government, the political nature of some of BPN activities (especially those associated with development) and the use of registration as a taxation stream. *Also significant are – the wish of right holders/owners to stay outside the complex framework of some 2000 regulations affecting land,*[24] *the lack of any improvement in the quality of the title, the comparatively high cost and complexity of the registration process, and the formality of conveyancing of registered titles and its cost compared with conveyancing of unregistered titles*.

As the New Order, *Orde Baru,* implemented centralised control and decision making, especially after the National Land Agency (BPN) was established in 1988, a reluctance to register was apparent. Post 1988 registration was driven either by commercial or credit transactions. For the average owner of land, it was certainly not a priority; in fact, just the opposite. The penetration of registration into *adat* communities was even more unlikely, since it depended on the devolution of communal land to a recognisable individual title.

[24] LAP PPR para 3.5, 19

An independent assessment of the machinery and practice is needed to inform policy makers and planners of the barriers to efficient registration and how to remove them. A broader assessment of the social impact of registration would also produce timely information.

Land Administration Projects

After a relatively short planning period, the Government of Indonesia, the World Bank and AusAID developed proposals for a series of Bank projects to assist land registration. The Land Administration Project (LAP) was proposed as a first five-year phase of a 25 year program and commenced in 1994. Other objectives of the project include a review of land administration laws, regulations and procedures to assist the Government in the formulation of land policy reform.

By the end of PY 5 some 1,238,2000 certificates had been issued by BPN under the systematic registration project. Preparation for next phase or LAP II, covering September 2000 through the next five years is currently being formulated by AusAID, the World Bank and the Government. The issues raised by autonomy are being addressed through this process, together with an assessment of the impact of the current program.

A tentative outline for LAP II has been proposed, which is designed to -

- Foster efficient and equitable land markets and alleviate social conflicts over land by continuing acceleration of land registration from a possible 2.4 million certificates at end of phase 1, and producing 6 million certificates in phase 2.
- Improve land administration by de-centralisation, including consideration of the establishment of a state owned enterprise for land registration; with special focus on transparency, reduction in service delivery times; improvements of land office services, reduction in delivery periods, with widely publicised fees to sustain the registration program.

The land policy component (Part C) would address land policy reform. It would support the implementation of land policy actions and programs of selected themes.[25]

Systematic and Sporadic Registration

Government Regulation No 24 of 1997 allows an Adjudication Committee (for systematic registration programs) or the Land Office (in case of sporadic registration) to examine the evidence of title and boundaries and makes an official report which legalises the physical and juridical data. The legalisation is the basis for the recording of the land right in the land book, recognition of the right or granting of the right (Article 28 PP No 24/1997). An inadequacy or objection can be noted in the report.

The report is the basis for entry in the land book, which includes a note about incomplete data or a dispute. If additional evidence is submitted or five years pass without a claim being filed with a court, the note about incomplete data is expunged. The note about the dispute is erased when 1) a solution is reached, 2) the court decides the dispute, 3) or after a short period (60 or 90 days) have passed since the claimant has been requested to file a court claim but has not done so. A certificate is not issued until the note is erased.

Information about systematic registrations has been easier to obtain than for other BPN registration programs. Since the advent of systematic registration in 1994 cumulative data by 1998 revealed that 99.9% of titles registered under systematic registration were *hak milik*. In cases where *hak guna*

[25] World Bank/AusAID Supervision Mission No 7, Aide Memoire, September 25, 1998, p.5

bangunan was found these were quickly converted to *hak milik*. Overall 30% of the titles are issued to women, 5% joint names and 65% sole male.[26]

The first phase revealed that very few of the parcels were on state land. Most were clearly privately owned. However recent systematic registration efforts are in DKI Jakarta and show much more state land, to the degree that the expectation of parcels being generated dropped by 50%.[27]

Registration Activities

The work processes in BPN are regulated in detail. Each of the following functions has a detailed flow chart showing the necessary paper trail and registration activities involved.

Table 4.1 Services Provided by BPN Land Offices

No.	*List of Services/Activities Provided by Land Offices*
1	Development and Land Acquisition Permit (*Izin Lokasi*)
2	Permit to convey/transfer land rights (Right of Use and other rights derived from state land)
3	Permit to change land use
4	Compensation for land reform objects
5	Land Consolidation (private initiative)
6a	Cost redistribution analysis for self-supported registration (*swadaya*)
6b	Cost proposal for work plan and final approval
7	Land acquisition for public purposes/interest (Presidential Decree No 55/1993)
8a	Initial Registration: Systematic
8b	Initial Registration: Sporadic
9a	Survey procedures: Systematic
9b	Survey procedures: Sporadic
10a	Grant of Title: Systematic
10b	Grant of Title: Sporadic
11a	Recognition of Title for non-state land: Systematic
11b	Recognition of Title for non-state land: Sporadic
12a	Recognition and confirmation of right (non-state land): Systematic
12b	Recognition and confirmation of right (non-state land): Sporadic
13a	Recordation of Right: Systematic
13b	Recordation of Right: Sporadic
14a	Revocation of Right: Systematic
14b	Revocation of Right: Sporadic
15	Change in recorded rights (Minister of Agrarian Affairs/BPN Decree No 21/1994)
16	Re-issuance of Certificate due to damage
17	Re-issuance of Certificate due to loss
18	Registration and recordation of strata titles on behalf of developer
19	Subdivision/Consolidation of Titles
20	Revocation/cancellation of previous rights/certificates
21	Registration of Secured Interests
22	Recordation of Satisfaction of Secured Interests
23	Recordation of foreclosure/debt forgiveness/assumption by other parties
24	Registration of right revocation/release

[26] Advice from Chris Lunnay, AusAID Chief Advisor - BPN, Land Administration Project – Part A & B, April 1999.

[27] Advice from Chris Lunnay, AusAID Chief Advisor - BPN, Land Administration Project – Part A & B, April 1999

No.	List of Services/Activities Provided by Land Offices
25	Registration of name change/name correction
26	Application for land office records
27.1	Registration of derivative transactions
27.2	Registration of rights for social and religious purposes
28	Information assistance
29	Surrender of non-ownership right/re-granting of ownership right (*hak milik*) for developer built low cost housing units with less than 200 m2 plot size (Ministerial Decree Agrarian Affairs No 9/1997)
30	Grant of right-to-build (*Hak Guna Bangunan*) or use (*Hak Pakai*) over owned land (*Hak Milik*) based on deed drawn up by land deed official (PPAT) Article 23 - PP No 24/1997)
31	Registration of Transfer of Security Interest
32	Application for right on state owned land
33	Recording public enquiries (received by mail)
34	Issuance of project based certificates e.g. *HGB Induk*
35	Grant of ownership title for residential use for homes with less than 600 m2 plot size (Ministerial Decree Agrarian Affairs No 6/1998)
36	Grant of ownership title for residential use to civil servants/armed forces personnel who are eligible for and have acquired government housing (*rumah dinas*)

The above list of services/activities is dutifully spelt out in a highly detailed Ministerial Instruction No 3/1998 aimed at increasing service performance by land offices. Each of the 36 service activities comes complete with detailed flow charts and present a broad menu for rent seeking opportunities. *The inconsistencies inherent in BPN's interpretation of the BAL with respect to the recognition and granting of rights is fully enshrined in BPN's land office operations manual. Interested readers will note that ample opportunity exists to interpret whether in fact a right does exist as well as the extensive scope to amend and even revoke rights without due process.*

Survey

Surveying of land is a recent undertaking in Indonesia. Systematic registration commenced in 1994 and has surveyed approximately 1.5 million parcels. Sporadic registration which commenced on the adoption of the BAL in 1960 has surveyed approximately 17 million parcels. Land tax objects number approximately 75 million parcels which means approximately 50 million parcels are not yet on the legal cadastre. Survey quality is variable. Issues in mapping and GIS remain on the agenda. The assumption that all initial registrations should be accompanied by survey is correct.

In most developed systems, the land registry identification function is enhanced by mapping and positional information available from a general mapping or surveying agency. Integration of information generated by creation of new parcels with the information held by the mapping or surveying agency is usually well worked out. New Zealand and England have separate surveying and land registration agencies. Other land offices manage the survey process internally, albeit with contracted private surveyors.

Meanwhile in the context of land rights, the relationship of map and text information is dealt with in a variety of ways. A registration system can guarantee the boundaries and position of the land (New South Wales), or it can include maps and site plans (up to any survey standard) "for convenience". Even in highly developed systems, it is possible to run a register without guaranteeing the maps accompanying the text. For example, Victoria's land registry does not guarantee boundaries or position, reflecting the early history of surveying in the state and the unreliability of many of the early surveys.

Purposes of the Indonesian Registration Scheme

The advocates of the ongoing Land Administration Project see land registration as an important prerequisite for efficient land markets. In the traditional analysis,[28] this is done in several ways:

1. Greater knowledge of owners and rights – most private and public sector development is predicated on the basis of available information. If information is not available on rights in land then inappropriate development decisions can and do result
2. Security of tenure - registration of rights provides recognition of rights and affords and equitable basis for negotiations if land is appropriated by public and private sector developers
3. Resolution of land disputes – systematic registration is the most effective means to resolve widespread disputes over land rights
4. Improved conveyancing – where land rights are unclear, additional costs and or time are incurred in the transfer of rights, and the whole system operates in an environment of uncertainty
5. Security for credit – registration reduces the risk to providers of property credit.
6. Management of government land – registration can also provide the basic records to managers of government land
7. Support for taxation – land registration can assist government in compiling and maintaining accurate tax rolls to serve as an equitable basis for property taxation.

While any registration scheme can achieve these purposes, the extent of the achievement depends on the law and practice. If tenures can be easily cancelled or challenged, despite being registered, then security of tenure is limited.

The Land Administration Project carries another hidden agenda by the Bank – to introduce efficiency in land registration and to close out the extensive rent seeking found in BPN. As shown in Table 4.1, BPN's administrative processes has in-built at every level opportunities for rent-seeking, that is for officials to make a charge beyond the official fee for a task. Systematic registration, despite AusAID's best efforts, cannot eliminate the rent seeking culture prevalent in BPN. This will require political will, clean government and decent remuneration for land office personnel.

What can be registered?

Annex 4.1: Indonesian Land Titles illustrates which rights on land can be registered. Encumbrances can also be registered. Registration is allowed for a security interest (*hak tanggungan*) or another lawful encumbrance on a land right or apartment ownership right. Lessors right such as the right to build (*hak guna bangunan*), the right of use (*hak pakai*) or right of use of structures, or a lease (*hak sewa bangunan*) can be registered over an underlying ownership right (*hak milik*).[29] State land is not registered but is recorded in a *daftar tanah* (land identification list).

Who Registers?

Generally, there is no obligation on an interested party to register legal acts which are evidenced by a Deed of Sale. Land Deed Officials (PPATs), who are regulated by BPN, are required to submit the land deeds they have made with related documents to the Land Office for registration purposes.

[28] LAP PPR 19

[29] PP 24/1997 Article 44 (1) if evidenced with a deed authorised by PPAT.

The biggest driver for initial sporadic registration is the use of land by right holders as a pledged collateral for a loan. In some cases, community groups have used registration as a defence to acquisition of their land and often initiate the process.

Conclusiveness of Information on the Register

Registration systems usually contain an incentive to owners to bring their initial grants or their transfers into the system.

Regrettably, BPN's registration system does not widen the proprietary protection, although a significant improvement is contained in Government Regulation 24/1997 in Article 32 which provides that:

> "Land and ownership information in the certificate must be accepted as true in court proceedings and daily legal acts if it matches the cadastral map and land book until it is proven otherwise, and
> Claims not the subject of a court action laid in five years of the creation of the certificate cannot be enforced against a registered owner who acquired in good faith and has been in possession".

This provision gives Indonesian registration a proprietary impact of quietening off the register claims not acted on in the five year period, provided the certificate has been legally issued and the registered owner acquired the parcel in good faith.

This is mere regulation, not legislation, and subject to the courts' discretion. Experts accept that these closures are imperfect and would be more effective if they were contained in the law. Reform of the Basic Law to provide possessory titles and to close off land disputes with effective limitation period is therefore essential.

Disputes about Registration

Inherent uncertainties of title encourage disputes to arise during the initial registration processes. Between BPN and the public disputes arise about the status of the land including decisions by BPN that the right cannot be registered because in their view -

- The land is state land (either because it has never been in private ownership or because it reverted to state ownership through the revocation processes associated with foreign or corporate ownership).
- The appropriate tenure is *hak pakai* and not *hak milik*.
- The right does not exist because insufficient evidence is available to support the claim.
- The right is disputed by another claimant.
- Land boundaries are disputed.
- Land position is disputed (the existence of the parcel and its owner are settled, but the position of the parcel is not).
- The whole or part of the land is required by the government or local government.
- The land is subject to a dispute brought by a third party, eg holder of a security title.

Anecdotal information indicates that the registration system is not always reliable and in one known case seven separate certificates were issued for the same parcel.

Title Insurance in Indonesia

Before any back up insurance can work, the title itself has to be secure. If a registration process is the delivery point of risk identification, that process must be extraordinarily reliable. A registration

system which is experiencing predictable and large scale attack on its outcome certificates or titles cannot sustain an insurance scheme. *In other words, disputes need to be highly controlled and virtually eliminated before insurance is used as a loss distribution method both to control premium levels and to ensure that the insurance is not bankrupt in a short time*. Failure of the supporting insurance systems led to failure of title registration scheme in California.

It is essential to convert Indonesia's registration into a positive system, but not by introducing title insurance. It is too early. The system would be bankrupted by claims in a land law which does not facilitate claims closure and a court system that is unpredictable in its decisions. The opportunity for collusively created claims would compound the issue. Australian and English experience with assurance fund claims includes collusive and consensual registration of forged mortgages of co-owned land with one partner getting the land, and the other partner seeking and receiving a payout from the fund because of fraud of his or her signature on the mortgage or transfer. Without a significant and predictable penalty for forgeries and fraud, systematically and universally applied, and a workable criminal justice system, the risks of fund bleeding from collusive claims would be huge.

Another source of unpredictable claims is the uncertainty inherent in Indonesian titles. With no closure system available from long possession, latent claims can exist for a long period of time and be raised at unpredictable points. The uncertainty of titles potentially involves every initial registration in uncertainty. Despite adequate and effective adjudication systems before an initial registration is granted, a significant number of subsequent competing claims are made. Of these, it is impossible to predict how many are sustainable or sustained (systematic analysis of court outcomes is not available).

Title security should not be confused with title assurance or insurance. Insurance is not a substitute for security of title. Registration could theoretically offer title security without an insurance system. No Torrens scheme does this, for the good reason of seeking a reasonable balance between certainty of interests on the register and compensation for losses caused by the high level of security accorded to registered and later registered interests.

Pricing of risk in the Indonesian system would be an open issue given the level of land disputation and the lack of business ethics codes in the essential professions of surveying and conveyancing.

Assessment of Risk

In any event, the protection available to a person who relies on the register needs careful definition. The reliance should not protect all risk takers. The limitations on protection available from the register to persons who acquire in good faith applicable in the German and Dutch system are appropriate, rather than the broad protection available under the Torrens and English systems.

Before any decision about title insurance is made, a cost benefit analysis is essential. The experience of US private insurers in estimating risks and calculating premiums, and the experience of governments managing Torrens systems will not provide indicators of risk and premium levels inherent in land registration in Indonesia. Calculation of risk and definition of liability will require specialist expertise, fully briefed on the limitations of registration as a source of security of tenure and the opportunities for claims, including collusive claims, generated by the system. If the analysis shows that the pricing of the cover exceeds the ability of many owners to pay, or impedes the spread or subsequent registration of transactions, whether paid by government or by individuals, then insurance should be postponed until the surrounding legal and administrative systems are improved.

4.6 Land Registration Issues for Indonesia

Assessment of the Indonesian Registration Scheme

Registration has provided information in the form of names and maps of land but its accessibility and general usability is diminished by its paper base, physical spread and amount. The survey component is capable of delivering more information about land uses and titles. Registration has given a little more security to the credit market in land securities than would otherwise be available, if only because the international credit community relies on its general understanding of registration processes and results, without appreciating the Indonesian connotations. The ILAP project teams report positive receptions to systematic registration and a high level of local cooperation.

Of itself, registration cannot overcome the inherent limitations of the Basic Agrarian Law. Without substantial law reform, registration will do little to improve the economic functions of land and land titles in the overall economy. If one is registering titles which are thoroughly dysfunctional for market operations, one is merely putting names and maps in a convenient form. True, this will help by providing certainty and evidence of the tenures and titles that exist, but that is all. If the tenures are so prescribed as to make them unmarketable, the development of the economy will not occur.

Land Registration and Land Disputes

Registration has been a success in terms of the numbers and impact, particularly by resolving land disputes through the adjudication processes.[30] Although quietening of disputes is an economic good, it is enormously difficult to quantify. Despite this, it is one of the most significant and long standing positives to come out of the registration program.

A body of literature has examined the relationship between land registration and excitation of land disputes. Frequently this is very critical of land registration initiatives,[31] but the criticisms need to be put in perspective. There is no doubt that the process of allocating precise boundaries to a title involves processes which are challenging. Some land registration initiatives have been abandoned when the challenges became too great.[32]

But it is wrong to assume that land registration inevitably excites disputes, or that the disputes are not valuable and cathartic occasions exposing incipient tensions, if not inevitable short term conflicts which are essential costs in the eventual calming of disputes overall in the medium and long terms. One thing is certain – land markets require registration. This, plus the State's requirement for taxation income, will create land registrations in one form or another when national development reaches the preliminary stage of becoming interested in who uses land for what.

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[30] Some commentators view land registration is initiating land disputes. See Fitzpatrick: " ..[T] process of registering titles under the Basic Agrarian Law itself creates long-term disputation and social conflict, and, for that reason, is highly unlikely to fulfill its objective of legal certainty." Page 173. An objective assessment of land registration must be made before conclusions are drawn. The uncertainty appears to be generated by the fundamental land law, not registration itself. The law, at bottom level, is the problem. Fitzpatrick's views that the Basic Law is fundamentally destructive of *adat* and traditional relationships with the land are consistent with our findings and with hundreds of comments made in the public arena by NGOs and community representatives throughout the country.

[31] Fitzpatrick, 188-9.

[32] Papua New Guinea

Land Registration and Development

Registration is an activity associated with the cusp between local communities and development. Uncaring development will be negative with or without registration and the critical and policy analytical processes should be directed to making development processes more benign, rather than on eliminating registration and allowing the developers open paths through the land of local communities.

The question, then, is not whether to have registration, but how to make it receptive to local needs. The experience of registration and its accompanying adjudication in Indonesia under the ILAP project provides an example of a popular and successful registration process, advancing according to its own reputation. The cost of this scheme and its meticulous attention to sorting out the boundary and title issues incrementally is obvious, but its benefits are undiluted by acrimonious disputes. There will be discernible improvement if the democratisation and localisation permitted by the Law on Local Government, 22/1999, are introduced quickly.[33]

In the meantime, the dual function of BPN as an allocator of land through the land development permit process (*izin lokasi*) and its role as the register of rights has created significant tension which can be remedied by reallocating land development approval processes to local government.

Fiscal Initiatives/Registration Disincentives

Rent seeking opportunities must be systematically removed by transparent strategies such as published fees for services and routine auditing.

The cost structure and pricing of registration services to the public needs to be addressed to determine whether self sufficiency might be feasible. Initial registration should become a government priority and be made available at concessional rates (i.e. below cost) with subsequent transfers (derivatives) perhaps priced to recapture initial subsidies. Initial registration must not be burdened with other taxes or levies charged by the government as these charges act as a substantial deterrent to registration. In this regard land transfer taxes as stipulated in Law 21/1997 should be abolished and replaced by a progressive land tax administered at the local level.

Land Information through Land Registration

Sophisticated systems provide useful information about the land. This information is basically identity of owner and parcel, mortgages and other encumbrances, but good systems also provide the price the owner paid, when he purchased and the official value. The overall land market will determine the relationship between an official and market value – they are typically discordant, with market price exceeding official values, unless there is a severe economic downturn.

Incomplete Register

A major issue is how should registration proceed. The vast majority of parcels remain unregistered. While initial registration will continue to be incremental great emphasis must be placed on maintaining the integrity of the register by continued recordation of subsequent transfers and interests which derive from initial registration. See Chapter 5 **Conveyancing and Priorities.**

[33] The Government is moving fast to implement the autonomy law, particularly in the context of BPN and other land related agencies.

Typically, government owned land and related physical assets are not in compliance with building permits and not on the register.[34]

Making Titles Secure

The system must provide positive incentives to register. To do this it must provide indefeasibility or security of title. The cost of doing this, in the present system, will be felt by those whose rights have been fraudulently or collusively overridden by the registration seeker and compliant or paid-off administrators. To assist these, remember that registration is not indefeasible for fraudulently obtained registrations. To improve transparency in administration and encourage accountability of officials, the law should allow a person wrongly deprived of land through the activities of a land official an action against that official personally for the extent to the loss, being the value of the land and the expenses of suit. New priority rules are essential and addressed in Chapter 5 **Conveyancing and Priorities**.

Viability and Sustainability of Initial Registration

With the introduction of systematic registration in 1994, an audit of their penetration and adoption by the public is appropriate. There are good reasons to suspect that initial registrations may not have been followed up by registrations of subsequent changes in ownership. These include–

- Taxation is collected on transfers of ownership.
- Publicity of ownership – there are reasons why a citizen may not want the state to be aware of his or her property interests.
- Registration alerts others to the claim and raises the potential for challenge by a competitor owner.
- The State is alerted to ownership and can appropriate the title in a larger number of situations that is usual in other titling systems.
- Registration is seen as market related, and is popular in areas where a land market has developed. Its reputation with areas outside the land market is unclear.
- Local offices capable of handling the business and appropriately trained officials and ancillary professionals are not always present.
- The product offers relatively little improvement in the level of protection of ownership – no guarantee is associated with it, no investigation of entitlement or title accompanies the process and disputed ownership claims persist regardless.
- Formal title suits a highly formalised individualised western model of property ownership, not the flexible and open community rights common among many Indonesian communities[35].

On the other hand, there is substantial experience with registration, particularly systematic registration which suggests that it is approached positively by the participants. The subsequent experience of Land Offices in and around Jakarta is that transactions following registration are brought into the system. Formal and exhaustive statistics (if available) would be give a much firmer guide to the real state of affairs and would enable a strong and positive education program to be undertaken to address the issues.

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[34] **The Jakarta Post** of 13 February 1999 page 3 reported that many city buildings do not have permits because it was thought that building permits were only required for the general public and the private sector. Former Governor Surjadi Soedirdja who governed the city from 1992 to 1997 had started to issue every government building asset with a license. The data showed that 5 percent of 8,277 city owned buildings had building certificates. Data showed that 104 of the 5999 plots of land said to belong to the administration were subject to ownership disputes.

[35] See Final Report Topic Cycle 1, 3-5.

Informal Documents

Registration as devised by BPN requires a Land Deed Official (PPAT) sanctioned document to legally evidence a transfer of the land. Only under "certain" compelling circumstances to be determined by the State Minister of Agrarian Affairs (unspecified in the implementing regulation), and only for a *hak milik*, does the head of the land office have the discretion to accept informal documents. If "certain circumstances" is interpreted narrowly, informal transactions will not be registered by BPN. Therefore, land register will be less conclusive as a source of information because these informal transactions are still legal, although the 5-year rule will NOT apply.

Closer Cooperation with Tax Office

The registration and taxation functions are separate in Indonesia, with the tax office holding records on about 50 million parcels unknown to BPN. The separation is obviously inefficient. Integration of parcel and owner records is a goal which needs to be defined and achieved by the government. There are a number of advantages from sharing the records –

- The tax office always has more compelling claim for resources for record creation and maintenance. Its use of computers is internally funded. Integration of record keeping function could ensure that similar standards were implemented supported by cost sharing arrangements.
- The inclusiveness and accuracy of both record bases would be improved.
- A comment unique parcel identifier system is desirable in the near term.

Improvements in Indonesian Registration Scheme

Identify Owners

Registration cannot function unless owners are precisely identified. Registration does not identify owners with precision, although the National Identity Card (KTP) number is held in BPN but is not on the register. This means that BPN is unable to monitor ownership holdings of land and cannot implement land redistribution reforms spelt out in the BAL. Ownership data is essential for taxation and a land market. Land ownership records are further complicated because Indonesian families typically do not use surnames.

Sustainability of the Register

As discussed previously there is strong anecdotal evidence that subsequent transactions are not being recorded by the public. This will very quickly result in an out of date register and marginalize the heavy investment made in initial registration. The planned Social Assessment Study financed by the Bank will hopefully reveal the extent of this problem.[36] Other measures which should be adopted include:

1. *Remove Taxation on Registration and Subsequent Registrations*
2. *Simplify Standard Conveyancing Forms*
3. *Simplify Registration*

   The registration system appears to be designed to maximise its overheads, not its efficiencies. The system depends on separate title recording and requires extensive cross-referencing because each kind of title is kept in its own register or "book". This breeds enormous administrative overheads and uncertainties. Alternatively, a parcel record containing the interests relating to the land is easier to manage, easier to search and more reliable.

