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DEFORESTATION IN DECENTRALISED INDONESIA:
WHAT'S LAW GOT TO DO WITH IT?

Luke Lazarus Arnold

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INTRODUCTION

It is hard to overstate the value of Indonesia's forests. Apart from their intrinsic worth, these forests represent the 'lungs of Asia', surpassed in area only by the forests of Brazil and the Democratic Republic of the Congo.¹ An estimated 20 million Indonesians live in or near forests,² which approximately 30 million people depend upon for their livelihoods.³ Timber-based industries play a key role in Indonesia's national economic development, having long ranked as the country's largest export sector after oil and gas.⁴ However, despite the importance of Indonesia's forests, rapid deforestation is taking place throughout the archipelago. While this is nothing particularly new – forest area declined by 40 percent between 1950 and 2000⁵ – the driving forces behind deforestation have changed significantly since the fall of Suharto in 1998.

Whereas most deforestation – both legal and illegal – during Suharto's New Order regime took place with the blessing of a highly centralised state, deforestation now takes place in the context of 'a quasi-federal form

of decentralisation'.⁶ This system of decentralisation, known as *Otda* (from *Otonomi Daerah*, meaning Regional Autonomy), has involved the devolution of significant amounts of political, administrative and fiscal authority to sub-national legislatures and executive governments – including over forestry. It therefore represents a 'near-revolutionary'⁷ change in the organisation of the Indonesian state, and has important implications for any understanding of contemporary deforestation in the country. Although decentralisation remains one of the least noticed political trends worldwide,⁸ a number of commentators realised quite early that these sweeping reforms would have a significant impact on forest management in Indonesia. However, the literature relating to decentralisation's impact on deforestation has approached the issue almost exclusively from a political economy perspective, focusing on the rise of local politics in forest management and its relationship to centralised power.⁹ These analyses

1 Total forest cover in Indonesia is estimated at between 90 and 100 million hectares. See Christopher Barr et al. eds, *Decentralization of Forest Administration in Indonesia: Implications for Forest Sustainability, Economic Development and Community Livelihoods 2* (Bogor: CIFOR, 2006).

2 See Charles Palmer and Stefanie Engel, 'For Better or for Worse? Local Impacts of the Decentralization of Indonesia's Forest Sector', 35 *World Development* 2131, 2132 (2007). See also Ida Aju Padnya Resosudarmo, 'Shifting Power to the Periphery: the Impact of Decentralization on Forests and Forest People', in Edward Aspinall and Greg Fealy eds, *Local Power and Politics in Indonesia: Decentralisation and Democratisation* 230, 231 (Singapore: Institute of Southeast Asian Studies, 2003).

3 Ida Aju Pradnja Resosudarmo, 'Closer to People and Trees: Will Decentralisation Work for the People and the Forests of Indonesia?', in Jesse C. Ribot and Anne M. Larson eds, *Democratic Decentralisation through a Natural Resource Lens* 117 (Oxford: Routledge, 2005).

4 See Barr et al., note 1 above at 2. The Indonesian timber industry is thought to directly employ 2.5 million people, with a further 1.5 million employed indirectly. See Resosudarmo, note 2 above at 231.

5 See Palmer and Engel, note 2 above at 2132.

6 Jacques Bertrand, 'Indonesia's Quasi-federalist Approach: Accommodation amid Strong Integrationist Tendencies', 5 *International Journal of Constitutional Law* 576, 581 (2007).

7 *Id.* at 592.

8 Philip Oxhorn, 'Unravelling the Puzzle of Decentralization', in Philip Oxhorn, Joseph S. Tulchin and Andrew D. Selee eds, *Decentralization, Democratic Governance and Civil Society in Comparative Perspective: Africa, Asia and Latin America* 1, 3 (Washington, DC: Woodrow Wilson Center Press, 2004). Oxhorn notes that, in terms of worldwide policy reforms, perhaps only economic liberalisation is more widespread than decentralisation.

9 See, e.g., Eva Wollenberg, 'Between State and Society: Local Governance of Forests in Malinau, Indonesia', 8 *Forest Policy and Economics* 421 (2006); John F. McCarthy, 'Contesting Decentralization: Transnational Policy Narratives and the Emergence of Volatile Narratives and the Emergence of Volatile Socio-Legal Configurations in Central Kalimantan, Indonesia', in Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Anne Griffiths eds, *Mobile People, Mobile Law: Expanding Legal Relations in a Contracting World* 153 (Aldershot: Ashgate, 2005); Semiarto A. Purwanto, 'Forest Resource Management and Self-Governance in Regional Autonomy Indonesia', in Maribeth Erb, Priyambudi Sulistiyanto and Carole Faucher eds, *Regionalism in Post-Subarto Indonesia* 211 (London: RoutledgeCurzon, 2005); Anne Casson and Krystof Obidzinski, 'From New Order to Regional Autonomy: Shifting Dynamics of Illegal Logging in Kalimantan, Indonesia', in Luca Tacconi ed., *Illegal Logging: Law Enforcement, Livelihoods and the Timber Trade* 43 (London: Earthscan, 2007) and Resosudarmo, note 3 above.

