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Research Interests

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**Power Struggle Over Land:
Decentralization, Land Tenure Security, and the Rule of Law in Indonesia¹**

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Abstract: Decentralization and the subsequent policies that are intended to address land related-problems turns out to have little impact to bring about an environment conducive to secure property rights. Despite attempts at reforms, highly corrupt and ineffective institutions inherited from the New Order regime persist and continue to constraint Indonesia's land politics. Using a temporal analysis, I aim to explain the trajectory of property rights institutions in land during the New Order era (1966-1998) and the post-New Order era (1999-2012). The central puzzle to be addressed is why Indonesia's institutional arrangement fails to provide tenure security and an effective land reform program resulting in high discontent and contestation over land. I argue that the weak institutional arrangement governing land is not an honest mistake made by the leaders, but rather is a deliberate political consideration driven by their mode of land exploitation. Land has always been a commodity that is used strategically for economic and political gains.

Keywords: tenure security, property rights institution, decentralization, rule of law

I. INTRODUCTION

Land affairs are among the most contentious and complicated problems in Indonesia. Landholding and land relations, including land control and management, assumes socio-economic significance within the society due to the fact that 57 percent of the populations still depend on land for their subsistence.² In addition, agriculture contributes 61 percent to the country's non-oil exports and remains the primary target of

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² Colin MacAndrews, *Land Policy in Modern Indonesia: A Study of Land Issues in the New Order Period*, (MA: A Lincoln Institute of Land Policy Book, 1986), p 73.

investment for small-scale to large-scale businesses. Discontent over land is, thus, historically one of the main sources of Indonesia's social conflict.³

Over the past several decades, the Indonesian government has made numerous attempts to construct property rights institutions in land and strengthen tenure security, through among others programs, legal reform and land registration. However, there is little evidence to suggest that those efforts have had any significant effects in providing tenure security. Corrupt, highly ineffective, and centralized institutions have been prevalent features of Indonesia's property rights institutions.

The regional autonomy and decentralization policies were intended to address these problems by dispersing power to the regional governments in hopes of fostering public participation and accountability in development policies, thus increasing overall efficiency. However, empirical data shows that decentralization policies lead to a more complicated land administration that in turn trigger an even high incidence of land-related conflicts at the local levels. Based on the Consortium for Agrarian Reform (*Konsorsium Pembaruan Agraria*) documentation, in 2013 there were 369 land conflicts involving 1,2 million hectares of land and affecting no less than 139,874 families,⁴ a starkly increase from the number of conflicts in 2012--198 cases involving 318,000 hectares of land.⁵ The puzzle to be addressed, then, is why have Indonesia's property rights institutions failed to create tenure security and to prevent contestations over land rights?

This paper seek to examine Indonesia's contemporary property rights institution in land and its relation with tenure security. I argue that power struggle over land as a

³ *Ibid.*

⁴ Suara Agraria, "Ini Data Konflik Agraria di Tanah Air Sepanjang Tahun 2013," ("The Incidence of Land Conflict in Indonesia 2013") <http://suaraagraria.com/detail-1918-ini-data-konflik-agraria-di-tanah-air-sepanjang-tahun-2013.html#.U2EZUF4irwI>, accessed on April 1, 2014.

⁵ *Ibid.*

result of a complication of institutional arrangement intermingled by weak capacity is at the core of the current land problems in Indonesia. The complication of institutional arrangement is a result of a continuation of Suharto's institutional legacy that is characterized by ineffective, corrupt, and highly centralized institutions with overlapping jurisdictions. Weak capacity hinders the state's ability to enforce property rights in the face of weak judiciary system and ineffective public administration.

II. PLACING ARGUMENT INTO A BIGGER ISSUE: THE RULE OF LAW AND THE PROTECTION OF PROPERTY RIGHTS

The bigger issue in this research concerns the political foundation of property rights and rule of law in Indonesia. The fundamental issues to be addressed are power, rules, and compliance with regard to the rule of law. These issues are important because the protection of private property has been a problem since the New Order era and has become even worse since the Reformation era. Indonesia's transition to democracy in 1998 was not followed by a transition from a personal order through sultanistic regime to impersonal institution through the rule of law.⁶

Many studies have highlighted the importance of a well-defined and secured property rights for productive investment and economic growth.⁷ Property ownership provides the owner the rights to gain access to his/her own property and at the same time "the right to exclude all other individuals from the ability to enter property."⁸ In the classical liberal conception, property ownership provides the owner "the exclusive rights

⁶ Jeffrey A. Winters, *Oligarchy*, (Cambridge: Cambridge University Press, 2011).

⁷ Among others: Harrison 1987; World Bank 1974, 2003; de Soto 2000.

⁸ Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law*, (Harvard University Press Cambridge, 2011).

to occupy, use, and dispose of their property.”⁹ This rights to be fully exercised requires the state protection through impersonal rule of law.

Waldron defines rule of law as, “a formal and procedural ideal,” which refers to, among others, free judiciary, access to justice, due process of law, and government accountability.¹⁰ In term of property, rule of law protects individual’s rights against arbitrary power and reinforce the sanctity of contracts. The rule of law will always side with the property owner with high degree of enforceability and predictability.

Many scholars argue that private property regimes of classical liberal vintage are compatible with the rule of law. However, scholars such as Seller suggests that enforcement is the key element in securing property rights regardless of whether or not the system is operating under private property rights or customary land tenure.¹¹ In other words, the issue of enforcement is central in ensuring secure property rights. Enforcement of property rights means protection against any threats from either private or state actors. People seek the government’s protection to secure their property rights from private extortion.

In Indonesian case, the weak rule of law is at the core of the problem of property rights enforcement. The absence of a strong and independent judicial system and weak law enforcement has led to low protection of property rights. In the absence of effective formal institutions, people turn to alternative forms of protecting property and enforcing contracts. People rely increasingly on informal institutions or “extralegal” instruments

⁹ *Ibid.*

¹⁰ Jeremy J. Waldron, “Lecture 3: The Rule of Law, Property, and Legislation,” in “The Hamlyn Lectures 2011: The Rule of Law and the Measure of Property,” New York University Public Law and Legal Theory.

¹¹ Kathryn Firmin A. Sellers, “The Politics of Property Rights,” *American Political Science Review* 89, 4 (1995): 867-881.

such as clientelism and various forms of physical intimidation, including private extortion, as means to secure their property claims. As a result power, commonly in the forms of physical coercion, become a common tool for protecting property and ensuring the adherence of contract.

We cannot begin to understand the complexity of the property rights problem in Indonesia until we first understand the institutional design of property rights and rule of law. Property rights come in various types. It covers movable goods such as car and money, as well as immovable goods such as land and building. It also can be in forms of tangible and intangible property including intellectual property. In this research, however, I focus to examine property rights in land.

I choose land as a starting point to illuminate this complexity because it is one of the most contentious issues and one of the messiest problems in Indonesia. There is lack of clarity of who is entitled to a piece of land, who could sell it, or who could enter into any transaction over land. Furthermore, there is also lack of clarity, consistency, and enforceability of the law and regulations governing land. Overlapping jurisdiction and highly ineffective land administration bodies result in confusion, discontent, and social conflicts that in turn bring detrimental effect to property rights security.

In this regard, I identify there are three interrelated-problems in land matters: the continuance of Suharto's institutional legacies, the shifted power balance due to decentralization policies creating dualistic land administration, and the clash between state and non-state tenurial systems that erode the state's capacity in law enforcement and legitimacy.

The first problem is related to the highly ineffective property rights institutions inherited from the New Order government, consisting of three aspects: paradigm, legal framework, and institutional arrangement.

