The Return of the Native in Indonesian Law

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Indigenous communities in Indonesian legislation

Although the UN-proclaimed 'Decade for Indigenous Peoples' officially ended in 2004, the continuing array of activities in support of special 'indigenous rights' shows that this movement has lost little of its impetus.[1] In spite of criticism of the underpinnings and of the consequences of attributing special rights to 'indigenous communities' (Kuper 2003), support for them has remained strong – among NGOs, international organizations, governments, and scholars who do not agree with the criticism. The most notable event in this context is that after having failed to do so in 2004 the United Nations finally adopted the 'Declaration on the Rights of Indigenous Peoples' on 13 September 2007, with an overwhelming 144 countries voting in favour.[2] Thus, there is little reason to suppose that the movement will run out of steam in the near future.

A remarkable feature of the struggle for indigenous rights is that, while it concerns issues played out at the national and sub-national levels, much of the strength of the movement seems to derive from its international dimensions. Thus, an important element in the indigenous rights discourse has been International Labour Organization Convention no. 169 of 1989 (ILO 169), which has provided indigenous communities all over the world with a legal symbol to legitimize their pursuit of land, rights and self-determination. Lacking binding force in most countries where indigenous rights are at stake – only 13 countries have ratified the Convention – it nonetheless combines discursive strength with a worldwide presence. In the near future, a similar and even stronger effect may be expected from the new Declaration.

1 We are most grateful to Sandra Moniaga for sharing her knowledge on the subject, and want to thank Laurens Bakker and two anonymous reviewers for their comments.

2 Among them is Indonesia. Only four countries voted against the Declaration: the United States, Canada, Australia and New Zealand.

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Until recently, the influence of ILO 169 was confined mainly to Latin America and North America (Assies 2005), as in Africa and Asia most states denied the presence of 'indigenous peoples' or communities, using the argument that all of their citizens were indigenous (Niezen 2003:75, 231). Indeed, unlike in the Americas, most former colonies in Africa and Asia were not of the settler-type, and after independence lacked clear ethnic division lines. If present, these were glossed over in the rhetoric accompanying the emergence of national states. However, in Asia some changes seem to have taken place.

A notable example is Indonesia. While it is one of the Asian countries which has not recognized ILO 169, Indonesia has clearly felt its influence. After independence, official policy was concerned mainly with nation-building and economic development, and the post-revolutionary leadership's aim was to 'modernize' citizens and to disregard indigenous communities' legal and administrative systems. The zenith of this approach was Soeharto's national dogma of development and national unity.[3]

However, the breakdown of Soeharto's New Order marked the rise of various local structures and movements legitimizing themselves on the basis of *adat*, meaning 'custom' or 'tradition'.[4] Their struggles with local power holders have drastically changed the political landscape in many localities and their collective influence even extends to Jakarta's legislators.[5] Although many local movements citing *adat* to legitimize their struggle for more autonomy and resources do not label themselves 'indigenous peoples', a large number of such communities would fall within the ILO definitions and some have used the opportunities this offers.[6]

3 Lev 1973; Persoon 1998; Schefold 1998.

4 *Adat* is a concept loaded with all kinds of meanings, not least because of the central role it played in Dutch colonial policy as a basis for structuring state and legal relations. For an excellent overview of the current rise of *adat*, see Davidson and Henley 2007.

5 Persoon 1998, see note 5; Li 2000; Moniaga 2007.

6 Article 1(1): This Convention applies to:

a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

It should be noted that these definitions are quite broad and may be interpreted in various ways. One should also be aware that migration and modernization have intensely changed Indonesian society and that in many cases it has become quite difficult to determine whether communities still qualify as 'peoples' in the sense of these definitions. For our purpose, however, this is not a serious matter. Our starting point is the observation that many communities and groups invoke these provisions to legitimize their claims to rights and privileges, while others seek the same on the more straightforward basis of *adat*.

Most influential among the latter is the Aliansi Masyarakat Adat Nusantara (AMAN, National Alliance of Indigenous Communities).[7] This self-proclaimed national representative of *adat* movements in Indonesia has managed to lift the separate, local struggles to the national level. It derives legitimacy for its efforts from the international discourse of indigenous peoples, most notably the rights and claims laid down in ILO 169, and participates in the UN International Workgroup on Indigenous Affairs. As a highly diverse congregation of groups from all across the archipelago, AMAN has a permanent secretariat, a website, and its own newsletter, and has managed to attract a lot of media attention. The organization's statement at its first national congress that 'if the Indonesian state does not recognize us, then we will not recognize the Indonesian state' brought the organization national headlines (Li 2001:645).

While this statement suggests that the indigenous communities united in AMAN are defying the Indonesian state, that is not their actual aim. They are not challenging the Republic's sovereignty, but seek to establish special indigenous rights to land and natural resources, as well as self-government by their own institutions. In most cases the rights are more important than the self-government, in some cases they go together. This agenda is neither well-defined nor consistent, but shared by many groups and actors who use *adat* to legitimize their claims.[8]

Various authors have described this pursuit either in rather general terms or based on specific cases.[9] However, a comprehensive analysis has not yet been made of the current position of indigenous communities in Indonesian national law, and how it has changed.[10]

The present article intends to fill this gap. It provides an overview of the most important legislation relating to the rights and position of indigenous communities in Indonesia, the consistency or inconsistency of this legislation, how it has changed, and how it may change in the near future if certain proposed laws are adopted. It connects the discourse of AMAN and its allies, as

7 The central concept in international legal discourse is 'indigenous peoples' rather than 'indigenous communities'. In this article we will use the term 'indigenous communities' or '*adat* communities' to indicate those groups looking for recognition of their special rights to self-government and use of natural resources on the basis of their (perceived) historical origin. It is important to acknowledge that many of them do not use the international 'indigenist' discourse, although they pursue similar objectives. As one reviewer of this article rightly pointed out, the issue of *adat* played an important role in several cases of districts splitting off from others (the process known as *pemekaran*). Given the limited scope of this article, we will not go into these issues – which have been discussed at length by others – but basically limit ourselves to an analysis of how central state law deals with indigenous communities.

8 For more details, see Davidson and Henley 2007, in particular pp. 2-9.

9 Moniaga 2007; Persoon 2002; Li 2000, 2001; Acciaioli 2001; Bakker 2005.

10 Interesting accounts on changes in law at lower levels can be found in Davidson and Henley (2007) and in Schulte Nordholt and Van Klinken (2007), notably the chapters by Franz and Keebet Von Benda-Beckmann, Henk Schulte Nordholt and John McCarthy.

inspired by the global discourse on indigenous peoples' rights, to the legislation discussed and assesses to what extent this discourse is reflected in legal change. It thus contributes to an expanding literature exploring the effects of international law on national legal systems, but at the same time our legal analysis reflects the history of changing ideas on indigenous communities within Indonesia.

The position of Indonesia's indigenous communities under international law

Although Indonesia has submitted to much of the ILO regime – having ratified all eight ILO conventions on labour law – it has not accepted ILO 169. Apparently indigenous communities (or peoples) are a more controversial subject than labour, even in the post-1998 climate of political and legal change known as Reformasi.

However, this is not to say that international law is irrelevant. First, Indonesia is legally bound by several provisions concerning indigenous communities after ratifying the UN Convention on Biological Diversity (Law no. 5/1994). These recognize the 'dependence of many indigenous communities on natural resources' and the 'desirability of equitably sharing of benefits' (preamble). Preservation of traditional knowledge is to be implemented if 'possible and appropriate' and is subject to national legislation. The equitable sharing of benefits 'should be encouraged'.

Although the scope of these provisions is limited, their adoption by the Soeharto regime nonetheless seems remarkable. Only one year earlier, the head of the National Planning Agency Bappenas declared in response to the United Nations' proclamation of the Decade of Indigenous Peoples that indigenous communities (*masyarakat adat*) as a legal term in Indonesia's forest zone was 'dead' (Li 2001:645). Such was the logical outcome of more than 40 years of attempts at nation-building and gaining full control over national resources. By contrast, the adoption of the Biodiversity Convention could be seen as an implicit recognition of the continued relevance of indigenous communities.

