

Agrarian Justice and Indonesian Law

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Abstract. This paper presents a socio-legal consideration of the usage and role of the concept of ‘agrarian justice’ (keadilan agrarian) in the debates over access to natural resources in Indonesia. Agrarian justice has a limited but persistent presence in these discussions and by considering the concept within the context of the legal, political and societal developments taking place I seek to come to an understanding as to why such a broad concept is ostensibly used by so few only. I conclude that while the issues that agrarian justice pertains to are highly relevant, they are generally discussed using other denominators. Probably due to historical reasons and to the impractical level of abstraction inherent in ‘agrarian justice’.

1. Introduction

What is justice? Working on the interface of social science and law this is central question, if a difficult one. Most legal regimes have the delivery and upholding of justice for those whom they govern among their stated goals and reasons to exist and it is unlikely that any community would object against justice being central to the quality of its government. Yet this immediately highlights the friction that the concept might cause when subjected to a meeting between legal and social scientific approaches of study. ‘Law’ in most definitions refers to a system of rules in place to maintain order within a society. The rules are made, applied and enforced by the state in its various forms: government, judiciary and police. Law, then, is a macro system aimed at regulating the lives, for better or worse, for those living under its jurisdiction. I say ‘for better or for worse’ because laws are conceived by human minds and drafted by human hands. They are the result of political, social, historical and economic issues deemed sufficiently important to be given the weight of law. As such, some nations may have laws that others do not have, or the contents of laws on similar subjects may be opposite. Ideally, the application of law is neutral and all are equal before the law (Lady Justice wears a blindfold so as not to see who is standing before her) but law itself is not: it is made by humans and the product of social circumstances. It is here that the issue of justice becomes relevant.

‘Justice’ –that what is fair and appropriate- relates to law in at least two ways. First, in whether what is in the law is being seen as just by those subject to it, and second by the matter as to whether the law is applied to all equally, as Lady Justice would have it, or to some more (or less) than to others. This, the practice and experience of justice has been the subject of considerable debate and research in Indonesia. Such work focused on how to improve the quality of justice within the law by improving good governance, transparency,

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accountability and ending corruption (e.g. Rasul 2009; Bin Atmoredjo 2012, 47–52), yet also on the practical qualities, as emphasized by socio-legal scholars and development agencies, such as distance to courts, expenses, limited trust in the official legal system and appeals to alternatives based on custom and religion (Safitri and Moeliono, 2010; Saptomo, 2010; Bakker, 2011).

In this paper my approach to justice is a pragmatic one for which I have also argued elsewhere (see Bakker and Timmer, 2014). I will use a conceptualisation of justice that is the inverse of injustice, a fundamentally pragmatic definition that sees justice within the resolution of injustices. It is the classical access to justice narrative (see Cappelletti 1992), which is called comparative realism by Amartya Sen (2009). Sen argues that the aim of thinking about justice should not be to come to the identification of a perfectly just society, but rather to identify feasible social reform that will lead to the enhancement of justice. As such, comparative realism cannot be wielded as a justification of power or sovereignty. Its pragmatism provides an unstable basis for such institutional arrangements but conduces flexibility in increasing attainable and socially accepted justice and decreasing injustice. There is a multiplicity of reasons behind a comparative realism approach; injustices have many reasons as to why they are unjust. Such an approach might be opposed to a notion of ‘ideal justice’, justice as a transcendental or divine form, or as a mythic ideal, that is intimately connected with the nature of power. Such a conceptualization suggests an intimate link between justice and the nature of (centralized) state power and as such is subject to criticism in terms of neutrality, transparency and legitimacy. It could perhaps be argued that the New Order notion of justice worked in such a way, yet what we should not overlook in this post-New Order era are the forms of ideal justice, as imagined by individuals, on the basis of which today’s justice-seekers act.

Using the approach set out in the above, my subject will be agrarian justice (*keadilan agraria*) in Indonesia’s legal, political and social development. My reasons for these are multiple: as a researcher I have been interested in the development of agraria as a socio-legal field of research for well over a decade, and the friction between the law-in-the-books and what happens on the ground for me has been a fascinating focus of my studies. Not so much to consider whether the law is properly applied –that I leave to the full-blood lawyers among us- but rather to understand whether the resulting outcomes are considered fair or just by those involved, and why. As a category, agrarian justice pertains to issues relating to land, farming and the ability to profit from one’s toil, but it overlaps with social justice as guaranteed in the 1945 Indonesian Constitution as well as with the environmental justice favoured by activists and NGOs. My reason for choosing agrarian justice out of these is that the concept has a steady history of discussion by Indonesian scholars, and seems to reappear every once in a while. I like to consider how the issues it pertains to stand out in its specific light and what we can learn from such a consideration as to the quality of justice.

In order to do so, I shall discuss three different fields of land issues, which I will base on my own research as much as possible. These will be the relations between plantation companies and small-scale producers, the issue of customary land rights and foreign investors’ considerations for (not) investing in Indonesia. These three will be preceded by a paragraph on the background of the concept of agrarian justice and one on its relation with Indonesian law and society.

A revolutionary concept

In the winter of 1795-1796 Thomas Paine, an English-born, American writer, activist and thinker wrote a short pamphlet entitled ‘Agrarian Justice’. In it, Paine argued that the earth in its original form was the common property of the human race: a natural right, endowed on humanity as a whole by God the creator. That humanity then went on to allow for the

development of a division between rich and poor citizens was, according to Paine, however a division that was not divinely created and, as such, one that was questionable and particularly in reference to land property, one in which the natural right of humankind as a whole was being threatened with usurpation by the rich.