In regard to paradigm, there are conflicting views about the property rights institution. While the dominant view in the debate about property rights institutions is that formalized private property rights are pivotal in providing land tenure security and thus encouraging development and economic growth,¹² Indonesia's position is rather ambivalent. While *adat* and communal rights have been the prevalent features in the society, the government has never fully implemented the classical liberal views of property rights and contract. The Indonesian Constitution as well as the Basic Agrarian Law (BAL) and its subsequent regulations are operating within the primary premises of "state control over natural resources" and social function of land. When Suharto took over the country there was a clear shift in Indonesia's agrarian politics from a socialist towards a more liberal orientation. However, there is no clear constitutional limitation on the power of eminent domain or public interest that can supersede private ownership.

In regard to legal framework, Indonesia's legal framework is characterized by a multiplicity of overlapping land-related regulations, creating ambiguous, often-contradictory provisions concerning the management of land and other natural resources. These multiple legal frameworks create overlapping institutional arrangement in land administration systems. This disaggregation has led to multiple and poorly coordinated sector agencies governing, for example, agriculture, forestry, and urban planning. This condition is aggravated by incompetent administration and arbitrary rules through which corruption, bureaucratic red tape, and unjust land appropriation are prevalent features.

¹² Harrison 1987; World Bank 1974, 2003; de Soto 2000.

The second problem focuses on the change in the balance of power between the central and regional governments following the democratization and decentralization processes at the sub-national levels. If the first problem highlights the horizontal segregation of natural resources management, the second underlines vertical partition in which conflicted interests between the central and the periphery lead to a “half-hearted” institutional arrangement of land decentralization. The result is dualistic land administration due to the unclear authority boundaries between the central and the local governments, adding complexity to the already chaotic institutional arrangement in land.

The last problem concerns potential conflicts between formal and informal/semi-formal land systems, making it difficult for the state to exercise an effective law rule of law and maintain its social legitimacy. Indonesia’s tenure landscape is characterized by multiple tenure arrangements operating in a range of different situations. Different legal systems and tenure arrangements governing land, including *adat* (customary) laws,¹³ coexist in the society, leading to issues of transactional uncertainty and tenure insecurity. This condition is aggravated by the fact that the majority of Indonesians live in either informal or semi-formal land tenure systems operating beyond the officially recognized system. Together these three problems have caused the institutional failure in providing environments conducive to securing property rights in Indonesia.

Argument and Research Design

The explanation above shows that the institutional arrangement poses the biggest

¹³ For the sake of simplicity, I loosely define *adat* law as customary law, although Hooker argues that it has a broader meaning beyond that definition. The term of *adat* can refer to one of the following: “law, rule, precept, morality, usage, custom, agreement, conventions, principles, the act of conforming to the usage of society, decent behavior, ceremonial, the practice of magic, sorcery, rituals.” Therefore, he contends that the precise meaning of *adat* depends upon the context. See: M.B. Hooker, *Adat Law in Modern Indonesia* (New York: Oxford University Press, 1978), p. 50.

obstacle to Indonesia's tenure security. In this study, I examine the trajectory of Indonesia's property rights institutions in land, focusing on why, despite attempts at reforms, the weak and highly ineffective institutions have persisted?

I use leader's type of ownership as the independent variable in explaining the outcome of weak property rights institutions in Indonesia. The dependent variable is the outcome of property rights institution that is limited to tenure security and redistribution program. Leader's type of ownership will affect leader's preference that in turn will affect the type of institutional arrangement in governing property rights. Leader's preference is a result of the leader's type of ownership that refers to motivational factors, either economic or political, whether to strengthen, neglect, or undermine property rights institutions.

I depart from Onoma's finding that not every leader favors strong property rights institutions.¹⁴ Under certain conditions, some of the elites will prefer weak institutions that can foster their economic and political survival. Those who benefit from a weak institution are reluctant to support change, or even worse, they subvert institutions that already exist. Thus, a weak institutional arrangement is not an honest mistake, but is rather a result of deliberate political considerations.¹⁵

A strong property rights institutions will provide a strong tenure security. In this regard, I follow Reerink's definition of tenure security as, "the protection of landholders against involuntary removal from the land on which they reside, unless through due

¹⁴ Ato Kwamena Onoma, *The Politics of Property Rights Institutions in Africa, Africa* (Oxford University Press, 2010), 2009.

¹⁵ *Ibid.*

process of law and payment of proper compensation.”¹⁶

However, the extent to which the leader can translate his/her institutional preference into an actual institution will depend on several conditioning factors such as bureaucracies and judiciary system.

According to Onoma, property rights institutions in land consist of four inter-related elements: (1) rules (both formal law and informal norms), (2) land administration agencies, (3) dispute settlement bodies (including courts, councils of elders, and administrative bodies tasked with adjudication), and (4) rule enforcer bodies (such as police, task forces, village committees, and boards).¹⁷ I employ a rather thinner concept of property rights institutions which comprises only the first two elements: formal legal framework and land administration body. The former is related mainly to the Law Number 5 Year 1960 concerning the Basic Agrarian Law (BAL) and its subsequent regulations, and the latter refers to the National Land Agency (*Badan Pertanahan Nasional/BPN*) which was established in 1988.

To make the case, I apply a temporal comparative analysis starting from Suharto’s New Order era (1968-1998) to the post-New Order era (1999-2012). By this research design, I focus on the origin of property rights institutions and how they change or persist. I further examine the trajectory of Indonesia’s property rights institutions and identify two critical junctures. The two critical junctures¹⁸ of institutional change in

¹⁶ Reerink further differentiates between legal, *de facto*, and perceived tenure security. These various level of tenure security is distinguished by the extent to which protection is given, either “legal protection,” “actual protection,” or “perceive sense of being secure.” See: Gustaaf Reerink, *Tenure Security for Indonesia’s Urban Poor: A Socio-Legal Study on Land, Decentralisation, and the Rule of Law in Bandung* (Leiden University Press, 2011), p. 221-224.

¹⁷ *Ibid*, p.15.

¹⁸ Critical juncture is defined as a “sudden change of the institutional equilibrium that was previously in place,” “punctuating the periods of stability”, “disruptive moments of change, in which exogenous shocks break down institutions, creating periods of contingency that allow agents to choose

Indonesia's land politics occurred in 1965 and in 1998.

The first critical junctures occurred in 1965 and dramatically reversed the direction of Indonesia's land politics following a failed "coup" of the 30 September Movement. This critical juncture involves a significant change in land's politics ideology from a socialist towards a more liberal market-oriented. The second critical juncture occurred in 1998 in the wake of decentralization and regional autonomy policies that are installed following Suharto's disposal. This critical period occurred from 1999 to 2004 during the installment of decentralization and regional autonomy policies. This period was a time of uncertainty for the direction of land administration, with increased conflicting interests between the central and the regional governments over authority, including in land affairs.

III. SUHARTO'S INSTITUTIONAL LEGACY

Indonesia inherited, from the colonial administration, a dualistic legal system governing land with different systems applying to foreigners and Indonesians (*inlanders*). Foreigner included Europeans and Foreign Asians subject to a civil code in which lands were surveyed, registered, and titled based on the Western tenurial system. For Indonesians, various *adat* or customary laws were applied, with land ownership and landholdings usually un-surveyed, unregistered, and non-titled.¹⁹

Since, Independence in 1945, this dualistic system has continued in Indonesian land politics. As a result, by 1960 less than 5 percent of land was registered and titled

between alternatives.”¹⁸ Onoma, p. 49; James Mahoney, “Path Dependence in Historical Sociology,” *Theory and Society*, Vol. 29, No. 4 (Aug, 2000), pp. 507-548.

¹⁹ MacAndrews, p. 19-20.

under the Western titling system, leaving the rest untitled yet recognized under various kinds of *adat* or semi-formal tenurial arrangements.²⁰

The enactment of Law Number 5 Year 1960 on the Basic Agrarian Law (BAL) has become a milestone of agrarian politics in Indonesia.²¹ The BAL was aimed to redress the problem of legal dualism by creating a comprehensive system which incorporated both Western and *adat* land rights.²² It was intended to be a “basic” or “umbrella” law governing all agrarian matters, including land, water, air, and other natural resources.