However, the official Indonesian translation of the text of the Convention makes clear that this is not the case. Instead of translating the term 'indigenous' as '*adat*,' it is translated as '*lokal*' (local) and '*asli*' (literally: genuine). The latter term is commonly used to refer to all Indonesians who are not of such foreign descent as Chinese, Arab, Indian, and so on. Thus, according to the Indonesian interpretation of the Convention, it applies to all Indonesians and the provisions of the Convention thereby lose their intended meaning to protect communities living in traditional ways. It should be borne in mind, however, that the English text of the Convention holds precedence over the Indonesian translation incorporated in the Ratification Law, and that this

translation is therefore open to challenge.[11]

The second reason why Indonesia has not been immune from international law on this issue has to do with developments in international customary law. Although the UN 'Declaration on the Rights of Indigenous Peoples' was only a draft, it already had considerable influence. The Declaration considerably extends indigenous peoples' rights, including the right to self-determination. For this reason, even before its adoption some scholars argued that ILO 169 should be considered part of international customary law, which would make it binding on every country in the world. Hence, despite the low rate of ratification, the Convention has become 'a benchmark for state practices'.[12]

This could have significant consequences for Indonesia. The main reason for the Indonesian government to have resisted ILO 169 is its self-identification criterion (Article 1(2)), which could potentially be used to legitimize the claims of millions of Indonesians to self-government, *adat* lands and so on.[13] The reliance of the New Order on controlling the use of natural resources precluded any move in this direction (Cribb 2003:43), but natural resources remained important to the Indonesian central state after 1998 and initially not much happened (Asian Development Bank 2002).

However, the pressure on the Indonesian government to recognize *adat* communities on the basis of standards consistent with international law has steadily increased. Large donors such as the World Bank and the Asian Development Bank are in the process of developing policies applying the standards of ILO 169 (Asian Development Bank 2002; World Bank 2001), and within Indonesia itself the pressure to conform to international law standards has mounted as well. AMAN has enthusiastically adopted the discourses of indigenous communities worldwide on self-determination and multinationality. One of the goals of AMAN, as stipulated in Article 7(3) of its statutes, is the restoration of the '*kedaulatan*' of *adat* communities (meaning their right to self-determination), and the organization has continued to pressure the government to ratify ILO 169 (Van Huis 2005:39).

As a consequence, it has become increasingly difficult for the Indonesian authorities to simply deny the existence and the rights of indigenous communities. We will now consider to what extent this is reflected in Indonesian national legislation.

11 The Convention does not define the term 'indigenous communities'. It seems that few MPs were aware of this issue during the parliamentary debates on ratification. These were based on the Indonesian translation, not on the English original (personal communication of Sandra Moniaga, who attended these debates as an NGO representative, 6-11-2006).

12 Iorns Magallanes 1998:212. An obvious question is why Indonesia has voted in favour of the Declaration, as it has always resisted ILO 169. Our preliminary thesis is that unlike ILO 169 the Declaration does not define the concept of 'indigenous peoples' and that Indonesia will deny having many of those. As indicated in note 6, it is much harder to deny that many indigenous communities in Indonesia would fall under ILO 169.

13 Abdon Nababan (2003) of AMAN claims there are about 50 to 70 million persons in Indonesia qualifying as '*masyarakat adat*'.

The position of Indonesia's indigenous peoples under the Constitution, the Regional Autonomy Law and the Human Rights Law

The Constitution

The amended 1945 Constitution contains two provisions of direct relevance for indigenous communities. The more general one is part of the human rights catalogue, introduced in 2000:

> The cultural identity and the rights of traditional communities [*masyarakat tradisional*] are protected in accordance with altered times and culture [*perkembangan zaman dan peradaban*]. (Article 28i(3).)

This provision is representative of many others promulgated during the past eight years. Unlike under the New Order, the (constitutional) legislation now grants at least symbolic recognition to indigenous communities' rights.

However, the Article avoids the term *adat* community (*masyarakat adat*) or *adat* law community (*masyarakat hukum adat*),[14] both terms that bear connotations of autonomy. Moreover, the recognition is unspecific and conditional: it is unclear what rights it refers to, whether a community that is no longer 'traditional' loses its specific rights, and whether if these rights themselves are out of tune with 'altered times and culture' they remain protected. This last part in particular strongly reduces the level of protection provided by the provision.

More important is the other constitutional Article 18B(2), which was part of the same amendment. It determines that:

> The state recognizes and respects individual [*kesatuan-kesatuan*] *adat* law communities [*masyarakat hukum adat*] and their traditional rights, in as far as they are still alive and in line with the evolution of society [*perkembangan masyarakat*] and the principle of the Unitary State of Indonesia, as regulated by Act of Parliament.

This provision is more accommodating of indigenous communities' aspirations than Article 28i(3) in using the term *adat* law communities. The conditionality is perhaps slightly reduced by using 'in line with societal evolution' as a yardstick rather than 'in accordance with altered times and culture', although this term also leaves much room for interpretation. The reference to the Unitary State is unsurprising, given the fear of separatism.

An important setback from the perspective of indigenous communities, however, is that the recognition of individual *adat* law communities must be regulated by an act of parliament. This means that at present little can be said about the effective meaning of Article 18B(2).

14 The term *adat* law community is of colonial origin (*adatrechtsgemeenschap*) and can be considered the predecessor of the term *adat* community. See also Moniaga 2007:281-2.

These restrictions are thrown into sharper relief if we look at the predecessor of this provision. In fact, the former constitutional Article 18 gave wider and more direct protection to the rights of indigenous communities, stipulating that:

> The division of the territory of Indonesia into large and small regions shall be prescribed by law in consideration of and with due regard to the principles of deliberation in the government system and the right of origin (*hak asal-usul*) of special territories (*daerah-daerah yang bersifat istimewa*).

Moreover, the Elucidation to this Article stipulated that the special status of the approximately 250 self-governing entities (*zelfbesturende landschappen*) and the autonomous communities (*volksgemeenschappen*) was to be respected (*dihormati*) and their customary rights duly considered in all legislation applying to them. The scope of their autonomy was limited only by the provision that they were not allowed to have the character of a state within a state and had to establish representative bodies.

Thus, the old Article 18 had been a solid support for many indigenous communities' claims, as it established a link with the colonial legal system of autonomy for special territories and 'autonomous villages'.[15] Although subject to supervision by the colonial government, these entities retained customary rights to land and to their own administration of justice.[16] Article 18 thus clearly went further than the current Article 18B(2), even if in the course of time the Indonesian Republic had reduced many of the rights attached to the special status.

[15] Self-governing territories were those recognizing Dutch suzerainty/sovereignty on the basis of a treaty, while maintaining their systems of customary government and rights. Although from 1900 onwards the Dutch seriously – but inconsistently – restricted the rights of the self-governing territories, they never lost their formal position of autonomy. By the end of Dutch rule, in 1941, 52-53% of the population of the outer islands (*buitengewesten*) lived in the *zelfbesturende landschappen* under indirect colonial rule (Bongenaar 2005:339-40).
'Autonomous communities' (*volksgemeenschappen* and *streekgemeenschappen*) were local traditional political entities with the so-called 'right of origin' (*hak asal-usul*) in directly governed territories. According to Article 71(2) of the Regeringsreglement of 1854 the autonomous communities elected their own heads and held the authority to govern their own local affairs, albeit under the obligation to comply with the regulations of the colonial government. By the end of the colonial era the Dutch tried to revive traditional rule by a policy called '*ontvoogding*' (literally: removing the ward) and opened up the possibility of establishing larger autonomous units by means of the Groepsgemeenschapsordonnantie 1937. On the eve of the Japanese occupation in 1941, there were three recognized *groepsgemeenschappen*: Minangkabau, Palembang and Banjar (Bongenaar 2005:317, 322).

[16] According to Haga (1929:66-7) the *zelfbesturende landschappen* had a favourable position: 'Almost all of them have maintained their customary law institutions and their right of avail to [agrarian] lands and therefore are in a stronger position than the other customary autonomous communities, like the desa'.

It is ironic that in spite of the increase in international legal support for the rights of indigenous communities and the liberalization of Indonesian politics, Indonesia amended this Article in 2000. By getting rid of the entire notion of special territories, the position of indigenous communities has been reduced rather than reinforced.