Obviously, Paine was writing in times when private property, the role of the state and the hierarchy between individual citizens were the focus of strong and dynamic debate. The French revolution was at its height: the National Assembly had transformed the nation from a monarchy into a republic and the king, Louis XVI had been executed by his former subjects in 1793. The world was watching with mixed feelings: the old kingdoms of Europe with shock and anxiety, the recently independent United States of America with considerable enthusiasm. France's intellectuals were seeking to reinvent their society, governance and legal system. Property, particularly (farm)land in such an agrarian economy, was a crucial element in this. A few decades earlier the philosopher Rousseau had uttered his concern with such issues which had likely inspired Paine. Rousseau recognized that there was natural inequality among humans based on physique, gender, etcetera, but he felt humanity was to blame for the inequality it imposed upon itself through the development of government, law, and the ceding of individual powers to the authority of the state. Rousseau, in one of his most famous quotes, formulated this thus:

The first man who, having enclosed a piece of ground, bethought himself of saying This is mine, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not any one have saved mankind, by pulling up the stakes, or filling up the ditch, and crying to his fellows, "Beware of listening to this impostor; you are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody." (Rousseau, 1999:29)

Thomas Paine in his writings similarly concluded that originally, there could have been no such thing as landed property. Only through cultivation, he argued, did humanity begin to distinguish private rights to land and while he had no qualms with the idea that there might be richer or poorer individuals within nations and communities –peoples' lives develop in different ways as luck and choices impact on all- that did not mean that anyone could claim a property right in perpetuity to any land he occupied. While agrarian law should govern the ways in which land was owned, used and managed by a nation, agrarian justice was to see that each individual was to benefit from his or her individual right as a proprietor of the natural earth. Paine suggested that a tax could be levied on private lands to see to the needs of those without land, pay general pensions and a modest precursor of the 'basic income' for each citizen of legal majority. While put forward in the revolutionary spirit of the time, the ideas of Paine resound in the present. Private lands are taxed, many states have installed general pension plans of some sort or another and particularly following the recent Western economic crisis the notion of a basic income – a sum paid to citizens by their government regularly- has been argued prominently by activists, scientists and politicians worldwide. Yet while these elements of Payne's ideas have become implemented in most nation's legal and financial systems, this often happened in tandem with a disconnection of agrarian issues as urban development and industrialization became prominent urban and social features. In various countries, amongst others in Indonesia, did discussions on the fairness of agrarian law and land property arrangement particularly take into account notions of 'fairness' and 'justice'. While Indonesia's discussion on *keadilan agraria* does not, as far as I am aware, refer to Rousseau, Thomas Paine or the French revolution, some of its roots and present issues on control, access, security and income resound remarkably with these ideas of two centuries earlier and half a world away e.g. Suhendar et al. 2002; Safitri and Moeliono, 2010; Rachman,

2017). In this paper I therefore propose an analysis of ongoing socio-legal issues in Indonesia's agrarian policies and laws against the background of social change (though not revolution) and conceptions of fairness. My interest lies not in a discussion of the fairness of Indonesia's agrarian legislation –fairness is a subjective concept the quality of which differs as to the interests of stakeholders- but rather in the question as to how different parties seek to ensure t share of justice and, eventually, what this means for the role of government and national law.

The agrarian justice debate in Indonesia

Paine and Rousseau emphasized the appropriation of land and resources by private individuals as potentially problematic for society at large and argued for a more proportionate division of benefits generated. While Rousseau criticized private landownership, Paine recognized that both poverty and richness were realistic human conditions and suggested that taxation of private land rather than abolishment of private rights would serve general interests better. In the central discussions on agrarian justice the division of profits originating from land and other natural resources among the population at large continues to be a central tenet, particularly in discussions on (and in) agrarian relations in postcolonial states. As such, in the twenty-first century the concept has become an umbrella term for power and distribution issues. (Vel and Makambombu, 2010) strongly associated with drives for land reform (Ansari, 2007), with “the collective struggles of rural working people to democratise access, ownership and control of land, water and other natural resources”(TNI, 2015) and the opportunities to shape and take part in the decision-making process (Pichler, 2017). The concept is rarely in the foreground for any extended period of time, but is frequently used in relation to drives for change in agrarian policies.

In Indonesia, it is important to distinguish three main periods in the struggles over land. The first of these is the period from independence in 1945 until 1965. During these years Indonesia was home to multiple well-organised farmer organisations with links to political parties and specific politicians. Farmers and agrarian issues focussed prominently in the political thinking of the time –one only needs to think of Sukarno's Marhaenisme- and proponents exerted strong pressure for a national land reform program. The communist party as well as the Barisan Tani Indonesia (BTI) mobilized landless supporters and farmers to occupy the lands of private large landowners and demand redistribution. In this political-agrarian climate the Basic Agrarian Law of 1960 was promulgated; a law that promoted land to the tiller regulations, capped private landownership and introduced a nationwide uniform system of land management to replace the diverse regional customary structures where these were still in place. By 1965 however, following an aborted coup, the military seized power and all left and left-leaning political parties and organizations were criminalized and banned. Hundreds of thousands of real and alleged communists and supporters were killed. Thus the organisational and support base for social land reform was effectively destroyed. The BAL was not revoked, yet while many of its elements were effectively ignored by the new New Order government it served as one of the legitimising laws for large-scale land dispossession by state institutions, thus facilitating a capitalist economic structure to replace the socialist tendencies in land management of the Orde Lama. The third period begins with in 1998 with the stepping down of President Suharto and the beginning of *reformasi*. This period can be characterized by two simultaneous yet opposite developments taking place. On the one hand attention for farmers' issues and rights, also in terms of customary (*adat*) rights is receiving considerable more attention. Activists and new organisations vehemently argue these causes publicly and win the ears of politicians, resulting in attention for these matters in a wide number of revised laws and lower regulations. At the same time, however, Indonesia is returning to the global market with considerable emphasis on its richness in natural resources. Consecutive governments seek to attract national and international investors and the

country's market is increasingly liberalised. Even though politicians fulminate against neoliberalism in public, market policies and new regulations present an opposite picture (see Bakker, 2016). While the rights of farmers have increased significantly on paper as compared to the New Order era, enforcement of such rights remains a difficult issue. That said, civil society in Indonesia has never been as strong and well-connected as it is today, with prominent activists entering political positions and advising the president, as well as being part of global networks and organisations.