Proclaimed under Sukarno’s Guided Democracy era, the BAL was heavily influenced by Indonesia nationalism and socialism values, addressing the nation’s commitment to the interests of the people.²³ The main features of the law concern the social function of land and other natural resources, prohibition absentee and foreign ownership of land, and land redistribution.

Land reform was particularly the main focus of Indonesia’s agrarian politics under the Old Order regime. In 1964, a land reform court was established as a political statement to prove the government’s commitment to “land for the people.”²⁴ The court served to adjudicate any cases--civil, private, or administrative--related to the implementation of land reform. The court employed a five-judge panel consisting of a

²⁰ *Ibid.*, p. 20.

²¹ The BAL was a product of the lengthy discussion between the two opposite groups i.e. those who favored a single land system based on *adat* and those who advocate a continuation of the existing dual systems. The BAL was a result of a compromise between the two groups, in which it retained certain elements of previously existing land law system while also providing a new approach for Indonesia’s agrarian management.

²² Leaf, p. 109

²³ According to Article 33 (3) of the Constitution, Indonesia employs the doctrine of state control over all natural resources throughout the country. Thus all matters related to the management and control of natural resources, including mining, water, and land, are under central governmental authority. Some of the authority over natural resources may be conferred to the autonomous regions or *adat* communities provided that doing so does not contradict national regulations and interests.

²⁴ The court was established by Law Number 21 Year 1964 on Land Reform Court.

majority of three judges representing peasant organizations and one judge each from the agrarian ministry and the judiciary.

The law introduced a new tenurial system consisting of primary and secondary land rights that revoked all the previous colonial land titles. The primary rights include the Right of Ownership (*Hak Milik*), the Right of Building (*Hak Guna Bangunan*), the Right of Use (*Hak Pakai*), and the Right of Cultivation (*Hak Guna Usaha*). In addition, there is the Right of Management (*Hak Pengelolaan*) for the holding of land for developmental projects, limited specifically to government agencies.²⁵ The BAL stipulates that all western titles will be converted to the new system. The unregistered *adat* land rights are recognized provided that they do not contradict national and state interest. However, the BAL required *adat* rights to be brought into the registered system and considered as the semi-formal rights until these rights complete the registration process.

The First Critical Juncture

During 1965-1968, Indonesia underwent a chaotic time of tremendous institutional instability. It was a transitional period of regime change from Sukarno's Old Order to Suharto's New Order. When the New Order regime seized power, Indonesian politics and economic policies were both to undergo radical shifts.²⁶ It was a chaotic period with uncertainties, fears, and anxieties spreading throughout the country in the wake of the mass massacre of at least a half million of the members of the Indonesian Communist Party (*Partai Komunis Indonesia/PKI*) and people associated with them. This

²⁵ Leaf, p. 113.

²⁶ MacAndrews, p. 49.

“cleansing” was a pivotal event for Suharto’s rise to power and stabilize his role.

Historically, PKI and its affiliated organizations such as the peasant organization (*Barisan Tani Organization/BTI*) were the main advocates of land reform. With the elimination of PKI and the peasants as political and social forces, the land reform program was practically dismantled and the country’s future direction was in the hand of the new authoritarian regime under Suharto's leadership.

The period of 1968 – 1974 was critical for Suharto to consolidate his power in which he asserted control over both civilian and military organizations mainly through repressive means. He heavily applied the “stick” (repression) and “carrots” (rewards) methods to overcome challenges and extend loyalties. In this regard, land served as one of the pivotal intermediary means to assure the survival of Suharto’s early phase regime. In addition to the use of force, it was important for Suharto’s government to suppress peasants’ resistance through land institution because they depended heavily on land for their subsistence. A weak tenure security will make them vulnerable for land eviction. On the other hand, the demolition of land reform will appeal for support from landlords both in urban and rural areas who had been persistent opponents of the program.²⁷

Stability, rapid economic development, and agriculture self-sufficiency were the priorities during the New Order era. This period marked the first critical juncture reversing the direction of Indonesia’s agrarian politics. The new regime reinterpreted socialist premises of the agrarian politics into more market-friendly and business-oriented policies that did not give the same benefits to all segments of the population.

²⁷ S.M.P Tjondronegoro and Gunawan Wiradi, *Dua Abad Penguasaan Tanah: Pola Penguasaan Tanah Pertanian di Jawa dari Masa ke Masa (Two Century of Land Control: The Pattern of Agricultural Land Control in Jawa from Time to Time)* (Jakarta: Yayasan Obor Indonesia, 2008).

The Suharto government made no attempt to revise or improve the BAL nor to formulate any national policy pertaining to land. Instead, the government maintained the BAL because it for it provided legitimacy for modifying the concepts of “state land” and “national interests” for the regime’s own purposes.²⁸ At the same time, however, the government completely neglected the principles stated in the BAL by not issuing the subsequent regulations to implement to the law, creating a legal limbo in agrarian affairs.

Despite its negative association with PKI, the socialist and nationalist premises stated in the BAL remained a popular concept among the ordinary people in rural Indonesia.²⁹ For this reason, Suharto continued to sustain the BAL, but only as lip service because it was completely neglected by his subsequent developmental policies. Thus, instead of reinforcing the BAL and the redistribution program, he subverted them by enacting sectorial regulations and policies that contradicted the principles of BAL.

During this period, the BAL maintained its mere existence but not its spirit when the New Order enacted several sectorial laws³⁰ that contradicted the BAL and circumvented the integrated approach of land and other natural resources management that was previously intended. Since then, control over land was regulated by at least four regulations: the BAL, Forestry Law,³¹ Mining Law,³² and Spatial Planning Law.³³ These laws exclude forestry, mining, and coastal areas from the provisions of the BAL. The BAL applies only to the so-called “non-forestry” land comprising about 30% of national

²⁸ Anton Lucas and Carol Warren, *The State, The People, and Their Mediator*, p. 96.

²⁹ Anton Lucas and Carol Warren, “The Land, The Law, and The People,” in *The State and Agrarian Conflict in Indonesia*, (Center for International Studies, Ohio University, 2013), p. 5.

³⁰ Law No. 11/1974 on Irrigation.

³¹ Law No. 5/1967 on Forestry, replaced by Law No. 41/1999.

³² Law No. 11/1967 on Mining, replaced by Law No 4/2009.

³³ Dianto Bachriadi, Yudi Bachriktora, Hilma Safitri, *Ketika Penyelenggaraan Pemerintahan Menyimpang: Mal Administrasi di Bidang Pertanahan, (When the Polity Implementation Deviate: Mal Administration in Land)* (Yogyakarta: Laper Pustaka Utama, 2005), p. 42-43.

land areas,³⁴ while the Forestry Law governs land and natural resources within the forestry area.³⁵ The Mining Law regulates mining operation, including the utilization of the land above, while Spatial Planning Law governs spatial zoning, including land use planning.

Indonesia during the Suharto's early phase reaffirms Onoma's finding that the leader's institutional preference depends on how he or she uses land. The leaders who directly use land for securing or advancing their political or economic gains will prefer a weak institution. Conversely, those who extract value from land through an indirect mode of exploitation, such as agriculture or the real estate industry, will prefer strong property rights institution.³⁶ In this case, Suharto strategically used land for political support through the use of "stick and carrots" facilitated through weak property rights institutions.

In addition, the strong developmentalist orientation of the Suharto's regime required great needs for investors and a huge amount of land for development. Land appropriation would be easier if it operated within insecure tenurial system. The absence of a land ownership limitation and redistribution program would allow investors to acquire bulk parcels of land for various developmental projects. The weak rule of law and unreliable court system supported the government's hegemony since people did not have a channel to oppose its exploitative rules.