[36] This study is due for completion in late October 1999.

A strategy of change is required to bleed out the paper, in particular to change the recording system to parcel based registers (not title based registers), and to replace the separate issued certificate with a simple receipt which is an extract only of the official register and which has no legal significance.

4. *Develop a Strong Vision of a Computerised System*

   The emphasis should be on a paperless environment. The future of certificates is therefore timelocked. There will be a substantial interstitial time during which paper records and certifications remain, but they will inevitably be replaced by digital systems which generate a non-authoritative print out of the state of the digital register. The UK Law Commission **Land Registration in the Twenty First Century** consultation paper considers the opportunities for electronic conveyancing and digital registration.

5. *Multi Purpose Registration*

   While computerisation is a long way off, the vision of an efficient registration office is immediately available. The registration process cannot stand alone from other land related information. The ability of any government to make use of the information it creates depends on sensible decisions about the way the information is kept and on its usability. The core component of a land administration system is to make ***parcel based information*** useable by as many agencies as possible, and to create opportunities for public and commercial users to make the data into more valuable information sets. One key to this process is the uniform parcel identifier.

6. *Land Tax*

   The land tax system is in need of change and its administration is sufficiently advanced (given the low rate) for it to be the basic ingredient for reform.

   Tax is a responsibility of land owners. Land users and owners gain direct benefits from government infrastructure of access, water supply, flood control, title records and a conveyancing system, land use planning and so on. Where possible, these improvements should be financed by those who benefit. Land tax is therefore a basic tax which every local government should use to fund its land services. Sometimes this tax is broken down into charges for components so that the cost of infrastructure improvements such as roads, sanitation, water supply etc is paid by landowners within the sphere of betterment. There are also residual benefits provided by land offices and a fair and equitable fee for services arrangement makes eminent good sense and for good local government.

Property taxes have become the most stable and reliable form of local government revenue. Moreover, social equity does not support the proposition that the central government should supply land owners with considerable benefits of registration and survey systems, with no direct contribution from owners. If development particularly at the local level is high and land tax is low, the obvious source of revenue is to increase the land tax.

If a land registration system is being developed, it is probably better to create maximum incentives for initial and transaction registration by reducing the fees to bare minimum and supporting the system out of land tax proceeds, at least until the record base reaches a level of maturity at which it is capable of supporting transactable land. At that point, the system is mature and can be made self sustaining.

Meanwhile, the major issue with Indonesian land information is that the majority of transactable parcels are outside the registration system – tax office records are the only useful source. There is a very strong practical incentive to build these records into the land information system by initiating changes in the record base to facilitate the process. These changes include introduction in the record base of the uniform parcel identifier, owner tracking, switching from tax objects to parcels as the taxable item, and data matching with land offices to increase the accuracy of both data sets.

Land and Owner Database

The database depends on the Directorate of Land and Building Tax within the Ministry of Finance gaining the capacity to –

- Record owners of unregistered parcels and, by coordinating with land offices, of registered parcels
- Meet metadata standards anticipating an agency neutral information base and eventually making this database available to other agencies
- Use software and data entry standards which are agency neutral
- Remove disincentives to gaining information
- Develop a uniform parcel (not tax object) identifier in conjunction with BPN, taking account of its newly developed NIB used in the systematic registration process
- Introduce management improvement programs which ensure increasing accuracy in the database both for owner information and parcel information.

Metadata

International standards for data maintenance and entry have been established so that records are platform neutral, i.e. can be used by different kinds of computer systems. These standards establish the source of information, its date of creation, and accuracy levels and are standard in the Land Administration Systems, and Geospatial Information Systems. Any system introduced would need to be developed in accordance with international standards for metadata.

Parcel Payment Tracking

Tax office must track not just payments against objects or land parcels, but who pays. We acknowledge that the tax office has an incentive to get payment from anyone who applies. This is efficient collection and should be continued. It has a downside, in that it separates the person who gets the receipt from the person who should ultimately be liable to pay. The receipt taker is sometimes (and we cannot determine how often) not the owner. Possession of tax receipts are therefore not an indicator of ownership. Receipts are neutral as to evidence of ownership.

Removal of Tax Disincentives

Currently a transaction tax is charged on land transfers both to buyers and sellers.

- Seller pays income tax of 5% on price (with underreporting of value a major problem).
- Buyer pays duty of 5% on transfer of right.

Land Tax is also payable annually, but the current maximum tax rate of 0.5% inhibits the introduction of any progressive tax system on land. It is not registration, rather direct investigation of ownership by the tax office which brings land into the tax collection system. The buyer tax is the disincentive point for registration.

Coordination of the Juridical and Fiscal Cadastres

While the full scale merger of the functions of tax collection and land registration has a downside of negativity in the public mind, the coordination of the databases and record sets is essential. From the public perspective, payments and collections of tax can be segregated from the operations of the land registry, but for appropriate *Kabupatens* an office supporting the dual functions, and maybe other land information system functions, is an efficiency that the autonomy process might benefit from. However the customer services are delivered, the co-ordination of records by improving the way that both offices function would deliver better outcomes for the state and for the public.

CHAPTER 5 CONVEYANCING AND PRIORITIES

5.1 Dual Land Titling Systems

Despite the assumptions in the Basic Agrarian Law that all land will be registered and that the dual system of land law was abolished, Indonesia has a dual system of land titles which will remain in existence for the next two decades. Consequently, the BAL in effect presides over two land titling systems, one for registered land and one for unregistered land which is largely ignored. The second system has suffered from denial, and from a single strategy of pursuing registration instead of methodical and incremental reform of tenures, conveyancing and land recording. These issues require immediate address by strategies in addition to pursuit of land registration, but sympathetic to the ultimate goal of a single system.

5.2 Results of Land Titling and Registration

Most of the recent programs for land titling in Asian economies have a secondary result of removing the opportunity for the poor (the numerical majority) from participation in the system unless schemes are subsidised. Meanwhile, these owners use informal markets for their land and informal indicators of entitlement to use land. By focusing on individual owners who personally use agricultural land, the drafters of the BAL intended to protect the *Adat* rights of the small subsistence agrarian holders. The imposition of a registration system on *Adat* use patterns, however, immediately raised barriers to participation by small holders. The focus on *Adat* principles in agrarian law has given rise to two problems:

- The lack of security for user rights of the local communities. This is discussed in Chapter 6.
- The situation of unregistered individual owners of unregistered land.

5.3 Evidentiary Rules for Unregistered Land

Writing Should be Required

Dealing with land and solving disputes in land all require evidence of the existence of the interest. Conveyancing is the process of transferring and creating titles in land and it involves investigation of the evidence of the title. In Indonesia, the informal market in land is huge. Unregistered land parcels are traded (outside and independent from the land register). Theoretically under *Adat* principles, a transaction can be verbal, so long as there is a public arrangement of some kind and it is recognised by the mores of the community. The use of oral transactions (outside villages) is rare because the strength of the title obtained is poor.[1] However, the existence of the possibility of conveyancing through mere oral arrangements creates unlimited scope for uncertainty about titles. Without any objective proof, the title proof depends on the tenacity of the voices. Every modern conveyancing system has removed oral transactions for its range and requires at least written, if not deed, evidence to prove the transaction.

If the reform of community titles in Chapter 6 is accepted, the local village community would remain able to define its own transaction and titling processes within its members. For these groups, oral transactions between members of the internal community can remain.

[1] Arie S. Hutagalung, SH, Legal Consultant

Whether or not community titles are accepted, the law of conveyancing should be changed to make oral transactions in land ineffective and to require simple writing (in the form or to the effect of standard forms) to be used.

Existing Written Proofs

Land transaction data is very scarce for the informal market. Despite this, the user typically has some papers:

- *Perjanjian Pengikatan Jual Beli* (Sale Purchase Agreement)
- Wills and inheritance records
- *Girik* or tax records

Nevertheless, a person seeking to acquire the land is faced with a difficult task of identifying the owner. Should this be done, the even more difficult tasks of ensuring that there are no third party rights or other ownership claims remain. Many of these processes are open-ended. Even when a standard conveyancing process is undertaken and release of rights obtained from an identified owner, a land acquisition of 25 years history can still be subject of claims.[2]

5.4 Disadvantages of Informal Market in Land

The disadvantages of this informal market are:

- Uncertainty about the source of the title
- Open-ended opportunities for creation of new disputes because of inherent informalities, even if the title has a recognised legal source
- Reduced incentives for the land user to adopt sustainable and socially acceptable land use practices
- Loss of information about land ownership by both interested third parties and, more importantly, by the state
- Inability to close off disputes or create an appropriate level of security of title
- Vulnerability of small holders to exploitation
- Existence of an informal land market
- Consequential social, civil and political unrest.[3]

5.5 Tax Records

Conveyancing of unregistered land occurs every day. In proving title, tax records before 1960 have high probity. Even records generated between then and 1985 (when the tax office stopped recording the names of owners) are useful evidence. After 1985, the records carry less weight because the tax could be paid by other parties who are non-owners.

In 1987, Law No 12/1987, the Land and Building Tax Law removed owner identification information from the tax files, apparently because they were persuaded to pursue tax from objects (land parcels) rather than subjects (owners), leaving the National Land Agency (BPN) to record owners. On a more pragmatic explanation, the office ceased recording anyone as owner in order to avoid tax administrators being caught up in pointless disputes because the titling system was so flawed.[4] While this made sense at the time, the decision had serious adverse consequences for the

[2] Experience of PERUM PERUMNAS, the national housing developer, in acquiring land includes cases with lengthy and complex history of claims, particularly in high value land in Jakarta. Interview with Mr Edy Suhud, 29 April 1999. The longest case ran for 25 years.

[3] Tony Burns, Land Administration Project - Thailand

[4] Interview with Mr Hassan, PBB Tax Office, 28 April 1999.

conveyancing system in the medium and long terms. The problem with this is obvious: BPN records cover a small proportion of parcels, an estimated 16 million of the approximate 70 million tax objects known to the tax office.

An authoritative method of proving title, by collecting tax records well understood by the Indonesian public, was lost. Land registration has not been able to offer a replacement system. Meanwhile, the administrative competence in the Tax Office has increased and their record base has grown extensively. PBB records are detailed and each parcel has a unique tax parcel number of 18 digits which identify the tax object. Maps, although not geo-referenced, remain detailed, useful and highly sought after by government agencies.

The Tax Office is in effect undertaking systematic recording of transactions in unregistered land. On their own estimate, about 70% of their records already reliably indicate owners, and they record occupiers as occupiers. The record base is relatively open to automated inquiry (by telephone) if the uniform tax parcel number is known.

These administrative foundations, together with the public reliance on tax records as an indicator of title (which remains strong, despite the change of practice in 1985), can form the basis of improvements in the titling system for unregistered land.

Improve Land Registration

The land registration program is an essential part of land administration. Apart from foreign aided programs to assist progression, registration should be market driven by encouraging owners and lenders to use it for commercial land, and using user-pays conversion programs. The costs of conversion would be considerably reduced if unequivocal standards of evidence or proof of title were available. Reliable evidence would eliminate opportunities for endless disputes about ownership by improving the unregistered titling system and establishing a basis for moving the existing negative registration system into a positive system.

Three strategies are necessary to create reliable titles in unregistered land:

- Establish a basic database initially in the tax office
- Establish a basic title or conveyancing system
- Establish a basic land tenure or ownership record.

These strategies are detailed below -

TABLE 5.1: EVIDENCE OF TITLES TO UNREGISTERED LAND

BASIC DATABASE	BASIC CONVEYANCING	BASIC LAND TENURES
Include information about – • Owners (non determinative and for information only) • Taxpayers • Parcels • Uniform Parcel Identifier (tax property number). Remove all notification disincentives, including transaction taxes. Increase	Maintain status quo of sale purchase agreement and other formalities where people choose to use them. Include tax property number as means of identifying land in all written conveyancing documents (except testamentary instruments). Upgrade formalities from oral transactions to written document. Oral agreements are no longer legally effective.	Verify existence of *hak milik* (freehold) in unregistered land. Verify *hak milik* community titles. Recognise possession as a tenure. Possession both cures a bad title and creates a new title if conditions are met. Provide a limitation period for claims in relation to land.

BASIC DATABASE	BASIC CONVEYANCING	BASIC LAND TENURES
land tax to compensate. Reestablish *girik* (tax receipts) evidence as proof of title by recognising that a tax receipt in a person's name is evidence of title. Encourage payment of tax by and issuance of receipts to owners. Based on tax records and payments. Require tax office to keep taxpayer/owner files.	Reduce the overheads of conveyancing. Simplify documents to simple written standard form. Remove the need for notarised or camat/ PPAT verified deeds. Generate information which can be used to evidence title, and found registration of title if owner requires. Reduce costs of issuing registered title Protect owner by providing proof of title pre-registration.	

Further changes in law and administration are necessary. **The adoption of a unique parcel identifier throughout the land administration system is essential**. The tax property number is the obvious choice given the economies of scale in endorsing respective numbers and integrating their use in the land agencies, particularly in land offices. The tax records and BPN records will need to be co-ordinated so that registered land parcels are known to the tax office and all land parcel records are endorsed with the UPI (uniform property identifier or tax property number).

With the advent of Law 22/1999, the administrative structures of government will undergo fundamental change, offering opportunities to achieve efficiencies and rationalisation which before were academic.

Conclusiveness and Accuracy

By recognising tax receipts as evidence of title, the system provides an opportunity for owners to improve security of ownership at minimal cost to the state. With unregistered land, tax records in the office would not be not conclusive of ownership. Tax receipts (with the name of the payee) would be evidentiary. In case of a dispute with registered land, the tax receipts would carry equivalent weight and provide a substantial back-up of other title evidence, including the certificate, pending introduction of positive registration.

5.6 Priorities

The uncertainty in land titles affects not only unregistered land but registered land. The establishment of unequivocal evidence that interests exist is not enough to cure disputes. Clear priority rules which establish firm and unequivocal rankings of interests in cases of competing claims are also essential. Only then it is possible to organise the serial allocation of the entitlements to use and receive income from land and the simultaneous existence of non competing interests. Simply, it becomes possible to say that an interest in land or a title is perfectly proved but it fails because someone has a better title or interest. Provisions in a new Basic Land Law are required to establish evidence of title and priorities.

Priorities involve a number of components:

- Rules which determine when interests exist – evidentiary and formalities rules. See above.
- Rules which destroy interests through conflict – priority rules
- Rules which destroy interests through running of time. Chapter 2 **Land Law** dealt with the need for recognising titles acquired by possession and its correlative limitation on rights of

owners to recover land after time has passed. A clear limitation law is a primary means for all modern property systems to close of stale arguments about land claims. It is an essential part of the apparatus of land titling systems.

- Rules which allow bad paper titles to be repaired by proof of possession. Table 5.2 below uses a 10 year period as the basic limitation period and a shorter period where the land is registered. This strengthens the positive effect of the registered certificate evidencing a right which has not been the subject of a claim in 5 year period since it was issued, building on the significant and practical reform in Government Regulation 24/1997 re Land Registration, Article 32.
- Rules about fraud, forgery and duress. The basic forgery rule denies the forgery any legal effect. It cannot change the title. The normal structure of fraud rules in market economies allow the victim to sue to reverse the fraud within a time limit of, typically, 3-5 years. After that, there is no remedy available. The rules also limit the opportunity of the victim to reverse the fraud (limiting him or her to a personal action against the perpetrator to recover any money or receive any damages) if another person has acquired an interest in the land in good faith and for value.

TABLE 5.2: RECOMMENDED PRIORITY RULES
UNREGISTERED LAND

Reliability	Type of Evidence	Comments
Absolute	Status quo paper records Plus possession for 10 years	If no claim was lodged in the courts within the 10 years after possession was obtained, and possession was related to the claimed title
Absolute	Some paper records Plus possession for 10 years Plus tax receipts for 10 years	As above
Absolute	*Akta Jual Beli* to claimant over 10 years old Plus possession for 10 years	
Absolute	Possession for the limitation period in circumstances which bars the opportunity of the owner to sue for recovery of the land.	The time for bringing an action to recover land is assumed to be 10 years.

REGISTERED LAND – Stage 1 At the date of commencement of the law

Level	Type of Evidence	Comments
Absolute	Certificate plus 5 years possession as owner	Claims arising through later certificates issued in relation to the same land. certificates and unregistered claims are eliminated.
Absolute	Certificate 5 years old or older	Without claim being raised as per Article 33.

REGISTERED LAND – Stage 2 (after 5 years after commencement of the law)

Level of Reliability	Type of Evidence	Comments
Absolute	Certificate	.

Fraud and Forgery Rules

Clear fraud and forgery rules are required applying to land. Under these rules, any evidence of title which is forged is ineffective. Any evidence of title produced through a fraud can be set aside by the victim taking action to reverse the fraud. The action of the victim must be taken before a third person relies on the evidence of title to acquire an interest in the land in good faith and for value. A third person who acquires an interest by gift remains capable of being affected by the victim's claim.

Rules establishing these policies need to provide that –

- A suit by a victim of fraud must be brought within 5 years of the fraud.
- No transaction can be set aside or affected by fraud if setting aside adversely affects a person who subsequently acquired the land in good faith and for value.
- A registered forgery is ineffective except when registered by a person who obtained the registration in good faith and for value.
- A fraudulently obtained registration is ineffective in favour of the person tainted with the fraud (fraud includes forgery).

5.7 Land Disputes

The pattern of land disputes, apart from complaints about the amount of compensation, shows the impact of uncertainty of titles. Activities and areas which create claims include -

1. Cultivation by a local community on forest or plantation land (see Chapter 6 **National Interest versus Land Titles**)
2. Non compliance with regulations regarding land reform
3. Land acquisition for development projects
4. Civil claims about entitlement
5. Customary rights or *hak ulayat* issues (see Chapter 6).

Many disputes involve a community or a member of a community against a government agency, or a community against a company or entrepreneur (*pengusaha*). Unregistered land figures highly, especially where the evidence supporting the claim is not strong. However, even registered titles are vulnerable, given the negative registration system.

Courts

Most disputes are handled by the General Court (*Peradilan Umum/PU*[5]) and the Administrative Court, (*Peradilan Tata Usaha Negara/PTUN*[6]). The Religious Court has lesser jurisdiction. (Land reform issues were handled by a special Land Reform Court between 1964 and 1970.) Appeals are available to the High Court and ultimately to the Supreme Court.

Litigation is time consuming and expensive. It also generates significant costs because of the uncertainties and delays it imposes on development of land. Litigation fails to result in clarification of legal principles because of inherent problems with the judicial system, particularly in the quality of reasons given for decisions.

[5] Law 2/1986

[6] Law 7/1996

Legal issues which recur are:

- The definition of *hak ulayat*, including its principles, criteria, object and scope of authority, and compensation available to *adat* communities
- Land acquisition for public interest, its definition, scope, negotiation procedures and compensation
- Evidentiary quality of the certificate, especially in relation to forgery, and processes of annulment of the certificate
- State land, its definition, scope and processes to be used in relation to it
- Cultivation by the community of plantation, forest and other land, and the principles to be used when settling access
- Legal effect of sale purchase agreements and protection of third parties who acted in good faith.

Land Court Proposals

A number of groups have proposed establishing a definitive Land Court which would garner expertise and knowledge of land issues and focus this on land disputes so that a coherent body of law developed and similar disputes received similar solutions.[7] Other proposals rely on an alternative dispute resolution option either stand alone or as part of the machinery of justice through court annexed procedures.

Given the state of the land law, a specialist court has an immediate attraction because it is capable of bringing a greater degree of predictability to court decisions. However, without reform of the judicial system and the BAL, its chances of success remain questionable.

5.8 Tax Regime

Introducing a Policy Based Taxation System

Land tax is a principle mechanism available to governments to raise money to service land, to influence land investment decisions, and to influence land holding decisions. The maximum tax rate on land in Indonesia is extremely low at 0.5%. This prohibits the introduction of a progressive land tax system and reduces the capacity of local government to generate revenue.

Taxing Buildings

Land Tax is charged on the value of land and buildings. In underdeveloped countries, this regime (if tax is levied at an effectual rate) is a substantial disincentive to land improvement and has immediate and long term deleterious effects. Given the current tax rate, the impact on land development is neutral, but if the tax is raised to the level at which it is an effective instrument in land administration and fiscal arrangements, the issue will be stark.

Taxing buildings with an effective land tax will have secondary economic consequences. Even developed economies such as the State of Victoria, Australia avoid these secondary consequences of dampening building and development by taxing only the unimproved capital value of land.

[7] NGOs are especially interested in a land court. Another support has come from lawyers who argue that Law 2/1986 permits establishment of a special court within the General Court so that every District Court would have access to a specialised judge.

Setting Tax Rates

The political action required in rate setting involves defending the rate to taxpayers. In order to achieve an adequate public understanding and appreciation of the rate depends on having a precise program of what the tax will be used for, for example specific services, administration costs, programs, local levies for special purposes, and so on. These decision processes will have to be developed at the local government level, under Law 22/1999 and Law 25/1999.

Removal of Tax Distortions

If progressive land taxation was adopted, an equivalent revenue to that generated by transaction taxes charged to buyers and applicants for registration could be generated and a disincentive to registration would be removed. The state's knowledge about land ownership and acceleration of registration would be substantially improved.

Using Land Tax to Subsidise Essential Government Programs

Raising taxes to a level to off-set the administrative overheads of land registration would be beneficial because it would keep the charges reasonable and attract a greater number of land owners into the system. This would require a level of fiscal integration, whether on a national, a provincial, or local government basis reflecting the priorities for the registration program.

CHAPTER 6 NATIONAL INTEREST versus LAND TITLES – RESOURCES DEVELOPMENT AND TRANSMIGRATION

6.1 Villagers' and Indigenous People's Land

Indonesian tenures under the BAL are discussed in Chapter 3 **Land Rights**. Few countries have claimed so much for their land law, and delivered so little. The basic strategy of building their law on *Adat* principles carried with it a message to the people of Indonesia that their land tenures were both recognised and respected. Yet by 1999 even highly isolated Indonesian communities in Irian Jaya, Timor, Sulawesi, Kalimantan, Sumatra, and smaller islands had felt the intrusion on their land by developers, resource takers, central government projects and others, all approved "in the national interest". How and why this happened is in great part explained by the "right to control" claimed by the state over all land in Indonesia, and by the severe limitations prescribed for tenures under the BAL.

The New Order Government was motivated to assist mega and overriding national development at the lowest local price for land and land compensation. The land tenure system was a crucial part of the development machinery, as was the planning, financial, military and political infrastructure. The role played by the Indonesian Armed Forces (ABRI) must also be especially acknowledged.[1] Large scale developments were fuelled by a central elite who controlled projects and who extracted rents and payments for the allocation of economic opportunities in all sectors.

Despite the high rhetoric surrounding the BAL and its proponents who claim that it converted property rights into a single system "of new rights based on *adat* law but an *adat* law modified by principles introduced in the Basic Agrarian Law", land theft and displacement of indigenous groups has been pervasive. "The legislature had in mind the legal insecurity of the native population under colonial law, since the rights in land of the native population under colonial agrarian law were not at all secure. Thus the legislature has substituted one kind of insecurity for another, in the hopes eventually of doing away with legal insecurity altogether."[2] The result was, ironically, a massive increase in insecurity.

Given the tension now expressed by indigenous and autochthonous people about their security of tenure, the Basic Agrarian Law can be assessed empirically. It has failed to provide security in non forest land. It is of course unfair to test the BAL against the delivery of security of tenure in forest land. The BAL has operated to remove community and collective land use from the spectrum of ownership by requiring *hak milik* in agrarian land to be individually owned and by not specifically recognising community titles or *hak ulayat* in juridical terms.

[1] ABRI is involved in project implementation throughout Indonesia, ostensibly to keep civil peace.

[2] Gautama and Harsono, 24

6.2 *Adat* in the Basic Agrarian Law

The Explanatory Memorandum required that agrarian law to be based on *adat* law, but that *adat* law would be shaped by "the people's interest in a modern State and their relations with the international world."[3]

Article 5 provided specific limitations. *Adat* rights could not be contrary to –

1. The national interest of the State based on national unity
2. Indonesian Socialism
3. Regulations of the Basic Agrarian Law
4. Other prevailing regulations
5. Stipulations based on religious law.

The law also generated opportunities for farmers to claim ownership and seek registration. If a person cultivated land to the point where his right to use the land was recognised within the *adat* community and he could fulfil the appropriate formalities, he could seek registration as an individual[4].

6.3 Factors in the Loss of Communal Rights

The factors in the loss of community rights include:

1. Land redistribution policy via implementation of individual ownership.

The BAL, according to its supporters, is central to land redistribution and prosperity of the Indonesian people. The ultimate design (currently interpreted) is for each Indonesian to have a sufficient parcel of land for housing and support.[5] The focus is on permanent individual use, which is inconsistent with patterns of collective use that are the basis of *adat* communities.