Within these three periods, arguments making use of the agrarian justice concept were fielded throughout, but agrarian justice does not feature as prominently as environmental justice which, as Peluso, Afiff and Rachman (2008) describe, became the term of choice during the New Order as it allowed activists to team up with transnational environmental activists as well as with the national Ministry of the Environment and other government agencies that had to compete with the powerful Ministry of Forestry over matters of resource management. Following the end of New Order and the onset of *reformasi*, *keadilan agraria* features with a certain regularity in writings and debates on land reform, in which the current (and ongoing) revision of the Basic Agrarian Law (*Undang-Undang Pokok Agraria*, hereafter BAL) is an illustrative example (cf. Slaats et al., 2009; Bakker, 2009:79-82). Full of aspirations and symbolic values, the BAL's main strengths are in its nation-building potential rather than its direct applicability. A 'basic' agrarian law, the BAL was intended as an umbrella law providing a framework for a national system of land legislation. It does not contain many elaborated stipulations, but rather provides principles according to which implementing legislation was to be formulated.

The BAL has a distinct nationalist outlook. Article 1 decrees that all of Indonesia's territory as well as the natural resources it includes belong to the united Indonesian people, while none but Indonesian citizens can have an ownership right to land (Article 21). The state is the manager of the land (Article 2), but should carry out this task with a distinct social outlook. Article 6 states that all rights to land must have a social function, implying that collective rights supersede individual ones, while Article 7 decrees that the general interest should be protected by limiting large landownership. The BAL instructs the establishment by law of a maximum size of land property (Article 17), and the formal registration of all land tenure to guarantee its certainty (Article 19). Article 9 stresses that all Indonesian citizens, men and women alike, have an equal right to land to provide for their needs. Nonetheless the interest of the state is paramount: the government has the authority to withdraw citizens' land rights if this is in the national interest (Article 18) – although a suitable indemnification should be paid and the decision must be in accordance with the law – in which case the land reverts to the state (Article 27).

The BAL's drafters aspired to develop a uniform national land law that honours Indonesian traditions, which, for land, come to the fore in the nation's many and diverse local *adat* systems. Article 5 states that the agrarian law governing land and water is *adat* law, whereas Article 3 confirms the validity of communal (*ulayat*) *adat* land rights. However, the actual impact of these Articles is not so straightforward. Article 5 continues by posing the limiting conditions that *adat* may not conflict with national interests or those of the state, 'Indonesian Socialism', other regulations in the BAL, or other laws. Article 3 prescribes that the effectuation of *ulayat* rights must take place in such a way as to be in accordance with national and state interests and may not be at odds with other legislation. Recognition of *adat*-based land claims thus becomes possible only if no other legal claim is made to the land, and might be annulled if the limiting conditions of Article 5 require this.

As such, the BAL contains a considerable number of elements that sit closely with the notions central to the agrarian justice debate. Particularly the limitation of large landownership in protection of the general interest (Article 17) the guarantee of land rights (Article 19) and the

assurance that all Indonesian citizens, men and women alike, have an equal right to land (Article 9) work in this direction.

Critique on Indonesia's agrarian law along the lines of agrarian justice hence is generally not so much of the BAL, but rather on its implementation (or rather the lack thereof) and on the wider, social and economic governmental interpretations of land usage and access in relation to available labour and societal needs. Tjondronegoro (2002), for instance, notes how the development of Indonesia's agrarian industry as of the New Order has been capital intensive rather than labour intensive which, with the reservoir of rural labour available, does not do as much for agrarian human development as rural populations hope for. Simultaneously, the issue of land reform announced in the BAL and advocated in the founding of the Republic of Indonesia, has become a social and political minefield after the failed coup of 1965 and the ensuing fights and killings between pro-reform communists and opposing forces of religious groups, nationalists and the army. Even were land reform to be reattempted –as was announced by national government in 2006- issues of compensation prices, the recipients of distributed land (tillers or entrepreneurs) and the number of recipients for whom plots would actually be available (a minority of those in want) make the issue sensitive and subject to considerable critique.

That said, the diverse elements of the concept of agrarian justice can be argued to be strongly intertwined with Indonesia's national philosophical outlook on society, economy and fairness. The *ekonomi kerakyatan* concept, for instance, which also returned to the fore in the first post-New Order decade, referred to a notion of 'People's Economy' that is social, ethical, in line with Indonesian culture, traditions and religion. According to Mubyarto (2014:5) the concept is similar to that of *Pancasila* Economy of the early eighties, but with more emphasis on deliberation and unanimity in deciding. It relates to the post-Washington Consensus anti-globalization theories and emphasizes morality, humanism, nationalism, democracy and social justice. However, as with the issue of land reform, the usage of 'Pancasila Economy' as a concept has its issues since the term was abused by the New Order to serve that regime's interests (Mubyarto, 2014:6-8). Before the New Order, however, the concept of *Pancasila* Economy combined elements of both liberal market economics (free market and individual enterprise) and socialism (state control of the market) while rejecting other elements of these ideologies, such as the free competition of liberal market systems and the lack of individual enterprise and ownership of socialism. However, surprisingly few outlines of the concept exist. Perhaps the most comprehensive is Mubyarto's and Boediono's (1981), who explain that in *Pancasila* Economy state enterprises and cooperatives take precedence over private enterprises, which are only allowed a major role in sectors where state enterprises are not effective. Furthermore, in contrast to the competition and individualism of the capitalist system, *Pancasila* Economy is based on higher motives: social and religious values in addition to economic ones. *Pancasila* Economy aims for greater social equality and egalitarianism, and unity of the population through such economic nationalism as is needed to build up sufficient economic strength to compete with foreign enterprises. Its functioning is guided by a balance between central planning and decentralized economic decision making, so as to optimize the possibilities of local cooperatives in relation to national needs and capacities.