³⁴ The Indonesian government claims that forestry land covers almost 70% of Indonesia's total area (around 1,331,270 square kilometers). However, based on World Bank's report, the actual forestry area covers only 48.8% of land. World Bank, 2009. p. 4.

³⁵ Forestry land is under the control of Ministry of Forestry and subject to the Forestry Law instead of the BAL.

³⁶ Onoma, *op.cit.*

The Abandoned of Land Reform Program

Under Suharto's regime, land reform has not been given similar importance, and even has been neglected.³⁷ In fact, in 1970 the regime abolished the Land Reform Court that was established under the previous administration, stating that the "nationalist, socialist, and communist" principles violated the new direction of national policies.³⁸ Consequently, land reform remained as only a memory and landlessness continued to deepen rural poverty and food insecurity, especially on Java Island.

Efforts at land reform have become only slogans and thus have failed. There has been no political force willing to command the power to really engage in the redistribution program, particularly for the poor. The New Order government also never made any policies to stipulate maximum land control for individuals and legal entities. As a consequence, unjust land distribution and ownership inequality due to spatial monopolization have been prevalent problems because only a few people own and control the largest areas of land, especially in urban and strategic areas.

The BAL indeed prohibits extensive ownership and control over land.³⁹ However, the BAL requires an implementing regulation for the size of holdings limitation to be put into effect. In 1961, the Old Order government has issued Law No. 56/Prp/1960 on the Limit to Agricultural Land (*Penetapan Luas Tanah Pertanian*)⁴⁰ which declares a maximum 20 hectares of land ownership for a family.⁴¹ This provision, however, pertains

³⁷ MacAndrews, p. 74.

³⁸ Consideration of Law Number 7 Year 1970 on the Abolishment of Land Reform Court."

³⁹ The BAL stipulated that "land areas held in excess of the maximum are to be redistributed to the people based on need" with the compensation for the land owners. The priority was given to peasants who were cultivating the land in questions. The BAL, article 7.

⁴⁰ It further reiterated by Agrarian Minister Decree No. SK 978/KA/1960.

⁴¹ Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, (*Indonesia's Agrarian Law: History of the Basic Agrarian Law, Substance, and Its Implementation*) Ed. Rev. Cet. 10, (Jakarta: Djambatan, 2005), p. 371.

only to agricultural land including plantations, farmed fisheries, ranches, and forestry,⁴² whereas non-agricultural land is still not regulated. In addition, the limitation provision excludes land that is controlled based on temporary titles such as the Rights of Cultivation (*Hak Guna Usaha*), the Rights of Use (*Hak Pakai*), and the Rights of *Bengkok*/Ordinance Land (*Tanah Jabatan*). It also does not apply to legal entities such as companies and state enterprises.

Table 1
The Limitation of Agricultural Land Ownership⁴³

Area Category	Population Density per KM2	Maximum Size of Holdings	
		Rice Field (Ha)	Dry Soil (Ha)
Not Populous	<50	15	20
Less Populous	51 – 250	10	12
Populous	251 – 400	7.5	9
Very Populous	>401	5	6

In contrast to agricultural land, there was no single regulation enacted to set the maximum size of holding of non-agricultural land. It was not until the regime collapsed in 1999 that the new government finally regulated non-agricultural land ownership limitations for legal entities.⁴⁴ Regulation on non-agricultural land ownership limitation is indeed important, particularly in urban areas. In the absence of such regulation, land in urban areas easily becomes a target for large private investors' and land speculators' purchasing large parcels of land for their own capital gains.

A weak tenure security and the absence of a redistribution program are actually a deliberate institutional design constructed by the New Order government based on the

⁴² Joint Instruction between the Ministry of Internal Affairs and Regional Autonomy and the Ministry of Agrarian on January 5, 1961 No. Sekra 9/1/12.

⁴³ Jurnal Hukum "Pembatasan Pemilikan dan Penguasaan Tanah," ("Land Ownership and Land Control Limitation") <http://www.jurnalhukum.com/pembatasan-pemilikan-dan-penguasaan-tanah/>, accessed on April 1, 2014.

⁴⁴ It was regulated by the Minister of Agrarian/Chief of BPN Number 2 Year 1999 on Location Permits.

way it acquires values from land. As previously mentioned, Suharto's era is often referred to as "developmentalist, centralistic, and corrupt." It was then hardly surprising that Indonesia under Suharto was concerned with market and economic development at the expense of a just economy for the people.

In this regard, the New Order government employed state lands for its massive developmental projects such as plantations, real estates, mining, and tourist resorts. The massive growth of these and other industries, particularly real estate, is evident by the salient increase in the membership of the Indonesian Real Estate Organization (REI) from only 25 members in 1972 to 900 in 1990.⁴⁵ As MacAndrews rightly indicates, Indonesia's real estate industry has been dominated by "a small number of large and sophisticated developers and a large number of small firms."⁴⁶ In urban areas such as Bogor, Tangerang, and Bekasi, 87,045 hectares were issued and controlled by only 17 real estate companies.⁴⁷

The government has been manipulating state land for its developmental projects at the expense of the people's justice and tenure security.⁴⁸ If people such as plantation workers and peasants do not hold formal title, the government will more easily appropriate land without due process of law and proper compensation.⁴⁹

This condition also highlights the problem of inequality in land distribution and land usage. By 1998, the government had issued location permits covering three million hectares for various developmental projects, but only 26% of the land had actually been

⁴⁵ MacAndrews, p. 232.

⁴⁶ *Ibid.*, p. 231.

⁴⁷ B.F. Sihombing, *Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia (The Evolution of Indonesia's Land Policies)* (Jakarta: P.T. Toko Gunung Agung, Tbk. 2004), p. 516.

⁴⁸ Leaf, p. 222.

⁴⁹ Anton Lucas, and Carol Waren, p. 96.

utilized, leaving thousands of hectares of land neglected.⁵⁰ By 1992, large plantation estate leases covered 3.8 million hectares, held by 1,206 foreign and domestic companies with an average holding of over three thousand hectares each.⁵¹

These numbers contrast starkly with the average-size family holding of less than 0.8 hectare of agricultural land.⁵² The proportion of landless and land-poor agricultural households is especially high on Java. According to BPN data in 1993, 83% of farmer or agricultural families in Java are either landless, lease, or own fewer than 0.5 hectares cultivated land.⁵³

The beneficiaries of this weak property rights institution were none other than Suharto, his family, and his cronies. In Jakarta, for example, according to the BPN report in 1996, Suharto's son, Hutama Mandala Putra (Tommy), owned 22 parcels of land with an area of 57,532 square meters.⁵⁴ That is the official area of land registered with the BPN. If Tommy's unregistered land or other semi-formal titles such as *girik* land, cultivated land, and so on, are counted, the amount of his land is likely much larger.⁵⁵ This size of land ownership is remarkable compared with the average land ownership in Jakarta. There are at least 2,377,000 poor people living in Jakarta, occupying 4,481.60 hectares of slum areas,⁵⁶ and additional millions of Jakartans are landless.⁵⁷

⁵⁰ Dianto Bachriadi and Gunawan Wiradi, "Land Tenure Problems in Indonesia: The Need for Reform," in A. Lucas and W. Warren, *Land for the People*.

⁵¹ Data on agricultural land control 1963-1993 in Dianto Bachriadi and Gunawan Wiradi

⁵² *Ibid.*

⁵³ BPS 1993.

⁵⁴ According the Letter from Kakanwil BPN DKI Jakarta on 15-11-2000.

⁵⁵ Sihombing, p. 21.

⁵⁶ *Ibid.*, p. 22-25.

⁵⁷ *Ibid.*, p. 25.