In the next section we will consider whether this also applies to the next cornerstone of constitutional law to be discussed: the Law on Regional Autonomy.

The Law on Regional Autonomy

Since the fall of the New Order, Indonesia has adopted two Regional Autonomy Laws, the first one in 1999 (no. 22, henceforth RAL 1999), which was replaced by the second one in 2004 (no. 32, henceforth RAL 2004). Both are key to the position of indigenous communities; the first one is based on the old Article 18 of the Constitution, the second on Article 18B. We will discuss them together, indicating where adjustments have been made.

Provisions for indigenous communities can be found at two levels: that of the village and that of the district. We will start our discussion with the village level.

Village autonomy

RAL 1999 abrogated Village Government Law no. 5/1979. The latter statute, in violation of Article 18 of the Constitution, had replaced all *adat* institutions in village government by a uniform, national system based on the Javanese village model (Article 3). The village was brought under control of higher authorities, with village governments' decisions and budgets subject to approval (*pengesahan*) by the district head (Elucidation, paragraph 19).

Even in the absence of a comprehensive overview of the practical consequences of the Village Government Law, there is no doubt that it tended to erode existing *adat* structures without always putting into place a viable alternative (Antlöv 2003). As a result, in some places hardly any form of effective government was left. The urgency of the situation was conveyed well by a government-commissioned evaluation report, which unexpectedly became a plea to 'save the village' (see Galizia 1992:3).

Re-reforming the village system was therefore high on the list of many reformers when the RAL was drafted to replace the Village Government Law. And indeed, in addition to reinforcing democracy at the village level, the new statute allowed for traditional forms of local government to be reinstalled. The preface to RAL 1999 states:

> […] that Law no. 5/1979, in which name, form, organization and powers of village government have been unified, does not comply with the spirit of the 1945 Con-

> stitution, and that [the state] needs to recognize and respect the special rights of origin of the regions (*perlunya mengakui serta menghormati hak asal-usul Daerah yang bersifat istimewa*), so that it [the Village Government Law] needs to be replaced.

Further examination of both RALs reveals that this fundamentally positive attitude towards customary rights of indigenous communities is reflected throughout both statutes, albeit with clear limitations. Thus, Article 1(12) RAL 2004 (former Article 1 (o) RAL 1999) defines a village as

> a unitary legal community (*kesatuan masyarakat hukum*) which [...] has the authority to arrange and regulate the interests of the local community, on the basis of the local origin and customs (*asal-usul dan adat-istiadat*) which are recognized and respected in the Government System of the Unitary Republic of Indonesia [...].

Compared to the Village Government Law of 1979, which never even mentioned *asal-usul* (origin), this is a significant change. The RAL clearly recognizes that local origin and customs are fundamental in governing villages. However, a village is not an autonomous governing body of local communities on the basis of a right of origin.[17] Thus, Article 200(2) RAL 2004 (former Article 93 RAL 1999) states that: 'The formation, abolition, and/or merger of villages will proceed with consideration of their origin (*asal-usulnya*) and at the initiative of the community'. Again, origin is fundamental and local communities have the right to propose the formation of new villages. However, this is not a case of self-determination: the decision is in the hands of the district and the criteria are unclear.[18]

The same applies to the election of a village head, which according to Article 203(3) should be governed by the 'local provisions of *adat* law'. However, these must be 'determined in a District Regulation as guided by a Government Regulation',[19] and the relevant Article 54 of the RAL's implementing Government Regulation no. 72/2005 states that the applicability depends on the indigenous community's recognition by the district government. Thus, an important avenue for indigenous communities to implement their own system is opened up, but it remains under the control of higher levels of government.

17 The Elucidation of the implementing regulation of the RAL (Government Regulation no. 72/2005) does state that villages enjoy 'genuine autonomy' (*otonomi asli*) based on the right of origin, but warns that 'it must be implemented (*diselenggarakan*) from the perspective of state administration that always follows the altered times (*perkembangan zaman*)'.

18 See the Elucidation to this Article. The 1999 RAL's equivalent Article 93 was more explicit: consent of the district was required and changes to the form of a village were to be implemented by district regulation.

19 The 1999 RAL was less strict, as it only stated that candidates for Village Head needed to fulfil 'other requirements which are in line with tradition as determined in a District Regulation' (Article 97 under m).

The most far-reaching provision of the RAL is Article 206 (former Article 99), which contains the clearest reference to a right of origin and genuine autonomy for villages: 'The scope of government (*urusan pemerintahan*) which becomes the authority of the village is […] the scope of government that already exists on the basis of the right of origin of the village'. This is the only provision that unequivocally recognizes the applicability of the right of origin to village government. Another token of recognition is Article 216(2) (former Article 111(2)), which states that all District Regulations pertaining to village affairs 'must (*wajib*) recognize and honour the rights, origin, and traditions (*hak*, *asal-usul*, *dan adat-istiadat*) of the village'.

Read in conjunction with Article 2(9), however, the scope of these provisions is much more restricted than when interpreted on their own. A copy of the Constitution's Article 18B in the RAL, Article 2(9), stipulates that 'traditional rights are still alive and in conformity with the evolution of society (*perkembangan masyarakat*) [...]'. Such a judgment is likely to be in the hands of the district government, although even this may not be enough, for the same provision says that this must be determined by an act of parliament. Less directly connected to the issue of indigenousness, but of utmost importance regarding autonomy, is that villages have become much more independent in planning and controlling their own finances than under the old Village Government Law. The District Head does provide guidelines on village finances to the village governments within his territory, but unlike under the Village Government Law of 1979 it is the Village Head who decides, together with the Village Representative Council (Article 212(5) and (6), former Article 107(4) and (5)).

Still, villages cannot easily resist higher levels of government imposing their development plans. There has been some improvement, with Article 215(1) (former Article 110(1)) stipulating that the executive and legislative institutions of the village must be involved in the planning, execution and supervision of such projects. According to paragraph 2 of the same Article, such cooperation can only be required on the basis of a District Regulation considering the interests of the village community, the authority of the village, the swiftness of implementing the investment, environmental protection, and harmony between the interests of the locality (*kawasan*) and the common interest. Thus, the village government lacks the authority to refuse a plan.

In addition, Article 99 of Government Regulation no. 72/2005 contains a long list of supervisory tasks by the district and allows the district government to considerably interfere in village government affairs if it so wishes, by setting standards, evaluation of government performance, and 'other guidance (*pembinaan*) deemed necessary'. In short, the power of the district over villages is considerable.

In the institutional realm, regional autonomy has brought significant changes as well. Symbolically important, the RAL speaks of '*desa* or the equiv-

alent' (for example Article 1(12), former Article 1 under o), thus replacing the previously compulsory use of the Javanese term for village (*desa*). On the other hand, the RAL of 1999 still imposed uniform government institutions on all villages in Indonesia, with an elected Village Representative Council (Badan Permusyawaratan Desa, Article 105(1)). Perhaps its Article 106 (Article 211 of the 2004 RAL) can be interpreted as opening up the possibility to incorporate *adat* institutions in village government, since it allows for establishing 'societal bodies' (*badan kemasyarakatan*) to 'assist the village government'.

The 2004 RAL leaves much more room for diversity, with its Article 210(1) stipulating that the representatives of the Village Representative Council are to be appointed by 'consensus following deliberations (*musyawarah dan mufakat*)'.[20] According to Article 42 of the RAL's implementing Government Regulation no. 72/2005, it is the district that prescribes by regulation what this mechanism should be. The Elucidation moreover states that 'representatives' may refer to *adat* functionaries (*pemangku adat*). Thus, the 2004 RAL has widened the possibilities for alternative forms of government at the village level.[21]

The overall conclusion therefore is that, from the point of AMAN and its allies, at the level of villages the 1999 RAL signified a considerable step forward when compared to the 1979 Village Government Law, while its successor statute is even more accommodating of aspirations of indigenous communities. However, the issue of autonomy remains controversial, and districts still possess the instruments to hold a firm grip on the villages within their borders. The 'right of origin' as a source for autonomy is accordingly held at arm's length in order to prevent it from developing into a full-fledged weapon against central and district government control. This means there is still some legal way to go before meaningful 'self-determination' is achieved.