While proponents argue that *Pancasila* is a 'Third Way' economic ideology – former President Yudhoyono stated this to be the reason why Indonesia escaped the 2008 global economic crisis relatively unscathed (see Ministry of State Secretariat, 2013)- *Pancasila* Economy is critiqued for its conceptual vagueness, unclear balance between socialism and capitalism, its academic nature and lack of proof of its effects in policy (e.g. McCawley, 1982; Liddle, 1982; Prasentiantono, 2007, X).

In summing up, the Indonesian debate on agrarian justice sees the issues set out in this concept largely represented under other names. Environmental justice has taken pride of

place over agrarian justice, possibly due to an association of the latter with the pre-New Order era and communism, yet the issues of agrarian justice and its main legal representation –the BAL– remain. Interestingly, the broadness and lack of definition of the concept make that it overlaps in practice with environmental as well as (also rather poorly defined) social justice, and that its interests resonate with both *Pancasila* and *Pancasila* economy. Although the concept of agrarian justice is vague and its present usage occasional rather than mainstream, its proponents have little difficulty in arguing its relevance. Yet be all that as it may, the proof of the eating is in the pudding. The next three paragraphs each briefly discuss an element of the issues that agrarian justice rallies against, in order to consider its present validity as a term of relevance to Indonesia’s agrarian issues.

Oil palm plantations and small-scale producers

Possibly the most visible and best-documented ongoing issues that would fall under the denominator of agrarian justice in terms of resource access, control and profit refer to oil palm plantations in Sumatra, Kalimantan and –to a lesser extent– Papua (cf. McCarthy, 2010; Haug, 2014; De Vos et al., 2018). The establishment and maintenance of such plantations has a history of (illegal) land appropriation, (forced) eviction of local communities, companies not living up to agreements with local communities over employment, indemnification for land usage or secondary benefits such as schools, clinics, or road maintenance and, as such, increasing dependence and poverty rather than facilitating development and wealth among local communities. Centrally or regionally managed, the permits for a plantation company to start work are provided at the national ministerial level in Jakarta, by provincial government and to a lesser extent by district-level authorities. As such, the arrival and development of such plantations is largely a top-down affair that follows a pyramidal organizational structure which sees the plantation’s territory divided into plots of uniformly planted oil palm, maintained, managed and controlled by hierarchically organized workers. Some of these will be local in origin, yet specialized tasks frequently require trained personnel that is not available locally and for which hence workers are brought in from elsewhere. Likewise, if enthusiasm to work on the plantation or in its supportive plasma plots (see below) is insufficient among locals, migrant workers from land-scarce areas are brought in from outside and given plots of land to grow oil palms to supply the company’s mills. Thus bringing new people to land which the local populations feels to be theirs and enlarging the overall number expecting to profit from the plantation’s activities. Such smallholders, in charge of a small ‘own’ plot of palms are initially depending on the plantation for seeds, fertilizer, housing and daily necessities to see them through the first years, until their trees bear fruit. They are to pay off the expenses of the goods delivered to them and generally have to sell their harvests to the company for a given price for a number of years after which they theoretically are free to sell to other companies as well. However, such free marketism is in practice frequently impossible given that harvested fruits need to be processed quickly before they spoil, and infrastructure and collection schemes are frequently maintained by a single company which thus maintains a monopoly through transport and access as much as through ownership and operation of procession mills.

As a hierarchy, plantation economies thus are largely top-down forms of economic and agricultural development in which those at the top of the pyramid are located optimally for wealth and profit accumulation. Yet throughout its lower layers, which depend on one another for production of oil and the generating of cash, profit-generating is practiced through corruption, theft and syphoning-off. Li (2015) points out three resemblances of this system to that of the Neapolitan mafia arguing that as with the mafia one caught up in the palm oil system cannot not participate in these practices and survive economically. Li describes how smallholders and farmers alike mix in rotten fruits, sand and gravel with the fruit for

collection, how workers embezzle fertilizer from the plantation to sell to smallholders, how farmers and co-operatives cheat individual smallholders by registering lower deliveries or quality grades or by paying them less than the due sum, how companies likewise cheat farmers in similar ways, how truck drivers use company trucks to moonlight and how foremen list fictional workers to obtain their wages. Senior company staff uses their position, connections to government and access to resources to start off their own extensive oil palm fields of which the yield is sold to the plantation. In own research (see Semedi and Bakker, 2014) similar mixes of stakeholders cheating each other were found. While plantation companies worked hard to set up virtual monopolies through logistics and supply of seedlings and fertilizer, farmers misreported the size and location of land plots, the numbers of families participating in smallholder plots, and sold off fruits contractually destined for other plantations. Yet at the end of the day, the economic risk lies mostly and disproportionately with the smallholders and farmers. They are dependent on company trucks to collect their produce before it rots and hence on the prices paid by the company. If harvests fail or fruits cannot be collected in time a company clearly runs a loss as well, but not to the extent of such smallholders depending on a single plot and crop for their income.

Likewise, companies generally are at less of a risk of loss of land and resources than local communities are. As companies lose the possibility to set up a plantation in a given location they can relocate their plans elsewhere relatively easily, yet for local agrarian communities to shift is considerably more difficult. If companies dispose of the required permits and succeed in setting up operations, there is little communities can generally do to (successfully) resist. The main road open to them is to attempt to keep company plantations out of their main territories and ensure alternative means of transportation, such as along a river. That said, such possibilities are largely dependent on the coordinates of plots on plantation permits and on the coincidence of a river running through the community's lands.