Many senior members of government report that individual ownership is an inevitable outcome of modernisation, particularly in Java. Harsono[6] is reported to take the view that the BAL is instrumental in restructuring *Adat* communities by forcing collective land use patterns into individualised land entitlements.[7] There is no extensive research on the causes or impact of individualisation on community life, but major areas of Java appear to be affected. In the out-lying islands, however, collective land use patterns predominate and the penetration of the policy of individualisation of land use is highly uncertain. Anecdotal information suggests that there is not only high community resistance to this strategy, but increasingly organised and public opposition.

2. Community rights are not absolute and subject to overriding interests.

Loose recognition of community or *ulayat* rights was given in Article 3 –

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[3] Explanatory Memorandum, objectives of the Basic Agrarian Law, Part A III(1)

[4] Prior to 1997 under PP No 10/1961 such permission was required from the provincial governor.

[5] Interviews with BPN research staff and Deputies

[6] Budi Harsono is the acknowledged legal expert on the Basic Agrarian Law. As such, his views about its purposes and meaning carry large weight.

[7] Interview with Suryo Suwarno, UTBANK – PBN 24 February 1999.

Considering the provisions of Article 1 and 2, the implementation of hak ulayat and the similar right of adat communities, so long as they continue to exist, shall be adjusted to fit the national and state's interests, based on the unity of the Nation and shall not conflict with the acts and other regulations which are higher in the legal hierarchy.

The provision did not create or recognise *hak ulayat* rights, but merely allowed them to continue to exist subject to national interests as these evolved. Communal rights to land were in fact never recognized and are non-registrable under the BAL in any event. Only individuals have the right to register land for *hak milik*. With no express protection and with a clear destiny of irrelevance, communal rights cannot survive under the BAL.

3. Theoretical support for community rights was deliberately vague.

The express subjugation was combined with the theoretical but shallow recognition of *hak ulayat* entitlements as falling within the expressed purpose of "protection of Indonesian people" or "greatest public welfare" in Article 2(3), 12(1), 13(1) and (4), 15 and Part II 2 of the general elucidation.[8] The theory was that the land held in *hak ulayat* (collective land) was protected by the initial statements that the Indonesian nation controlled all land. The national control or national relationship with the land contained the *hak ulayat*. This theoretical support for *adat* communities in continued use of their land is thin. High purpose expressed in vague language does not create land rights.

4. Commentators confirm that *ulayat* land was converted into state land.

Iman Sutiknjo, one of the formulators of the Basic Agrarian Law, explained that *'hak ulayat* (*beschikkingrecht*) is the people's right which has a public character belonging to the customary law alliance as the smallest political unit existing in the territory of the nation. In other words, the *ulayat* right is equivalent to the right of the state, and land supporting this right is equivalent to state land. By assuming that indigenous lands are *ulayat* lands which can be categorised as state land *tanah negara*, the state took over all authority to manage, administer and control legal relations for that land."[9]

5. Land Law and Marriage Law are Non-Neutral.

The basis of land law as deriving from and explicating *adat* law is fundamental. Both land law and marriage law are accorded special place in Indonesian jurisprudence in that they are "non neutral" law and theoretically cannot be changed. On this view, a claim for recognition of community rights could not even be admitted. This is despite the claims that the BAL is based on *adat* principles. The point at issue is whether the BAL changed the concept of *adat* or not. Harsono agrees it did. Therefore, if it could be changed in 1960, why cannot it be changed again?

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[8] Herman Soesangobeng, Cultural Adviser LASA/ILAP, Conference Paper *The Philosophy of Adat in the Basic Agrarian Law*, delivered at **Conference for 38th Anniversary of the Basic Agrarian Law** at BPN Jakarta, 13 October 1998 makes this point in terms of the "perversion of the 'land for the public' notion in the Law. The author however makes a case that the problem is not with the Law, but with its application and with a failure to understand the *Adat* philosophy with the Law.

We believe that the problems arise from the weak protection of collective and native titles inherent in the Law, not from interpretation or administrative implementation.

[9] Maria Ruwiastuti, 1998 p1

6. Abolition of Territorial Capacity of Communities.

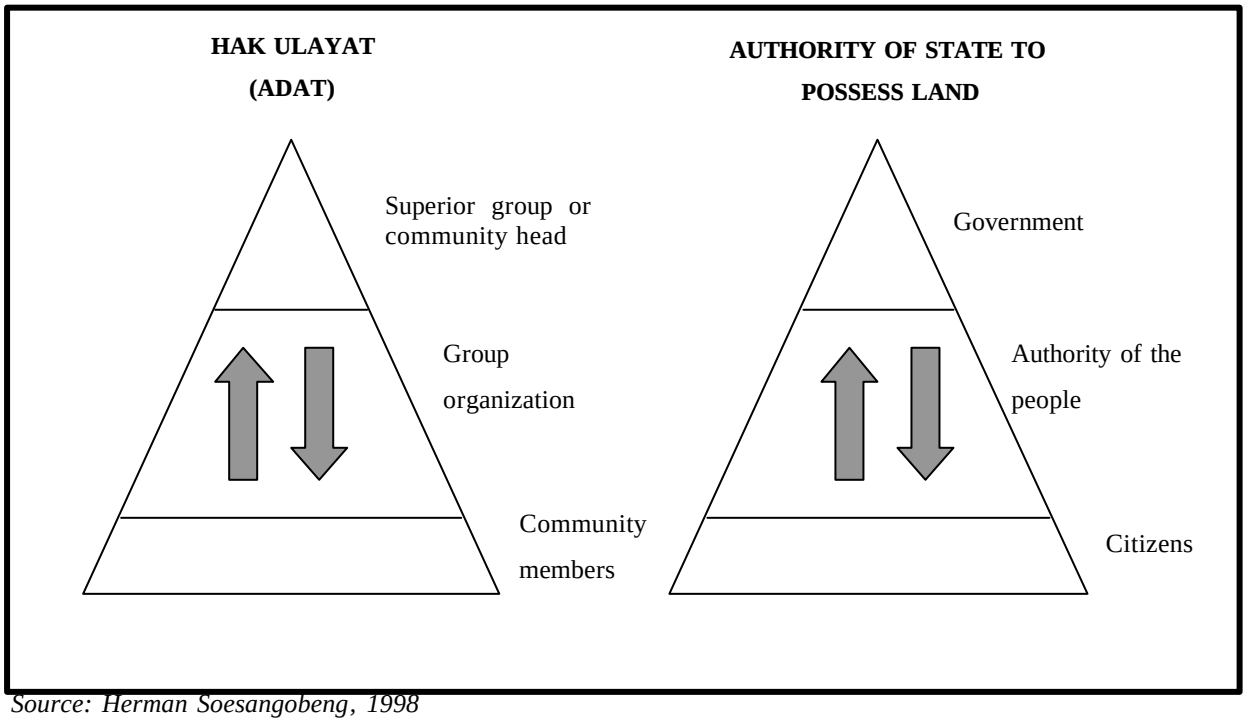
Adat principles not only distributed the land intra village. They distributed the land between neighbouring villages and communities. The principles allowed mutually respected and stable territorial integrity (sometimes in the context of population pressure and sometimes not, and sometimes with local and even violent land related disputes). The territorial integrity of communities was derived from various sources, including in the feudal areas, sovereign rulers. In others, it had a more loose source, born of praxis. The Dutch had ensured that by and large local communities should be left alone, apart from lands set for plantations etc under Dutch control. A formal opportunity for recognition of *ulayat* titles existed for some time, but was not acted on by the communities.[10]

The national government fundamentally changed these territorial imperatives when it passed the BAL. It substituted the State as the source of territorial integrity for individual communities. This change was seen as necessary for "national order and unity".

7. *Adat* philosophy in the Basic Agrarian Law

The struggle to interpret the Law to give a basis for community land use is however a corollary of a formal vacuum in express recognition. The debate has developed over the life of the Basic Agrarian Law and has reached a level of cogency at which it is possible to argue, as a matter of legal theory, that formal recognition of community titles would be compliant with not only the spirit (where there is shrinking opposition) but to the text (where the opposition to change of the Basic Agrarian Law is most strident).

Figure 6.1 Similarity between Concept of *Ulayat* and State's Authority to Possess Land



Source: Herman Soesangobeng, 1998

[10] See LAP-C Topic Cycle 4 Report on *Adat* Law Perspectives

6.4 Resources

Mining

Opportunities to access minerals varies from country to country. To understand mining law, one needs to differentiate between the grant of a mining title and working for minerals. The grant of a title is effectively neutral to landholders, but in the mining industry it serves to provide certainty of opportunity should the company decide to mine. It keeps other mining companies out. Only the working for minerals will disturb the occupier and owner of land. Hence negotiations about the kind of working activities and compensations for intrusion fall in at this stage. These negotiations depend on the mining law, the planning law and land use development codes, some of which may require consultation with affected landowners and occupiers and some of which will depend on the miner satisfying the relevant government or other official about the standards of work.

Dutch Law

Minerals belong to the owner of the land unless a different law is made. Any substantial exploitation of mineral resources is subject to government concession. The holder of a concession becomes owner of the mine and has a right to occupy its yield. The landowner is only entitled to some *redevance*.[11]

Indonesian Law

Conceptual horizontal separation means that minerals belong to the State, not the land owner. Except where expressly differentiated, "minerals" in the text below includes all minerals in whatever form and includes gas and oil. Mining is controlled by the Basic Mining Law No 11/1967 and Oil and Gas Law of 1960, amended by Law 9/1969 and Pertamina Law 8/1971. Pertamina, the state oil company, goes back to 1945 and is one of the largest state owned enterprises in Indonesia. The organisation of access to timber and mineral resources in 1967 was a centralised response which reflected the administrative arrangements of the time in that agrarian affairs were deliberately kept separate. The result is that mining titles override land titles and no new land titles can be granted in a mining area. After a mining right has been granted, no land rights may be granted over the land in the right without the permission of the Minister for Mines.

The Basic Mining Law No 11/1967 controls the relationship between surface land rights and right to develop mineral resources. Holders of surface land rights are obliged to permit the holders of mining authorisations to carry out mining operations.

Commencement of operations must be preceded by notice to the landholder of the purpose and location of mining, and payment of agreed compensation. If the agreement cannot be reached, the owner may refer the matter to the court for determination. Where mining rights have been issued for land for which no surface rights have been granted, prior approval of the Minister for Mines is necessary.[12]

Mining is prevented on sensitive places: cemeteries, sacred places, public infrastructure etc.

Indonesian protection of land holders is governed by Article 26 of the Basic Mining Law. Article 26 provides that holders of surface land rights are obliged to allow the holder of the mining authorisations to carry out necessary operations provided that –

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[11] WM Kleij 1978, p 81

[12] Land Administration Project, Project Preparation Report, 269

(a) prior to the start of operations those holding a title are notified of the purpose and location of the intended operations and shown the Mining Authorization or a copy
(b) the title holders are compensated or secured for any indemnification in advance.

Compensation is dealt with under Article 27 which leaves the matter to mutual consultation. If no agreement is reached, the Minister for Mines makes a decision, or if that is unacceptable, it goes to the courts. Liability for damage to surface of the land by accident or design is with the miner.

Mining titles are usually opportunities to prospect, explore and to mine. They can be overlayed. They are timelocked. Any holder must mine within a certain period.

6.5 Forestry

Status of Forestry Policies and Law

This Report does not review forestry policies relating to land which are addressed in LAP-C's report Topic Cycle 5 – Forest/Non-Forest Land Issues. It deals with the impact of forestry on security of tenure. A substantial review of the policies and procedures whereby forest lands are categorised and allocated for specified functions and uses is contained in the Ministry of Forestry, Forestry Sector Study.[13] Forestry is under review. The experience of local populations of forest areas is a substantial influence on the rethinking of forestry policies. The 1967 Basic Forestry Law is under revision and a number of drafts have appeared. While earlier versions of this proposed new law contained some explicit protection for land uses by local people, none appear in the current draft.

Concessions Undergoing Changes

The government began to award forest concessions to private companies in 1971 under the auspices of the forestry law which grants concession holders the sole right to cultivate and exploit the forest in their concession areas. The law has had a negative impact on forest exploitation and is blamed for leading to the concentration of the country's forest assets in the hands of a few major business groups.

On current figures, 421 private companies are currently involved in logging activities on 51.5 million hectares. However most of the companies are operating under 33 leading business groups. The Kayu Lapis Indonesia Group owned by Hunawan Widjajanto is the largest forest concession holder with 3.5 million hectares. Next is Burhan Uray's Djajanti Group with 2.9 million hectares, Prajogo Pangestu's Barito Pacific with 2.7 million hectares and Mohamad "Bob" Hasan's Kalimanis with 1.6 million hectares.

The Supplementary Memorandum of Economic and Financial Policies, Fourth Review under the Extended Agreement, attached to a letter which the Indonesian government wrote to the IMF on Tuesday 16 March 1999, contained the following information. *"A new forestry regulation signed by the President on 27 January 1999 authorised the auction of forestry concessions and the transfer of concessions by sale. This eliminates the requirement that concessionaires must either own or develop wood processing facilities, lengthens the concession period, and establishes a framework for forest concession performance bonds"*. Implementing regulations for performance bonds are being developed in consultation with the World Bank.

[13] Forestry Sector Study, Asian Development Bank Project Preparation, Mid term Report

Second, the Ministry of Forestry and Estate Crops is observing a moratorium on the award of new permits for forest land concessions while new land allocation procedures and conversion targets are being developed.

Third, the formula for the forest resource rent tax introduced in 1988 will be reviewed, and if necessary revised in consultation with the World Bank to ensure that it continues to capture most of the economic rent as international market conditions change.

Fourth, implementing regulations for Environmental Management Law have been drafted covering air pollution control hazardous waste management, and environmental impact assessment the environmental protection program is being further developed in consultation with the World Bank."

Review of Forest Taxes

The review of forest taxes was announced in early April 1999. Export taxes on logs and sawn timber have been reduced to 20 percent. This has not met with unanimous approval. The stated policy of the review was the inducement of large holders to relinquish parts of their holdings to smaller concession takers. However, the association for the smaller companies, Indonesian Forestry Society, thinks that the new tax will encourage big companies to increase their holdings.

The tax will be imposed on the existing timber companies whose areas exceed the maximum 100,000 hectares in a province. Although concessionaires will be allowed to manage forests in other provinces, the total area under their management cannot exceed 400,000 hectares nationwide. When the concession rights expire, the government will take over the excess and auction them according to terms agreed by the IMF.

6.6 Transmigration

The New Order regime recognised an increase in population mobility from one region to another and used the Basic Transmigration Law of 1972 as its principle tool. "As a result, current population distribution programs, especially the transmigration program, will become critical tools for regional development. The idea is that human carrying capacity must be in accordance with natural carrying capacity and spatial considerations. The population distribution program that fosters spontaneous [sic] migration (such as the transmigration program) will therefore be important in the future. The program is currently supported by development efforts which give priority to the provision of infrastructure and projects which are able to absorb manpower in various places outside of Java and Bali."[14]

As a result of these policies many thousands of people were moved. Transmigration was an attempt to create a national unity by exporting both the Javanese culture and Islam to the outer islands and other provinces. Seen in this context of a pseudo colonial centralisation of power and orthodoxy, transmigration is bound to cause problems beyond its planners' imagination.

The *Reformasi* Cabinet under Habibie is now struggling with failure of absorption of migrants in many areas of Indonesia, including Ambon, Aceh, West Kalimantan and Timor.

[14] **Agenda 21 – Indonesia**, page 70

Development

Indonesia's assessment of its problems is highly ideological. See for instance:

"Present housing development has largely neglected the sensitive aspects of the environment that it was supposed to protect. Another problem resulting from the development of housing and residential areas is the increased control of land by private parties. Housing development has tended to focus on the production of houses while neglecting the formation of harmonious residential areas. Up until now, there are few housing development projects related to people's economic activities. All of these constitute the results of housing development based only on the market mechanism".[15]

Housing development has neglected the environment. The production of housing has caused substantial distribution and social problems, not the least of which are those arising through the process of moving people off their land for development. The pattern of development is by large tract acquisition and large scale subdivisions produced by developers. The process of acquisition and development was substantially and fundamentally flawed.[16] However, the fault was not the private market, but the kind of limited market produced by the deliberate policies and favouritism of the Soeharto New Order which rewarded excessive and aggressive land developers, especially since 1990.

6.7 Land Reform

Land reform in Indonesia typically means land redistribution. A Study of Rural Land Reform was conducted by BPN in cooperation with the Faculty of Agriculture, Bogor Institute of Agriculture 1994/5[17] defined land reform as the management of land tenure, land use and land appropriation in order to improve the prosperity of farmers. The study showed that the structure of agricultural land tenure was the lease relationship. Leases are not a regulated tenure. Since then land reform policy has been driven by the simple perception of land scarcity on Java, defined by statistics which divide areas by numbers of people, and drive the conclusions that when the division shows an increase in the area of land per person, things have improved, and vice versa.[18]

Whatever the strategy, land reform remains a continuing aim of the GOI, but the better tool of achieving equitable distribution such as progressive land taxes and an efficient market remain illusive.

Land Disputes

The pressure for recognition of community titles is particularly apparent from the number and nature of land disputes. While accurate figures are not available, some data does exist. This overview is based on data analysis outcomes provided by the Indonesian Legal Aid Foundation. In 1988 there were 553 cases in 14 provinces in Indonesia with the classification as follows: 144 cases

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[15] **Agenda 21 –Indonesia**, Preamble page 9

[16] Report LAP –C Topic Cycle 2 – Land Acquisition and the Land Development Process

[17] BPN Implementation Study of Rural Land Reform, 1994/5

[18] The superficiality of such an analysis is obvious if one allows that, statistically, an apparently fairer land distribution might be achieved better by population control than by land redistribution and reform. To achieve sustainable results, land reform policies must be based on an assessment of how much and what land can be redistributed, the disruption costs and the deeper socio/political issues. Meanwhile, the most obvious socio legal strategy for land reform in Indonesia remains obvious – give a secure title to communities who have used land for long enough to have established and stable life styles.

or 41.6% related to large scale plantation development such as palm oil, rubber, tea and tobacco plantation.

Table 6.1
Plantations, Industrial Forests (HTI), Mining and Fishponds Cases in 14 Provinces

No	Provinces	Plantations	HTI (Industrial Forest)	Mining	Fishponds
1	Special District of Aceh	2	2	1	0
2	North Sumatra	15	8	0	1
3	West Sumatra	3	1	1	0
4	South Sumatra	67	17	2	1
5	Lampung	18	19	0	1
6	West Java	5	2	1	1
7	Special Capital District of Jakarta	0	0	0	0
8	Central Java	3	1	0	1
9	Special District of Yogyakarta	1	0	0	0
10	East Java	19	1	1	1
11	Bali	2	0	1	1
12	South Sulawesi	2	0	0	0
13	North Sulawesi	6	1	1	0
14	Irian Jaya	1	5	1	0
	Total	144	57	9	7

Source: Land and Environmental Division of Indonesian Legal Aid Foundation 1998

Table 6.2
Expansion of Industrial Estates, Tourism Areas, Housing Complexes and Related Cases

No.	Provinces	Industrial Estate Expansion, etc.	Other Cases
1	Special District of Aceh	0	2
2	North Sumatra	15	3
3	West Sumatra	2	5
4	South Sumatra	7	41
5	Bandar Lampung	24	11
6	West Java	14	5
7	Special Capital District of Jakarta	30	86
8	Central Java	5	13
9	Special District of Yogyakarta	1	2
10	East Java	15	23
11	Bali	3	2
12	South Sulawesi	6	4
13	North Sulawesi	5	2
14	Irian Jaya	2	8
	Total	129	207

Source: Land and Environmental Division, Indonesian Legal Aid Foundation 1998

Table 6.3
Displaced Persons, Land Area Disputed and Families Affected

No	Provinces	Total Cases	Land Area Disputed (Ha)	Total Victims (Households)
1	Special District of Aceh	7	59,985	4,254
2	North Sumatra	42	113,050	53,727
3	West Sumatra	12	15,483	1,612
4	South Sumatra	135	195,585	26,284
5	Bandar Lampung	73	253,122	98,846
6	West Java	28	3,422	2,887
7	Special Capital District of Jakarta	116	637	844
8	Central Java	23	1,083	1,241
9	Special District of Yogyakarta	4	1,057	572
10	East Java	60	1,050	5,632
11	Bali	9	285	684
12	South Sulawesi	12	13,110	2,382
13	North Sulawesi	15	32,285	6,593
14	Irian Jaya	17	137,197	8,798
	Total	553	827,351	214,356

Source: Land and Environmental Division, Indonesian Legal Aid Foundation 1998

6.8 Customary and Native Titles

Theories of Collective Use of Land

Collective land use by a group or community is vital to all legal systems. Every system of land distribution must allocate land for public or collective use. Many systems also recognise limited collective use titles and tenures. Recognition of collective or community use of land is not incompatible with land titling or resource retrieval systems, or with overlaying state land ownership or control or private titles with indigenous or local community rights. Public rights of way, high tide foraging rights, hunting rights and use of commons are familiar in English derived legal systems.

The jurisprudence of indigenous land rights, or native title tries to establish a reasonable balance between the over-layered claims of resource takers and indigenous users, and community claims and land developers. This jurisprudence is now highly developed. There are also highly developed systems for restoring lost, ignored and overridden native title to heritage and ancestral land, using legislative models which create statutory entitlements, facilitate indigenous empowerment, and build in dispute resolution mechanisms. These systems aim at announcing a sensible and defensible balance between the rights of indigenous groups and other competing land users, including pastoralists, miners, foresters, developers, utility suppliers, water users and so on.

The tension between native and community title claims and other land uses appears in countries at all stages of economic development. At the higher end of the development scale are Canada, United States, New Zealand and Australia. At the lower end are African countries. In the middle are industrialised countries with large indigenous populations who are looking for greater recognition of land rights and fairer land distribution, including South Africa, the Philippines and Indonesia.

Titles and Customary Land Uses - The International Experience

The common experience of native peoples is loss of land on conquest or settlement by outside groups. Whether the taking was by conquest, by acquisition for consideration, or gradual intrusion and settlement, the state and powerful groups articulated explanations and justifications, many of them rhetorical and ideological. Frequently, these explanations held for an historical moment but lost their persuasion in the light of subsequent history.

These explanations are positively embarrassing to eyes familiar with indigenous rights movements, the withdrawal of colonial masters, and changes in the way the nations of the world are prepared to take responsibility for indigenous people. Their insensitivity to the nature and indigenous people is unacceptable in a modern world. Take the Australian example. Aborigines were described as little better than monkeys. Despite there being an estimated 200,000 – 400,000 Aboriginal inhabitants at the time of Cook's acquisition on behalf of the British, 1788, the land was legally described as "unpopulated". The British acquisition was regarded as a "settlement", not a "conquest" according the population recognition as a colonized and conquered people and given normal entitlements of any conquered nation. By not recognizing the people as a nation or as people at all, the British take over of Australia was accompanied by repression and violence, creating one of the saddest experiences among the indigenous people of the world. This position is finally being addressed, particularly by the efforts of the Australian High Court in redefining the legal position of Aboriginal and Torres Strait Islanders. The court has legally recognised Australia as conquered, giving space for a recognition of rights of Aboriginal people, especially their land rights, and, ultimately, an Aboriginal nation.[19]

The recognition of the entitlement of customary groups and indigenous people to continued land access has grown, and is in the driving force behind the attempt to develop a convention on Indigenous Rights through the Human Rights Committee of the United Nations (Annex 2).

Groups in Modern Legal Systems

The use and ownership of land by groups is a feature of almost all societies, certainly successful ones. Market economies have developed highly sophisticated and technical methods of multiple entitlements and uses.

Companies

The conceptualisation of a legal entity limited in liability to its members and its creditors to the extent of its capital, and hence preserving the private capital of owners from business debts, was the most important factor in commercial growth. It encouraged and permitted sharing of commercial risks, including risks that were enormous, which would otherwise not have been taken. *The use of the joint stock or limited liability company is the basis of commercial activity throughout the world*[20].

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[19] In Milirrpum v Nabalco Pty, Ltd 1971, 17 FLR 141, Blackburn J decided that the traditional community did not have a system of law, and hence no recognisable land rights. This analysis has gone full circle. The High Court in the Mabo v Queensland No 2 1992, 117 CLR 106 credited traditional communities with legal capacity and in the Wik People v The State of Queensland 1996, 187 CLR 1 determined that they had territorial sovereignty over their land capable of reversing the "terra nullius" view of Australia as empty land. By changing the fundamental analysis of Australia from a "settled" (that is empty) land, to a "conquered" land, the Court admitted that Aboriginal Australians had law and ownership derived from their law.

[20] The company concept cannot be applied as a mechanism for ownership by communities in Indonesia, unless the BAL is changed

Associations and Cooperatives

Modern legal systems grant legal status, and along with it capacity to own land, to a variety of other groups more or less regulated, which allow land ownership for group or agreed purposes.