District autonomy

The next question is what provisions for indigenous communities can be found in the 1999 and 2004 RALs where government at the district level is concerned. The fundamental objective of RAL 1999 was to thoroughly decentralize the Indonesian state, by granting wide powers of autonomy to the districts. While this process has not been as sweeping as some anticipated, and although RAL 2004 has re-established some hierarchical controls, decentralization in Indonesia has still been something of a revolution (Aspinall and Fealey 2003; Schulte Nordholt and Van Klinken 2007). The question is whether this autonomy also means that *adat* communities may establish their own institutions at the district level.

20 From a democratic point of view this is obviously a disturbing development, the terminology sounding as if there is a return to Guided Democracy or the New Order.

21 It should also be noted that according to Article 12(5) of Government Regulation no. 72/2005 a village is allowed to determine the composition of the village government. However, it is bound to a certain format.

For *adat* supporters the answer is disappointing, when compared to the case of the village. Neither RAL 1999 nor RAL 2004 provides for any customary forms of government at the district level. The single relevant provision in RAL 2004 is Article 2(9), which acknowledges the existence of *adat* law communities. However, both statutes only refer to the local population of a district as the *masyarakat setempat* (local community), and when discussing districts are silent about *adat* communities, rights of origin, or even tradition. Decentralization certainly has not meant a return to 'self-governing communities' in the colonial sense of the word.

Conclusion

While significantly accommodating *adat* interests at the village level, regional autonomy as regulated by central state legislation has on the whole been a disappointment to AMAN and its sympathizers. At the district level no special rights of self-determination or self-government have been granted to indigenous communities, while district powers of oversight over village governments have remained considerable. Development plans can no longer be imposed on villages as easily as in the past, but village autonomy is still seriously circumscribed.

A related issue will be discussed in a later section of this article: such major departments as Forestry and Mining have remained highly centralized and preserved their huge spheres of influence, infringing on autonomous rights of indigenous communities.[22] From that discussion it will become clear that increased self-determination at the level of village institutions cannot compensate for lack of control over natural resources.

The Human Rights Law (no. 39/1999)

Adopted prior to the human rights catalogue in the Constitution, the Human Rights Law (HRL) is still a cornerstone of Indonesian constitutional law. Like the other pieces of legislation discussed so far, it does not refer to indigenous communities (*masyarakat adat*), and neither does it have a specific provision protecting the rights of indigenous peoples. However, it does contain a relevant general provision referring to *adat* law communities (*masyarakat hukum adat*) (Article 6):

> (1) Within the framework of maintaining human rights, the differences and needs of *masyarakat hukum adat* must be considered and protected by the law, society and the authorities.
> (2) The cultural identity of the *masyarakat hukum adat*, including the right to avail (*hak ulayat* – a communal land right), are protected in accordance with altered times (*selaras perkembangan zaman*).

22 Raden, Bestari and Abdon Nababan 2001.

Implicitly, this provision recognizes that group differences are worthy of protection. Moreover, they are not limited to the more outward appearances of culture, such as dress and dances, but include traditional communal rights to natural resources. At the same time the legislation puts a textual rug underneath this protection, which may be pulled out at any time on the basis of 'altered times'. In practice, this means that indigenous communities again have been made dependent on the goodwill of the district government, which holds the power to judge their status.

The Explanatory Memorandum further adds that *adat* rights are subject to higher regulations and to the principles of rule of law (*asas-asas negara hukum*) whose essence is justice and welfare for the people (*keadilan dan kesejahteraan rakyat*). The Memorandum also introduces the brilliant neologism 'national cultural identity of *adat* law communities' (*identitas budaya nasional masyarakat hukum adat*) as what must be protected, thus phrasing away the double identity of *adat* law communities.

In short, the existence of *adat* law communities is recognized, but subject to heavy conditions. The Memorandum offers symbolic recognition, but very little to constrain the government in their policies towards these communities.[23]

The position of Indonesia's indigenous peoples in laws concerning national resource management

The most contested field of indigenous rights claims is in natural resources. These are governed by a set of related laws pertaining to land and water use, forestry and mining.

There are two particular problems with these statutes. The first is that they are not always clearly delineated, resulting in overlapping jurisdictions. This has caused all kinds of disputes, both between agencies at the central level (for instance the National Land Agency and the Forestry Department), and between vertical levels of government (for instance district governments and the Forestry Department). Neither of these problems has been solved by new legislation or judicial decisions.

[23] In fact, Law no. 10/1992 on the Development of Inhabitants and the Building of Prosperous Families (Perkembangan Kependudukan dan Pembangunan Keluarga Sejahtera) offered more to members of indigenous communities than the HRL. Its Article 6 states that, as members of communities, inhabitants hold the right to 'develop the richness of their culture, the right to develop their collective strength as a group (*kemampuan bersama sebagai kelompok*), the right to use the area belonging to them on the basis of *adat* inheritance (*wilayah warisan adat*), and the right to conserve or develop their behaviour in life according to their culture (*perilaku kehidupan budayanya*)'. In particular the right to use the *adat* area seems promising on first sight, but as it depends on the relevant natural resource legislation it has in fact little meaning on its own. We thank Sandra Moniaga for alerting us to this law.

A second and more complex issue is the delineation of public and private law systems. At the root of this matter is the colonial recognition that *adat* law does not make a distinction between the two (Holleman 1981:43). It is therefore unclear whether certain rights under *adat* law pertain to private rights of ownership or to public rights to land use.

The following sections discuss the position of *adat* communities in the sectors of land and water use, forestry and mining. Compared to constitutional law, the situation of *adat* communities in natural resource law at present is relatively weak.

The Basic Agrarian Law (no. 5/1960)

The oldest law governing natural resources still in force today is the Basic Agrarian Law (henceforth BAL). Dating from the period of Guided Democracy, this is the cornerstone of regulations on traditional *adat* land rights.

Although supposedly applying to a mere 30% of Indonesia's territory (the Forestry Law governing the remaining 70%) since 1967 (Resosudarmo 2004:116), the BAL has been a major offence to those promoting the rights of indigenous peoples. The main reason is that its narrow definition of *adat* law communities has provided the state with a powerful weapon to acquire jurisdiction over lands considered to be part of 'indigenous' territory in all areas outside the scope of the Forestry Act.

At first glance, the BAL seems to take quite a positive view of the customary rights of indigenous communities. According to the Elucidation paragraph III(1), the BAL is 'based upon *adat* law, as the original law of the people (*rakyat*) of Indonesia [...]'. Article 5 states that 'the law in force concerning earth, water and air is *adat* law [...]', and Article 3 recognizes *adat* communal land rights (*hak ulayat*). However, upon closer reading the term *adat* law is severely limited.

Most fundamentally, the meaning of *adat* law in the BAL has moved very far from the common usage of the term. According to Harsono (2005:179) *adat* law in the BAL means 'the original law of a group of native Indonesians' (*hukum aslinya golongan pribumi*). The use of these nationalistic terms in opposition to the terms 'colonial', 'capitalist' and 'feudal' reflects the true objective of the BAL: the creation of national Indonesian law, not only opposed to colonial western law, but also to the 'backward' *adat* laws (Lev 1973). The language of the BAL has nationalized the term *adat* law and thus placed it outside its traditional regional context; it no longer refers to the wide variety of customary laws of the different *adat* communities living in Indonesia (Koesnoe 1977:170).

Article 5 adds that *adat* law may 'not conflict with national and state interests, based on the unity of the people, with Indonesian socialism, or with the law as stipulated in this law and other pieces of legislation [...]'.

Thus, national interests and state interests override customary rights of *adat* communities. The reference to 'Indonesian socialism' serves to underline that the developmental aspirations of the Indonesian Republic cannot be compromised by maintaining land rights of *adat* communities.[24]

Of what is left of these rights, Article 9(2) chips off another key element by stipulating the equal opportunities of all Indonesian citizens to acquire rights to land. This provision negates the exclusionary nature of special rights for *adat* communities, in fact prohibiting many of them from regulating use of *adat* land on the basis of their own rules (see also Harsono 2005:190-4). In short, the state holds a mandate to determine which *adat* rights it wishes to maintain or adjust, as *adat* rights are subject to the rights and needs of the national community as a whole.