often place little emphasis on role of law in the relationship between decentralisation and deforestation, such as the ways in which legislation and the legislative process supports deforestation and their capacity to promote more sustainable forest management.¹⁰

The lack of commentary on the impact of law on deforestation under *Otda* has given rise to the assumption in Indonesia that, in the words the President's Environment and Sustainable Development Advisor, 'the legal instruments are fine' and that any problems are simply the result of poor implementation.¹¹ The common response to deforestation, therefore, is to launch ad hoc 'crackdowns' on illegal logging activities rather than comprehensively examine the normative regime in which deforestation is occurring.¹² Presidential Instruction 4/2005,¹³ for example, aims to address deforestation by simply calling on all relevant government agencies to take firmer steps to enforce existing laws. These approaches demonstrate the existence of a false dichotomy in which *law* is seen as separate from, and unable to influence, its *implementation*. In this way, the content of Indonesian law and the process by which it is made are seen as unproblematic; 'implementation problems' let the law off the hook. This situation conveniently suits the forces behind the ongoing deforestation.

10 For an exception to this trend, see Jason M. Patlis, *A Rough Guide to Developing Laws for Regional Forest Management* (Bogor: CIFOR, 2004).

11 See State Ministry for the Environment, 'Exploitasi Alam [The Exploitation of Nature]', *Majalah Serasi*, April 2004, 8. See also Ahmad Syafii Maarif, 'SOS Hutan Indonesia [SOS Indonesian Forests]', *Gatra*, 22 June 2007 (discussing the failure of law enforcement and the need to pay enforcers more) and E.G. Togu Manurung, 'Radical Measures Needed to Stop Illegal Logging', *The Jakarta Post*, 26 January 2005 available at <http://www.thejakartapost.com/news/2005/01/26/radical-measures-needed-stop-illegal-logging.html> stating that 'the root cause of [illegal logging] is corruption and non-existent law enforcement'.

12 See, e.g., Marcus Colchester ed, *Justice in the Forest: Rural Livelihoods and Forest Law Enforcement 33* (Bogor: CIFOR, 2006).

13 Presidential Instruction No. 4 of 2005 concerning the Elimination of Illegal Logging in Forests and the Circulation of Illegally Logged Timber in the Republic of Indonesia.

Despite the clear impact of political and economic factors on deforestation in decentralised Indonesia, it is unwise to ignore the impact of law on the issue. On the contrary, this essay argues that law, through both commission and omission, plays an important role in supporting unsustainable deforestation under *Otda*. The corollary of this argument is, however, that law also holds significant potential to ameliorate the problem. The argument is structured as follows: Part II contextualises the relationship between deforestation and decentralisation in Indonesia by highlighting the historical, political and economic factors which have set the stage for the current situation; Part III describes the legal framework for governing forests in Indonesia, by reference to Indonesia's Constitution, the *Otda* laws and the Forestry Law; Part IV demonstrates the impact decentralisation has had on deforestation; and Part V builds on these discussions to analyse the ways in which law is partly responsible for the situation. Part VI then offers some concluding remarks. It should be noted that the focus here is on the municipal law of Indonesia and that, while highly important, a specific consideration of relevant bilateral and multilateral instruments is beyond the scope of this essay.

2 CONTEXTUALISING DEFORESTATION AND DECENTRALISATION

2.1 Forests, Decolonisation and the Unitary State of Indonesia

The Dutch, like many other colonial powers, applied a 'scientific forestry' approach to the governance of forests in their colonial possessions, including the Dutch East Indies (present-day Indonesia).¹⁴ This approach was characterised by top-down forestry policies, an emphasis on forest management based on modern science rather than traditional knowledge and an attitude to conservation 'in which destructive

14 Christopher Barr, 'Forest Administration and Forestry Sector Development Prior to 1998', in Barr et al. eds, note 1 above.

local communities were presumed to be the problem'.¹⁵ In practice, however, the Colonial Government only directly controlled the forests on Java,¹⁶ with forests on the outer islands being subject to *adat* (customary law) to the extent that this did not interfere with Dutch commercial or state interests.¹⁷ This was consistent with a general pattern of allowing sub-national governments to exercise some degree of autonomy, albeit within a framework of ultimate accountability to the central Colonial Government.¹⁸