Trusts - single owner managing for group

In Anglo American law there is little restriction on the kind of purpose (provided it is not illegal or against public purposes) for which a group can come together and form a trust or an owner of property declare the property subject to a trust for the benefit of known or knowable individuals or a limited type of purpose, usually educational, religious or charitable. It is not truly group ownership, but usually ownership or management of property (including land and shares) by one or two people for benefit of a group. The growth of superannuation and other worker protections has seen the trust model underpin a large scale accumulation of funds for group benefit of pensions and support retirement.

Common Ownership

These are forms of co-ownership and are used for personal and business reasons. In Dutch law, they are used to permit ownership by several investors (*vrije mede-eigendom* or free co-ownership) or commercial partnerships, to manage estates, or to allocate property in a marriage (*gobonden mede-eigendom* or tied co-ownership).

They are unsuitable as a model for community ownership because they normally involve one co-owner being able to alienate his or her interest or call for the dissolution of the arrangement.

Indigenous Ownership

There are many models of indigenous ownership which operate throughout the world, ranging from the discredited "reserve" system to advanced systems of overlaying native title on existing pastoral and mining areas (though not over freehold) and undistributed public or government land. In some cases, the title owners are given specific rights to negotiate their way into the modern world while preserving their traditional land use patterns. Australia, Canada and New Zealand provide examples. The **Te Tur Whenua Maori Act 1993** outlines the constitution of the Maori land court, defines Maori land as "customary" land and Maori freehold land. While this is a relatively minor amount (estimated at 5%) of New Zealand land, the rights are strong and vigorous.[21]

Two Problems – *Adat* Communities and Native Title

Some commentators view customary titles as fitting uncomfortably into a land administration system. The reasons given include -

- Land within the group is not defined or transactions recorded
- Tenures are not developed and do not fit the normal pattern
- Use not ownership is the focus of entitlements
- Outsiders are not encouraged to use the land
- Rights focus on groups, not individuals.
- No mechanism exists for allocating the ancillary opportunities – right to mine, to take trees, remove growth, flood or drain etc.

[21] See http://www.tpk.govt.nz/tangata/index.html#tangara and www.maoriland.govt.nz/stats.htm. Maori land legislation database (hard copy sources) is www.auckland.ac.nz/libr/maoriland.htm.

- Focus is on repeating activities in climatic cycles rather than changing the use, entertaining transactions or managing outsiders' access
- There is no market in the user rights or in customary land. Hence there is no price setting mechanism and no commodity value, although there is the inherent value of being able to sustain the local populations.

In cases of communal land uses, all of these are more or less true, but the problem lies with the inflexibility of a land administration system, not structure of the uses. *There is no inherent policy or jurisprudential reason for excluding community land from the land administration system or for not recognising communal land uses as a tenure and providing appropriate legal protection for its security*. In fact some countries with indigenous population have managed to address all these issues and to produce resolutions which balance the competing interests and provide a stable result.

6.9 Community Ownership of Land

International experience

Land registration focuses on protection of private property rights. It does not provide a natural home for native or community title, virtually anywhere in the world unless tenures are adapted. Once this is done, the artificial barriers of land registration systems to admission of community or indigenous titles are being broken down, and inclusion of crown, government or state titles and collective titles, is not only theoretically appropriate but practical. In fact, the inclusiveness of the land register (as a record of all land in the area of legal competence) is now the typical goal, making government and native title land well within its coverage. Following this trend, Indonesia could register *adat* land even though *adat* rights focus on use, not ownership and derive their integrity and meaning from traditional ways of life among village and native peoples.

A major political and social issue is the failure of BAL to recognize the right of *adat* communities to their land. Given the restriction of *hak milik* to individuals, the anticipation in Government, and expressed in the corporate philosophy of BPN under the New Order regime was that the communal allocation of land would gradually die out. The individualization of ownership is seen as a catalyst for bringing village communities into a more modern, and more centrally manageable organization. Providing registration for community land runs counter to this plan. The political realities however are demanding an attitudinal change. Even BPN is proposing a community title.[22]

Proposals for Titles for Adat Communities

The two extremes of this proposal are:

1. A very formal and structured arrangement with an identified person to take the "title", a group to monitor the title which is a legal entity, and a disputes system which identifies group membership and land use entitlements. This is thoroughly inappropriate for meeting *adat* community needs. It is too formalistic, too structured to cover the myriad of arrangements in the country, and incapable of being naturally absorbed into living communities.
2. A loose and flexible arrangement consisting of boundary definition, sensitive to the vagaries of boundaries in day to day community operations, and doing little more than ensuring that outsiders appreciate the land is not for the taking. The problem still remains of the formalistic and strict requirement of ownership by a single individual, although some in BPN and other agencies are showing a preparedness to reach beyond the gospel of the BAL and admit a group title.

[22] In June 1999, the Minister for Agraria produced a proposal for recognition of community titles for villages.

This second type of proposal should be strongly supported and encouraged. It should also be extended into forest areas. Should the individual ownership restriction remain, a compromise would be necessary.

While BPN needs a "subject or right holder" to include on the registration record, a community group is unable to provide one in relation to parcels. The nature of the community's use therefore cannot be reflected either in Basic Agrarian Law or in the registration scheme established by BPN. The formal proposal involves creating a community group exception provided -

- The group has a legal entity
- The registration identifies a process and person who can transact with the land
- The community has established a disputes handling process to deal with local claims for land use and membership of the community.

Forest Dwellers

Forest people raise different issues, especially when they are nomadic. The environmental impact assessment (AMDAL) procedure done prior to development does not require that the presence of forest people is reported or that their land tenure, including their land use practices, are described and mapped.

Customary uses do not focus on "land" and have no need for a sophisticated "tenure" system. They can focus on use of land, or even on more amorphous relationships with land. They can be mere grazing rights, tree crop access, sacred site use or other passive associations with land. The range of ways land is used in the Archipelago is extensive, and defies descriptive generalisations. The degree of precision is, however, not necessarily in the landscape but in a combination of the landscape and its spiritual meaning. Once this dimension of meaning is added, the precision of land use patterns increases. In New Zealand, Australia and Canada, models exist for land rights for nomadic peoples, and even facilitate mutually satisfactory resource harvesting arrangements between resource seekers and local indigenous people.

International Obligations and Negotiations

International Obligations

While local autonomy is generally respected, international attention is definitely focused on the way a local law or administration operates as against accepted standards. This is particularly the case in questions of discrimination against women and racial discrimination, in treatment of an indigenous or native people, and in environmental protection.

Indonesia has signed a number of United Nations Documents which ensure that the domestic laws have international significance.

UN Declaration of Human Rights

Indonesia is a signatory to this basic human rights document.

Convention on Elimination of All Forms of Racial Discrimination 1965

The House of Representatives agreed that a bill on the 1965 Convention on the Elimination of All Forms of Racial Discrimination be enacted into law on 6 April 1999. Indonesia has accepted all articles but with a reservation in relation to article 22 to the effect that, "The government of the

Republic of Indonesia does not consider itself bound by the provision of Article 22 and takes a position that disputes relating to the interpretation and application of the convention which cannot be settled through the channel provided for in the article may be referred to the ICJ only with the consent of all the parties".

When this convention is signed, the local law must be assessed against the principles in the convention. The implementation of the convention by Indonesia will be monitored by the committee of 18 UN experts, and by periodic reports provided to the UN Secretary General.

International Covenant on Economic, Social and Cultural Rights 1966

Indonesia has not ratified this covenant, nor the protocol on implementation.

International Covenant on Civil and Political Rights 1960

Indonesia has not ratified this covenant.

Agenda 21

The theories about the relationship of man and land are undergoing a remarkable change. The concept of sustainable development, strains on the environment, changes in production and land protection have brought different perspectives. Land use planning is now about developing land resources in a manner that is productive, sustainable and conserves.

Sustainable development was the central theme in Agenda 21 at the UNCED conference Rio de Janeiro in 1992. As a result, Indonesia produced a **National Strategy for Sustainable Development, Agenda 21**. Chapter 8 deals with resource management. Chapter 10 explains an integrated approach to planning and management of land resources.

Nowhere in the document is there a discussion of land law, land tenures, or community titles. The report acknowledges the that tendency to have smaller plots of land, resulting from changes in the allocation of land from agricultural to non-agricultural purposes, and the transfer of ownership of that right to developments will continue to threaten the viability of some land in the agricultural sector situated close to urban industrial areas.[23] Even with these omissions, the initiatives proposed in **Agenda 21 Indonesia** remain appropriate and do not conflict with a land right theory for native people.

Global Plan of Action - 1996 Habitat II Conference

A Plan for Communal Titles

The Habitat Agenda in Istanbul adopted in June 1996 focused on human settlements and urban development. Its messages are particularly for urban poor, but the tools it is using are applicable to non urban groups.

The Global Campaign for Secure Tenure has seen Habitat take a new strategic role, acting as an advocacy agency and mobilising the active support of a host of global, regional, national and local partners. The Campaign provides profile, support and a voice to hundreds of millions of poor, homeless and inadequately housed people trying to break out of a cycle of poverty.

[23] National Strategy for Sustainable Development, Agenda 21, p. 20

Habitat is proposing an approach to the Global Campaign on Secure Tenure to be launched in advance of the Global Campaign on Urban Governance. The strategy is a first step towards an International Convention on Housing Rights.

The key instrument delivering secure tenure is seen as concerted opposition to forced evictions. A Commission on Human Rights Resolution 77/1997 resolved a forced eviction "constitutes a gross violation of human rights, in particular the right to adequate housing". The policy approach advocated by Habitat is to examine the route of choice and alternatives, rather than eviction. Habitat points out that forced evictions involve extreme negative consequences -

- Evictions tend to be most prevalent in countries or parts of cities with the worst housing conditions
- It is always the poor that are evicted - wealthier classes virtually never face forced eviction, and never mass eviction
- Forced evictions are often violent, and include a variety of human rights abuses beyond the violation of the right to adequate housing
- Evictees tend to end up worse off than before the eviction
- Evictions invariably compound the problem they were ostensibly aimed at 'solving' and
- Forced evictions impact most negatively on women and children.

Indonesian people in urban, rural and forest areas have experienced mass forced eviction and displacement. The pattern has been associated with the lack of land rights and consequential loss of opportunities to negotiate quit terms which are fair and reasonable. The existing compensation packages are inadequate and do not provide compensation for loss of homes and livelihoods. This issue will be examined in greater detail in LAP-C's Topic Cycle report "Displacement of People and Resettlement".

Strengthening of land rights by recognition of possession as a tenure and by recognizing ownership of the Indonesian people to their communal lands are the first steps to remedying this situation.

In an attempt to encourage positive debate about how to resolve issues surrounding communal and native titles, the following plan is proposed. The plan makes no distinction between a sedentary and a nomadic community because it proposes a flexible approach which recognises the range of land use patterns and allows negotiations for alternative use, development, resource taking, compensation, royalties, employment and other matters to be managed by the owners and the outsiders within a framework of definitive and unequivocal recognition of land ownership by the collective groups.

This proposal aims at keeping the **same concept of ownership for communities as is available for everyone else**. The title is registered through the land office as a *hak milik* in the name of an individual or number of owners (as co-owners) who hold(s) the title on behalf of the village or community. Given the political need for recognition of community titles, and the need for economic certainty in an economy going through post-recession restructure, it is essential for legal change in relation to community titles to be made through an Act of the Parliament of Indonesia.

The principles applied in the draft *Undang Undang* below are explained below. The choice between the types of title are *hak ulayat* or *hak milik*. This proposal uses *hak milik* because it is already the basic right of all Indonesians and is amenable to the community title concept and easily converted to freehold. *Hak ulayat*, on the other hand, has a heritage of being persistently disregarded or overridden, a heritage which needs to be emphatically reversed.

PROBLEM	SOLUTION
Who initiates the process of getting a title	Someone has to convert the non title village land to titled village land. The initiation can be by the village or tribe itself, by the land agency, or by a third party.
On state or other land	The title is available for state or other land. (Ideally, even forests land).
Who owns	The village or the community through the community representative(s).
Decision process	By the means usually adopted by the community to make important decisions.
Where is registered title recorded	Records should be kept in the village to ensure transparency, and in the normal land register.
Process of sale and transfer	*To insiders*: by the village or tribe according to village its and not registered *To outsiders*, by the process identified by the village or tribe for decision making
Individual titles	By the usual process established by *adat* law or practice.
How much land should be included in the title	All land affected by *adat* as applied by the community
Where	Within the spatial boundary, recognising that this will need adaptation from time to time if parcels are put into individual *Hak Milik*, acquired by outsider, or community land increases or decreases.
What is shown on the register	Recording should be made for the community in the name of a person(s) identified by community process "on behalf of the … village/Community", that is the community representative.
Who can sell or transfer	The community by its community decision, through the community representative.
How land is individualised	Acquisition of an individual title from village land is by the ordinary process of village recognition. The individual can apply for a *hak milik* in the ordinary way
Internal access disputes	As determined by the community
Decision to sell, subdivide or other transactions with third parties	As the community decides.
Outside Restraints on community decisions	Normal legal and institutional restraints of criminal and civil law, plus community norms
Internal Restraints	The power of the person whose name is on the title is set by the community decision structure.
Winding up	Provision needs to be included for those communities which become dysfunctional. Land can be realized, sold or distributed among members as decided by the community
Tax	Same tax structure applies, but a progressive land tax should be sensitive to the area of land belonging to approximate number of members of the community and to the amount of land devoted to community uses: graveyards, communal meeting places, roads and paths and so on.
Securities	The community can decide to raise money by offering the land as security and a security title over the land can be obtained in the normal way.
Transactions	The same transactions are available as with *hak milik*.
Raising levies	The village can raise levies from members to develop facilities on the land.

Discussion Draft for Community Title Law

Act No .. of 1999
RE
OWNERSHIP OF LAND BY COMMUNITIES AND VILLAGES

BY THE GRACE OF THE ONLY ONE GOD

PRESIDENT OF THE REPUBLIC OF INDONESIA

Considering

a. That *Adat* communities require stable arrangements for use of their land, it is necessary to make available a strong institutional and guaranteed right capable of providing legal certainties for interested persons to boost the participation of people in national development and establishment of a just and prosperous society
b. That since the coming into effect of Act No 5 of 1960, re the Basic Rules concerning the Fundamentals of Agrarian Affairs (UUPA), no comprehensive legislation has been established concerning the use of community land as a right
c. That *Adat* and other communities should be able to own and deal with land in a way that suits both the communities and the nation
d. That in the light of the above it is deemed necessary to establish legislation concerning ownership of land by communities.

Bearing in Mind
1 Act No 5 of 1960 on the Basic Rules concerning Agrarian Affairs (UUPA) [State Gazette No. 104 of 1960, supplement to State Gazette No. 2042]; with the approval of

THE HOUSE OF PEOPLE'S REPRESENTATIVES OF THE REPUBLIC OF INDONESIA

RESOLVES

To stipulate: **ACT RE OWNERSHIP OF LAND BY COMMUNITIES**

CHAPTER 1
GENERAL PROVISIONS
Article 1

In this Act the following terms have the following definitions:

1 A community decision is a decision taken by the community according to its usual practice of making decisions which affect land ownership and use.
2 Land Office is an operational unit of local government at the district or municipal level and a similar administrative level which has the duties to administer the registration of land rights and to maintain the public registers of land registration.
3 The Community Land Book is the book kept by the village in which decisions about the land are recorded according to Article x, and is available for inspection without fee by person at ….. during the times ……..
4 Recording is -
- recording the *hak milik* of the community in the Land Office, and
- recording a community decision in the Community Land Book.

5. A community member is a person who is recognized by the community as a member by its usual process and, for the purposes of giving effect to a community decision, who resided in the community in the 3 months prior to that decision.

Article 2

[Nature of the right and registration]

(1) A community may obtain a *hak milik* (right of ownership) over the land which is used according to community practices and rules for -

- community purposes, or
- purposes of people as members of a community.

(2) The land in the right must be identified by a boundary survey by arbitration or both. The process of establishing boundaries must take into account the degree of precision associated with the practices of the community.

(3) The community must, by community decision, nominate a person(s) who is their representative or representatives and whose name(s) appears on the certificate to the *hak milik* and in the Land Book. This person or persons must seek registration of the *hak milik* in the Land Office and must hold any certificate which is issued on behalf of the community. The records in the Land Office must say that the person is owner as representative of identified community.

(4) For purposes of the UUPA, the use of the land by the community or by individuals belonging to the community is use of the land for individual purposes and complies with the UUPA. (Assuming the UUPA is unchanged)

Article 3

[Dealings with the land]

(1) The community may, by community decision and through tis representative, deal with the land by sale, transfer, lease, security, subdivision, or issue of property rights to outsiders, and may undertake any negotiation with any third party in relation to allowing the third party to do -

- any thing to the land,
- determine, receive and pay compensation or price, and
- generally undertake any act in relation to the land or rights to the land which has legal consequences.

(2) An individual may acquire *hak milik* in land held owned by a community and may receive a certificate evidencing this *hak milik* from the Land Office.

(3) The Land Office must not provide a certificate to an individual in relation to land owned by a community unless the community, by community decision, has consented to the transaction.

(4) The community representative must not undertake any negotiation in a process which would, if completed, affect the *hak milik* without prior approval of 60% of the adult members of the community given in a secret ballot.

Article 4

[Village records]

(1) The person(s) whose name appears on the certificate as community representative(s) must record all community decisions and any subsequent transaction concerning the land in the Community Land Book immediately the decision or transaction is made.

(2) Records must be made of –

Transactions concerning the whole or part of the land

Between the community and non members -

- sales
- transfers
- subdivisions
- securities
- lease
- release
- *share agreements [query]*
- *crop agreements [query]*

Between community members –

- Issue to an individual of a *hak milik* over community land
- Subdivision to facilitate *hak milik* , and

Any other community decision made which affects the title, or the records relating to the land in the Land Office.

(3) Dealings between individual members of the community and other members of the community are not recorded in the Community Land Book or in the Land Office.

(4) A community may decide to sell or transfer the whole of part of its land to a member of the community. This transaction must be recorded in the Community Land Book and in the Land Office.

(5) The nominee must make the Community Land Book available to all members of the community on request and keep the Book available in a place accessible by the community. The nominee and x and y must sign every record in the Community Land Book. Detailed regulations will be issued relating to these records.

Article 4

[Functions and responsibilities of holder of hak milik]

(1) Taxes, charges and expenses involved in obtaining a certificate and owning land must be paid by the community according to a community decision.

(2) The nominee cannot sell, transfer, secure, subdivide, lease or part with possession of the land, or do anything which adversely affects the opportunity of the community to use the land at any time.

(3) The nominee must pay the proceeds of any transaction (sale, lease or mortgage), compensation for the use or title to the land or any other amount for received for any reason in relation to the land, its use or its title to the members of the community equally as a personal entitlement.

(4) The community has a right to sue in the courts to recover any land.

Article 5

[Disputes]

[Inset provision for dispute process which recognises usual procedures operative in communities from time to time where the dispute parties are members of the community.

Insert provision for disputes arising between a member or members of the community and a party who is not a member to be resolved by access to existing and appropriate processes available to the public of Indonesia.]

Article 6

[Dissolution of the Community]

(1) The community, by community decision, [at least 60% by secret ballot] may decide to wind up the community.

(2) If this decision is made, the community, by community decision, must decide who are [adult] members of the community. The representative must record the names of each member in the Community Land Book.

(3) On winding up, the community, by community decision, may -

- Distribute all or part of the land to community members equally, or
- Sell all or part of the land community members for market value payable in 60 days, or
- Sell all or part of the land to people who are not members of the community for market value payable in 60 days.

(4) If the land is sold, the proceeds of the sale must be paid to the community representative and divided between the members of the community equally.

(5) The expenses of a sale must be paid out of the proceeds of the sale or by the members of the community equally.

(6) The expenses of a redistribution must be paid by the people who receive the land in the proportion that their land represents to the whole land.

CHAPTER 7 PROPERTY MARKET

7.1 The Market Place

This chapter argues that Indonesia's land market is defective for the following reasons:

- The commodities or titles are unattractive and deficient:
  - They are unique and confusing
  - They are immature and do not permit development of interests or a market in property interests, as distinct from a market in land
  - Much of the potential marketable titles is arbitrarily removed from the economy by the combined effect of the principle of horizontal separation and the refusal to overlap resource tenures and land tenures.
- Creation of and trading in the commodities is over-regulated by presidential and bureaucratic powers, not market processes.
- Land tenures and their titles are politically organised to restrict ownership of particular categories of people and legal entities. The restriction on ownership by commercial enterprises operating as companies is an economic tragedy.
- Commodity management is highly political, based on Indonesian socialism as interpreted from time to time.
- The market is kept very small and bureaucratically manageable and is incapable of supporting a modern economy.
- Market operations are constrained by inherent discretions, rent seeking behavior and invisible norms.

Because the Indonesian system focuses on tenures (not taxation and planning, investment controls and allocations) to control distribution, distortions in the market are replicated and embedded. Opportunities for developing long lasting and sensible land allocations are lost and existing traditional allocations are denied. Land transfers are inhibited, changes in ownership are hidden, and other mischiefs are apparent. Most significantly of all, much of the opportunity for creating interests in land is simply removed.

7.2 Rules of the Market Place

The GOI, though the Ministry for Environment, in **Agenda 21 – Indonesia**[1] identified evaluation of land ownership limitations, land law reform, and revision of the Basic Agrarian Law, taking into account the transformation from an agrarian society to an industrial society, as key activities.

However, the specified timetable, the period 2003-2020, is no longer relevant. More recent pressures for reform are pushing land law reform into the immediate agenda. They are also extending the range of reforms. An intention to change the BAL in the aftermath of the National Election on 7 June 1999 was indicated by senior members of the government.[2] The question is how much change will be possible.

[1] Agenda 21, Indonesia, p. 347

[2] Dr. Erman Rajagukguk, Vice Cabinet Secretary and other senior officials in interviews with LAP-C. However, Mr. Hasan Basri Durin, Minister for Agrarian Affairs has informed the World Bank Mission No 9 in May 1999 that any reform **would not include** the Basic Agrarian Law.

Reform is essential. Indonesia joins a large number of countries, typically those going from planned to market economies, in which legislation in relation to land is incomplete and/or inconsistent.[3] Moreover, the process of straightening out and closing gaps is potentially divisive. Other problems are also daunting. On the human side, the land administration system requires skills of lawyers, surveyors and cartographers, valuers, conveyancers, administrators, policy analysts, planners, real estate agents and land developers. While there is evidence (certainly in central Jakarta) that land developers are available with the requisite skills to replicate the building structures of a modern city scape, Indonesia lacks the skills bases of other professional groups. One of the immediate needs is building up appropriate skills bases, especially in local areas.[4]

A market in land cannot operate without substantial certainty of established rules which define commodities and permit their trading. Markets depend on rules which allow people to manage risks, raise credit and manage all aspects of their business predictably, cooperatively, and in a free market, competitively. The Indonesian market cannot work without good governance reforms, especially elimination of state control and rent seeking opportunities. The perception of multinational corporate and industrial staff is that Indonesia has severe corruption.[5] The superstructure of law affecting international capital and investment is also in need of reform.[6]

The cause of the Indonesian financial failure preceeding *Krismon* in 1997 is not seen in the economic policies implemented by the New Order government: these are seen as the right policies. For the informed, the problems arose because the institutions used in the country were not up to carrying the load demanded. *"Indonesia's great shortfall was that it had too many weak institutions and one very strong and unsustainable institution. The weak institutions were the legal system, the financial system, the civil service and an underdeveloped democratic process. The strong and unsustainable institution was Soeharto."*[7]

The legal system is under-developed. The **Diagnostic Assessment of Legal Development in Indonesia**[8] found that legal institutions had not changed since the middle of the 19th century. The research showed "legal authority and the legal professions were criticized for the methods they used in resolving legal problems which violated professional standards and ethics of the legal profession". The legal profession and legal structures, including the courts, are performing inadequately. "The dominant role of the executive branch enables an unhealthy restraining influence over the judiciary, particularly in controversial cases (both civil and criminal cases)." [9] The

[3] Guidelines for Improvement of Land Registration and Land Information Systems in Developing Countries, para 5.2.8

[4] The need for skilled surveyors is recognised by BPN.

[5] Pranab Bardhan, "Corruption and Development: A review of Issues" in Journal of Economic Literature (Sept 1997), 1320-1346

[6] Investment Law, UU 1/67, Forestry Law, UU 5/67, Mining Law, UU 11/67, Spatial Law, UU 12/92, Transmigration Law, UU 3/72, Regional Autonomy Law, UU 5/1974 and Village Administration Law, UU 5/1979 are in need of updating or fundamental change.

[7] Dennis De Tray, World Bank Country Director for Indonesia July 1994 to April 1999, *World Bank's Lessons from Indonesia*, The Jakarta Post, 14 April 1999, p6. The strength of the elite post Soeharto is continuingly apparent.