Table 2
Land Owned/Controlled by Suharto and His Family⁵⁸

No	Owner	Parcel of Land	Area (M2)	Land Title Status		Distribution per Province
				Rights of Cultivation	Rights of Ownership	
1.	Suharto	19	116.284	1	18	Jakarta: 18 Central Java: 1
2.	Siti Hartinah Suharto	13	58.798	3	10	Jakarta: 3 Yogyakarta: 1 West Java 7 Central Java: 2
3.	Siti Hardiyanti Hastuti	17	15.856	6	11	Jakarta: 16 Central Java: 1
4.	Indra Rukmata dan Siti Hardiyanti	1	8.113	0	1	North Sumatra: 1
5.	Sigit Hardjojudanto	19	141.552	4	15	Jakarta: 14 West Java: 4 Central Java: 1
6.	Hutomo Mandala Putra	61	333.297	3	58	Jakarta: 22 Lampung: 3 Central Java: 1, Bali: 55
7.	Siti Hediati Hariyadi	13	91.595	0	13	West Java: 6 Central Java: 1 Bali: 6
8.	Siti Hutami Endang Adiningsih	10	50.818	3	7	DKI: 3 West Java: 7
9.	Bambang Trihatmojo	1	4.350	0	1	Bali: 1
Total		154	820.663	20	134	Jakarta: 76 West Java: 24 Central Java: 7 Yogyakarta: 1, Bali: 42 North Sumatra: 1, Lampung: 1

Rapid urbanization, the expansion of the real estate industry, and commercial agriculture, and population growth, have led to land scarcity, rising land values, and the commercialization of land in many cities in Indonesia. This situation is aggravated by land speculation that has a detrimental effect on market values by withholding land from the market and thus driving up land values to unreasonable prices. This act of land speculation ultimately causes the bulk of land to be concentrated in the hands of a few

⁵⁸ National Land Agency 1999 in Sihombing, p. 22.

people or private investors, resulting in the astronomical land prices that price common people out of the market.

The failure of land reform and the absence of land ownership limitation are the very reason for the inequality of land ownership in Indonesia. This institutional arrangement which is characterized by the inefficient land administration, high incidence of land disputes, arbitrary land-taking, and conflicts with semi-formal land holders, has hampered Indonesia's economic and social development. Moreover, rapid development in both rural and urban areas as well as urbanization have led to a growing number of land-related issues that needed to be addressed.

On the other hand, in the mid-1980s there was a shift in the use of land following the expansion of Suharto's and his family's businesses. Ownership of these businesses changed Suharto's institutional preference, with a desire to facilitate the emergence of efficient land markets and to alleviate social conflict over land rights. Thus, the need for a comprehensive national land policy that provided adequate legislation and land administration reform was becoming more imperative.

Nonetheless, the government maintained its focus on addressing pervasive land conflicts that had had detrimental effects on national developmental policies, and it emphasized the need for a land-titling program. Thus the government again showed an ambivalent attitude toward land policies by focusing only on the formalistic approach of land registration, setting aside the salient needs of land redistribution.

A Change in the Leader's Type of Ownership

The last decade of Suharto's era during 1988-1998 marked the first feedback to the politics of property rights institutions in Indonesia.⁵⁹ Along with rapid development and industrialization, there was a shift in Suharto's and his allies' mode of production from direct to indirect exploitation. They used agriculture, real estate development, mining, and other businesses for their economic advancement and political survival. This shift affected their new preference for more secure land titles. In the long run, a strong property rights institution will indeed boost economic growth and give the leader more benefits. The New Order thus adopted ambivalence strategy by creating a deliberate separation between land administration and land reform programs, with the latter remaining neglected.

The change in institutional preference was indicated by the establishment of the BPN in 1988 and the subsequent systematic land-titling programs. The BPN is established as a centralized land administration body with broader authority over land administration, title registry, surveying, and land titling. The government, however, did nothing to ameliorate the unbalanced land distribution. Attempt at land reform was shifted to a transmigration program, focusing on the relocation of 3-4 million people from the high-density area of Java to less populous places in the outer islands.⁶⁰ However this program did not adequately address the land inequality problem and its benefits to agricultural practices has been doubted. Instead, the program had detrimental effects to

⁵⁹ This is the period where, "institutions continue to evolve in response to changing environmental conditions and ongoing political maneuvering but in ways that are constrained by past trajectories." In response to changing environment once institution is established, "actors adapt their strategies in ways that reflect but also reinforce the "logic" of the system." Kathleen Thelen, "Historical Institutionalism in Comparative Politics," *Annual Review of Political Science* 2 (1999).

⁶⁰ This transmigration program aimed at relieving the population concentration in Java and increasing agriculture productivity at the outer islands through the clearing forest or "the reclaiming of swamp land." MacAndrews, p. 56

the environmental destruction and assimilation problems between the settlers and the local people, triggering even more social conflicts.⁶¹ In addition, low capacity hindered the New Order government from translating its institutional preference to create strong property rights.

The Establishment of The National Land Agency

The National Land Agency (*Badan Pertanahan Nasional/BPN*) that was established in 1988 has long been known as one of the most highly centralized, ineffective, and corrupt institutions in Indonesia.⁶² Before 1988, agrarian affairs were under the Directorate General of Agrarian in the Ministry of Internal Affairs.⁶³ The status of the Directorate General of Agrarian was upgraded to a Non-Departmental Government Agency (*Lembaga Pemerintah Non-Departemen*), with organizational branches at the provincial and district/municipal levels.⁶⁴

During the period of 1993-1998, Indonesia employed a dualistic institutional approach to land affairs by establishing the National Ministry of Agrarian⁶⁵ in conjunction with the BPN.⁶⁶ The two institutions were headed by a single person--the Minister of Agrarian who was also the ex-officio of the Chief of BPN. In practice, the

⁶¹ MacAndrews, p. 57-58.

⁶² Craig C. Thorburn, "The Plot Thickens: Land Administration and Policy in post-New Order Indonesia," *Asia Pacific Viewpoint*, Vol. 45, No. 1, April 2004, p. 34.

⁶³ The establishment of the BPN was based on Presidential Decree Number 26 Year 1988 on the National Land Agency.

⁶⁴ Sihombing, p. 118-119.

⁶⁵ The National Ministry of Agrarian was established by the Presidential decree Number 96/M Year 1993 to carry out function in land matters.

⁶⁶ It based on Presidential Decree Number 96 Year 1993.

Ministry of Agrarian dealt with national policies and coordination, while BPN exercised authority over more administrative matters.⁶⁷

However, the institutional arrangement of BPN has proved to be weak. It lacks adequate personnel for land administrative processes, with only 23,990 staff throughout the country, and many of those are not fully qualified.⁶⁸ There is also a problem of uneven staff dispersion in which the highest number of staff are concentrated in Java which has an average of 2,000-3000 staff per province. Outside Java, however, the average is only 500-1000 staff per province, and some provinces have fewer than 500 staff. For instance, the BPN regional office in the district of Hulu, Sungai Utara, has only 27 staff, compare to the number of staff in the Municipality of South Jakarta at 196.⁶⁹

BPN also suffers from an insufficiency in land-mapping equipment. Reportedly, it has 4164 land measurement tools in total, but only 3157 (75.9%) of them are in good condition.⁷⁰ Furthermore, coordination among the various departments involved in land reform is inadequate. The BAL and the land reform program did not succeed in eliminating vested interests among bureaucracies at the local level, resulting in lack of compliance and program failures.⁷¹

Land Registration Program and Tenure Security

Much of the literature shows the importance of tenure security in improving the quality of life, particularly for the urban poor living in slum areas. Formalization of land

⁶⁷ It is further regulated by the The Minister of Agrarian/Chief of BPN Number 5 Year 1994 on Organizational Hierarchy and Staff's Operational Procedure at Agrarian Office.

⁶⁸ The level of education of the BPN staff is considerably low with the majority (57.96 percent) only high school graduates.

⁶⁹ Badan Pertanahan Nasional (BPN), "Kewenangan Bidang Pertanahan Sehubungan dengan Otonomi Daerah," ("The Authority over Land Affairs in Relation to Regional Autonomy"), p. 19.