The same reservations apply to the provision where the BAL explicitly refers to the possibility for the state to transfer control of land to *adat* communities:

> The implementation of the state's right to control [land] (*hak menguasai*) can be transferred to self-governing entities and *adat* law communities, only if necessary (*sekedar diperlukan*) and not contrary to the national interest according to stipulations in Government Regulation (Article 2(2.4)).

This provision has been of no importance because the government regulation referred to has never come forth. But in addition, the limitations of the Article itself are considerable. Foremost, it is the implementation that can be transferred, not the right itself. The Elucidation adds that this control is 'related to economic principles and participation in the implementation (*medebewind*) of the national policy in the field of regional government'. In short, the right to control granted by the state is limited to participation in implementing national policy concerning regional government.

Right to avail (hak ulayat)

For indigenous communities the most important right described in the BAL is the 'right to avail'. This is the English translation of the Dutch term *beschikkingsrecht*, for which the BAL uses the West Sumatran term *hak ulayat*. It refers to a communal right to property that is both public and private in nature. Although *ulayat* rights are recognized, Article 3 renders their implementation highly conditional, just as it does for *adat* rights in general.

> The implementation (*pelaksanaan*) of *ulayat* rights [...] by *adat* law communities, as long as they exist in reality, must be in such form that they are in line with the national and state interest, based on the principle of the unity of the people (*persatuan bangsa*), and may not be contrary to higher regulations.

[24] Indonesian socialism is mentioned three times in the BAL, without a definition being given. Article 14 indicates that one of its key features is state planning related to the use of land, water, sky and natural resources, to promote societal development (*pembangunan*).

Although this provision recognizes *ulayat* rights, their implementation is subject to strict conditions. As the Elucidation to this Article further clarifies:

> [...] so in principle the *ulayat* rights will be given attention (*akan diperhatikan*) if they are indeed in reality in the hands of the *adat* law community concerned. For example, if rights to land are granted (for example exploitation rights) [to a third party], the *adat* law communities concerned will be heard beforehand and will be granted the '*recognitie*' (compensation) a holder of *ulayat* rights is entitled to.

Viewed in this manner, the *hak ulayat* is reduced to a mere right to compensation. This is confirmed in a continuing section of the Elucidation:

> [...] It cannot be justified as based upon these *ulayat* rights [...] to hamper the granting of exploitation rights, when this is a real necessity for broader interests in that area. For example, an *adat* right community may not – on the basis of their *ulayat* right – refuse the execution of large projects, such as the thoroughly planned [state] conversion of forests on a wide scale to implement agricultural production growth and migration plans. Experience has taught that the development of the regions is often hampered because of difficulties concerning *ulayat* rights.

In short, the notion of 'broader interests' (*kepentingan lebih luas*) comprises all interests other than those of the *adat* community itself, including commercial exploitation and migration. *Ulayat* rights can be taken away from *adat* communities at any time to be given to commercial enterprise or to farmers participating in a state migration project.[25]

Hak milik

One of the main aims of the BAL was thus to get rid of the communal rights of indigenous communities. At the individual level the BAL also tried to achieve this by opening up the possibility to convert some *adat* rights into the individual ownership right of *hak milik*, defined in the BAL as 'the inheritable, strongest and fullest right to land granted to a person and which can be transferred to others' (Article 20). Just as granting *ulayat* rights depends on a government regulation that has not been forthcoming, so does the granting of *hak milik* (Article 22), but unlike the communal *hak ulayat*, the individual *adat* land rights resembling *hak milik* have remained in force pending the enactment of the government regulation mentioned above.

There is one restriction, however. According to Article 56 only *adat* land acquired before the implementation of the BAL (24 September 1960) can be registered as *hak milik*. Land cultivation that started at a later date can only

25 It hardly needs documentation to argue that the state has used such powers to the full (for example Fitzpatrick 1997:187).

be legalized through a cultivation license granted by the district head.[26] Obtaining such a cultivation license means that henceforth members of *adat* communities will be treated as common Indonesian citizens (Ruwiastuti 2000:98).

The overall conclusion must be that the BAL is quite ingenious in taking away what it purportedly grants. It opens up a host of opportunities to deprive *adat* communities of their rights, whether collective or individual in nature, and whether pertaining to private or public law. That there are still *adat* rights left is a consequence of weak implementation rather than of the wording of the statute.

The only solace from the point of view of *adat* communities is that the BAL only applies to approximately 30% of Indonesia's land territory. In the next section we will consider whether the Basic Forestry Law has more to offer them. It starts with a discussion of the Basic Forestry Law of 1967, which was replaced in 1999. We will discuss the 1967 law for two reasons. First, in order to properly understand its successor statute, and second, to help show the continuity of state policy towards *adat* communities.

The Basic Forestry Law (no. 5/1967)

While the Guided Democracy's BAL still states that the law 'in force on the lands, water and skies of the Indonesian Republic' is *adat* law, the New Order's Basic Forestry Law of 1967 (BFL 1967) lacked even such symbolic language. Article 5 simply specified that the state controlled all forests of the territory of the Indonesian Republic and the natural resources found within it. The same Article granted the state the authority to designate land as forest area.

Of particular importance for indigenous communities in such areas was the provision that their *adat* lands, even when recognized, were considered to be state forest and not private forest. BFL 1967 simplified the provisions on *adat* land as stipulated in the BAL, limiting them to *ulayat* rights only. It thus became impossible to convert any *adat* rights in forest areas into *hak milik*, meaning that for instance forest plantations outside *ulayat* areas automatically became state property.[27]

BFL 1967 moreover considered *ulayat* rights to be disappearing anyway:

[26] Daniel Fitzpatrick (1997:196-8) points out how the occupiers of vacant and abandoned lands, though highly subject to the power of the bureaucracy of the regional government, must rely on them to obtain cultivation licenses, an act incompatible with provisions in the BAL which allow criminal proceedings against such occupiers.

[27] As a result, many members of indigenous communities who had cultivated land for many years were suddenly labelled illegal squatters. Hence Haverfield's conclusion (1999:62-3) that 'any program to recognize *adat* rights to land requires the total renegotiation of the current forest/non-forest delineation and a clear division of power between BPN [Badan Pertanahan National, National Land Agency] and the Ministry of Forestry'.

> In the areas where *ulayat* rights in reality have ceased to exist (or never have existed) these *ulayat* rights will not be revived (*tidaklah akan dihidupkan*) in the future. In their evolution (*perkembangan*) *ulayat* rights have the tendency to weaken under the influences of multiple factors.[28]

This provision does not make clear whether *ulayat* rights whose 'existence in reality' had never been the subject of an official investigation could still be recognized after the promulgation of BFL 1967. The tendency of state policy under the New Order was to answer this question negatively, as reflected by the earlier mentioned remark of the Head of Bappenas that the term *adat* law community was dead in Indonesian forest areas (Murray Li 2001:645).

The *ulayat* rights in forest areas that were recognized were moreover made subject to restrictions by the provisions stipulated in BFL 1967 itself, provisions of other laws, and – as always – the national interest.[29] Article 17 stated that:

> The implementation of the rights of *adat* law communities and the rights of its members and the rights of individuals, to directly or indirectly benefit from the forest, as far as [these rights] are based on provisions in the law and still exist in reality, may not disturb the goals stipulated in this law.

The 'disturbing implementation' of *adat* rights – implicitly attributed to *adat* communities – was specified in the Elucidation. It consisted of the use of forest land for livestock, hunting, and the collection of forest products, which had the potential to disturb national policy goals of conservation and production. However, the most important 'disturbance' that might be caused by *ulayat* rights was their use to obstruct development projects:

> It cannot be justified if the *ulayat* rights of a local *adat* law community are used to obstruct (*menghalang-halangi*) the implementation of general state plans, for example by refusing large-scale forest clearance for large projects, or in the interests of transmigration, and so on.[30]

The restrictions on *ulayat* rights in BFL 1967 thus resembled those of the BAL, but in reality they impacted on the lives of *adat* law community members in a more fundamental way. The point is that Article 1(1) of BFL 1967 granted power to the state to define land as forest area. *Adat* communities tilling land in areas designated as forests suddenly had to comply with national forestry policies. In practice, this meant that their *adat* rights to farm land within forest areas had suddenly been replaced by the right to collect forest products. As they could no longer sufficiently support themselves, they were often forced to

28 General Elucidation to Article 2.
29 Elucidation to Article 2.
30 Elucidation to Article 17.

turn to agriculture elsewhere or to work in the forestry sector (Cribb 2003:42).