[8] Ali Budiardjo, Nugroho, Reksodiputro, IDF Grant No 28557, March 1997

[9] Land disputes are serious and common. On 10 March 1999 the Minister for Agrarian Affairs established an internal (National Land Agency) BPN committee operating in Jakarta for the whole of the provinces to handle land disputes. The deputy governor for governmental affairs, acknowledging disputes regarding the confiscation of several tracts of land in West Jakarta, set up a team to resolve ongoing disputes made up of administration officials, local people and students. The administrative courts are reputed to have 65% of cases involving land disputes. The government meanwhile called for Indonesians to use local commercial courts, rather than their preferred Singapore courts. The courts have called for independence

Constitution in Articles 24 and 25, together with Judiciary Law 14/1970 and Supreme Court Law 14/1985 are seen as creating a "two roofs" policy which allowed a weak judiciary to rule in favour of the government in cases that affected the government's interest. Some changes have been made. The MPR Decree No 10/1998 put separation of the power of the judiciary and the executive on the reform agenda. The Chief Justice submitted a draft law on judicial independence to the House of Representatives.[10] However, the process of establishing an effective legal system will require much more than reform of the law and an independent judiciary. *Without substantial development of an ethical and cultural basis which requires disinterested decisions, legal change in every area will be ineffectual*.

The Diagnostic Assessment reported discrepancies between modern international business needs and Indonesia's legal institutions and legislation. This discrepancy was highlighted by the recession and particularly the banking crisis. Despite these structural difficulties, changes in the law are still sought as a means of solving problems in land tenure, distribution and recording. LAP -C research showed consistent calls from all levels of society for tenure reform to support a modern economy.

7.3 Reinforcement of Legal Norms

In legal systems in which the rule of law has a high reliability, the legal norms relate closely to the behavior of legal persons - individuals, companies and legally competent agencies - and give rise to their legitimate and enforceable expectations. Legal norms are implemented by extensive and complex systemic supports by which crucial parts of the legal order reinforce themselves and their respective normative functions. This process of mutual reinforcement is always somewhat imperfect. Even in highly developed systems, the process is always kept under review as political, social and economic circumstances change.

Indonesia is not experiencing this process of structural reinforcement of legal norms. Its socio/political order and its markets function with little reference to legal rules, and, when reference is necessary, it is often motivated to achieve goals other than those articulated for the legal rules. The level of rent-seeking in the economy, law and politics negates opportunities to reinforce positive legal norms contained in legislation and procedures. **The more law is made, the less it is effective**. In fact volume, detail, lack of accessibility, complexity, incoherence and inherent conflict of the rules negate rational enforcement and create opportunities for bureaucratic invocation.

Legal Norms are not Operative

"For Indonesians, the law has no meaning."[11] On the level of the ordinary person, this view simply expresses the enormous distance between the citizen and the paraphernalia of government – a citizen can conduct daily life without coming in contact with the law. On the level of the institutional operation of government agencies and offices, it expresses a more worrying idea - that the law simply does not operate. The legal descriptions of government activities relating to property law do not reflect the way Indonesians think about land or describe how the bureaucracies operate.

The legal norms fail because they embed bureaucratic discretions not genuine entitlements, and because they are central inventions imposed on local communities and markets which mostly continue to function according to their unique, local norms.

Another reason for failure is the unsatisfactory nature and poor drafting of the laws themselves. The pattern is for the higher document or law to contain principles and broad statements, and to indicate that the detailed explications will appear in a lower regulation in due course. In terms of the Basic

[10] *Draft law broaches Supreme Court Independence*, 17 February 1999, The Jakarta Post, p. 2.

[11] Interview remark made by an AKATIGA representative 10 March 1999, 1999 in Bandung.

Agrarian Law, many of these regulations were not made, or only recently made. Frequently, an expressed basic principle or direction for the law cannot be implemented because the detail is missing. The hierarchy of laws is often ignored or compromised by necessity as lower level laws are inconsistent with or contradictory to higher laws. This hierarchy of legal statements is redolent with contradictions and statements by which lower legal authority or executive fiat seeks to overturn higher laws. They could not be applied by citizens even if they understood the content. The scope for selective application by managing bureaucracies is enormous.

In the period of *Reformasi* under Habibie, the need to pass laws quickly resulted in the laws being flawed. The most obvious example is the bankruptcy law passed in August 1998. The view that the courts rulings are partial to debtors is widespread.[12] The law is interpreted to free larger companies from the negative impacts of being made bankrupt. The GOI has indicated it intends to review the law.

Concealed Norms – Corruption and Collusion

The major problems are collusion and corruption. In the Indonesian system, three levels of corruption are apparent.

Petty Corruption

"Small bribes, payoffs, gratuities and other inducements that grease the wheels of the bureaucracy" is present in Indonesia as in many other developing countries.[13] It is institutionalized as an inevitable consequence of small salaries paid to officials. It is therefore universal. It affects central legal agencies including the police, the land administration agencies, audit agencies and so on. It does not just take the form of money payments. It is also manifest in the manipulation of standards of performance of contracts, reduction of quality and quantity of materials supplied, amount of labor time provided, dual sets of documents evidencing arrangements, and in many other facets of ordinary and business life.

The Javanese social order is extraordinarily hierarchical, requiring respect and deference to those holding higher positions. The social structures demand acknowledgment of both those higher and lower social status. Dating back to the colonial era, civil servants are paid in two components:

- a base salary and allowances (usually rice, transport, etc) package which is only minimally sufficient to cover subsistence requirements for simply reporting for duty; any significant task assigned is expected to be remunerated with a separate honorarium or project bonus, which is officially budged as administrative overhead in any project budget request, but not regularly provided, leaving nearly all civil servants in constant search of -
- supplemental income.

Civil service positions are usually described as "wet" or "dry" depending on the relative accessibility of supplemental income. The holders of "dry" positions frequently spend most of their days in other forms of employment.

Crony Corruption

The patterns of crony capitalism are well publicized. It is supported by a politicized legal system and a dependent Parliament, lack of transparency, lack of basic information about investments and

[12] Thomson Bank Watch of the Thomson Financial Services Company reported in The Jakarta Post, 4 March 1999.

[13] Schwarz, p. 135

accounts and a lack of controls. To Soeharto and the elite, this is not corruption, but a right of a Javanese ruler to distribute spoils of office. "That Soeharto, his family, his ministers, or, for that matter, the holder of any powerful office enriches himself in the course of executing his duties is accepted by many as the natural order of things."[14] Whether this constitutes moral corruption is a relative judgment. There is no apparent law breaking,[15] given the way the law is written and interpreted. It looks like no investigation of the behavior of members of the elite will be undertaken and that personal liability of individuals will be minimal.[16]

Even if many in Government and the business community accept crony capitalism as normal, it is highly dysfunctional in the allocation of major business opportunities and undermines the operation of the law and the economy. It remains the most significant issue Indonesia must deal with.

Corruption of the Legal System

While the legal norms are distant from behavior and do not determine activity or outcomes, they are often used in ways which contradict their stated purpose. In practical terms, the legal system cannot generate rules which govern behavior or create legitimate expectations. This affects the institutions of legal governance, especially the courts and parliament, the central bureaucracies, and the way that the public behaves towards them.

The checks and balances available in other systems through independence of professionals, ethical and prudential standards, accounting and auditing procedures and standards, are either not working or available. Whatever little predictability, transparency and certainty is apparent in the rules does not influence their operation. Legal formalists might spend their professional lives explicating the rules, and to an extent applying them to real situations, but generally these are academic exercises with predominantly ideological and rhetorical functions.

Articulated legal norms can no longer function in a transparent way to create, meet and level human expectations. Other certainties, operating below the formal legal structure, explain behavior and create expectations. Only when these are revealed and understood can an outsider begin to see how the system works. The major exercise for the future is to identify these sub-legal norms and to integrate them into the official land administration system so that it operates more effectively and is transparent to the people and the market. This is particularly true for processes of granting and annulling land tenures in BPN's land offices.

The judicial system is regarded as corrupt with all but the most obvious verdicts alleged to be "for sale" to the highest bidders. The GOI Audit Body, BPKP, overseen by the parliamentary audit agency BPK is simply viewed by all involved as ineffective and rent-seeking. BPKP is notoriously slow in producing audits, due to "negotiation" of audit findings and inconsistent follow up of negative audit findings.

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[14] Schwarz, p. 137

[15] A phone call apparently between Habibie and Attorney General AM Ghalib was intercepted and its text published in the media in February 1999. The conversation indicated that the investigation was slow. The Jakarta Post reported on page 1 on 10 March 1999 that the Attorney General advised the House of Representatives (DPR) that "complicated" legal procedures were involved in the Soeharto investigation. The Attorney General's office between April 1997 and March 1998 handled 728 cases of corruption which caused the state RP 621.7 billion in losses. The office was able to recover Rp 4.6 billion. Between April 1998 and February 1999, the office handled 1,284 cases of corruption which caused a loss of Rp 2 trillion. The office recovered Rp 76.3 billion.

[16] Bank restructuring under IBRA will demonstrate how far personal culpability is applied. Should the political momentum exist, some gains will be made, but many observers do not anticipate that systemic liabilities and personal losses will fall to the owners and profiteers of the failed banks.

A major form of corruption is buying legal or regulatory system requirements. While Indonesia has a legal code and regulatory framework, implementation and enforcement actions of GOI are notoriously unpredictable or "negotiable". Real estate and land acquisition and transfer are notoriously non-transparent[17].

While rent-seeking is an operative norm, there are public protestations about KKN *Korupsi, Kolusi, Nepotisme* (corruption, collusion and nepotism), targeting Soeharto, his children and his business associates. A powerful moral rearmament of the people who were adversely affected by large scale corruption generated a political fall out for those who are seen to breach a set of public expectations about standards. *The dialogue was negative (stop rent-seeking, stop corruption) rather than positive (be honest, be fair, apply positive rules, define conflict of interest to include an official decision in favour of an associate).* At the same time, the entrenched rent-seeking survived the replacement of Soeharto's leadership by Habibie, and replacement of many key officials in the bureaucracies and banks. Rent seeking continues to be exposed and elicits predictable government responses of shock and condemnation (where the evidence is available) or denial (where it is not) [18]. Meanwhile, real reforms remain illusive. The public debate, in other words, has not achieved a change of normative behavior, but has developed an ad hoc and pointed political tool which will continue to be used selectively. There are two main reasons for the failure to deal with corruption and collusion at a meaningful level. The first lies deep in the Indonesian psyche and culture which makes the behavior not only acceptable but frequently essential. The second lies in human pragmatism. It is simply not in the interest of a government or an elite to control corruption when it is netting them inexhaustible opportunities for more without adverse consequences.

The international community should also take some responsibility. The standard economic analyses which develop predictions from economic indicators seem to assume that a stable Rupiah is a better indicator of sound economic management than the reasons why the Rupiah has been kept stable and, more importantly, how. If these standard indicators of exchange rate, growth rate and inflation come in on the plus range, despite escalating and impossible to meet levels of government and private debt, healthy scepticism might be the best analytic tool.

Until the international community calls a stop to the flow of dollars and unless firm reforms and a "proof of implementation" agenda are in place, nothing stems *KKN*. The ADB agenda is for Asian governments to share all the four pillars of good governance – accountability, transparency, predictability and participation by external entities. Controls on corruption and increases in public service salaries are also pragmatic necessities.

At the very least, the government must attract foreign capital into a system which is internationally known to siphon large amounts into non-productive rent seeking for personal enrichment of a small

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[17] *Helping Countries Combat Corruption: The Role of the World Bank Group, World Bank report 1999*

[18] The use of World Bank loans for campaign purposes is constantly discussed in the media. The use of loan and IMF money for personal and fraudulent purposes, and for maintaining the exchange rate on the Rupiah is also a constant media theme. The amounts of money involved in the corruption have, however, increased The latest authoritative analysis on the level of corruption in the months before the June 7 1999 National Election puts the cost at 100-120% of government services in Asia: The Asian Development Bank, *ADB says corruption doubles costs in Asia*, The Indonesian Observer, 26 Aril 1999, p l. The actions of Organisation for Economic Cooperation and Development (OECD), the World Bank, the Asian Development Bank and the International Monetary Fund to control corruption have been ineffectual in Indonesia. ADB's loans to Indonesia's financial sector reform loan totalled US$1.5 billion. It also put US $800 million into social sector programs in Indonesia and Thailand to ensure that the poor in crisis hit countries have access to essential services. Where has the money gone is a question that all the donors are now asking. A public campaign to examine the actions of the Minister of Cooperatives and Small Enterprises - Adi Sasono and the cooperative movement is underway. Given past experience, this will have a similar effect to the previous revelations of corruption in government – none.

elite. This dampens its ability to attract capital because mainly high risk takers enter the market and at higher prices. Even for these hardy investors, risk minimization and management principles demand capital returns be achieved in the shortest possible period. Carpetbaggers are at home; conservative investors are not.

Rent-seeking behavior appears in political, bureaucratic and regulatory marketplaces. It also occurs in private markets, where it is much less analysed. Economists are interested in its effect on public policy, and usually assume that rent seeking should be minimised to prevent waste. "For those Americans concerned with advancing the nation's wealth, the elimination of rent-seeking/rent-protection outlays must be on a par (almost) with support of the flag, motherhood and apple pie."[19] There is no academic challenge among economists to the basic assumption that rent-seeking is usually deleterious, though they admit that it does have wealth transfer functions sometimes essential in a country with entrenched poverty. In moral and legal normative systems, rent-seeking is anathema. It undermines the systems and, at its most entrenched, subverts them.

Rent-seeking in Indonesia is pervasive. It is an operative norm and, in most forms, accepted as neither illegal or immoral. The fundamental institutions of government, courts, parliament, the criminal justice system, banks, teaching institutions, social services, the police and central bureaucracies all function on a rent-seeking basis.[20] The systems have an apparent workability and functionality, despite, or a cynic might say because of, rent-seeking.

Functioning of the Courts

Dispute resolution and prevention is the primary function of courts in a civil law system. In a common law system, the courts also have the important function of making legal rules. In both systems, the courts must function predictably, without corruption and without conflict of interests in order to establish public confidence. Whether the system is inquisitorial (civil law) or adversarial (common law), standards of openness and natural justice require disinterested decision makers, rule coherence and articulation of dispassionate and objective reasons for decision.

These are missing in Indonesia where the courts are not held in high regard. Civil litigation is avoided. Law 14/1985 allows the Chief Justice discretionary power to review Supreme Court appeals court decisions (Articles 67-72). The result is that disgruntled litigants have made review an inevitability and since the review is not a hearing on error of law, its constant exercise has destabilised the legal system. The GOI is showing considerable interest in the use of alternative dispute resolution, and the IMF has required reform of the courts as part of its agenda to establish a working economy. Neither initiative is sufficient to restore public confidence in the justice system. Chronic and public manipulation in bankruptcy and criminal cases shows no signs of abating. Nor does the use of Singapore courts in commercial cases.

Legal System Reforms

The supplementary Memorandum of Economic and Financial Policies attached by the GOI to the Fourth Review under the Extended Arrangement with the IMF indicated that anti corruption legislation has been submitted to Parliament establishing an independent permanent commission reporting to Parliament, the Supreme Court and the President to combat corruption in the public sector, including in the judiciary through a judicial sub-commission. The government has indicated that the judicial sub-commission will in no way compromise the principle of independence of the

[19] Rowley, p.5. "Scholars would concur that, ceteris paribus, rent-seeking behaviour should be minimized as imposing waste upon society. Concurrence on this judgment would appear to be independent of methodology, be it that of Chicago, New England, Cambridge England, or even, it would seem, the Kremlin."

[20] Internal staff memo World Bank, RSI Jakarta

judiciary and that it is modeled after similar legislation in other countries. It was planned to be operational in early April 1999. On 25 March 1999, the President appointed well regarded private practitioners and other experts as ad hoc judges to the commercial court, introduced a transparent court fee system for the commercial court, and reviewed the salaries of Commercial Court judges. Whether these changes lead to development of a sound ethical basis for administration of the justice system remains to be seen.

The stabilisation of the justice system is an essential element in the operation of land rights. It is a necessary, but not sufficient, condition for land reform. Other changes are also needed.

7.4 Land Rights as Products

Community Involvement

In Indonesia, an analysis of land tenures and land administration systems of itself could not identify the social and economic realities relating to land. These realities can only be explained by an analysis of the way the processes actually work. Overlaying national government and unity on disparate traditional communities creates an immediate communication problem. Thus far, the model used in Indonesia is "central down". The national system is now showing signs of cracking. Independence movements in Timor, Aceh and Irian Jaya are apparent. Others are developing.

In seeking to address this independence momentum, the government is devolving power to regions. This is not a "bottom up" approach, but a cautious and strategic reallocation of opportunities and decisions to non-central officials. Autonomy, as the process is called, will raise fundamental issues of governance as it strikes human and physical resource barriers. The lack of penetration of knowledge and understanding of the land tenure and administration system is now going to be apparent.

These issues form the background to a more fundamental question: land distribution. How land is allocated is a public issue. In developed societies, the distribution system is known and policed by community members. In transitional societies, the distribution of land changes in response to general pressures. The acceleration of change generates both demands for rational land distribution and practical difficulty in achieving it. Rapid change also makes it extremely difficult for the public to understand reallocations of land. Any opportunity for large scale policing of a land administration and distribution system by an informed public is compromised. What is needed is a strategy for achieving a much improved land distribution method which delivers a much more reasonable result.

Land in a Local Economy

Individual land entitlement depends on the development of an economy and political identity. Land allocation is an essential part of any national economy in that opportunities for development, food production and residence must be secure whether market driven or state allocated. Whatever the allocation mechanism, the result must be predictable, stable, explainable (rather than fair) and functional. At the same time, the system must be adaptable and capable of meeting changing needs.

Land titling is a method of making the entitlements in land known.[21] In most countries real estate accounts for between half and three-quarters of national wealth. In the less developed countries, even without a land market, the importance and significance of land use allocation are more pronounced, given other capital and goods markets are relatively underdeveloped.

[21] World Bank Development Report 1989 page 87

Moving from Collective to Private Ownership

Evolution of social and political institutions suggests that land use patterns change from feudal or collective to some form of private ownership. The world trend is clearly towards some form of individual or self ownership. The changes are, of course, dependent on local political and social experiences which bring remarkable reversals and accelerations and which might create conditions in which a land market and then a property market can develop. Individual ownership and the capacity to monetarise land use (that is, give a monetary value to land use) are essential components of a market in land and a precursor of markets in property interests.

Property Markets

In modern economies, the property market is essential to the national economy and the principle means of allocation of land ownership and use. The market activity generated by trading and creating interests in land is a significant contributor to the GDP. The open market allows owners, not governments (except where the government is itself the owner) to aggregate land holdings, change land uses, subdivide, develop, sell, buy and consolidate, mortgage, lease, arrange utilities and so on. The modern property right is the key to market operations. *Its first function is the articulation of defined legal opportunities for owners to make decisions about their land in response to market conditions. Its second function is to limit the power of the state in relation to the land. Its third function is a great deal more abstract: it supports conceptual opportunities and interests in the rights themselves, rather than in the land, that is the rights permit creation of new commodities in response to market demands*.

In a modern system, the state is relatively detached and invisible. Land law is a realm of private law, which defines the opportunities of citizens to make whatever arrangements for the land they think will be successful for them. The Indonesian system, by contrast, severely reverses this autonomy of decision making and ensures that the State controls these decisions. While the control might often be benign in the sense that the owner is *eventually* allowed to do what he or she wants, state control is pervasive and invasive, and the processes replete with uncertainties.

Production of Land Related Commodities

A country facing allocation issues must determine its land distribution policies, then select the appropriate mechanism (market or bureaucratic). If a market is used, the government must create commodities for the market to trade. These possible commodities are of two kinds:

- **Simple Rights Commodities** - land rights which make the land available and
- **Complex Rights Commodities**.

This involves two stages: making the land itself available, and then making rights in the land tradable.

Simple Rights Commodities

Making Land Available

It seems obvious to the novice that a market in land requires land in the first place. That is, a country should consider what raw material is available and which parts of it can be used in the land market. Most governments take out amenity areas such as national parks and public infrastructure such as roads. These excisions are made for sound reasons. After this, all land is available.

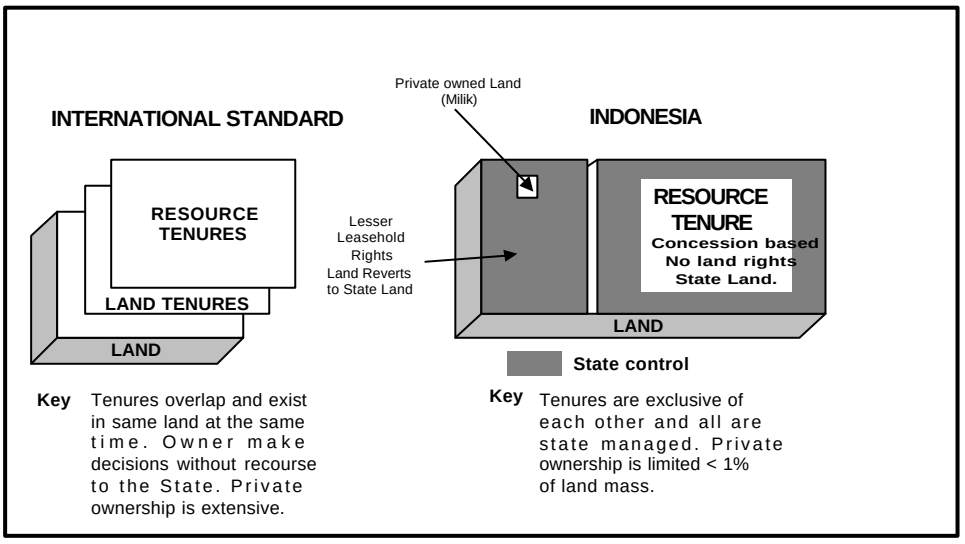
Indonesia, on the other hand limits its opportunities to offer simple rights commodities by its **doctrine of exclusive tenures** which prevents overlaying of resource and land tenures.

The Indonesian approach to resource harvesting is to create a single administration with overarching powers to focus on foresters, miners and related interests. By restricting creation of land tenures on forest and mining areas, the availability matrix in Indonesian land is substantially reduced. This is different from the processes used in countries where private land entitlements were firmly established and where overlaying resource harvesting techniques is well articulated without destroying the infrastructure of rights. The Indonesian exclusive tenures doctrine eliminates opportunity for regular creation and trading in simple land rights in the vast percentage of land regulated by resource tenures. In addition, the doctrine impedes resource tenures in private land.

By excising forest land the remaining surface land available to land tenures in Indonesia is 28% which is then reduced by the amount of land in public use, roads, and water affected areas, etc. The land surface available to support simple rights commodities is remarkably and unnecessarily constrained. The implications of this constraint for the Indonesian economy at large is substantial, though one cannot give precise figures.

Other countries use a modern overlaying system which involves articulation of arrangements for resource harvesting, mining work and reforestation programs in relation to landowners and possessors. The modern system allows a fairer allocation of opportunities to use land without necessarily diminishing the resource taking opportunities or coextensive operation land resource tenures. In these modern administrations, sound land administration and management policies do not demand separation of land and resource tenures.

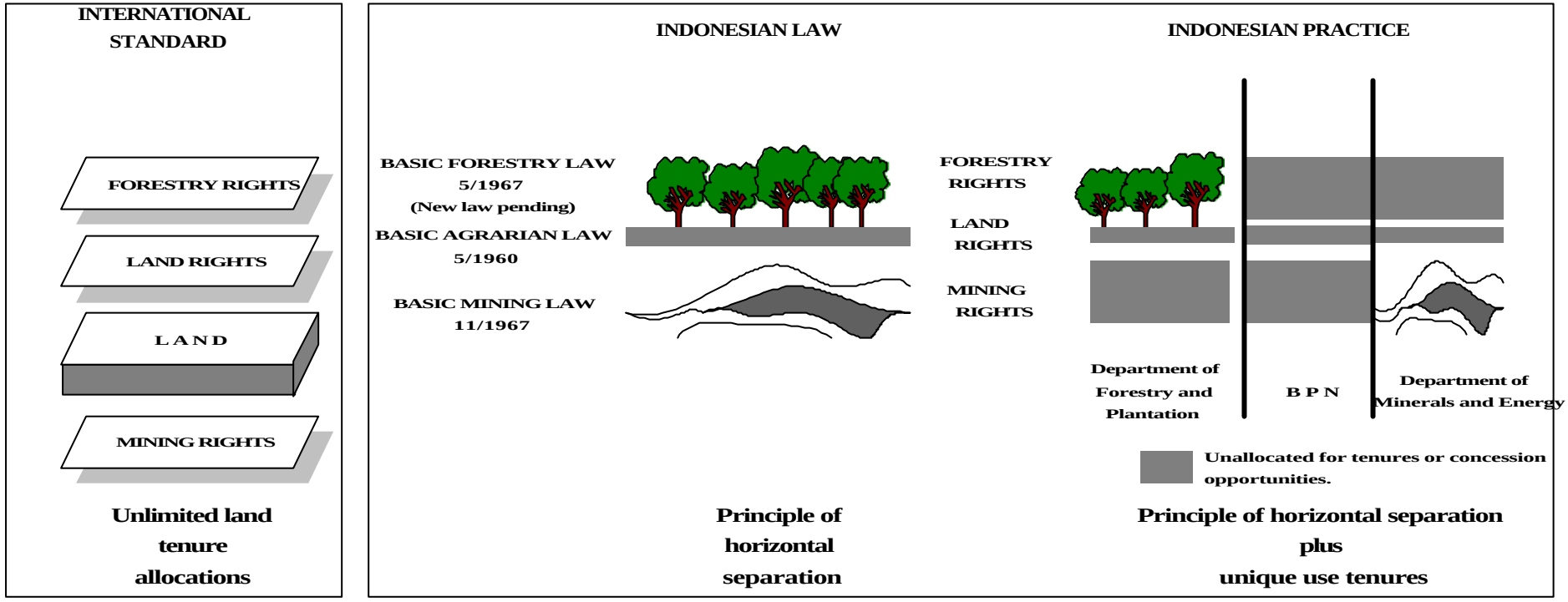
Figure 7.1 Tenure Models



Availability of Land Limited by Combination of Exclusive Tenures and Horizontal Separation

The combination of the exclusive tenures doctrine with the **principle of horizontal separation** effectively excludes even more land from the commodity process. The land tenures, by the simplistic adoption of *adat* principles suitable for stable agrarian communities, permit rights limited to the land surface, and do not conceptually allocate areas above and below the surface. In these unallocated areas, the process of creating interests is either impossible or functionally restricted. Indonesia conceptually restricts by two thirds its opportunities to create simple rights commodities.