Would alternatives be possible? Li (2015) thinks so. She argues that a fairer distribution of benefits between companies and smallholders as well as a breaking of the companies' monopoly would be largely beneficial for small farmers who now lack the benefit to choose their distributors and buyers. Similarly, the land situation could be included as a land reform. Most plantations with smallholder plots work on leases, which means that the land will become state land after lease expires. Smallholders would benefit from greater security if they would receive the land in ownership, or have the opportunity to buy it. This would likely also facilitate a greater willingness to invest in the land and its products on their part and encourage a fairer distribution of the profits the industry is making. What would this mean in terms of agrarian justice? First off, the important fact that while law and policy have instructed land reform intended to facilitate the lives and opportunities of small-scale farmers as of the 1960s, this has to date not taken place nor been revoked. This raises a serious question as to this specific element of Indonesia's legal system. Is this a matter of avoiding trouble (I think it is) or is there another explanation? In any case, this is a thorn on the side of the legal system in terms of deliverance and dependability. Second, and perhaps in partial explanation of the preceding issue, is the halfway turn made in the approach to agrarian issues when the New Order regime replaced farmers' issues with a liberal approach that took companies as leading factors. While understandable from a macro-level development perspective, the question should be asked whether this would not have warranted a clearer adaptation of the relevant legislation. If the aim was to have justice for the nation and its inhabitants through the (agrarian) economy, is this a goal that has been served? Finally, for now, the question arises whether the role of companies should remain as large as it presently is if this is shown to be at the disadvantage of those groups of the Indonesian population working for such enterprises and if its chain of production is so characterised by distrust, spite and cheating.

Customary land claims

The Basic Agrarian Law stipulates that *adat* land rights, or land claims based on custom, can only be honoured if no other, state-based rights overlap with the claimed territory. If this is the case however, the BAL allows for such claims to be registered as one of various official land rights. During the New Order era *adat* based claims to land stood very little chance of being recognized, as emphasis was placed on the unity of the nation, and hence its official, national land law, rather than on the differences that the multiple ethnic groups and their diverse *adat* systems posed. Yet *adat* rights to land were for many throughout the archipelago the main normative underpinnings of such rights as they perceived to dispose of. As land was identified as state land free of private rights under national land law, a steady register was built up of cases in which people perceived their *adat* lands as being illegally taken from them by the government that should protect those. Following *reformasi* and the shift of administrative power from the national centre to the districts and the provinces, regional identity gained in importance in political and societal terms (see Li, 2000 and 2001; Davidson and Henley, 2007) resulting in a rise to prominence of *adat* claims to land and the issue of their legal status (Bedner and Van Huis, 2008; Bakker and Moniaga, 2010). This rise of *adat* as identity took place along two main lines: the first of these is that of the rights of indigenous peoples debate which largely emphasized Indonesia's indigenous peoples as marginalized, underrepresented groups whose rights are consistently violated by government. This line tied into the international indigenous peoples debate and movements and had its main support base among NGOs, activists and intellectuals. A second line saw the potential of ethnic identity demonstrated more violently. In various parts of the country local wars broke out and whereas some of these were depicted as religious conflicts, many can be traced to issues of resource control and access to land (see Van Klinken, 2006). These two lines made a potent cocktail: *adat* land right as an issue of marginalized peoples with a potential for violence.

While opinions differ as to which was the most influential line in terms of political response, *adat*-based land rights arrived on the political agendas of the national and lower levels of government. On the national level Regulation 5 of 1999 of the Minister of Agraria/Head of the NLA instructed regional governments to research claims of the recognition of customary communal land (*ulayat*) against a given set of claims in order to establish whether the claim should be recognised, and record their findings in a regional regulation. Likewise, revised versions of important central laws such as the Forestry Law (1999/2004), the Law on Minerals and Mining (2014), the Law on Plantations (2014), the Law on Prevention and Eradication of Forest Destruction (2013) and the Village Law (2014) pay attention to *adat* claims, usually awarding a given space of usage or recognition under conditions. In itself, this is not new and only to be expected given the stipulations set out in the BAL, but the possibilities of claiming rights based on *adat* have, at least on paper, increased.

This development might also signify a change in the usage of *adat*-recognising legislation. Whereas *Permen 5/1999* was followed very sparingly, drives for *perda* on *ulayat* and *adat* rights now can be found throughout Indonesia (although less in Java). Perhaps an explanation of this development could be that *Permen 5/1999* might have been intended as a tool to do away with many claims of *adat* lands: while the *Permen* instructed for thorough research as to the validity of the claim made, it also pointed out that any claim should not contravene national law. If we but take the stipulations in the BAL in mind that decree that in case of overlap with officially sanctioned rights described in that law these take precedence, any claim could potentially be invalidated. Except, importantly, if the claim and the research enjoyed the support of the local government who at the time had a considerable say in land usage within their territories. As such, a collaboration between an ethnic group claiming *ulayat* rights through their *adat* and local government could be successful. One

might think of cases in which that ethnic groups formed the absolute majority in the region, had a strong majority in regional government, or could mobilise sufficient support for their claim for other reasons (one might think of the Baduy in Lebak here). At the time this however hardly the case anywhere in Indonesia, which meant that asking for such a research had the ethnic group in question run the risk that their claim would be denied (a result that should also have been put into a *perda*). Alternatively, if the research would confirm the existence of *ulayat* rights, the regional government would be faced with the problem of recognizing such rights for one group and annoying others, which does not bide well for elections, or with handing over partial sovereignty over part of the region's territory. Neither possibilities seemed very attractive.