It is important to be aware of the scale of these fundamental changes to *ulayat* rights. In approximately 70% of Indonesia's territory, essential rights of *adat* communities have lost their validity. *Adat* communities within forest areas whose rights to land had not yet been recognized were left resourceless at the mercy of the Forestry Department. Some remote *adat* communities have remained untouched in practice, but many others saw their lands taken and themselves forced to leave.

The implementation of BFL 1967 has spurred resentment and resistance. The question is whether opponents could mount sufficient political pressure to actually press for changing the law (Lucas and Warren 2000:229). We will consider this after an analysis of the successor statute to the BFL, but not before briefly discussing the other crucial New Order law relevant to our issue, the Mining Law of 1967.

The Mining Law (no. 11/1967)

From the perspective of indigenous communities, the Mining Law of 1967 (ML) is probably Indonesia's most reprehensible statute. It contains no reference to specific rights of *adat* communities whatsoever, and clearly stipulates the obligation for all rights-holders to allow mining activities on their land (Article 25). The only serious limitation is Article 16(3), which prohibits mining in:

> cemeteries, holy places, public works, for instance public roads, railroads, means of distribution of water, electricity, gas, and so forth;
> places where other mining companies are active;
> buildings, houses or factories with their adjoining lands, except with permission of the owner.

As the government has not been inclined to consider an entire forest a holy place, or to allow more than a garden to fall under the definition of 'adjoining lands', this means that all areas of land used for making a living are left out of this definition.

What remains for those holding rights to lands where mining is planned is some compensation, as stipulated in Article 25(1):

> The holder of a mining permit is under the obligation to give compensation for the consequences of his activities for everything on this land to the person holding rights to that land [...].

The compensation is thus limited to what is on the land and does not extend to compensation for the inability to use the land. This reduces the question whether 'the rights to that land' could also be *hak ulayat* to a rather academic one, since it is only crops and the like that will be compensated. The statute thus leaves every rights-holder empty-handed.

The new Basic Forestry Law (no. 41/1999)

BFL 1967 was amended by Basic Forestry Law no. 41/1999 (BFL 1999), the first law on natural resources enacted after the start of Reformasi. Many hoped that this statute would signal a new legislative approach to ownership and use rights of indigenous communities. However, in many ways BFL 1999 is a continuation of BFL 1967. It is still the state that controls all forests and the natural resources within them and determines the status of land as forest area or non-forest area (Article 5). This must be done 'while considering the rights of *adat* law communities, as long as their existence in reality is recognized, and [these rights] do not conflict with national interests' (Article 4). While at first glance this seems an improvement compared to BFL 1967, the restrictions are almost the same.

Article 67(1) stipulates a few rights that only apply to officially recognized *adat* law communities:

> [the right to] collect forest products for the daily needs of the *adat* law community concerned;
> [the right to] manage the forest in accordance with prevailing *adat* law as long as this does not contradict the law;
> [the right to] receive empowerment aimed at raising their level of prosperity.

These provisions look more generous than they are. The main problem is that *adat* law communities can only fulfil their needs by collecting forest products, because farming in forest areas is prohibited by law. As a result the communities concerned need 'empowerment', but then they will cease to be recognized as *adat* law communities and lose their *ulayat* rights. This is clearly stated in the Elucidation to Article 67, which identifies dependence upon collecting forest products as one of the key criteria for recognition as an *adat* law community. The others are:

> the community is still a legal community (*rechtsgemeenschap*);
> the existence of *adat* institutions;
> the existence of a clearly defined *adat* law territory;
> the existence of *adat* law institutions that are still respected.

Self-identification, as stipulated in the Draft Declaration on Indigenous Peoples and demanded by AMAN, is absent. The single positive point that can be found is that BFL 1999 seems to assume that new recognition of *adat* communities is still possible. However, that is the only point where it constitutes a break with the past.

With BFL 1999 we have come to the end of our discussion of relevant acts of parliament. Before summarizing our findings and looking at what the near future is likely to bring, we will add to our overview one regulation at

a lower level. The reason is that it shows how lower-level legislation may actually foreshadow changes that in 1999 could not yet be comprised in acts of parliament. Moreover, it is the only lower regulation of importance for the subject of this article.

Ministerial Regulation no. 5/1999 concerning Guidelines to Resolve Problems of Ulayat Rights of Adat Law Communities (MRU)[31]

This regulation was issued by the Minister of Land Affairs / Head of the National Land Agency (Menteri Agraria / Kepala Badan Pertanahan Nasional) in 1999 and elaborates on the concept of *ulayat* rights as defined in the BAL. However, its spirit is fundamentally different from the BAL itself.

First, the MRU starts with the consideration that *adat* law communities still exist, without immediately adding that they are bound to disappear in the near future. It adds that their claims based on *ulayat* rights have caused problems in several regions, and that these guidelines intend to offer district governments a tool to resolve such issues.

The regulation is refreshingly clear, with its first Article containing more definitions than the entire BAL. It defines *ulayat* rights as follows:

> *Ulayat* rights and those resembling them of *adat* law communities […] concern the authority (*kewenangan*) that according to *adat* law a certain *adat* law community enjoys over a certain territory which forms the living environment for its members to make use of its natural resources, including land, within that territory, to survive and make a living, which arises from the physical and spiritual bond, inherited from generation to generation and uninterrupted, between the *adat* law community and the said area.

The concept of *adat* law community is defined as well:

> An *adat* law community is a group of people bound by its *adat* legal order as common members of a legal association because of a common domicile or on the basis of descent.

Just as with the definition of *ulayat* rights, the defining characteristic is within *adat* law. This comes very close to the self-identification criterion promoted by AMAN.

However, Article 2 attempts to establish an objective criterion for this issue, by requiring that all the elements mentioned above are in place. This immediately raises the question how the community concerned can demonstrate to the evaluators the existence of its own legal order.

[31] We are grateful to Laurens Bakker and Sandra Moniaga for drawing our attention to this regulation.

The most serious restriction follows from Article 3: *ulayat* rights cannot be revived. A right to land granted on the basis of the BAL for land claimed as *ulayat* land remains valid. The same applies to lands that have been released to the state. However, according to Article 4 *ulayat* land can be temporarily released to the state, which may then issue a temporary right of use. After expiration of this right, new rights can only be granted with the permission of the *adat* law community concerned.

Everything considered, the MRU is the first serious sign of an Indonesian government's willingness to recognize *adat* communities and their rights. From a legal point of view, what is most important is that the regulation indicates beyond doubt that *ulayat* rights can still be recognized. Other important features are the recognition of *adat* law as the basis of *ulayat* rights and the absence of any mention of forced release of *ulayat* rights.

A final note concerns the process of recognition. Article 5 stipulates that various stakeholders must be included in this process, including representatives of the *adat* community concerned. This is an important step forward, but the ultimate authority to decide whether to recognize *ulayat* rights continues to lie with the district government.[32]

While there is little information available on how these processes work in practice, there is at least one instance where *ulayat* rights were recognized, namely by the district of Nunukan in East Kalimantan. Other reports show how problematic the process may be, but at least the regulation has not remained a dead letter (Bakker forthcoming).

Conclusion

The above analysis has shown that the current position of indigenous communities in Indonesian law presents a mixed picture. There is certainly a 'conceptual return', with all of the newer statutes recognizing that indigenous communities exist. The Basic Agrarian Law of 1960 did this, but laws of the New Order period such as the Basic Forestry Law of 1967 and the Mining Law hardly did. A strong statement in the same vein is Ministerial Decree no. 5/1999, which on the basis of the BAL presents opportunities hitherto unknown for indigenous communities to achieve recognition of their communal rights to land. Likewise, the Regional Autonomy Law of 1999 provided more autonomy for indigenous communities at the level of village government, further extended by the RAL's successor statute of 2004.