Figure 7.2 Land Tenure Allocations



Comments - Indonesia cannot allocate physical uses or activities in unallocated areas without tenures or concessions. Indonesia therefore cannot develop markets in these uses, nor can there be markets in rights and powers in relation to these uses.
Two thirds of the use opportunities are lost to economic activity. It is impossible to quantity the lost opportunities for markets in the rights, but these unused markets are potentially highly valuable.

Allocation Methods

All legal systems deal with land allocation on a rational basis. Allocation as a response to crisis driven movement of refugees, post war or during conflict, raises the same kind of issues as does allocation due to mass migration of people from rural areas to cities. The allocation principles and the process must be sensible and durable. In these situations, markets do not provide the answer and other allocation processes need to be used.

In times of stability and peace, the principle mechanisms range between feudal (no longer applicable), communal (used in *adat* communities), state allocation and market processes. Even in market systems, control is exerted in favour of the public good. World patterns of pollution, population increase and exploitation are creating pressures on land. International capital flows have made some governments highly protective of national ownership and control of assets.[22] Markets are consistent with regulation. Regulation of land use to create public assets (schools, hospitals, roads, and other public uses), spatial planning and building controls are normal in market systems.

The market is free, but managed by detailed and clear rules which are well understood by the players and, in the more accessible markets, by the public. Overall, an estimated 5% of the land in established economies is sold each year.[23] In the USA, with a more mobile population and an estimated 25% moving in a year, the percentage is far greater. Information is readily available and transparent. The flurry of marketing, buying and selling, and borrowing is evident, these days even on the Internet. But this is only one market, albeit the most visible.

In developed societies, the production of rights is highly ordered, institutionalised and resource demanding. *"Some institutional allocations have efficiency advantages over alternatives. …. [W]hen the methods of defining and enforcing private rights are devised through residual claimant action there is greater incentive to conserve on resources used in the process than when that process is imposed exogenously by non-claimants. The definition of property rights generates rents to resources which would otherwise be dissipated under communal ownership."*[24]

If creation of rights is a bureaucratic process, problems are predictable. The bureaucracies legally cannot claim a share of rents derived from increased efficiency, so they must seek alternative forms of payment. *"Corruption is one possibility, but this may simply be one way of collecting a proportion of the rents. Another possibility is that the bureaucrats can gain power and command over political resources if the definition process necessitates an even larger bureaucracy. Thus the controlling authority may require activities that dissipate rents in order that it can be given command over some political resources. Competing claimants to common property resource may have to prove themselves "worthy" of having rights bestowed upon them, with, of course, the bureaucrat needing considerable allocation of funds in order to make judgements of "worthiness". Or the bureaucrats may find that they can require activities that produce positive utility for bureaucrats. Hence, rather than there being no incentive to reduce resources expended in the definition of property rights, there may actually be an incentive to increase such expenditures."*[25]

Rent dissipation in the land allocation process is a constant problem, especially when the allocation is organised and/or administered by a government agency. It is present when the bureaucracy merely administrative, but omnipresent if the bureaucracy is allocative and determines entitlements, such as in the case of BPN.

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[22] Malaysia is the best known, but Indonesia is also highly nationalistic in its land policy.

[23] LAP-C Topic Cycle 3 Report , Chapters 2-7

[24] Anderson and Hill, p.375-7. The analysis of rent seeking by economists includes a technical language including "residual claimant".

[25] Anderson and Hill, p.377

Complex Rights Commodities

The most remarkable achievement of the property market is its capacity, when running well, to create complex commodities. Its market allocation processes not only allocate land uses and ownership, but encourage development of distinct markets in interests in land.

Marketing Complex Rights Commodities

Whatever is traded, the price of land on commercial sale does not merely reflect the commodity value of its production yield or use value. Land carries an added value because, perhaps, of the social status of being a landowner. Hence, it is usually difficult to repay the cost of the land (borrowed by mortgage) from the productivity yield of the land by itself.[26] Land values and trading are, however, only part of the economic functions of property rights. Only an estimated 25 countries have a market *in property*, not just land, recognized by law and have market systems in which rights in property can be confidently traded.[27]

Property Rights as Abstractions

In developed economies with extensive private land rights, property law is highly reactive to social needs and economic changes. Property law allows the creation of multiple interests that co-exist at the same time and allocates future possession and other abstract entitlements. The property interests are diverse, conceptually complex and economically significant. By recognising these interests, the private legal system creates a number of sub markets, over and above the land market. For instance, the secondary mortgage market (securitisation of securities), sales and mortgage of security interests and contracts, time shares (with international market potential), retirement villages with serial service levels, high rise development rights, complex corporate securities and leasehold securities. Along side these, public and private, listed and unlisted property trusts, sophisticated finance arrangements, tools for superannuation funds investment, cooperatives and communal ownership schemes develop according to the level of local inventiveness[28].

The maturity of a property system occurs at the point when the relationship between land and owners is viewed as one of the consequences of property rights, not even necessarily their core, and when legal rights are recognised as coherent statements of *relationships between owners and others* in relation to the land. The abstraction of the world of legal entitlements permits much more complex and dynamic opportunities for creation of unique and flexible property rights.

By contrast, a legal system which merely allocates the rights to immediate possession of land is flat and undeveloped; more so if the system simultaneously allocates both a single owner and a single use by each title or concession as in Indonesia. Tenures in Indonesia involve a physical and visible relationship with the land (apart from the security titles). All allocation and analysis of rights is done on the basis of what can be seen in relation to the land, emphasising the relationship between the owner and the land. ***The land law prevents development of complex land rights commodities***.

The difference between a market merely in land or simple rights commodities and a market in interests in land or complex commodities is illustrated by the example of mining titles. Visualise a gold rich country which regulates (as they all do) access to the mineral. The country needs to create

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[26] LAP-C Topic Cycle 3 Report, Chapters 2-8

[27] de Soto H, "The Missing Ingredient: What Poor Countries Need to Make their Markets Work" The Economist volume 328, number 7828, Special Supplement for the Economists' 150 years, pages 8-12 September 11 1993.

[28] See LAP-C Topic Cycle 6, Comparative International Report on Commercial Interests in Land.

licenses which allocate mining rights in specific territory to a miner. The next question for the country is how to regulate these licenses. To keep it simple, contrast two approaches.

COUNTRY A	COUNTRY B
Country A is highly nationalistic and determined to regulate the activities in the industry for its national benefit. Under its system, the state controls the right to mine. Its allocation, operation and effects are bureaucratically managed on behalf of a highly centralised national administration	Country B believes that government should create the regulatory and legal structure in which rights are created and traded and leave owners to manage how they use the rights (within a regulatory framework). It creates titling, registration and priority systems which guarantee security of tenure.
A mine owner can, to the extent allowed, trade in the mining operations. The government is always involved, trading is immensely difficult and unpredictable. Rent seeking is very difficult to control because it is inherent in the process. Because the right to mine is over-managed, the market in this right is always subject to bureaucratic intervention, and hence not readily marketable.	A mine owner can, to a much greater extent, trade in both the mining operations and in the abstract right to mine.

To the extent that the right to mine is separately and freely tradeable, the mine owner has two assets: the mining operation and the right to the mining operation. In market economies, the right to mine becomes a marketable asset of high value, depending on the estimated resource and the value and marketability of that opportunity to mine. Even if mining has not started, the miner can sell the opportunity to mine. Thus Country B creates two markets – markets in which the rights are traded and markets in which the mining business is traded. To see the difference in stark terms, Country B need not have any mining business or work (or, analogously, any land use) at all in order to excite a great deal of economic activity surrounding the creation of and trading in the rights to mine, independent of the value of the gold deposits.

Markets in land are mature when property interests, not just the immediate opportunities to use land, are traded. This difference cannot be expressed as a continuum or a line with highly regulated economies at one end and minimally regulated open market economies at the other. Highly regulated and state controlled land entitlements inhibit the massive and unpredictable amount of economic energy generated by markets related to interests in the land that makes the democratic and free markets systems work so well. They remain immature and flat. The alternative of minimum regulation permits and encourages growth in divergent and multiple market opportunities in abstractions or concepts which, in turn, develop their own economic incentives and consequences, their own rules and regulatory structures, and their own set of participants.

The problem for the Third World countries is not that they are nationalistic, but that their nationalism is uninformed. They forego property markets in order to ration land use by foreigners, developers and other market participants in the attempt to distribute land to favored people (sometimes because they suffer acute poverty). They often do this for the laudable intentions of relieving the plight of the land hungry and responding to demands for land reform and fairer distribution. Their problem is how to simultaneously respond to the political necessity of protecting (actual or possible) rights of their poor for land rights while gradually fostering markets in land interests. *Under developed land law in these countries has the unfortunate impact of restricting capital formation and growth in real estate and denies wealth accumulation opportunities to its citizens*.

The alternative of having a mature market which uses planning, social responsibilities, investment and taxation as regulatory tools, should be clearly articulated. In these processes, the land administration and land registration systems are vital, and require strategic policy input. To devise such a system, a national state needs to attach responsibilities to land ownership to counter the tendency of private property and family interests to promote individual selfishness. A larger land economy could support, for example, a significant land tax permitting more effective redistribution of national resources. Allocating resources (money, education, means of production, opportunities to work for fair wages) to alleviate poverty are other policy tools which are more effective in reducing poverty.

Countries such as Indonesia, in which restrictions on the market in land facilitated bureaucratic management and pursuit of land ownership by a chosen elite face a much more difficult road to reform because their land allocation methods and rights are politically tainted. Reform will involve rewriting the land law, restructuring land administration and recognizing different entitlements capable of attracting political support.

Unique Features of Land Markets

According to market theory, governments obtain the greatest prosperity of their people by strategically and incrementally moving to less regulated and eventually minimally or even unregulated markets in interests in commodities, not merely in commodities. This is especially true of land. *Land cannot be exported – it is immobile. It is the one thing that a country keeps within its boundaries, no matter who owns it.* The creation of opportunities for markets in complex commodities of land interests, not merely in land itself, does not abridge a nation's opportunity to regulate national investment, capital flows, land uses or effective use of any other macro economic controls. Foreign ownership of land (increasing the number of market actors) encourages a great deal more economic activity, assuming that the actors are permitted scope for market activity.

Whether market theory is accepted or not, governments need to appreciate that they can have nationalistic goals while permitting markets in both land and land interests, and that all markets require legal and instrumental support to operate and hence permit a level of control. In each market, it should be possible to work out a way of fostering the national goals while generating the amount of economic activity necessary to build the immature market and encourage growth and self generation of mature markets.

Complexity is not synonymous with mature markets. Immature markets can be associated with highly complex rules. A remarkably complex system of strict settlements creating present and future estates existing simultaneously in common law and in equity law, together with a very sophisticated mechanism for drawing in opportunities to create estates which came into possession at the fourth remote generation, was developed to support the landed aristocracy in England during the 17th and 18th centuries.[29] These rules were dismantled when they atrophied and forced families to stay on land during the agricultural depressions in the late 19th century.[30] They did not permit a market.

[29] The rules allowed simultaneously interests in reversion, remainder, life estates both for legal owners and for different equitable owners. The rules permitted a variety of specific interests: such as conditional and determinable fees, vested and contingent remainders, and open and closed class interests. The function of the structure was to allocate possession among a large range of individuals over time, up to the end of approximately the fourth generation. The settlement maker could control the destination of the land from the time of grant or death up to the period created by the length of a life in being plus 21 years. To get the maximum time, settlements referred to the life in being as the longest living of the relatives of the reigning monarch – a "royal lives clause".

[30] The English 19th century Settled Land Acts allowed the structures of estates in the land to be converted into interests in the capital derived from selling the land through appointment of trustees of a settlement. This

Their raison d'être was to ensure the land could not be sold out of the lineage, but they were certainly abstract and complex, reflecting a considerable ingenuity for creating opportunities to utilise land titles which ensured land was **not** sold or exchanged. Their complexity ensured that they remained embedded for centuries, bringing with them a remarkable and rigid class system and agricultural practices.

Likewise, markets in complex interests can be organised by simple, intelligible rules which facilitate transactions and support the professions who manage them, for example the rules which surround retailing of the bonds associated with secondary mortgage markets, or units in property trusts.

Facilitating land development

The primary function of the land law should be to provide security of tenure just as the function of international law is to deliver territorial integrity. Intuitive judgement suggests that a perception of insecurity of tenure will dampen land investment, and that secure tenure will encourage owners to invest maximally in use and development. There is no research on the economic impact of insecurity of tenure in Indonesia, but there is some research on perceptions about insecurity of title that showed only 60% of registered *hak milik* owners of house units believed that their title was "very secure".[31] Other figures which suggest that perceptions of insecurity were well founded are the numbers of land disputes in the court lists and the relatively low amounts of compensation received when government and private developers wished to acquire land. The existence of a perception of insecure tenures, even for owners of *hak milik* titles, is pervasive enough to support the hypothesis that investment in land by Indonesians is adversely affected.

Security of tenure is also important in the creation and operation of communal or common land use goals and facilities. It forms the background for management of a multitude of complex pressures which impact on land and land allocation including -

- Population growth and consequential demand for land
- Devastation of environment, and development of preventative and protective measures
- Satisfaction of demand for utilities to service land use– gas, electricity, water, drainage and sewerage
- Satisfaction of demands for infrastructures to service the public – roads, rails, ports, bridges
- Development of a market for land – typically following intrusion by outsiders.

Given the static nature of Indonesian land titles and tenures, it is difficult to see how the system can react effectively to demands that land be used in new ways and for new purposes which recognise its importance as an environmental and recreational good. The system simply cannot react officially and effectively to these claims without major upheaval. Demands for sustainable development are now part of the mainstream politics. The strategic claims of the landless, women and of the poor living on outskirts of cities for land use opportunities, or for better land management for productivity or resettlement, are obvious. Artificial limitations on the amount of available land and flattening of the structure of land rights are dysfunctional and make it impossible for Indonesia to address the basic issues.

Tenures in Market Based Systems

The basic assumptions remain –
A country should be able to feed and house its population.

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enabled the landed estates to be dismantled in response to the severe depression, and facilitated the acquisition of property by the industrial middle and upper classes.

[31] Struyk, Hoffman and Katsura, p 95

Processes of distribution of opportunities to feed and house should be fair, economically sensible (given the topography and natural environment), and National prosperity and optimization of the use of resources can best be achieved by allowing the market to operate efficiently within the broad parameters that assure satisfactory environmental, health, safety and social standards. [32]

Markets operate best if:

- Land tenures are easily understood
- Land tenures are secure
- Owners are easily identified
- Land uses are flexible
- Land parcels are easily and permanently identified
- Priority laws are clear and consistently applied
- Conveyancing is regular, cheap and quick
- Land information is highly developed.

Most of these goals are not yet achieved in Indonesia.

7.5 Direct Legal Impediments to Markets

Restrictions on Absentee Ownership

Senior BPN officials continue to express concern about exploitation of land by:

- forbidding absentee ownership in principle in agricultural land and controlling it in other land,
- insisting on a (high) personal use of agricultural land,
- forbidding excess land holdings in agricultural land (by area and parcel number)
- proposing to forbid excess holdings in other land.

These blunt and unworkable tools are supposed to prevent exploitation of land, that is exploitation of an under class of agricultural workers who transfer the gains from their labour to the land owner, usually through feudalism or expropriating leasing and share cropping arrangements. However, these tools cannot address exploitation of labour. Their real purposes lie elsewhere. First, they are a simplistic sop for a mass political audience which has genuine concern about land exploitation. Second, they allow bureaucratic discretion and rent seeking opportunities. Third, they have distracted attention from the large and selective land acquisitions by a small elite. *These tools have not kept land reasonably priced and available. They have not stopped speculation. They have, however, significantly reduced the land market and undermined the accuracy of land registration and tax records*.

Recent experience provides an unequivocal demonstration of how the BAL was instrumental in land exploitation, despite these tools. Yet BPN proposes to tighten them to further prevent absentee ownership. Extending these tools is unlikely to improve their capacity to attack land exploitation. There is no mechanism by which the government can determine who actually owns land. Indonesians do not carry same surname through the generations, and a family's holdings are easily concealed. There are no connections between records held in the various land registries, hence "out of town" holdings are never aggregated. There is no control over the use of nominees, nor foreseeably can there be any. The policing of the minimum holding requirements depends on an honor system, which is known to be ignored.

[32] LAP-C Topic Cycle 3 Report - International Comparative Review – Spatial Development Planning, Executive Summary iii.

These tools are indefensible on economic grounds. The theory behind requiring personal use and minimum ownership, and indeed the basis for their public support, is a naive assumption that absentee ownership is equivalent to speculation. In fact, in a working market, absentee ownership and land accumulation are effective allocators because they tend to price land at the opportunity costs and yield potential.

Ownership of large amounts of land is not necessarily bad ownership. Some large or multiple holdings are good and serve social and economic purposes. Others are exploitative. It is the nature of the use, not its amount or its owner, that determines what is exploitative and what is not. The focus on these tools misdirects attention away from the causes of excess, notably the *izin lokasi* process associated with earmarking excessive land for projects and the rapacious profit seeking of developers and the elite. *Hence effective tools and strategies, such as a progressive land tax system, are not even considered. For example, excessive non-productive land holdings could be taxed at a punitive rate by local governments forcing owners either to sell or develop the land*.

To the extent that the system fails to admit absentee owners, it denies Indonesians the capacity to create markets in land interests, arguably the greatest land market available. The State assumes that it can effectively allocate the realm of choices of land use and possession, an assumption which is hardly credible given the number and diversity of situations involved, and its recent history.

Bureaucratic Control of Market Processes

Given that the state "controls" all land on behalf of the people enormous power and discretion has been given to the state apparatus and bureaucrats. *"The perverse modern result of the Basic Agrarian Law's adoption of adat concepts is that those principles, in particular that of social function, have served simply as legal cover for arbitrary and inequitable bureaucratic control of land administration."*[33] The result is a level of transaction price uncertainty which affects all elements of the process, from settling the sale price, creating documents, execution of documents and registration or formal recognition where the land is unregistered.

Corporations Disallowed as Owners

The ideological overlay of the Basic Law requires that only individuals can own *hak milik* land. Companies (by definition commercial users) are restricted to lesser titles of *HGU*, *HGB* and *hak pakai*. The impact of this is severe. Companies must obtain land with a time and use delimited title. Their opportunities to make commercial decisions in relation to the land are constrained by these limitations. The official reason behind the limitation is the desire of the government to police corporate and excessive ownership. As a strategic management tool, the limit on commercial titles has the same flaws as the limits on individual ownership – it drives corporations interested in acquiring land to use artificial mechanisms (such as nominees) which in turn dampen and undermine an open land market.

The restriction on corporate ownership also has more serious consequences. The Indonesian public are not allowed to collect together to obtain and develop land through the most influential and successful method of capital acquisition and development ever invented – the corporate business organisation which limits liability, allows share transfer and has perpetual life. The joint stock company has had a relatively short history but long gestation in the form of a corporate charter granted by governments. The idea of statutory or constitutional provisions permitting incorporations under general laws is relatively new, but once invented, it quickly replaced the arduous negotiation

[33] Fitzpatrick, p.203. Fitzpatrick explains that the rise in the ascendency of "social function" and "development" derive particularly from the Court's decision in the Kedun Ombo Dam Case where a review court consisting of Chief Justice HR Purwoto S Gandasubrata and four other judges rejected compensation.

of private corporate charters between contracting partners. In the USA, joint stock companies are regulated under state law, and Delaware dominates as the charterer of new corporations and corporations changing their state of incorporation. The US constitutional protection of competition among the states, facilitated by the commerce clause, spawned the universal acceptance of general incorporation codes. This removed barriers from corporations switching their state of incorporation. The change from government granted charters (with full rent seeking opportunities) to privately initiated and administratively simple incorporation was not achieved easily, but it was achieved. The system was so spectacularly successful that all market oriented economies allow incorporation of limited liability companies.

While Indonesia permits incorporation and has a stock exchange for listed companies, it does not allow its public the opportunity to undertake investment and land development in the context of land ownership by their companies. The economic consequences of this restriction have not been researched but anecdotal information indicates that they are deleterious and serious.[34] They prevent the use of major commercial investment mechanisms and competitive property trusts. In the short term, releasing land ownership to companies would significantly stimulate a repressed property market. More importantly, it would allow the average Indonesian citizen the same opportunities for capital formation, investment and securitization that is available to market economies everywhere in the world.

Comparative Positions

Among non-communist (excluding some ex-communist) nations, Indonesia is virtually alone in placing absolute restrictions on the ownership of land by a company or other collective enterprise.

TABLE 7.3: OWNERSHIP OF LAND BY COMPANIES IN ASIAN PACIFIC RIM

Country	Companies Allowed
Singapore	Yes
Malaysia	Yes
Thailand	Yes
Vietnam	Yes
Philippines	Yes
Myanmar	No
India	Yes
Hong Kong	Yes
China	Yes
Australia	Yes
New Zealand	Yes
South Korea	Yes
Indonesia	No for ownership Yes for use and building tenures

[34] Discussions with major commercial agents indicated that limits on ownership by both corporations and foreigners was a serious restraint on markets and long term capital investment. Steps have been taken by the State Minister for Agrarian Affairs to extend the term duration of initial grant for *HGU's, HGB's* and even *Hak Pakai*. However, these remain non-perpetual, use restricted and inferior to outright ownership.

Foreign Ownership

Foreign Ownership in Other Asian Countries

The Asian nations diverge in their approach to foreign investment and ownership in land. Some, such as India, Thailand especially Hong Kong, welcome it, while others, particularly the communist regimes Vietnam and China, and centralist economies like Indonesia and Myanmar, discourage it. Indonesia uses its tenure system as a **primary mechanism** in the attempt to control foreign land investment. Other countries use much more focused strategies of foreign exchange controls, investment approval systems and regulatory capital or exchange limitations on the amount invested or zoning of land available for investment.

TABLE 7.4: BASIC CONTROLS ON FOREIGN OWNERSHIP OF LAND IN ASIA PACIFIC REGION

Country	Foreign Ownership	Comments
Singapore	Land (not stratas) is restricted, as are apartments in buildings under 6 stories which are not condominiums.	No foreign exchange controls or restrictions on repatriation of funds. Foreigners not permanent residents cannot get Singapore dollar loans for purchase of residential property.
Malaysia	Restricts acquisition by non-citizens and foreign companies Foreign Investment Committee	Can acquire "building" and "agricultural" land with approval of state authority. No restriction on "industrial". Generous controls on dwellings and condominiums
Thailand	Freehold restricted. Leasehold not	Can purchase freehold for some business purposes. Residential sector is being opened up.
Vietnam	Restricted	Vietnamese individuals and organizations and joint ventures with foreign and Vietnamese own
Philippines	Restricted, but can own condominiums. No foreign equity is allowed in certain activities.	Filipino citizens and companies can own freehold. Land Law under review to allow foreign ownership.
Myanmar	Restricted in freehold, allowed in leaseholds	Legislation prevents foreigners owning land, and restricts private leases to 1 year. Government leases are longer
India	Incentives to invest. 100% foreign equity allowed (conditions). Not allowed in agricultural or forestry.	Permission of Reserve Bank of India, with controls on repatriation of capital on sale.
Hong Kong	None	No currency or Foreign exchange controls
China	Incentives if property is designated "for sale on overseas market".	Currency exchange restricted. No conversion to Renminbi.
Australia	No restriction. Companies register as foreign company and operate as normal. Foreign individual can own land.	Foreign Investment Review Board reviews sensitive investments.
New Zealand	No restriction. Companies register as overseas companies and operate as normal. Foreign individual can own.	The Overseas Investment Commission controls investments over NZ $10 million, and in rural land.