⁷⁰ *Ibid.*, p. 18.

⁷¹ MacAndrews, p. 42

rights through registration is seen as the key element to afford tenure security in particular as well as other developmental objectives such as “slum eradication, poverty alleviation, and social justice.”⁷²

Legalization of what de Soto calls “extra-legal”⁷³ land tenure, by registering the land, is considered key to gaining access to the formal economic system. Formal landholders are expected to use their land certificates as collateral for capital accumulation and thus will enjoy greater economic benefits. Formal titles are also perceived to protect tenure security from involuntary removal by the state or private parties. Even if involuntary removal occurs, those with land certificates will be more likely than informal landholders to receive proper compensation. This policy is widely promoted by the World Bank and has become dominant in developing countries, including Indonesia.

Since 1981, the Indonesian government has been promoting mass land registration through various programs such as the National Land Registration Project (*Proyek Operasi Nasional Agraria* or PRONA), Regional Land Registration Projects (*Proyek Operasi Daerah Agraria* or PRODA), and the Land Administration Project (1994).⁷⁴ These programs aim at accelerating land registration and improving the legal-institutional framework for land administration, including a systemic review of land regulations and human capacity building.⁷⁵ The results of these programs, however, remain limited.

⁷² World Bank, *Land Policies for Growth and Poverty Reduction, A World Bank Policy Research Report* (the World Bank and Oxford University Press, 2003), pg. 40-51.

⁷³ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. Basic Books, 2000.

⁷⁴ Gustaaf Reerink. *Op.cit.* p. 11.

⁷⁵ *Ibid.*

PRONA and PRODA succeeded in registering only 3 million hectares out of 60 million hectares of targeted lands. By the early 1990s, out of 193 million hectares of Indonesia's non-forestry land, only an estimated 20 percent were formally registered. Meanwhile the Land Administration Project program has registered only another 1.8 million parcels.⁷⁶ With current resources and procedures, it was estimated that it would take BPN approximately 100 years to register all the existing eligible land parcels, let alone process the annual growth in new parcels.⁷⁷

Again, corruption, patron-client relationship, and red-tape bureaucracy were the main problems behind this failure. A slow and cumbersome bureaucracy and illegal payments had led to the high cost of obtaining land certificates, which resulted in high levels of discontent and public distrust to the adjudication programs. It was estimated that getting a certificate usually took more than one year, with numerous illegal payments expected. These illicit practices seriously undercut the program.

While the government emphasizes that land adjudication through a single property rights systems is the most effective means of providing land tenure security, the reality presents a different picture. Corruption and mal administration practices, such as multiple certificates for the same parcel, certificates issued to the wrong people, or land appropriation without proper compensation and due process of law even after certificates have been issued,⁷⁸ have eroded public trust in the national land administration system.

⁷⁶ The SMERU Research Institute, "An Impact Evaluation of Systemic Land Titling Under the Land Administration Project (LAP)," June 2002, <http://www.smeru.or.id/report/research/lap/lap.pdf>, accessed on March 10, 2014.

⁷⁷ Erna Heryani, "Land Administration in Indonesia," 3 FIG Regional Conference, Jakarta, Indonesia, October 3-7, 2004, p. 6.

⁷⁸ Thorburn, "A long row to hoe," p. 2.

Moreover, land registration is not always associated with a higher level of tenure security, resulting in low incentive for land registration through any formal system.

Reerink, for example, argues that semi-formal tenure is sometimes as secure as formal tenure.⁷⁹ Assessing the relationship between registration and tenure security of low-income urban dwellers in Bandung, West Java, Reerink concludes that there are no differences between titleholders and semi-formal landholders. In this regard, he believes that perceived tenure security is enhanced not only by land registration but also by increasing *de facto* tenure security.⁸⁰ This conclusion confirms Onoma's finding that "the security of land rights is the effect of multiple factors, including deep-rooted social practices and customs as well as population density and access to land."⁸¹

Peter Ho and Max Spoor put forward a similar view by contending that formalization does not always generate economic development and access to formal credit. They argue that, "in the absence of land redistribution, land titling does nothing to enhance economic security. Legal security of tenure is not always associated with economic security of tenure."⁸² Banks are reluctant to give loans to slum residents, due to

⁷⁹ Reerink examines the extent to which Indonesia's urban poor apply different tenure arrangements to enjoy tenure security. Working within an Indonesian context, he distinguishes land tenure security into three categories: formal tenure, semi-formal tenure, and informal tenure. "Formal tenure is based on formal rights recognized by the 1960 Basic Agrarian Law (BAL). While semi-formal tenure is based on *adat* (customary) rights, of which legal conversion to BAL recognized primary rights has not yet been validated, but which can be validated on the basis of the argument and other evidence." (Reerink, 2011: 15).

⁸⁰ Reerink differentiates between legal, *de facto*, and perceived tenure security. *Legal tenure security* is defined as "the *legal* protection of landholders against involuntary removal from the land on which they reside, unless through due process of law and payment of proper compensation." *De facto tenure security* means "the *actual* protection against involuntary removal, irrespective of the legal status of land tenure." *Perceived tenure security* means "a sense of being secure, experienced by landholders. An indicator of perceived tenure security is the assumed legitimacy of tenure – that is, whether landholders think the authorities agree with them residing on the land they occupy." Reerink, p. 221-224.

⁸¹ Ato Kwamena Onoma, *The Politics of Property Rights Institutions in Africa* (Oxford University Press, 2010), p.14.

⁸² Peter Ho and Max Spoor further argue that, "by proceeding with land titling under conditions of low socio-economic development, the state risks creating what is here termed as an 'empty institution' rather than a 'credible institution.' In other words, the new institution remains nothing more than a paper

high transaction costs and the risks assumed in respect to people with low and unstable incomes.⁸³

In addition, land registration may have detrimental effects, such as an increase in land taxes, market eviction, and land disputes. Furthermore, titling programs entail significant costs, are time-consuming, and impose a heavy burden on land administration agencies. As Soehendra notes, the objectives of land registration is often impeded by patron-client relationships and unequal information among various actors.⁸⁴

In situations where institutions enforcing formal land rights are absent or largely ineffective, a certificate of title cannot provide absolute evidence of the land title. Thus land registration might not always be the most apt mechanism to secure rights. Formal rights may grant more benefits when titled landholders face eviction either by the state or private companies. In daily life, however, the difference between the two rights is not that significant.⁸⁵ In these situations, *de facto* control over land seems no less important than *de jure* ownership.

As the result, government efforts at “reform” and the land registration program did not succeed in overcoming discontent over land, and land conflicts continue to be prevalent problems. By the 1990s, land issues had become the single most prominent source of conflict in Indonesia, with land disputes making up the largest number of cases at Administrative Court and National Human Rights Commission.⁸⁶

agreement or a hollow shell with little or even a negative effect on the actions of social actors.” Peter Ho and Max Spoor (2006). “Whose Land? The Political Economy of Land Titling in Transition Economies.” *Land Use Policy* 23(4): 580-587. Available at: <http://mearc.eu/resources/WhoseLand.pdf>

⁸³ Gustaaf Reerink, p. 5.

⁸⁴ Djaka Soehendra, *Land Certification and the Poor: the Implementation of Adjudication Project in Kampung Rawa, Jakarta (Sertifikasi Tanah dan Orang Miskin: Pelaksanaan Proyek Ajudikasi di Kampung Rawa Jakarta)*, (Jakarta: HuMa-Jakarta, 2010).

⁸⁵ *Ibid.*

⁸⁶ Anton Lucas and Carol Warren, p. 10.