After a drawn-out war for independence, the Dutch finally agreed to transfer sovereignty to a federal state known as the United States of Indonesia.¹⁹ However, Indonesia's first President, Sukarno, viewed this federal system as a legacy of the colonial divide-and-rule strategy and a way for the Dutch to continue to exert influence over the archipelago.²⁰ The power of the Central Government was then enhanced in August 1950, only eight months after the official transfer of sovereignty, when Sukarno dissolved the federal system and established the

Unitary State of Indonesia. Ironically, given the fact that the new Central Government's forestry bureaucrats were generally the same personnel as those who worked for the Colonial Government, this ensured that the post-colonial state inherited the scientific forestry approach.²¹ In 1960, the Basic Agrarian Law²² granted private ownership over agricultural lands to local farmers, but this did not apply to forested land.²³ In Java, the state took over the direct management of forests from the Dutch,²⁴ but the status of the forests on the outer islands – the vast majority of non-plantation forest – remained unclear until General Suharto ousted Sukarno from the presidency in 1966.²⁵

2.2 New Order Indonesia and the Hyper-centralisation of Forestry

Suharto came to power on the promise of curbing rampant inflation and ensuring high levels of economic growth. His regime, which he termed the New Order, saw timber exports as a key way of achieving this. One of the first laws passed under the New Order was the Basic Forestry Law of 1967,²⁶ which asserted that 'all forest within the territory of the Republic of Indonesia... is to be controlled by the state' (Art.5(1)). In what some have described as 'one of the largest land grabs in history',²⁷ this had the effect of granting the Ministry of Forestry authority to manage over 143 million hectares of forest – approximately 70 percent of country's land mass. The New Order maintained

15 Craig Segall, 'The Forestry Crisis as a Crisis of the Rule of Law', 58 *Stanford Law Review* 1539, 1542 (2006).

16 See generally Barr, note 14 above.

17 See McCarthy, note 9 above at 166.

18 Ignasius Ismanto, 'Decentralization and Democratization in Indonesia's Political Changes', in T.A. Legowo and Muneo Takahashi eds, *Regional Autonomy and Socio-economic Development in Indonesia: a Multidimensional Analysis* 1, 2 (Chiba: Institute of Developing Economies, 2003).

19 Sovereignty was transferred in relation to all territory that fell within the Dutch East Indies, with the exception of Netherlands New Guinea – the area which now comprises the Indonesian provinces of Papua and West Papua. In 1962, sovereignty was transferred to the United Nations and then to Indonesia in 1963 pending an act of free choice to determine whether the Papuan people wanted to remain part of Indonesia or secede. Indonesia claims that this occurred in 1969 with an unanimous vote by 1026 representatives, but whether this constituted a genuine act of free choice is disputed. For competing views, see Permanent Mission of the Republic of Indonesia to the United Nations, Facts on Indonesia's Sovereignty over Irian Jaya: Questions and Answers, available at <http://www.indonesiamission-ny.org/issuebaru/HumanRight/irianjaya.htm> and John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of a Betrayal* (London: RoutledgeCurzon, 2002).

20 *Id.* at 3.

21 See Barr, note 14 above at 19.

22 Law No. 5 of 1960 concerning Basic Agrarian Principles.

23 This may have been partly due to the fact that swidden agriculture was not well understood at the time. See Eva Wollenberg and Hariadi Kartodihardjo, 'Devolution and Indonesia's New Forestry Law', in Carol J. Colfer and Ida Aju Pradnja Resosudarmo eds, *Which Way Forward? People Forests and Policymaking in Indonesia* 81, 83 (Washington, D.C.: Resources for the Future, 2002).

24 See Purwanto, note 9 above at 213.

25 Most of Sukarno's presidential powers were transferred to Suharto on 11 March 1966, the date usually referred to as the commencement of Suharto's rule. Sukarno was not formally ousted as President until 12 March 1967.

26 Law No. 5 of 1967 concerning Basic Forestry Principles.

27 Chip Fay and Martua Sirait, 'Reforming the Reformists in Post-Soeharto Indonesia', in Colfer and Resosudarmo eds, note 23 above.

direct control over the timber industry on Java, but outsourced the management of forests on the outer islands to timber companies through the granting of timber concessions called forest commercialisation rights (Hak Pengusahaan Hutan or HPH). The state had thus converted common property forests into public property and then allowed selected private interests to exploit this.²⁸