Country	Foreign Ownership	Comments
South Korea	Incentives. Foreign ownership permitted except for non business	Exceeding 660 m^2, special tax on foreign ownership is levied.
Indonesia	Foreign ownership not available in *hak milik*, and restricted in commercial tenures	*Hak Pakai* and HGB are available to foreigners domiciled in Indonesia, Indonesian corporations and foreign corporations with representatives in Indonesia

Early Land Use by Foreigners

Prior to colonisation by the Dutch, private ownership was unnecessary and unrecognized in Indonesia. Cultivation shifted, in general, when necessary. Stable villages developed their local *adat* law. *Adat* principles did not admit the right to transfer; alien persons not members of the community were obliged to obtain consent from the community to enter and exploit land, and paid tokens before working the land and after harvest. Commercial crops required boundary definition, exclusion, development of land and a high degree of permanence in land use entitlement. The ability to transfer land to non local Indonesians was approved under 1870 Agrarian Law – the previous practice was recognized by the law and a commercial market in land became evident.[35]

The Dutch by regulation forbade "indigenous Indonesians" to alienate *adat* land to persons belonging to other population groups (Europeans and Chinese). The law of the colonial period made it clear that Indonesian nationals of foreign descent could not belong to indigenous Indonesians but only to one of the other groups, Foreign Orientals or Europeans. This limitation has nothing to do with nationality. Its purpose was to preserve and protect indigenous social organisation and culture.

Controls on Grants of Titles

Research indicates that few *hak pakai* titles have been issued to individual foreigners, and that there is little trading in rights in these tenures, because, should they be sold, the process involves surrendering the existing title to BPN who then issue a new one.

The limitation on who can acquire the titles has bred practices of avoidance. In the typical case of a foreign individual wanting to buy a house or business premises, the title is put in the name of a nominee Indonesian. Even in the commercial sector, separate agreements setting up nominee ownership are common because they allow the business to run on a *hak milik* title, and avoid the time and use delimited commercial titles.

Restrictions on Foreign Land Use in the Basic Agrarian Law

The restrictions remained after independence. In 1960 the Basic Agrarian Law continued this restriction but for a different reason. In Article 9.1, "only Indonesian nationals can have full relationship with land, water and air". Article 9.2 gives "every Indonesian national, whether man or woman, equal opportunity to obtain rights on land." The ideological underpinning of the restriction was fundamentally altered – was an expression of the "principle of a single Indonesian nationality". The point of the Basic Agrarian Law was to create a centralised state with a singular nationhood over the 4800 kilometer-long archipelago composed of diverse cultural and social groups.

Further restrictions were imposed: Article 26.2 declared every transaction indirectly or directly transferring *hak milik* (Indonesian ownership) to foreigners is invalid.

[35] See LAP-C Report Topic Cycle 3, International Comparative Review on Spatial Planning

In retaining the restriction on foreign ability to acquire land, the BAL also tidied up the substantial complexities which had arisen through the dual systems of Dutch and *adat* law which attempted to resolve conflicts caused when people of different population groups transacted with one another.

Another consequence, obvious at the end of the 20th Century, is the substantial impediment to international investment created by the limitations on foreign titles. Restrictions on foreign land ownership, and expulsion of ex-colonial masters on independence, are a popular but naïve way of expressing national pride and solidarity. The rise of global capital as the major monetary institution, and the sophisticated opportunities of controlling land titling and use by fiscal policies (land taxes and so forth) make this restriction not only obsolete, but destructive of national opportunities. The restriction impedes capital flow and has practical secondary effects – where the need to obtain foreign capital overrides the restriction, the law becomes "more honoured in its breach". Another consequence is that the focus on *adat* law forces the country to be inward looking in the way it designs its relationship with land.

Securities in Land

Under Basic Agrarian Law

The Basic Agrarian Law retained the provisions of Book II of the civil code pertaining to *hypothec* (mortgage) and pre BAL provisions relating to *credietverband* (credit security). Pending regulations being made, Dutch law relating to mortgages (*hypothec*) in Book II of the Civil Code and the colonial regulations relation to *credietverband* was retained. Originally, a mortgage could only be created in rights of ownership, exploitation and building and the *credietverband* was created over *adat* rights. Regulations in 1961 allowed either form of security to be created in the rights.

Security Title Act

By 1996, these were no longer suitable and they were replaced by security titles in **Act No 4 of 1996 re *Hak Tanggungan* (Security Title) on Land and Land-Related Objects**. This Act permitted mortgage by security title on *hak milik, hak guna usaha* and *hak guna bangunan* under the UUPA, and *hak pakai*.

Hak Tanggungan (security title) can be transferred as a result of cession (transfer), subrogation (replacement by another creditor who repays the debt), bequest or consolidation and liquidation of companies.[36] The explanatory memorandum provides that the title is the accessory to the credit and that the title legally follows the transfer of the credit. Transfer of the title does not require a separate legal act.

The security title system is designed as an engine for land registration. The titles assume that the land will either be registered or that an application for registration will be made as part of the mortgage process. If the land is not registered, (that is, is a land right originating from conversion of an old right – distinguished from informal ownership), the conveyance of the security title is carried out at the same time as the application for registration.

The security title can cover the land rights defined in the BAL, including or excluding the objects standing on the land parcel and forming an inseparable part thereof, for purpose of guaranteeing repayment of a debt, and gives registered creditors priorities over unregistered creditors. The security is created by Deed on Security Title Conveyance, a PPAT deed.

[36] PP 24/1997 Article 16 – How far *hak tanggungan* will become marketable in its own right is unknown. In *adat*, the benefit of an ordinary debt cannot be assigned. However these rights are seen as business or commercial interests and are not limited by *adat*. Whether the right can be sub-mortgaged is unknown.

Hak Pakai, a right of use over state land, requires special regulations, provided for in Article 4(3). No such regulations exist. Some enforcement problems exist with security titles taken over *HGBs* on *hak milik*. Where structures, plants and works are not owned by the land right holder, the execution of the security title to these can only be done by the owner of the structures co-signing the security title or by a person empowered by deed by their owner.

The Act applies to exertion of a Guarantee Right *hak jaminan* to Apartment Buildings and Apartment Ownership Rights.

Standard Conditions

The Act provides for a range of standard conditions. A conveyance may contain a promise that, in the event that the provider relinquishes the right to the object, or the right is revoked in the interest of the public, the holder will pay all or part of the compensation received to repay the debt. It may also contain a promise by the provider to vacate as part of the execution process. There is no restriction on other conditions which might be included in the credit arrangements.

Formalities

The conveyance of a security title must be registered at the Land Office which issues a security title certificate to the holder. The title then has the same level of executorial power as a court ruling, and replaces the original mortgage deed or *grosse acte Hypotheek*. Existing titles are converted in Security Titles: Article 24. A security title can be transferred to another owner, and registered at the Land Office in the security title land book and the land book of the land right, and copying the record on the security title certificate and the land right certificate.

Assessment of the Security Titles Act

The Act does not give the wide range of effective remedies which are familiar in the commercially developed systems of land mortgage. A creditor is allowed an auction run through the state auction agency. This remedy seems relatively appropriate for the easy work outs, but it is not sufficient to preserve the asset for the dual benefit of debtor and creditor. Moreover, there is strong anecdotal information, backed up by the experience of IBRA, that personal covenants of indebtedness are not reliable enough to source legal action for recovery of capital, interest or expenses related to bad loans.

The principal remedy available to a mortgagee is notably missing. This is the **immediate right to possession** or right of entry on to the land that a mortgage gives to the creditor in western law. This right exists immediately the loan is executed, whether there is default or not.[37] The mortgage agreement then limits the legal entitlement to possession by setting up a prior default as a precondition. The law allows the lender to take possession with little more than the formal notice to remedy default, subject to statutory protections which may exist. Once the notice is given and time expires, the lender simply takes the land. The threat of losing possession is, of course, the greatest incentive to debt performance available. Once in possession, the mortgagee is entitled to the rents and profits of the mortgaged property. The lender can also carry on the borrower's business in preparation for sale.

[37] Harman J, Cuckmere Brick Co v Mutual Finance, 1971, Court of Appeal, UK

Lenders also have other significant rights:

Personal right to sue for the debt. This personal covenant to repay the debt creates an ordinary contract which can be enforced in its own right, separately from the exercise of the rights the lender has in relation to the land. It continues to exist throughout the loan.

Power of sale (not merely sale through the government agency, but private sale) which allows the lender to sell the land free of the debt to a stranger and take the proceeds to settle the debt. It preserves the lender's opportunity to sue the debtor for the balance of the debt. In Indonesia, this opportunity is far from clear. In any event, whatever the law, the major bank creditors indicate reluctance to pursue the personal covenant, given the way the courts operate. The experience in bank liquidations suggests that the sale of secured assets to recoup unpaid debts is a difficult and arduous process. The sales must be by public auction, with exceptions for a private treaty in the case where it can be shown to bring more money.

Foreclosure which extinguishes the debtor's right in the land and transfers to ownership to the creditor.

Right to appoint a receiver, a right which is significant for commercial securities which involve trading or manufacturing businesses on the land.[38] The receiver's legal position is agent for the borrower. This remedy is contrasted with the remedy of taking possession which leaves the mortgagee liable to the borrower for wilful default.

Fail Safe - Taking Ownership

Strong anecdotal evidence and analysis of court case records indicates that sometimes a loan is secured by the creditor taking a sale/purchase agreement and assignment of the ownership, rather than a mere security title.

This is not unusual. Until it was stopped by the **Law of Property Act 1925** in England a mortgage was a conveyance of land, and sometimes deeds which purported to be outright conveyances were taken to secure loans. Also it was done under the Torrens system in Australia. However, if formalising loans by transfers is a standard way of securing credit, it reflects badly on the system. It suggests that the system of law cannot provide a sufficiently attractive regime for securing credit and for working out the property on default. It also represents to the rest of the world that the creditor is the true owner of the land, when in fact the debtor has a right to its return, certainly as between the parties, but also in most systems against new owners.

In Indonesia, we have no figures about the level of this kind of securitisation. But we do have information about the efficacy of the credit arrangements and anecdotal accounts of creditors defrauding debtors in these circumstances by acting as owners of the land in their own right.

Case Law

In a working commercial system, many disputes about priorities and debtor creditor behaviour will arise. Competition among competing claims in relation to the land will also occur. If the system of law has a firmly applied precedents system, the accumulated cases will begin to express clear rules so that subsequent similar situations less likely to be litigated. The maturation of the case law system in Indonesia is a long way from achieving these standards, with the result that every situation of claim must theoretically be litigated to finality or compromised. The cases cover similar

[38] In England, the right is established in the Law of Property Act 1925 ss101(ii), and 109(i)

situations are dealt with differently, adding to the need to litigate in every case and making the system less coherent.

7.6 Indonesian Tenures – a Flawed Commodity

Evidence of Market Operations

The most successful broad based market in Indonesia is the condominium market. However it has seen price falls of 57% since the economic crisis began in July 1997. The number of transactions has dropped significantly because of a decline in purchasing power, lack of mortgage facilities and political and social instability.[39] Other markets such as residential and commercial rental markets, the raw land market and the residential and commercial land markets are similarly downsized. While this might be regarded as an economic aberration, pending recovery, any return to the hey-day will produce very limited economic value unless tenures are fundamentally reformed.

Comparisons with Tenures in Other Countries

Indonesian tenures are fundamentally flawed in four ways:
1. they are mutually exclusive (with some marginal and unimportant overlapping of *hak milik* and the commercial tenures)
2. they balance the relationship between the state and owner in favour of the state
3. they involve a high level of legal and economic insecurity
4. they are uniquely structured and labelled.

1. Exclusive tenures

This has been discussed previously.

2. Balance of rights and obligations is in favour of the state

The tenures available, even *hak milik*, are vulnerable to forfeiture especially because they are defined by use. Theoretically, the rights are available for forfeiture if the use involved is no longer apparent. Even if forfeiture is not the consequence, the system breeds large rent seeking opportunities.[40]

3. Legal and economic insecurity

Legally, a tenure can be very short and very secure. For example, a letting of a holiday house at Malibu on the west coast of USA for one month provides a very secure entitlement to the house. On the other hand, its economic security is marginal. For an economist, security is related to the time an interest is available as well as its strength during its existence. Economically the distinction between a *hak milik* or potentially perpetual right and a commercial right for up to 90 years, is significant. It is consequently significant for valuers, members of corporate boards and other key decision makers. For the lawyer, the insecurity factors are overwhelming. The retention of discretions in the state to end the

[39] Jakarta Post 1 April 1999, page 9, quoting property consultant Procon Indah in association with Jones Lang LaSalle.

[40] Indonesian Observer, 12 March 1999, p 4, reported a complex permit system for using residences as offices. *Hak milik* titles theoretically should be used for personal use or occupancy. Observations suggest that the drift of residential properties into commercial use is extensive in the cities, and an inexorable result of market demand.

tenures means that the security is obtained from non-legal sources, ultimately political or bureaucratic patronage.

4. Unique structure and labels

Indonesia has a unique tenure system. See the table below.

TABLE 7.5 BASIC LAND TENURES IN ASIA PACIFIC REGION

COUNTRY	TENURES	COMMENTS
Malaysia	Freehold Leasehold 30,60,99 years	Broadly based on English common law.
Thailand	Freehold Leasehold 30 + 30 years	
Singapore	Fee simple Statutory Leasehold 30,60,99,999 years	No separation of ownership of land and buildings. Broadly based on English common law.
Vietnam	Land is owned by the people of Vietnam. Land rights are granted by local People's Committee	The rights are guaranteed by state. Foreign investors can get up to 70 years, usually 20 – 45. Anyone is permitted to own buildings
Philippines	Freehold Leasehold	Filipino citizens and companies can acquire freehold. Leaseholds in public lands are available to everyone. Leases may be sold, transferred or assigned
Myanmar	Freehold (rare) Leasehold	Most land is leased for a maximum of 60 years
India	Freehold Leasehold < 999 years Statutory tenancy	Broadly English common law and practice
Hong Kong	Leasehold	Based on English common law. Head leases and sub-leases are used
China	Land Use Right 50-70 years	Constitution of PRC Article 10 was changed in 1988 to allow the transfer of "land use rights" for value
Australia	Freehold Leasehold	Based on English common law
New Zealand	Freehold Leasehold	Based on English common law
Indonesia	*Hak milik* *Hak guna usaha* *Hak guna bangunan* *Hak pakai* *Hak sewa*	5 types of basic tenure. Each tenure is highly prescribed and related to specific uses of the land. Most tenures are derived directly from the State, not from a private owner. Separate tenures for buildings are available.

7.7 Paying the Price

Banking Crisis

In the last decade the Indonesian banking system expanded rapidly. Over 100 new banks opened in the last 10 years since the deregulation package of October 1988 (*Pakto 88*). These were mostly sourced by major corporate groups to finance their own businesses. The result was an undercapitalized, inefficient and fundamentally corrupt commercial banking sector. Coupled with lax regulation and minimal supervision, there were no adverse consequences applied to persistent violations of prudential regulations. Many of the loans made were poorly secured. Valuations accompanying loans were often grossly higher than the real asset value. Some 70% of total credit is now non-performing loans.

With the economic crash (*Krismon*), lending stopped.[41] By end of 1998, Bank Indonesia reported the system had a negative net worth in excess of $11 billion. Few new loans are made. International audits conducted in 1998 concluded that over 90% of Indonesian banks were bankrupt and none met the international standards for capital adequacy. Bank restructuring was undertaken; the amount of capital needed to fund restructuring is still doubtful, having increased from Rp 300 billion to Rp 500 billion as at April 1999. The restructuring was based on figures generated by standard audits, not risk assessments.[42]

Analysts do not expect the recapitalisation of the banks to work for two reasons. First the capital adequacy ratio (capital against risk weighted assets) being used is only 4% and is far below the international standard of 8%. Second, little new capital is being injected; rather 80% of the recapitalisation is achieved by a paper bond float. Over 95% of total loans are classified as substandard or worse. Management competency is also a question, as is the ingrained practice of insider and related lending.[43] The banks pay high interest rates [35% + at April 1999] to attract and maintain customer deposits, while receiving virtually no interest income from their loan portfolios. The entire banking industry at 1 April 1999 is now technically bankrupt with a negative equity position of Rp 99 trillion ($11 billion).

The restructuring authority, IBRA, will undertake workouts of the assets of the failed banks. In this process, the limits of the security arrangements and the lack of prudential lending standards will be further revealed. With gross violations of legal lending limit regulations with connected lending to shareholder held companies exceeding 85% of capital in some cases, bad loans are the norm. Moreover, the process has resulted in nationalisation of the banking system with the government taking at least 80% majority share in all but a few minor commercial banks through its recapitalisation via state bond instruments. The political overtones in the selection of "bad" banks and saveable banks were widely exposed in the national media. Meanwhile, the Habibie administration is particularly careful not to identify any individual who was involved in the banking collapse.

In short, the banking sector cannot provide funds necessary to stimulate a property market. Unless there is return of personal flight capital, the markets will not recover.

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[41] "95 percent of the country's housing developers have gone bankrupt due to the continued slump in the country's property sector, according to the Indonesian Real Estate Developers Association (REI). Most members faced difficulty in selling property due to high interest rates [currently 40% commercial] and the sharp price increase of construction materials following the sharp depreciation of the rupiah against the dollar." *Almost all real estate developers insolvent*, The Jakarta Post 12 April 1999 Page 9.

The same story reported the former REI chairman Edwin Kawilarang estimating the property sector's debts, including foreign debts, at Rp 70 trillion (US $8 billion)* as of May 1998. He blamed the problems in the country's banking industry on massive investment in the property sector. Many banks failed to regain money invested in the property sector.

* An underestimate, we believe, of the level of proved indebtedness at April 1999.

[42] The problems in the commercial sector are highlighted by the failure of the banking system. While standard auditors accepted the asset values presented by banks as real (even though over-valuation (mark up) was a standard mechanism for removing money to benefit individual executives who pocketed the difference between what was actually paid and what was advanced on security), due diligence audits measured asset value according to the market. The result is a comprehensive set of figures which are virtually meaningless in real terms. See Kwik Kian Gie, *Corruption hides truth in audit reports*, 20 April 1991, The Jakarta Post p 1.

[43] Melville S Brown, Senior Financial Advisor, The Indonesian Bank Restructuring Agency, The Indonesian Banking Crisis report, April 1999.

Functioning Legal System

Reform of land tenures and land law will not reduce the gap between legal norms and sub-legal operative norms and practices relating to land. For this, the legal system at large needs to be improved. A healthy legal system supports basic principles. These do not take the form of norms, but are used to judge the norms and to inform the interpretation of specific legal rules.[44]

Principles usually adopted by legal systems include equal application of rules, enforcement of contracts and protection of property. The means of articulating these principles in an integrated legal system are complex and interactive. By contrast, the Indonesian government tries to achieve its goals by means of setting up artificial structures and entitlements which are detailed and complex. The effect of these in the field is very often failure because they are ill thought out or subvert or contradict principles, even when the structural rules and procedures are complied with. In one complicated illustration, small plantation owners place land on security for loans paid to the processor, and on their inevitable default (given the processor controls product prices and quality), the realisation sale of the land by the creditor allows the processor to purchase the holdings outright. What appeared to be an empowerment of the local owners was the means of loss of their land.

During the last decade of the New Order, land dealing did not follow market demand. It responded to individuals seeking political approval for an idea and being allowed to do it. The on ground picture that resulted may look like the cities everywhere else, but properties cannot be developed and marketed in the normal way by people, including off-shore investors, bidding and dealing among themselves without the constraint of returning title to the state if a use is changed or asking for permission. Deals were done, and buildings were built, and factories opened, but not through open market channels.

7.8 Land Reform

The BAL allows the national government to make decisions about land development for the national betterment. In this goal, Indonesian law is no different from law of any other nation: all nations must reserve an overall opportunity to release land for national interests, be they roads and hospitals, or major developments seen as an economic imperative. The difference lies in the extent of balance struck between the owners and the state.

In systems with strong property rights, the structures for allocating land resources to nationally prescribed activities usually involve:

- Participation, usually political, but sometimes even aimed at achieving high levels of local consent
- Payment or compensation (including solatium payments for people forced to move from personal attachments)
- Transparency and clear processes.

Contrast Indonesia. Land tenures in Indonesia are used as a bulwark to address deep fears (built of colonial experience, perhaps) of land concentration, land grabbing and abuse of power. The operation of BPN in granting land use opportunities is seen by its officials as directly addressing these perceived woes and containing potential excesses that a freer system would "inevitably" produce. Hence, they see little need for individual rights.

Unlike other countries, Indonesia uses its tenures as primary social and economic policy tools to prevent corporate and foreign ownership of land, to limit the amount of land available to an

[44] Ronald Dworkin, Principles of Jurisprudence,

individual, to prevent ownership by groups and deterred the emergence of a civil society. Other social policy and economic tools are either underdeveloped or contradicted, particularly land use planning at the local level.

The unfortunate reality is that a tenure system cannot answer these fears adequately, and by focusing on tenures (not taxation and planning, investment controls and allocations), the distortions in the distribution system are replicated and embedded. Opportunities for developing long lasting and sensible land allocations are lost and existing traditional allocations are denied. Land transfers are inhibited, changes in ownership are hidden, and other mischiefs are apparent.
A more mature approach would combine:

- planning (isolation of community land from ownership by outsiders, dedication of land to small parcel owner occupied residential)
- land taxation (fiscal prices payable on multi-parcel or extensive area ownership)
- agrarian policies (arrangements between processors and growers), and
- effective devolution of controls to local administrations.

TABLE 7.6 COMPARISION OF MARKET BASED AND INDONESIAN LAND LAW

	MARKET BASED	INDONESIA
LEGAL SYSTEM		
Private Law Relating to Land	Well developed Coherent rule making and dispute solving system	Under developed Rule making dependent on central government
Rent Seeking Opportunities	Few	Many and uncontrollable by existing administrative and regulatory structures Accepted as normal and constantly reinforced by behavior
Norms	Close relationship between the operative norms and legal norms	Distance between operative norms and legal norms. The formal law has little to do with how land is dealt with or used.
Importance of sub legal norms	Low	High, eg nominee culture, corruption
Knowledge of system in community	Extensive, with consequential implications for transactions costs	Restricted and limited, with consequential implications for interpretations priced by bureaucratic rent seekers
Scope for interpretation of laws and rules	Extremely limited	Extensive
TENURES AND TITLES		
Tenures	Abstract and complex, multiple Absolute	Few, rigid and narrow. Focus on the visible: surface of land, buildings and specific uses
Ownership	Maximum control and discretion by the owner	Maximum control and discretion by the State
Controls on grants of titles	Multiple, open no national distinctions	Nationalistic and discourage corporate ownership
Interests in land	Can develop to meet need	Formally cannot develop but probably do.
Possession	Significant, can repair a bad title, and if adverse can bar owner's title	Possession insignificant, does not repair a bad title or create a title.
Community land ownership	Available	Not available for private groups or philanthropy. Derived from state land through permission process
Public land	Well defined	Poorly defined
Building titles	Standard leaseholds allow building on another's land	Separate title available for "building" on another's land
ADMINISTRATION		
Bureaucracies	Service minimum	Maximum, nationally present, and centrally responsive
Registration	Confers a proprietary benefit	Merely evidence of ownership, a little stronger that off register documents or use
Use of Land	Controlled by planning processes	Controlled by titling processes
Planning	Created by over arching planning legislation with layers of control applying universally	Obtained ad hoc as proposals are assessed Ineffective national planning
Quality	Reasonable and fast. High conformity of records to use. Administration detached from policy and allocations	Complex and slow. Low conformity of records to use (with exception of some registration programs). Administration involved in policy making and allocations
Land Administration System	Reasonably well developed and partially integrated Systems generally trend towards integration Land information a major resource and publicly available Various balances between public and private skills and systems providers Computer use large and growing	Disintegrated and incomplete Based on manual systems of recordation Skills bases in need of development Public access to information virtually non-existent

MARKET		
Amount of Private Land	Vast proportion of national area	Less than 1% if based on *hak milk*
Land Values and Pricing	Values are market defined Most transactions are stranger to stranger No regulation or price control.	Values are bureaucrat defined Transactions are project based between related or familiar parties Prices are controlled by selective release of land, compounded by rent-seeking
Credit System	Security interests are highly protected System is highly integrated and consistent with titles The system is well understood by borrowers and lenders in equivalent terms Independent credit underwriting	Security interests are poorly protected System is disintegrated and partial Apparent disjuncture between parties' understanding of system – debtors expect to escape liability while creditors' expectations to recover capital are frequently disappointed Credit underwriting standards are both inadequate and poorly applied
Taxation	Tax is separate liability, charged for services or on transactions	Tax is charged on and collected through registration
Market Opportunities	Maximum. Legal system permits owner to make decisions about the most efficient use of land by returning the owner to possession after this use ceases	Minimum. The law limits absentee ownership in an effort to control speculation, and removes opportunities for *owners* to allocate land efficiently. The *State* becomes the allocator. This results in a flat and static system of land interests
IDEOLOGY		
Expressed	Free market economics Public purpose land controls State role minimal Private law and rights maximised	Indonesian socialism, *Adat* principles Remedy the lack of legal security for autochthonous population Regulate land for maximum prosperity of the people Law pursues land redistribution and controls land speculation Land is merely "controlled" by the state, not owned The state, rather than owners, is the primary decision maker in relation to land.
Actual	Consistent with expressed ideology	Collective ownership by autochthonous population must be converted to individual ownership Land regulation formally comprehensive but is not in communicable form and is virtually ineffective for limiting ownership and redistribution State "control" functions as ownership

CHAPTER 8 THE FUTURE

8.1 As of Right – Future Vision

Whether or not Indonesia moves from a centralized economy to a devolved market economy, land policy reform is essential. The components of this reform are three:

- Tenures (land Rights)
- Tax
- Autonomy.