On the other hand, not all of the post-New Order legislation has favoured the legal position of indigenous communities. Thus, constitutional amendments have reduced rather than reinforced it, while the Human Rights Law

32 A negative decision is in principle open to review by the administrative court.

subjects them to 'conditions of traditionality' similar to those of the New Order. Neither have the Regional Autonomy Laws offered much scope for indigenous communities' aspirations at the district or the provincial level. Probably the most serious disappointment has been the Basic Forestry Law of 1999, which has continued the New Order policy so detrimental to the interests of indigenous communities, the policy of maintaining central state control over forest lands. Thus, the first statutes enacted during Reformasi were a great disappointment to AMAN and others seeking recognition of their *adat*.

It should be noted, however, that both the new BFL and the first RAL date from 1999, when the struggle for indigenous rights had not yet picked up much speed. We have seen that RAL 2004 offered more to indigenous communities at the village level than did its predecessor of 1999. The question is whether there are further indications for such a change.

An affirmative answer to this question is contained in Decree no. IX/2001 of Indonesia's People's Consultative Assembly (Majelis Permusyawaratan Rakyat, henceforth MPR).[33] In this decree the MPR has set the legislative agenda for legislation concerning land and natural resources, recognizing the inconsistency of existing legislation, and listing some points of departure for further legislation to be enacted. Among these is the least conditional recognition of indigenous communities encountered so far (Article 4(j)):

> The renewal of agrarian affairs (*pembaruan agraria*) and natural resource management should be performed according to the following principles: [..] j. recognize, honour, and protect the rights of *adat* law communities and the people's cultural diversity (*keragaman budaya bangsa*) to agrarian resources/natural resources.

This provision should ideally set the standard for all new legislation in the field.

There is presently one law that actually puts this to the test. In 2004 Indonesia enacted Law no. 7/2004, concerning water resources. Like BFL 1999, the Law on Water Resources (LWR) was heavily protested by NGOs.[34] At first glance it seems surprising that AMAN joined the campaign against the LWR, since Article 6 appears to protect the rights of *adat* communities:

[33] The authors are grateful to Martua Sirait for pointing out the continued relevance of this decree. Its status is somewhat disputed, as after the amendment process the MPR no longer has a right to enact decrees which are binding upon other state organs, with the exception of constitutional amendments (Article 3, Constitution). Moreover, Article 7 of Law no. 10/2004 on Lawmaking Procedure no longer includes MPR decrees in its hierarchy. Nonetheless, according to the MPR itself, this decree remains valid until the legislation it calls for has been enacted (Article 4(11) of MPR Decree no. I/2003).

[34] Their main fear was that the privatization of water resource management envisaged by the LWR would have a negative impact on the water resources available to farmers. *Suara Pembaruan* 18-09-2003, 'RUU SDA: Mengejar Utang, Menuai Konflik'. See also Source: www.walhi.or.id/kampanye/air/privatisasi/050510_privair_sp.

> The control of water resources by the central and local government must be implemented with due respect for the *ulayat* rights of the local *adat* law communities and similar rights as long as this does not conflict with the national interest or the law. These *ulayat* rights to water resources will be recognized as long as they are real and are registered in regional legislation (Perda).

Looked at more carefully, AMAN's stance is easier to understand. First, we find the omnipresent escape clause referring to the national interest. Second, these provisions only apply to *adat* communities recognized by the state. So the LWR confirms the stance of current legislation that there is no provision for self-identification. Still, this is much better than the Basic Forestry Law of 1999 and suggests some cautious advancement.

Is it likely that such a trend will proceed? Although predictions are difficult, a number of draft bills, at various stages of completion, are circulating and presenting information on the potential future of the legal position of indigenous communities.[35] Therefore we end our overview with a brief discussion of these drafts.

Strikingly, but in line with the earlier observations on existing laws, they present a mixed picture, but at least none of them further reduces the position of indigenous communities. At one extreme we find the Plantation Bill, which marks a kind of status quo for indigenous communities. It remains in line with the Basic Agrarian Law, by referring to *adat* law communities and *ulayat* rights while making these dependent on an undefined 'national interest' (see Article 9). The authority of recognition remains with district governments. Moreover, the bill still reflects the basic attitude that indigenous communities need to be developed.

In the middle are the Draft Bill on Management of Coastal Areas and Small Islands and the Mining Bill. The first uses the term *masyarakat adat* instead of *masyarakat hukum adat*. While defining *masyarakat adat* as 'communities which have a daily lifestyle based upon traditional values inherited from their ancestors' (Article 1(23)), Article 74(6)'s criteria for determining whether a community qualifies as *masyarakat adat* do not reflect this definition and are therefore likely to be more acceptable to indigenous communities, even though they do not provide for self-identification.[36] Moreover, unlike

35 All draft bills were obtained prior to June 2007. Please note that they may change in the legislative process.

36 It concerns the following criteria:
– the existence of a clearly delineated coastal area or small peninsula under the management of the community involved;
– the existence of a community that conducts the management, and which has a clear institutional organization;
– the existence of clear norms and rules on the use of natural resources which must be applied in practice;
– the existence of a management plan drawn up by the community involved on the basis of their traditions and customs;
– a history of descent which is clear and recognized by the *masyarakat adat* involved.

the MRU, this bill allows communities to initiate a procedure for recognition as *masyarakat adat*. Even if such recognition is eventually established by the district, as are the relevant procedures, the right of initiative would clearly strengthen the position of indigenous communities.

Article 74 recognizes the rights of *masyarakat adat* as owners (*pemilik*) of the coasts and to use the beaches and waters of the coasts, and respects their *adat* law. To put this in proper perspective, one should realize that Article 74(7) allows other communities to obtain similar rights without them having to go through the troublesome accreditation procedure reserved for *masyarakat adat*, so the recognition is not as special as it first appears.

Likewise, the Mining Bill uses the term *masyarakat adat*. Article 40(3d) states that mining is prohibited on 'land owned by *masyarakat adat* (*tanah milik masyarakat adat*)' without any escape clause: reference to the national interest has vanished. However, it remains to be seen whether *ulayat* rights fall under the definition of ownership, and even then the position of indigenous communities would still be dependent on the Basic Forestry Law and the Basic Agrarian Law, which only recognize *hak ulayat* under strict conditions, as stated above. The bill could thus turn out to be no more than an empty shell.

Finally, one fundamental bill concerning natural resources is extremely favourable for the aspirations of indigenous communities: the Bill on Management of Natural Resources (MNR). It refers to *masyarakat adat* instead of *masyarakat hukum adat*, and recognizes *ulayat* rights without any restrictions, without relying on any other laws.

This bill is the product of a participatory process, involving representatives of farmers, *masyarakat adat*, fishermen, labourers, poor city-dwellers, entrepreneurs, national and local authorities, academics, experts and NGOs. It is highly controversial and vehemently opposed by most sectoral ministries of the national government, who consider it far too generous for *adat* communities in the struggle over natural resource management. In turn, AMAN and other NGOs strongly oppose any revision.[37] This resulted in the postponement of parliamentary debates on the bill on the eve of the 2004 elections.[38] This stalemate has continued until the present, and it is unlikely that the MNR will be submitted to parliament in this form in the near future.

This is no surprise if we look at the draft's contents. Its definition of *masyarakat adat* is almost identical with the definition of indigenous communities in ILO 169, as it seems to open the way to self-identification. It explicitly wishes to 'create legal certainty for the *masyarakat adat* and other communities involved in the management of natural resources' (Article 3(c)), through the establishment of customary clearly delineated territories by local authorities, with the involvement of the *masyarakat adat* concerned in a consensual process

37 *Kompas* 7-10-2003, 'Koalisi LSM tolak perubahan RUU PSDA'.
38 *Kompas* 10-10-2003, 'Jangan tunda pembahasan RUU PSDA'.

(Article 14(1)). If agreement is reached on the territory, the *masyarakat adat* is awarded rights to natural resources (*hak atas sumber daya alam*). These rights consist of ownership rights, use rights, and management rights, ownership rights (*hak milik*) being based on national or *adat* law' (Article 15(1a)). These ownership rights are collective and inalienable (Article 15(4)), key principles in international discourses on indigenous peoples.

It will be clear that the enactment of this draft would create an extremely complex legal situation. Logging concessions and plantation areas all over Indonesia would suddenly become *adat* territories, and the government would be forced to pay compensation for losses suffered by these companies. Many provisions in the draft conflict with existing legislation. However, the draft law does not contain the conventional provision that the rights mentioned must comply with existing legislation. On the contrary, Article 55 states that within five years after implementation, all other legislation must be harmonized with the provisions of this law. That would be a massive operation, and not very realistic – just as it seems unlikely that Indonesia would voluntarily return to a legal situation closely resembling the one under indirect rule.