Attempts at reform have largely failed, due mainly to cumbersome and corrupt modes of land exploitation that have turned land administration into a “bureaucratic rentier activity.”⁸⁷ These problems have embroiled the country in social discontent that eventually led to the disposal of Suharto’s regime in the wake of the major financial crisis of 1997-1998.⁸⁸

IV. DECENTRALIZATION AND ITS IMPLICATIONS ON LAND ADMINISTRATION AND POLICY

There are several issues in the center-periphery relationship within the framework of regional autonomy and decentralization policies, such as fiscal ratio, forms of responsibility, balance of power, and so on.⁸⁹ With regard to land, the issue of the dispersal of powers is also related to sectorial affairs such as forestry, water, mining, tourism, and environment. In this section, however, I focus on the decentralization of institutional arrangements regarding land, particularly related to land administration and registration. In addition, I limit the scope to non-forestry land allocated for settlement and agriculture that comprises approximately 30% of national areas.

The Second Critical Juncture

The second critical juncture in the trajectory of Indonesia’s property rights institution occurred following the regime change of 1998 and the subsequent decentralization policies. The disposal of Suharto has led to a “dramatic resurgence of

⁸⁷ Timothy p. 700.

⁸⁸ Anton Lucas and Carol Waren.

⁸⁹ The implementation of Regional Autonomy has officially started on January 1, 2001.

agrarian protest”⁹⁰ that includes peasants’ direct occupation actions to reclaim their rights over long-disputed lands or to demand higher compensation for the previous unjust land appropriation.⁹¹

At the same time, there has also been a salient revival of *adat* community, particularly on the outer islands (outside Java), with people demanding recognition of their rights and institutions. As Davidson and Henley note, “the rise of indigenous movement is often thought of as the continuation at sub-national level of an old tradition of anti-imperialism.”⁹² On the one hand, *adat* is seen as a potent tool for “redressing past injustices.” It is believed to be the cure for Indonesia’s chronic corruption and ineffective institutions as well as the means to “promote more democratic forms of village government.”⁹³ On the other hand, the revival of *adat* has showed the continuing clash between the state and non-state systems, leading to the issue of competing powers and legitimacy.

While decentralization policies have been intended to extend democracy at the local level and offer more authority for local government, the dispersal of power has yielded unintended institutional outcomes. On the one hand, the distribution of authority to regional government has allowed for more openly contested claims over power, hegemony, and legitimacy at the local level. On the other hand, change in the balance of power has reduced the state capacity in terms of coherent policy-making, coercion, legitimacy, and revenues. The decreased in state capacity has thus hindered effective law enforcement.

⁹⁰ Antony Lucas and Carol Waren, p. 14.

⁹¹ P. 88-89.

⁹² Jamie S. Davidson and David Henley, “Introduction: Radical Conservatism...,” p.5.

⁹³ *Ibid.* p.4.

In this period, the new administration showed urgency to strengthen institutions that had long been abandoned by the previous regime. Securing land rights was an instrument for perpetuating power in the face of the increasing demands from below. In this regard, land reform gave legitimacy and increased domestic support in the wake of the economic and political crisis following the ousting of Suharto.

In 2001, the civil society organizations succeeded in pushing the Indonesia People's Consultation Assembly (*Majelis Permusyawaratan Rakyat/MPR*) to issue a decree initiating regulatory reforms and land redistribution programs. Moreover, since 1998, eleven laws covering land, water, forestry, and mining sectors have been enacted in an attempt to establish land reform.⁹⁴ Although these laws indicate a positive trend, the implementation process has been far from effective and eventually failed to bring about the desired outcome.⁹⁵

Amidst the attempt to reform, the post-New Order government found their response constrained by earlier institutional choices. Following decentralization policies, Indonesia's national, provincial, and district governments have engaged in an intense struggle over how authority and the power embedded in it should be shared. These struggles are reflected in any distributional arrangement, including in land institution.

Power Struggle between Center and Periphery

⁹⁴ LEI, p. 63.

⁹⁵ EASRD, Rural Development and Natural Resources East Asia & Pacific Region, (World Bank) "Decentralizing Indonesia's Land Administration System: Are Local Governments and Land Offices Ready? Evidence from 27 Districts." Final Report, June 2001, p. 10.

The period of 1999-2004 was critical for determining the new direction of Indonesia's land politics. Decentralization sought to increase local governments' authority in managing political, social, and economic affairs in their regions. Land affairs are among the responsibilities devolved to the district/municipal government.⁹⁶ Decentralization, thus, was aimed at extending public services and providing a more effective and efficient land administration body.

This policy, however, was entangled in a power struggle between center and periphery, resulting in compromistic arrangements that create another dualism of land administration policies with overlapping authority.⁹⁷ The power struggle between center and periphery over land affairs is particularly evident in the institutional arrangements of the land administration body.

Sihombing describes this era as a “structural and critical crisis”⁹⁸ of BPN in which a fierce contestation occurred between the central government and the local government over the authority in land. As USAID reports, “BPN has long resisted reforms and does not appear likely to embrace them, while some regional governments may be more amendable to reforms that they see as responsive to the needs of their constituents.”⁹⁹

On the one hand, the BPN has a vested interest to maintain its power as the centralized institution with authority over policy-making and various land administration functions. On the other hand, the regional governments, whose power have significantly

⁹⁶ According to the Law Number 32/2004 on Regional Government, six matters are excluded from the regional government's authority: foreign politics, defense, security, judicial, monetary and fiscal, and religion. Thus outside these six matters, the regional governments have full authority over their respective bailiwicks, including matters related to land.

⁹⁷ Sihombing, p. 2.

⁹⁸ P. 121.

⁹⁹ USAID Report, “Property Rights and Resource Governance: Indonesia,” http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Indonesia_Profile_0.pdf, accessed on March 10, 2014.

increased following the decentralization, called for more authority of land affairs that would enhance regional revenues through land-related taxes. With the installment of direct local election, local politicians had more incentive to meet demands for land reform and to address social discontent from land conflicts within their localities. Conflicting interests between the center and the periphery were thus inevitable. Land affairs, following the decentralization, had become a site of contestation over power, hegemony, and legitimacy.

Three options were available for an institutional arrangement in land affairs. The first option was maintaining the authority of land affairs under the central government with the BPN continues to be the centralistic land administration body. The second proposal called for the dissolution of a central role and complete devolution for all *land affairs* to the district/municipality level. Under this arrangement, the local governments would be entitled to establish their own land agency within their regions under the Regional Autonomy Law, leaving the BPN completely uninvolved.

The last option was a compromistic arrangement creating institutional dualism in which the local government could install its own land agency under the Regional Autonomy Law, while maintaining the existence of BPN under the BAL. This arrangement would subsequently maintain BPN as a centralized institution but with a more limited authority over polices and some land services.¹⁰⁰

This power struggle eventually produced a compromistic arrangement with policy-making and land-titling functions remaining centralized under BPN and land management functions being carried out by regional governments. This institutional model has created a new form of administrative dualism that is even more complicated

¹⁰⁰ Heryani, p, 11.

than the arrangement of the previous regime.¹⁰¹

Government Regulation Number 38/2007 stipulates that nine authorities over land are to be given to the regional governments. These authorities include the authority to issue location permits; stipulate land procurement for public interest; resolve conflicts over cultivated land, *ulayat* land, and compensation settlements; determine subject and object of land redistribution; determine the usage of unused land and absentee land; deal with the issue of neglected land; issue permits to open/develop new land; and set land use planning within regency/municipal areas.

Furthermore, the separation between land titling under BPN and urban planning functions under regional governments has caused many difficulties in coordination and policy implementation. Unclear regulations, overlapping jurisdictions, and ambiguous boundaries have resulted in an even more chaotic institutional arrangement.

V. CONCLUSION

The complexity in Indonesia's land administration is a structural problem with two forms: horizontal and vertical. It has resulted from the combination of Suharto's institutional legacy and the weak of law enforcement. The revival of *adat* institutions with their demand for rights to control land complicates the problem.