The Basic Agrarian Law is now out of date. It was designed to service an agrarian economy. It cannot service the modern industrialised economy which Indonesia has built in the last two decades. What is needed now are flexible and clear tenures which minimise land disputes, facilitate sectoral changes required by autonomy and permit the structural transformation of agriculture without loss of civil peace.

Policy directions set by disparate ministries with little opportunity and almost no incentive to cooperate must be avoided. *Land related services are no longer appropriately delivered by a isolated, centralised bureaucracy.* To make the system work, the social responsibility of land ownership needs to be definitively established by legislation after informed political processes involving the people and the Parliament. The fundamental allocative principles need to be reiterated in legislation so that people understand their entitlements are as of right, not courtesy of bureaucratic decision.

Moving Tenures into the Future

This Report provides an explanation of how land rights developed in democratic, law based economies. It shows how possession became central and how recognition of possession initiated a property right. The next stage of development, when land markets become property markets, is described so that policy makers appreciate what is meant by a market system in land rights. It also demonstrates clearly that the Indonesian land law has not even begun to make the transition into those stages of economic growth that open property markets provide. By retaining tight control over land, the government severely restricts not only land trading, but also the development of the secondary property markets that it needs. These markets depend on market choice. This in turn depends on private ownership. The free market is incompatible with state control over all facets of land titling and use. *The question that needs to be answered by Indonesia is what kind of land rights do Indonesians need for sustainable development in the 21st Century?*

National Land Administration Policy

The national land administration policy must establish firm policy goals. While it is tempting to write policies in terms of justice, fairness and efficiency, these are far too broad to give any real on-ground direction to the ultimate destiny, nor do they provide any pathway to achievement. Hence, the policies below are much more focused on definitive outcomes and results. If these are achieved, they would deliver Indonesia a modern, efficient land administration system within which its goals for land reform and sound land use could be achieved through integrated and consistent operations.

The broad policy goals are:

1 **Vision**. Develop a vision for land administration for the next decade which ensures inclusive and comprehensive policy implementation, and relies principally on computers, not paper recording. Strategically direct all changes in administration, law and policy implementation towards this vision.

2 **Legislation**. Change the basic law to create a legal environment which delivers certainty of interests in land, especially by recognising the existing dual system of *adat* principles for existing villages and communities, and clear contract and property law for everyone outside these, including clear conveyancing and priorities rules.

3 **Rentseeking**. Ensure that legal norms reflect the practices of titling, using and transacting with land, especially by removing opportunities for rent seeking.

4 **Tenures**. Reform tenures to reflect modern tenure systems in comparable countries and to achieve land reform.

5 **Efficient Administration**. Through the autonomy initiatives, immediately plan and implement integration of land tax and land registration administrations, especially at *Kabupaten/Kotamayda* levels.

6 **Records - Make once, use many times**. Mapping, taxing, recording and registration functions must be integrated. Land ownership and parcel records must be made once and used many times, through the development of a unique parcel identifier capable of being used in all land (public and private) systems, and adoption of parcel (not tax object) based land taxing system.

7 **Autonomy**. Develop integrated information delivery, collection and servicing at the local level. Ensure easy local access to records. The community should be able to find out what the records say, and how they are changed and be encouraged to keep records closely aligned with land ownership with education and familiarisation projects at all levels.

National Land Administration System

Land information systems everywhere are undergoing change. Developed nations have sophisticated tenure systems which reflect their historical experiences. They have generally completed the process of integrating tenures, markets and agencies, but they still undertake continued improvement as mapping, electronic and record keeping systems mature. Their experiences provide examples of how Indonesia might move forward to achieve its own land reform and national goals.

Land Administration Reform (Figure 8.1 below) shows the three core functions in Indonesian system which require immediate change – Tenures, Tax, and Autonomy and an appropriate administrative framework. While some pathways are obvious, it is evident that the changes required are complex and require overview capacity. A body of experts is therefore needed to manage the process.

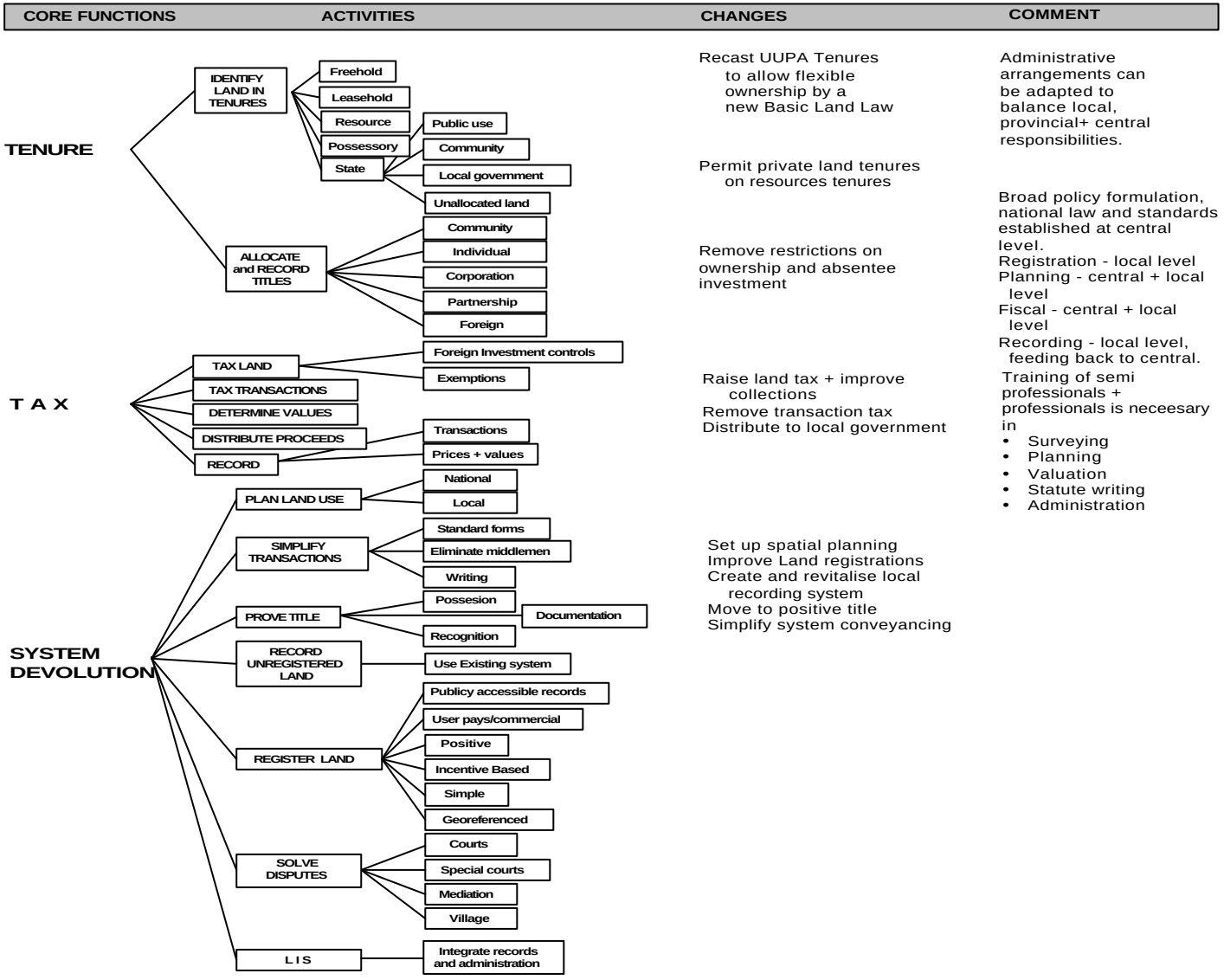
Land Reform Commission

The GOI should establish a Land Reform Commission to oversee implementation of national policies empowered to create a national land administration system through autonomous local governments and regions (Law 22/1999), in particular to:

- develop land reform policies and strategies necessary to achieve them
- develop interdepartmental cooperation
- undertake strategic change activities including consultation, public education, training supervision, and keeping essential public services within the price range of its users
- oversee and generate legislative changes which ensures that fewer but better laws are made, and which generates a comprehensive and consistent authoritative statute book

Figure 8.1 Land Administration Reform

Goals : Social justice, protection of ownership, private realm of law
Policies: Transparent, Local, Incentive Driven, Integrated
Strategy: Move from status, flat and complex system to a flexible, multi layered, self policing, simple system.



- obtain advice from experts, including overseas experts
- provide information on record co-ordination, computer and technological options to agencies, and direct strategic and technological reforms
- monitor implementation
- manage autonomy and devolution.

The Commission should preferably be established by Act of Parliament. It should have its own budget and should consist of a board chaired by a full time senior person with 5 part time members appointed for 2 year terms, and a permanent executive staff of sufficient size and expertise to deliver management competency to manage the changes in the next decade, not less than 15 people. The Commission should have a sunset clause in its legislation giving it a firm mandate to plan and to implement in the next 10 years.

The Commission should report to Parliament bi-annually. Its principle tasks should be to act as a think tank and problem solver. It must be able to commission reports, review operations of existing agencies, oversee operations of land related departments, give directions for efficiencies and elimination of duplications across agencies and within all levels of government administration, and recommend changes in the law where these as necessary. It must have direct management capability to make changes in the delivery of land related, and land information related, services. It must be flexible and able to provide advice to Government on key issues as they arise, such as idle land, land banks, land redistribution or other emerging issues.

8.2 Essentials for a Market in Land - Commodities, Participants and Rules

Commodities

A market in land cannot exist without commodities to exchange. Indonesia's land law restricts choice (market activities), primary and complex commodities and participants.

Remove Restrictions on Land Use and Allocation

The future of small holder intensive farming is an open question throughout the world. Indonesia's land law requires an owner to use the land personally and limits leasing. Commercial and large scale users are required to obtain lesser titles. To restrict the primary and most stable title to a particular land use is inappropriate in an industrialised and highly populated country. Changes in the land law are needed to create more flexibility in land redistribution (through choice), newer agricultural methods, and to facilitate modern agricultural methods to improve yield and husbandry of resources.

Allow Tenures in all Land

Land designated as forest accounts for 72% of the land surface. No country can afford to take 72% of its land out of its land law. Conveyancing of rights in this land occurs every day. It supports an estimated 40 million people. Land rights within forest areas are essential.

Recognise Tenures in Unregistered Land

Most of the parcels in Indonesia are not registered. If the existing registration program continues, Indonesia will achieve land registration of known parcels in 100 years. Conveyancing and titling in this land must be assisted by recognition of tenures, titles and priorities.

Participants

Allow Corporations to Own Land

The restriction preventing Indonesians from owning land through a corporation is thoroughly inappropriate for a modern economy. This destructive limitation on the use of land as a capital resource is unworkable and drives all business activities to lesser and thoroughly unsatisfactory titles.

Allow Foreign Ownership of Land

Indonesia is not alone in restricting foreign ownership of land. Past concentration on the flat and spatial characteristics of land illustrates a misunderstanding of the nature of land ownership. Ownership of rights in relation to land is neutral as to the land itself. While foreign control and use, like any other control and use, are subject to spatial planning, investment and other laws, the ownership of the land in itself is not a mischief. The land always remains despite whoever has rights in it. As an economic tool, land ownership is capable of generating a great deal more economic growth and wealth for Indonesia. The quickest way to increase economic activity in relation to land, and the economy is to allow foreign investment directly in land.

Rules

Add Certainty to Land Law

Features of *adat* societies: social control tight, no written rules, no closures of disputes, could not operate in inter-ethnic environment involving outsiders and local communities. Indonesia needs a modern dynamic pluralism – space in which the local textures of its people can operate without the centralist state imposing a rigid mono system and within which the actions and desires of its people in relation to their land can receive firm legal recognition.

Reliance on *adat* principles in the Basic Law adds intolerable dimensions of uncertainty in land law. These principles were highly suited to traditional communities, but cannot sustain the kind of certainty that modern titling, even for an agrarian nation, demands. The experiment to taking unwritten *adat* principles and raising them to the national scale in an arena as significant as land rights was questionable from the outset. It has been tested by 40 years of experience. It has led to principles (such as horizontal separation, separate commercial tenures, and an emphasis on use rather than rights) being rigidly adhered to when they are counter intuitive for a society which demands permanence in the vast and rich textures constantly created by its members when utilizing their land. The severe economic consequences of using *adat* principles are made plain by this report. The severe social and political consequences of using *adat* are demonstrated by the demands for land rights and a private realm of law now frequently expressed by its people.

A much more confident, fair, certain and generally acceptable set of laws is needed.

Conveyancing and Priorities

A market in land cannot exist without clear rules.

Land Registration

The function of land registration must not be political. Public trust is an essential component of successful land registration programs. To achieve a detachment and competence capable of instilling public trust, the land registration agency should be divorced from political activity – this includes

land grants and management of land development. Management of land must be handled at the local government level which will manage the granting, sale and development of land through a transition process exactly parallel to the developer creating new parcels from raw land or building subdivisions. The initial grant of a tenure in state land should be undertaken by the local land office. Once the initial grant has been made, the local land office registry should issue certificates in the normal way.

Land registration, when reformed, will provide a juridical cadastral system, a familiar titling and registration system that encourages domestic and foreign investment, better marketing of land, quietening of land disputes and an improved land information system. The registration system should be integrated with the fiscal cadastre to create a basic land information system built around a uniform parcel identifier.

Land Tax as a Land Reform Instrument

Rather than using land tenures as the single policy instrument, the recommended approach would combine:

- planning (isolation of community land from ownership by outsiders, dedication of particular land to small parcel owner occupied residential), protection of coastlines, local land development codes etc
- land taxation (fiscal prices payable on multi-parcel or extensive area ownership)
- agrarian policies (arrangements between processors and growers), and
- effective devolution of controls to local administrations.

Indonesia should increase its land tax level and capture range to increase the return by the amount necessary to directly fund:

- Development and implementation of a national vision for a LIS and GIS
- Systematic land registration by owners with commensurate elimination of registration related and land transaction tax collections
- Land registration administration at an appropriate level for each district, focussing on urban and commercial land
- A sufficient geodedic network capable of supporting geospatial information system for roads, services, government administration, registration and tax collection.

Coherent Statute Book

The State Minister for Agrarian Affairs/BPN has generated legal instruments which have resulted in a statute book remarkable for its size and lack of coherence. While explication of basic principles in the Basic Agrarian Law by government regulation and lower instruments is legally permitted, recasting of the basic principles, or rewriting of them, is not.

The overall result is a legislative framework which is so hard to manage that only a few throughout the country are able to explain or operate it. Simplification and coherent publication of the law and subordinate legislative instruments is essential.

Employment and Skills

Given the changes of the last 20 years, a land law focused on individuating land plots and requiring owner cultivation[1] is obsolete. Indonesia has moved away from subsistence agrarianism and local markets for agricultural commodities. While the proportion of the population working on land

[1] Article 10 of the BAL requires an owner of agricultural land to cultivate his land actively.

remains large, the trend for rural population to move to centres of labour and development in towns and cities is as evident here as it is elsewhere. Employment - steady, predictable and for a living wage – must be the major goal for the Government. The land law, a fundamental part of the legal system, must be seen as a component in the implementation of policies for employment and social justice.

Professional services and skills for creating and maintaining the land administration system include lawyers, legislative drafters, surveyors and cartographers, valuers, conveyancers, administrators, policy analysts, planners, real estate agents, and land developers. The immediate need for creation of appropriate skills bases is made more pressing by devolution of central government functions in land administration to local governments.

8.3 Foreign Aid Focus

The focus on aid in land systems should shift from paying for supply side registration projects to:

- broadening registration to include self financed (*swadaya*) programs
- providing technical assistance to local government to strengthen land administration in the areas of registration, land taxation and land use planning
- encouraging Indonesia to apply its own resources to land administration goals
- building up the human skills which are needed for the tasks and
- creating the legal environment.

8.4 Tenures (Land Rights)

Law relating to tenures is fundamental and any changes must be approved by Act of Parliament.

The tenures should be strengthened by:

1. Allowing land and resource tenures to co-exist
2. Removing use as a general characteristic of tenures and annulment as a penalty for change of use
3. Establishing clear rights to just compensation for state and developer acquisition based on market value, or if market value is not established for want of previous sales records, on a fair publicly set value, including costs for moving and a solatium for the forced move
4. Establishing clear standards applicable for state and private acquisition, including appeals
5. Introducing tenures which are internationally competitive, and are based on a freehold/leasehold dichotomy
6. Abolishing the principle of horizontal separation in relation to land and buildings by introducing a fixtures rule which transfers ownership of things affixed to the land to the owner of the land
7. Admitting ownership carries rights and powers over air space above and sub-surface of land
8. Removing stale claims to land by creating a clear general limitation period of 10 years in which claims must be filed in the court system otherwise they expire by running of time
9. Creating a limitation period of 5 years during which claims arising through fraud in relation to any land, must be brought
10. Introducing a positive registration system
11. Allowing title to be acquired by possession which is adverse to the owner of private land or to the state's control of state land, if possession is used openly actually and

exclusively for 10 years, without gaps of more than one year. The possessory title should be alienable. The law should state that the effect of time running is to confer ownership of private or state land on the possessor[2].

12. Strengthening security title holders remedies and simplifying the way the title is created and its effect
13. Providing that all interests in land, apart from possessory interests and interests arising through a fraud, must be created or evidenced by writing signed by the party to be charged.

These changes are too complex and extensive to be implemented by government regulation. They require new law enacted by Parliament.

8.5 Informal Conveyancing

Informal conveyancing should be recognised and should become the basis for land records by:

1 Requiring writing for acquisition of an interest in land
2 Including parcel and owner information in tax records to create a database or land information system
3 Allowing payment of tax by or on behalf **of an owner** as evidence of title
4 Simplifying conveyancing by making simple written instruments (signatures and one identified witness) available for ordinary use, leaving use of notaries and PPATs for those who can afford them, and
5 Encouraging people to have the completed forms computer copied at both the Land and Tax Office for permanent records available for public search.

8.6 Unregistered Land

The Land Information System should be improved by:

1. Recognising possession as a tenure
2. Recognising all government records, including tax records since 1985 (for whatever information is included) as evidence of title
3. Improving government records of ownership throughout, and especially the tax records
4. Creating simple local land records, based on tax records
5. Allowing free inspection of the records by owners, and for fee inspection by strangers
6. Providing a positive effect for recording by giving recorded interests priority over interests created by later recorded and unrecorded transactions.

8.7 Registration

Registration should be encouraged by:

1 Providing a positive result of absolute title.
2 Allowing and encouraging free inspection of the records by owners, and for fee inspection by strangers
3 Directing supply side systematic registration at urban and semi-urban land of high value
4 Facilitating systematic demand driven (*swadaya*) registration at all land offices

[2] Adverse possession claims by individuals within *adat* communities would not be recognized without the express consent of the *adat* community.

5 Removing taxes imposed on the registration process and reducing the costs of sporadic registrations, in particular by eliminating the *uang pemasukan* fee payable when a certificate is derived from *tanah negara*
6 Simplifying the processes involved
7 Removing of opportunities for fraud, principally by requiring proof of identification on execution of documents related to land and recording ID numbers in land records, but the latter only after racial and religious information has been removed from the ID system and the numbers.

Political impediments to land registration should also be addressed. The system should be made objective and rule based. Opportunities for rent seeking should be eliminated.

8.8 Land Information System

Indonesia's land information must be improved and more use made of its existing information by:

1. Establishing a vision for 2010 for Indonesia's LIS, and developing clear strategies which will achieve that vision. The vision should allow for digital systems, overlayed information, public access and government guarantee that the information provided to customers is accurate.
2. Establishing a legislative base for the LIS which assists its implementation
3. Removing duplication of records by ensuring that information held by land and tax offices is exchanged on a formal and regular basis
4. Setting data standards for both text and graphic databases in anticipation of computer use, in particular metadata and conversion standards.

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APPENDIX 1

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

UNITED NATIONS HIGH COMMISSIONER ON HUMAN RIGHTS

Sub-Commission resolution 1994/45

The Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Recalling its resolutions 1985/22 of 29 August 1985, 1991/30 of 29 August 1991, 1992/33 of 27 August 1992, 1993/46 of 26 August 1993,

Taking into account, in particular, paragraph 3 of its resolution 1993/46, in which it decided to postpone until its forty-sixth session consideration of the draft United Nations declaration on the rights of indigenous peoples agreed upon by the members of the Working Group on Indigenous Populations, to request the Secretary-General to submit the draft declaration to the appropriate services in the Centre for Human Rights for its technical revision, and to submit, if possible, the draft declaration to the Commission on Human Rights with the recommendation that the Commission adopt it at its fifty-first session,

Recalling Commission on Human Rights resolution 1994/29 of 4 March 1994, in which the Sub-Commission was urged to complete its consideration of the draft United Nations declaration at its forty-sixth session and to submit it to the Commission at its fifty-first session together with any recommendations thereon,

Bearing in mind General Assembly resolution 47/75 of 14 December 1992, paragraph 12 of Commission on Human Rights resolution 1993/30 of 5 March 1993, paragraph 6 (a) of Commission resolution 1993/31 of 5 March 1993 and paragraph II.28 of the Vienna Declaration and Programme of Action (A/Conf.157/23),

Having considered the report of the Working Group on Indigenous Populations on its twelfth session (E/CN.4/Sub.2/1994/30 and Corr.1), in particular the general comments on the draft declaration and the recommendations contained in chapters II and IX respectively of the report,

Taking into account the technical review of the draft declaration prepared by the Centre for Human Rights (E/CN.4/Sub.2/1994/2 and Add.1),

1. Expresses its satisfaction at the conclusion of the deliberations on the draft United Nations declaration on the rights of indigenous peoples by the Working Group on Indigenous Populations and the general views of the participants as reflected in the report of the Working Group on its twelfth session;
2. Expresses its appreciation to the Chairperson-Rapporteur of the Working Group, Ms. Erica-Irene Daes, and to the present and former members of the Working Group for their contributions to the process of elaboration of the draft declaration;
3. Expresses its appreciation to the Centre for Human Rights for its technical revision of the draft declaration;
4. Decides:
   (a) To adopt the draft United Nations declaration on the rights of indigenous peoples agreed upon by members of the Working Group as contained in the annex to the present resolution;
   (b) To submit the draft declaration to the Commission on Human Rights at its fifty-first session with the request that it consider the draft as expeditiously as possible;
   (c) To request the Secretary-General to transmit the text of the draft declaration to indigenous peoples and organizations, Governments and intergovernmental organizations and to include in the note of transmittal the information that the draft declaration is to be submitted to the Commission on Human Rights at its fifty-first session;
5. Recommends that the Commission on Human Rights and the Economic and Social Council take effective measures to ensure that representatives of indigenous peoples are able to

participate in the consideration of the draft declaration by these two bodies, regardless of their consultative status with the Economic and Social Council.

36th meeting
26 August 1994

[Adopted without a vote]
Annex

DRAFT UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,
Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,
Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,
Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,
Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,
Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,
Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,
Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,
Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,
Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,
Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,
Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,
Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,
Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,
Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,
Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,
Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,
Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5

Every indigenous individual has the right to a nationality.

PART II

Article 6

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.
In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person.

Article 7

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
(e) Any form of propaganda directed against them.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

Indigenous peoples have the right to special protection and security in periods of armed conflict. States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous individuals against their will into the armed forces and, in particular, for use against other indigenous peoples;
(b) Recruit indigenous children into the armed forces under any circumstances;
(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;
(d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

PART III

Article 12

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, whenever any right of indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

PART IV

Article 15

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.
States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.
States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.
Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary.

PART V

Article 19

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.
States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.
Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. Article 24
Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.
They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

PART VI

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have

traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

PART VII

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

Article 34

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

PART VIII

Article 37

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

PART IX

Article 42

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.