Recent years have seen a much wider drive for regional and provincial *perda* recognising *adat* rights. These however are often not always aimed at a specific ethnic group (although they tend to cover the largest ethnic minority) or at a communal right perse. Moreover, the rights in question are not necessarily specified. Although they tend to refer to land and other natural resources, it is not uncommon that it is not clear what rights the *perda* actually gives. What is important, however, is that the *perda* generally recognise a form of *adat* authority: by it a counsel, *adat* leaders or simply the authority of *musyawara* and *kesepakatan*. Albeit vaguely worded, the coming into existence of such *perda* could well give weight to claims to *adat* land and resources. How much weight does however remain to be seen.

If we consider these developments from the perspective of agrarian justice, both positive and worrisome elements can be discerned. For communities and individual families depending on subsistence farming –as a large part of the agrarian population outside of Java and Bali does- with no registered claims to land besides *adat*, the greater attention for *adat* claims could provide opportunities to obtain greater security of existing claims and –perhaps- redress of claims to land that has been lost. For small farmers such changes could make a considerable difference, in a positive sense. On the other hand, there is no proof as yet that the regional *perda* and stipulations in national law will effectively be more than window dressing. As with other elements of law, such as the BAL, they might just be ignored in practise. Also, importantly, it remains to be seen whether *adat* is actually fair. It is not unthinkable that the authority to govern *adat* claims comes to lay with a select elite who might abuse that position to the disadvantage of the rest of the population, be it members of the *adat* group, migrants, companies and so on. Clearly a recognition of *adat* claims could do much good for the poor and less-developed subsistence farmers among Indonesia's population, but their rights and security –and those of people who are not part of the *adat*-group- should not be left to a sovereign *adat* leadership. The government, on behalf of the state, should have a role here.

Foreign investment in natural resources

Considering the importance of foreign parties in the economic development of Indonesia's agrarian sector, it seems to make sense to consider the influence of international capital in natural resource issues. While a lot has already been said about the relations between local communities and oil palm companies above, I consider international companies and finance to illustrate that the issue of agrarian justice cannot be simply limit to what is going on locally or even nationally. Where the global economy has become both a financier and a market for Indonesian agrarian products (specifically palm oil, though one might consider mined coal and oil here as well). Indonesia needs foreign direct investment to maintain its economic stability and keep on a par with its neighbours. While FDI has a history in Indonesia that is almost as long as the nation's independence (see Lindblad, 2015), its regulation and access have been considerably reshaped following the Asian financial crisis and reformasi. This

resulted in two developments I was to highlight in the context of this paper. First, foreign investors eyed Indonesia with considerable lack of confidence following the crisis. The nation held the promise of considerable profits, but also the danger of unstable governance and a regulatory framework that was in full swing of being reshaped and modernized following the political and societal alterations of reformasi. While foreign investors considered these alterations and their unpredictability as sources of uncertainty and potential risks, Indonesia's market was also opening up and –willing or not- taking considerable steps in implementing neoliberal reforms and doing away with protectionism. Uncertainty and opportunities combined, bringing in a steady flow of foreign revenue that increased as Indonesia's politics and regulation stabilized.

In terms of FDI in natural resources, a shift is going on from western to Asian investors as main players, with Western investors taking second position investing through Asian partners (cf. Salerno, 2017). Possible explanations may lie in the emphasis on corporate responsibility, human rights and certification of palm oil exercised in the homelands of these Western companies, making direct investment less attractive or at least more complex (see Laurance et al., 2010). As such, this means that while concerns over 'proper' and responsible behaviour in terms of relationships with local communities and restoring of landscapes after leases end may be concerns that live more in Western than Asian markets, but –as with adat issues discussed in the previous paragraph- such notions have found their way into national laws as rights of locals and duties of companies for government to deal with.

Furthermore, in a recent research project on the capacities of smallholders to influence decision in large scale investment in land, particularly in their own areas (see Rutten et al., 2017), we found that while smallholders are significantly more vulnerable than companies, they are not without influence. We found that smallholders can exert influence on companies and investors through five mechanisms and regularly do so. This does not necessarily mean that they get the result they aspire to, but it does mean that they can alter the course of events and, on occasion, actually prevent companies from setting up operations in a specific area. It also means illustrates that smallholders are not powerless once plantations are set up, but that this actually might be the time when most results can be obtained. The strategies deployed by smallholders that we identified were: (1) relations of interdependency with investors; these include reputational risk to investors, the need for investors and companies to access certain locations, limited mobility of assets (one cannot easily move a plantation) and, as such, vulnerability to local activities such as sabotage or theft. (2) 'Horizontal' relations of shared interests and identity: this refers to relations among smallholders. While companies frequently manage to wedge themselves between populations by playing out different interests (see De Vos et al., 2018) if smallholders manage to unite and remain united they can have a strong advantage in dealing with companies. For investors, dealing with an area where the local population is united and unwilling to receive them, is an unattractive option. (3) Tactical relations with state officials; it is not uncommon for state officials to side with smallholders in dealing with companies. This might either be for election purposes, because the officials actually prefer another company to operate instead of the one present, or to put pressure on the company for other reasons. Having allies in the local or national bureaucracy makes the position of smallholders considerably stronger. (4) Relations with specialists in violence: clearly this situation works both for companies and smallholders, but bringing in the assistance from the police, the army, or preman can be an effective way to pressure the opposition into agreement. Whereas stories of companies applying such tactics abound, local populations have become wise to this as well and do not shirk from deploying intimidation and violence if this serves their purposes. (5) Relations with supra-local civil society groups: these include national and international NGO-networks, which in recent years have come to the fore as powerful means of bringing news and issues to the knowledge of the world at large. International investors are confronted by such NGOs on issues taking place at the

locations of their investments and in many instances nations have promulgated laws forcing investors to take responsibilities for the effects of their investments, even if these are overseas. As such, these contacts can be of considerable value to local communities.