Suharto's exploitation of land to harness political and economic benefits contributed to his preference for a weak property rights institution. The New Order government arbitrarily enforced and abrogated rights, subversively exploited land documents, and neglected redistribution programs. However, although the New Order's

¹⁰¹ Michael Leon Leaf, "Land Regulation and Housing Development in Jakarta, Indonesia: From the Big Village to the Modern City," Dissertation at University of California, Berkeley, 1991, p. 276.

institutional inheritance played a significant role in its highly ineffective land administration, the post-New Order era also failed to construct institutions for secure property rights following the state's decreasing capacity to employ coercive power, legitimacy, and effective law enforcement.

LIST OF REFERENCE

Book

- Bachriadi, Dianto, Yudi Bachrioktora, Hilma Safitri, *Ketika Penyelenggaraan Pemerintahan Menyimpang: Mal Administrasi di Bidang Pertanahan, (When the Polity Implementation Deviate: Mal Administration in Land)*. Yogyakarta: Lapera Pustaka Utama, 2005.
- Davidson, Jamie S. and David Henley (eds). *The Revival of Tradition in Indonesian Politics: The Deployment of Adat from Colonialism to Indigenism*. Routledge Contemporary Southeast Asia Series. New York: Routledge, 2007.
- De Soto, Hernando. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. Basic Books, 2000.
- Epstein, Richard A. *Design for Liberty: Private Property, Public Administration, and the Rule of Law*. Harvard University Press Cambridge, 2011.
- Harsono, Boedi. *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya, (Indonesia's Agrarian Law: History of the Basic Agrarian Law, Substance, and Its Implementation)* Ed. Rev. Cet. 10. Jakarta: Djambatan, 2005.
- Hooker, M.B. *Adat Law in Modern Indonesia* (New York: Oxford University Press, 1978).
- Leaf, Michael Leon, *Land Regulation and Housing Development in Jakarta, Indonesia: From the Big Village to the Modern City*. Dissertation at University of California, Berkeley, 1991.
- Lucas, Anton and Carol Warren. *The State and Agrarian Conflict in Indonesia*. Center for International Studies, Ohio University, 2013.
- MacAndrews, Colin. *Land Policy in Modern Indonesia: A Study of Land Issues in the New Order Period*. MA: A Lincoln Institute of Land Policy Book, 1986.

- Onoma, Ato Kwamena. *The Politics of Property Rights Institutions in Africa*. Oxford University Press, 2010.
- Reerink, Gustaaf. *Tenure Security for Indonesia's Urban Poor: A Socio-Legal Study on Land, Decentralisation, and the Rule of Law in Bandung*. Leiden University Press, 2011.
- Sihombing, B.F. *Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia (The Evolution of Indonesia's Land Policies)* Jakarta: P.T. Toko Gunung Agung, Tbk. 2004.
- Soehendera, Djaka. *Land Certification and the Poor: the Implementation of Adjudication Project in Kampung Rawa, Jakarta (Sertifikasi Tanah dan Orang Miskin: Pelaksanaan Proyek Ajudikasi di Kampung Rawa Jakarta)* Jakarta: HuMa-Jakarta, 2010.
- Tjondronegoro, S.M.P and Gunawan Wiradi. *Dua Abad Penguasaan Tanah: Pola Penguasaan Tanah Pertanian di Jawa dari Masa ke Masa (Two Century of Land Control: The Pattern of Agricultural Land Control in Jawa from Time to Time)* Jakarta: Yayasan Obor Indonesia, 2008.
- Waldron, Jeremy J. "Lecture 3: The Rule of Law, Property, and Legislation," in "The Hamlyn Lectures 2011: The Rule of Law and the Measure of Property," New York University Public Law and Legal Theory.
- Winters, Jeffrey A. *Oligarchy*. Cambridge: Cambridge University Press, 2011.
- World Bank. *Land Policies for Growth and Poverty Reduction, A World Bank Policy Research Report*. The World Bank and Oxford University Press, 2003.
- _____. Justice for the Poor. *Forging the Middle Ground: Engaging Non-State Justice in Indonesia (Menemukan Titik Keseimbangan: Mempertimbangkan Keadilan Non-Negara di Indonesia)*. Jakarta: World Bank, Mei 2009.

Article

- Badan Pertanahan Nasional. "Kewenangan Bidang Pertanahan Sehubungan dengan Otonomi Daerah," ("The Authority over Land Affairs in Relation to Regional Autonomy").
- Bedner, Adriaan, and Stijn van Huis, "The Return of the Native in Indonesian Law: Indigenous Communities in Indonesian Legislation," *Bijdragen tot de Taal-, Land-en Volkenkunde (BKI)* 165-2/3 (2008): 165-193.
- EASRD. Rural Development and Natural Resources East Asia & Pacific Region, (World Bank) "Decentralizing Indonesia's Land Administration System: Are Local Governments and Land Offices Ready? Evidence from 27 Districts." Final Report, June 2001.

Heryani, Erna. "Land Administration in Indonesia," 3 FIG Regional Conference, Jakarta, Indonesia, October 3-7, 2004.

Ho Peter, and Max Spoor. "Whose Land? The Political Economy of Land Titling in Transition Economies." *Land Use Policy* 23(4) (2006): 580-587. <http://mearc.eu/resources/WhoseLand.pdf>

Jurnal Hukum "Pembatasan Pemilikan dan Penguasaan Tanah," ("Land Ownership and Land Control Limitation") <http://www.jurnalhukum.com/pembatasan-pemilikan-dan-penguasaan-tanah/>, Accessed on April 1, 2014.

Mahoney, James. "Path Dependence in Historical Sociology," *Theory and Society*, Vol. 29, No. 4 (Aug, 2000), pp. 507-548.

Sellers, Kathryn Firmin A. "The Politics of Property Rights." *American Political Science Review* 89, 4 (1995): 867-881.

Suara Agraria. "Ini Data Konflik Agraria di Tanah Air Sepanjang Tahun 2013," ("The Incidence of Land Conflict in Indonesia 2013") <http://suaraagraria.com/detail-1918-ini-data-konflik-agraria-di-tanah-air-sepanjang-tahun-2013.html#.U2EZUF4irwI>. Accessed on April 1, 2014.

Thelen, Kathleen. "Historical Institutionalism in Comparative Politics." *Annual Review of Political Science* 2 (1999).

The SMERU Research Institute. "An Impact Evaluation of Systemic Land Titling Under the Land Administration Project (LAP)," June 2002, <http://www.smeru.or.id/report/research/lap/lap.pdf>. Accessed on March 10, 2014.

Thorburn, Craig C. "The Plot Thickens: Land Administration and Policy in post-New Order Indonesia," *Asia Pacific Viewpoint*, Vol. 45, No. 1, April 2004.

USAID Report. "Property Rights and Resource Governance: Indonesia," http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Indonesia_Profile_0.pdf. Accessed on March 10, 2014.

Law and Regulations

Law Number 21 Year 1964 on Land Reform Court.

Law Number 5 Year 1967 on Forestry, replaced by Law Number 41 Year 1999.

Law Number 11 Year 1967 on Mining, replaced by Law Number 4 Year 2009.

Law Number 7 Year 1970 on the Abolishment of Land Reform Court.

Law Number 11 Year 1974 on Irrigation.

Law Number 32 Year 2004 on Regional Government

Presidential Decree Number 26 Year 1988 on the National Land Agency, revised by
Presidential Decree Number 154 Year 1999

Presidential Decree Number 96 Year 1993.

Presidential Decree Number 103 Year 2001 on Task, Function, Authority, Organizational
Structure, and Work Procedure of Non-Departmental Government Agency

Presidential Regulation Number 63 Year 2013.

Minister of Agrarian/Chief of BPN Number 5 Year 1994 on Organizational Hierarchy
and Staff's Operational Procedure at Agrarian Office.

Minister of Agrarian/Chief of BPN Number 2 Year 1999 on Location Permits.