Therefore, in our view, 'cautious advancement' seems the wisest legislative course to follow. The current legal situation is still characterized by conceptual inconsistency and conflicting rules. Overly drastic steps should be avoided, even if only to safeguard the integrity of the legislation .

However, the enormous injustices suffered by many citizens falling under any definition of 'indigenous communities' demand an advancement of their position, and not a return to New Order-like rules. The indigenous discourse has not produced much legislative result yet, as the Indonesian legislature has failed to grant any substantial concessions – in particular concerning the management of natural resources. Continued pressure on the government to ratify ILO Convention no. 169 and to implement the Declaration on Indigenous Peoples is therefore likely to remain a concern of AMAN and its allies. This will hopefully translate into legislation that manages to balance all of the interests involved in an equitable manner.

References

Acciaioli, Greg
2001 'Grounds of conflict, idioms of harmony; Custom, religion, and nationalism in violence avoidance at the Lindu Plain, Central Sulawesi', *Indonesia* 72:80-114.

Antlöv, Hans
2003 'Village government and rural development in Indonesia; The new democratic framework', *Bulletin of Indonesian Economic Studies* 39:193-214.

Asian Development Bank
2002 Country Report: Indonesia. Indigenous Peoples/ Ethnic Minorities and Poverty Reduction Series, RETA 5953. [Http://www.adb.org/Documents/Reports/Indigenous_Peoples/INO/indigenous_in o.pdf.]
Aspinall, Edward and Greg Fealy (eds)
2003 *Local power and politics in Indonesia; Decentralisation and democratisation*. Singapore: Institute of Southeast Asian Studies.
Assies, W.
2005 'The challenge of diversity in rural Latin America; A rejoinder to Jean Pierre Reed (and others)', *The Journal of Peasant Studies* 32-2:361-71.
Bakker, L.
2005 'Resource claims between tradition and modernity; Masyarakat adat strategies in Mului (Kalimantan Timur)', *Borneo Research Bulletin* 36:29-50.
forthcoming 'Politics or tradition; Debating Hak Ulayat in Pasir', in: Gerard Persoon and Manon Osseweijer (eds), *Reflections on the heart of Borneo.* Wageningen: Tropenbos International.
Bongenaar, Karel E.M.
2005 *De ontwikkeling van het zelfbesturend landschap in Nederlandsch-Indië; Deel I: 1855-1942.* Zutphen: Walburg Pers.
Cribb, Robert
2003 'Environmentalism in Indonesian politics', in: Adriaan Bedner and Nicole Niessen (eds), *Towards integrated environmental law in Indonesia?*, pp. 37-43. Leiden: Research School CNWS. [CNWS Publications 127.]
Davidson, Jamie S. and David F. Henley
2007 *The revival of tradition in Indonesian politics; The deployment of adat from colonialism to indigenism*. London: Routledge.
Fitzpatrick, Daniel
1997 'Disputes and pluralism in modern land law', *Yale Journal of International Law* 22:171-212.
Galizia, M.
1992 'Village institutions after the Law no. 5/1979 on Village Administration; The case of Rejang-Lebong in South-Western Sumatra', *Archipel* 51:135-60.
Haga, B.J.
1929 'Inwerking van de Westersche bestuursvoering op de Inlandsche maatschappij in de Buitengewesten', *Mededeelingen van de Afdeeling Bestuurszaken der Buitengewesten van het Departement van Binnenlandsch Bestuur; Serie B* 1:30-81.
Harsono, B.
2005 *Hukum Agraria Indonesia; Sejarah pembentukan undang-undang pokok agraria, isi dan pelaksanaannya*. Jakarta: Djambatan.
Haverfield, R.
1999 'Hak Ulayat and the state; Land reform in Indonesia', in: Timothy Lindsey (ed.), *Indonesia; Law and society*, pp. 42-73. Sydney: Federation Press.
Holleman, J.F. (ed.)
1981 *Van Vollenhoven on Indonesian adat law*. The Hague: Nijhoff.

Huis, S.C. van
2005 'De Verenigde Masyarakat Adat van Indonesië; Een gevaar voor de nationale staat?' MA thesis, Leiden University.
Iorns Magallanes, Catharine J.
1998 'National lands and resources in international law', in: Catharine J. Iorns Magallanes and Malcolm Hollick (eds), *Land conflicts in Southeast Asia; Indigenous peoples, environment and international law*, pp. 181-240. Bangkok: White Lotus.
Koesnoe, Moh.
1977 *Opstellen over hedendaagse adat, adatrecht en rechtsontwikkeling van Indonesië*. Nijmegen: Katholieke Universiteit. [Publikaties over Volksrecht 2.]
Kuper, A.
2003 'The return of the native', *Current Anthropology* 44:389-402.
Lev, Daniel S.
1973 'Judicial unification in Post-Colonial Indonesia', *Indonesia* 16:1-37.
Li, Tania Murray
2000 'Locating indigenous environmental knowledge in Indonesia', in: Roy Ellen, Peter Parkes and Alan Bicker (eds), *Indigenous environmental knowledge and its transformations; Critical anthropological perspectives,* pp. 121-49. Amsterdam: Harwood Academic Publishers.
2001 'Masyarakat adat, difference, and the limits of recognition in Indonesia's Forest Zone', *Modern Asian Studies* 35-3:645-76.
Lucas, Anton and Carol Warren
2000 'Agrarian reform in the era of Reformasi', in: Chris Manning and Peter van Diermen (eds), *Indonesia in transition; Social aspects of reformasi and crisis*, pp. 220-38. Singapore: Institute of Southeast Asian Studies.
Moniaga, Sandra
2007 'From Bumi Putra to Masyarakat Adat; A long and confusing journey', in: Jamie S. Davidson and David F. Henley, *The revival of tradition in Indonesian politics; The deployment of adat from colonialism to indigenism*, pp. 275-94. London: Routledge.
Nababan Abdon
2003 *Konflik penguasaan dan pengelolaan sumberdaya alam; Implikasinya terhadap Masyarakat Adat.* Publikasi AMAN. http://dte.gn.apc.org/AMAN/publikasi/makalah_ttg_konflik_sda.html.
Niezen, Ronald
2003 *The origins of indigenism; Human rights and the politics of identity*. Berkeley, CA: University of California Press.
Persoon, Gerard
1998 'Isolated groups or indigenous peoples; Indonesia and the international discourse', *Bijdragen tot de Taal-, Land- en Volkenkunde* 154:281-304.
2002 'Isolated islanders or indigenous people; The political discourse and its effects on Siberut (Mentawai Archipelago, West-Sumatra)', *Antropologi Indonesia* 68-26:25-39.
Raden, Bestari and Abdon Nababan
2001 *Pengelolaan hutan berbasis Masyarakat Adat; Antara konsep dan realitas*. Publikasi AMAN. http://dte.gn.apc.org/AMAN/publikasi/Pengelolaan_Hutan_Berbasis.html.

Resosudarmo, I.A.P.
2004 'Closer to people and trees; Will decentralisation work for the forest and the people?', *European Journal of Development Research* 16-1:110-32.
Ruwiastuti, Maria Rita
2000 '*Sesat pikir'; Politik hukum agraria; Membongkar alas penguasaan negara atas hak-hak adat.* Yogyakarta: Pustaka Pelajar, Insist Press, Konsorsium Pembaruan Agraria.
Schefold, Reimar
1998 'The domestication of culture; Nation-building and ethnic diversity in Indonesia', *Bijdragen tot de Taal-, Land- en Volkenkunde* 154:259-80.
Schulte Nordholt, Henk and Gerry van Klinken (eds)
2007 *Renegotiating boundaries; Local politics in Post-Suharto Indonesia.* Leiden: KITLV Press. [Verhandelingen 238.]
World Bank
2001 *Rancangan kebijakan mengenai Masyarakat Adat (KO/PB 4.10).* http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/BahasaIndonesia-BankConsultationsStrategy/$FILE/BahasaStrategy.pdf.