In terms of agrarian justice, we see that the issues here are far more encompassing and globally connected than most ideas underlying the concept would have assumed. Intertwined as relations and interests are in terms of geography, economy and jurisdiction, it can be argued that whereas this increased complexity initially weakened the position of smallholders and local communities, the increased international attention for the effects of overseas investment as well as national Indonesian interest in protecting the needs of the local population in national law have begun to provide greater security. That said, better connections, greater experience and confidence have also begun to have their impact on local communities, meaning that it is becoming clear that companies and investors can be quite vulnerable upon establishment of their operations, meaning that if their initial arrival had negative effects, this does not mean that the local community will remain unable to address these and pressure the company for redress.

Concluding remarks

In this paper I sought to consider the usage of the concept of agrarian justice within Indonesia's socio-legal issues, and its meaning within the context of Indonesia's development. The outcomes are several. First off, it is interesting to note that the concept is used sparingly, if persistently. This may perhaps have to do with associations with Marxism or communism, but this is purely a hypothesis of mine. The issues that the concept relates to are however frequently discussed and actively championed throughout Indonesian history. This is perhaps no surprise: agrarian justice is a very broad and encompassing concept that as such covers a lot of subjects. Whether these are known as 'environmental justice' or 'social justice' is not that relevant for those finding their needs covered by it. Such issues as agrarian justice pertain to are clearly present in Indonesia and are rooted in its legal system. 'Social justice' is guaranteed in the constitution, but suffers from the same drawback as agrarian justice in that it is a broadly applicable and broadly defined concept. Neither, nor 'environmental justice' stand out in applicability or clarity. Importantly, however, discussions on the issue come to the fore in reactions to threats or crises regarding land and resource access for smallholders and local communities (quite in line with Paine's ideas, as it happens) and we see that in the cases of the three specific foci discussed in the above, the combinations of notions of justice and agrarian issues is highly relevant for the individuals involved.

The paper shows that while Indonesia has moved through different stages of dealing with issues of agrarian, justice and rights of small-scale farmers, these rights have become more entrenched in law over time and are increasingly better consolidated by those in need of them. That said, proper application of the law and success in consolidation are not guaranteed beforehand. The justice we may be looking at remains a justice by degrees, in particular for as long as such matters as adat claims remain inconclusively addressed.

References

1. Ansari, Mahmood (2007) *The Agrarian Justice: A Long Journey*. Journal of Assam University Vol. II, No. 1, 2007, Pp. 83-100.
2. Bakker, Laurens (2009) *Who owns the Land? Looking for Law and Power in East Kalimantan*. Ph.D thesis Faculty of Social Sciences and Faculty of Law, Radboud University Nijmegen.
3. 2011 'Pengantar: Akses terhadap keadilan atas tanah'. In *Akses Terhadap Keadilan: Perjuangan masyarakat miskin dan kurang beruntung untuk menuntut hak di Indonesia*. edited by W. Berenschot, A. Bedner, E. Riyadi Laggut-Terre, and D. Novirianti, 39–52. Leiden: HuMa, KITLV-Jakarta, Epistema Institute, Jakarta and Van Vollenhoven Institute.
4. 2016 'Perceiving neoliberalism beyond Jakarta' in: Michaela Haug, Martin Rössler and Anna-Teresa (Eds.). *Rethinking Power Relations in Indonesia: Transforming the Margins*. London [u.a.]: Routledge, pp. 117-131.
5. Bakker, Laurens and Sandra Moniaga (2010) 'The Space Between: Land Claims and the Law in Indonesia' *Asian Journal of Social Science* 38 (2), pp. 185-201.
6. Bedner, Adriaan and Stijn van Huis (2008) 'The Return of the Native in Indonesian Law. Indigenous Communities in Indonesian Legislation' *Bijdragen tot de Taal-, Land-, en Volkenkunde* 164 (2/3), pp.165-193.
7. Bin Atmoredjo, S. (2012). *Hukum Progresif. Untuk Mewujudkan Keadilan Substantif dalam Bingkai Nilai-Nilai Pancasila*. Yogyakarta: Pusat Studi Pancasila UGM.
8. Cappelletti, M. (1992) Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform. *South African Law Journal* 22: 22–39.
9. Davidson, Jamie and David Henley (eds.) (2007) *The Revival of Tradition in Indonesian Politics. The deployment of adat from colonialism to indigenism*. London/New York, Routledge.
10. De Vos, Rosanne, Michiel Köhne and Dik Roth (2018) "We'll turn your water into Coca-Cola": The atomizing practices of oil palm plantation development in Indonesia. *Journal of Agrarian Change* 18, pp. 385-405.
11. Haug, Michaela (2014) Resistance, ritual purification and mediation: Tracing a Dayak community's sixteen-year search for justice in East Kalimantan. *The Asia Pacific Journal of Anthropology* 15(4), pp. 357-375.
12. Laurance, William, with Lian Koh, Rhett Butler, Navjot Sodho, Corey Brdshaw, David Neidel, Hazel Consunji and Javier Mateo Vega (2010) 'Improving the Performance of the Roundtable on Sustainable Palm Oil for Nature Conservation' *Conservation Biology* 24 (2), pp. 377-381.

13. Li, Tania Murray (2000) 'Articulating Indigenous Identity in Indonesia. Resource Politics and the Tribal Slot' *Comparative Studies in Society and History* 1, pp. 149-179.
14. 2001 'Masyarakat Adat, Difference and the Limits of Recognition in Indonesia's Forest Zone' *Modern Asian Studies* 35 (3), pp. 645-676.
15. McCarthy, John (2010) Processes of inclusion and adverse incorporation: oil palm and agrarian change in Sumatra, Indonesia. *The Journal of Peasant Studies* 37 (4), pp. 821-850.
16. McCawley (1982) 'The economics of Ekonomi Pancasila' *Bulletin of Indonesian Economic Studies* 18 (1), 102-109.
17. Ministry of State Secretariat of the Republic of Indonesia (2013) Indonesia escapes from the global crisis thanks to Pancasila. 26 February, at http://www.setneg.go.id/index.php?option=com_content&task=view&lang=en&id=6849.
18. Mubyarto (2014) 'Ekonomi Kerakyatan Dalam Era Globalisasi' in Mubyarto (ed.) *Ekonomi Kerakyatan*. Jakarta: Lembaga Suluh Nusantara/American Institute for Indonesian Studies (AIFIS), pp. 3-10.
19. Mubyarto and Boediono (1981) *Ekonomi Pancasila*. Yogyakarta: Fakultas Ekonomi Universitas Gajah Mada.
20. Paine, Thomas (1999) [1795-1796] *Agrarian Justice*. Grundskyld, Lillerød. At: <http://www.piketetty.pse.ens.fr/files/Paine1795.pdf>
21. Peluso, Nancy Lee, Suraya Afiff and Noer Fauzi Rachman (2008) 'Claiming the Grounds for Reform: Agrarian and Environmental Movements in Indonesia' *Journal of Agrarian Change* 8 (2 and 3), pp. 377-407.
22. Pichler, Melanie (2017) 'What's democracy got to do with it? A political ecology perspective on socio-ecological justice' in: Melanie Pichler, Cornelia Staritz, Karin Küblböck, Christina Plank, Werner Raza and Fernando Ruiz Peyré (eds.) *Fairness and Justice in Natural Resource Politics*. Routledge: London and New York, pp. 33-51.
23. Prasetiantono, T. (2007) 'Sekapur Sirih. Tiada Letih Memperjuangkan Pemberdayaan Rakyat' in: G.
24. Sumodiningrat (ed.) *Pemberdayaan Sosial. Kajian Ringkas tentang Pembangunan Manusia Indonesia*. Jakarta: PT Kompas Media Nusantara, pp. VIII-XIV.
25. Rachman, Noer Fauzi (2017) *Petani & Penguasa. Dinamika Perjalanan Politik Agraria Indonesia*. INSISTPress, Yogyakarta.
26. Rasul, Sjahrudin. (2009) Penerapan Good Governance di Indonesia Dalam Upaya Pencegahan Tindak Pidana Korupsi. *Mimbar Hukum* 21 (3): 538-553.

27. Rousseau, Jean-Jacques (1999) [1754] *Discourse on the Origin of Inequality*. International Relations and Security Network Primary Resources in International Affairs (PRIA), Zurich. At: http://www.liupoliticalphilosophy.com/wp-content/uploads/2013/04/5019_Rousseau_Discourse_on_the_Origin_of_Inequality.pdf
28. Rutten, Rosanne, Laurens Bakker, Lisa Alano, Tania Salerno, Laksmi Savitri and Mohamed Shohibuddin (2017) 'Smallholder bargaining power in large-scale land deals: a relational perspective' *Journal of Peasant Studies*, 44(4), 726-752.
29. Safitri, Myrna A. and Tristam Moeliono (eds.) (2010) *Hukum Agraria dan Masyarakat di Indonesia*. HuMa, Jakarta, Van Vollenhoven Institute, Leiden and KITLV, Jakarta.
30. Salerno, Tania (2017) 'Cargill's corporate growth in times of crises: how agro-commodity traders are increasing profits in the midst of volatility' *Agriculture and human values*, 34 (1), 211-222.
31. Saptomo, Ade (2010) *Hukum dan kearifan lokal: revitalisasi hukum adat Nusantara*. Jakarta : Gramedia Widayasarana Indonesia.
32. Semedi, Pujo and Laurens Bakker (2014) Between Land Grabbing and Farmers' Benefits: Land Transfers in West Kalimantan, Indonesia. *The Asia Pacific Journal of Anthropology* 15(4), pp. 376-390.
33. Sen, A. (2009) *The Idea of Justice*. Cambridge, MA: Harvard University Press.
34. Slaats, Herman and Erman Rajagukguk, Nurul Elmiyah and Akhmad Safik (2009) 'Land law in Indonesia' in: Janine Ubink, André Hoekema and Willem Assies (eds.) *Legalising Land Rights. Local Practices, State Responses and Tenure Security in Africa, Asia and Latin America*. Leiden University Press, Leiden, pp. 493-526.
35. Suhendar, Endang with Satyawan Sunito, MT. Felix Sitorus, Arif Satria, Ivanovich Agusta and Arya Hadi Dharmawan (eds.) (2002) *Menuju Keadilan Agraria. 70 Tahun Gunawan Wiradi*. Yayasan Akatiga, Bandung.
36. Tjondronegoro, SMP (2002) 'Kata Pengantar' in: Suhendar, Endang with Satyawan Sunito, MT. Felix Sitorus, Arif Satria, Ivanovich Agusta and Arya Hadi Dharmawan (eds.) *Menuju Keadilan Agraria. 70 Tahun Gunawan Wiradi*. Yayasan Akatiga, Bandung, pp. v-x.
37. TNI (2015) 'About Agrarian & Environmental Justice' The Transnational Institute at: www.tni.org/en/page/stub-22.
38. Van Klinken, Gerry (2005) New Actors, New Identities: Post-Suharto Ethnic Violence in Indonesia. In: Fortuna Anwar D, Bouvier H, Smith G and Tol R (eds) *Violent Internal Conflicts in Asia Pacific*. Yayasan Obor Indonesia/ LIPI/ Lasema-CNRS/ KITLV-Jakarta: Jakarta, 79-100.

39. 2007. Communal violence and democratization in Indonesia; small town wars, Routledge: London.
40. Vel, Jacqueline and Stepanus Makambombu (2010) 'Access to Agrarian Justice in Sumba, Eastern Indonesia' *Law, Social Justice & Global Development Journal (LGD)* 2010 (1).