Small-scale loggers were essentially locked out of the timber industry from 1970, when the minimum HPH area was set at a massive 50,000 hectares.²⁹ By the early 1970s, the massive commercial exploitation that followed saw Indonesia emerge as the world's largest exporter of tropical logs.³⁰ The Central Government had a monopoly over the granting of HPHs. Over time, these became more and more concentrated in the hands of elites who formed part of the New Order's elaborate system of patronage and were almost invariably based in the capital Jakarta.³¹ By 1995, HPHs had been granted over 60 million hectares of forest (approximately half of the remaining stock at the time),³² with five companies possessing 30 percent of them.³³ The highly centralised military played a key role in protecting these large areas from 'illegal logging' by non-HPH holders, while at the same time extracting rents from HPH holders in exchange for turning a blind eye to those who logged outside their designated HPH areas or in breach of selective cutting requirements within these areas.³⁴ As such, the timber industry became characterised by massive over-capacity, sowing the seeds for the deforestation taking place at present.³⁵

The Central Government rarely consulted local communities when issuing HPHs.³⁶ As these

concessions were issued on a 'single use, single user' basis, they ultimately led to the marginalisation of forest communities.³⁷ This was exacerbated by the creation of protected forest based on scientific forestry principles, such that communities were in most cases denied any management rights over the forests that had traditionally been under their control.³⁸ This led to an erosion of *adat* norms and knowledge,³⁹ a trend compounded by two highly top-down Central Government policies. The first was the Transmigration Programme, which involved mass state-sponsored migration from Java to the outer islands. This policy, initially commenced by the Dutch Colonial Government but not formally abandoned until 2000, involved facilitating the internal migration of millions and millions of Indonesians from the highly populated islands of Java, Madura and Bali to less populated regions throughout Indonesia. During its peak between 1979 and 1984, almost 2.5 million people were transmigrated,⁴⁰ thus having a significant impact on indigenous communities. The second top-down policy to compound the erosion of *adat* was the Village Governance Law.⁴¹ This Law, passed in 1979, required all villages to adopt a governance structure based on the Javanese village (*desa*) structure.

In addition to granting of exclusive rights to HPH holders, scientific forestry-driven conservation programmes and pro-centre policies on transmigration and village governance, *adat* communities also suffered from an assault on their identity as indigenous peoples. For example, the very term '*ada*' was removed from official vocabulary. Instead, the New Order referred to isolated peoples (Suku Terasing) and promoting a view – in contrast to, say, Malaysia or India – that there was no such thing as 'indigenous' Indonesians (or that all Indonesians were indigenous, except those of

28 See Purwanto, note 9 above at 211.

29 *Id.* at 214. See also Resosudarmo, note 3 above at 116; and Casson and Obidzinski, note 9 above at 45.

30 See Barr, note 14 above at 18.

31 See generally Resosudarmo, note 3 above.

32 See Barr et al, note 1 above at 1.

33 See Casson and Obidzinski, note 9 above at 45.

34 *Id.* at 47.

35 See generally John F. McCarthy, 'Turning in Circles: Governance, Illegal Logging and Environmental Decline in Sumatra, Indonesia', in Tacconi ed, note 9 above.

36 Christopher R. Duncan, 'Mixed Outcomes: The Impact of Regional Autonomy and Decentralization on Indigenous Ethnic Minorities in Indonesia', 38 *Development and Change* 711, 716 (2007).

37 Jeffrey Y. Campbell, 'Differing Perspectives on Community Forestry in Indonesia', in Colfer and Resosudarmo eds, note 23 above.

38 *Id.*

39 See generally McCarthy, note 9 above.

40 See, e.g., Wiki Media Foundation, Wikipedia: Transmigration Program, available at http://en.wikipedia.org/wiki/Transmigration_program.

41 Law No. 5 of 1979 concerning Village Governance.

Chinese descent).⁴² Forest communities and their indigenous forest management systems were thus systematically disempowered. During this time, they could at best hope to secure employment or rents from HPH holders.⁴³

Revenue from timber exports under the New Order was clearly perceived as a driver of *national*, not local, economic growth.⁴⁴ Most of the revenues from the one-off HPH licence fees went to the Central Government, together with virtually all volume-based royalties and export taxes.⁴⁵ This followed a general pattern of hyper-centralisation throughout Indonesia, as the New Order established one of the most centralised countries in the world in what remained a highly geographically and culturally diverse archipelago.⁴⁶ The Central Government collected 93 percent of all government revenues and allocated 90 percent of this itself.⁴⁷ National development projects were imposed on local populations from above, as exemplified by the Million-Hectare peat land Project in Central Kalimantan, which attempted to convert over one million hectares of peat land into rice paddies for the settlement of 1.5 million transmigrants.⁴⁸ Such projects were possible because, politically, all major decisions were made by the Central Government. Regional civil servants were appointed by – and often simply sent from – Jakarta,⁴⁹ and regional

legislatures (Dewan Perwakilan Rakyat Daerah or DPRD) became mere advisory bodies.⁵⁰ Regions were not even permitted to develop linkages with each other – everything, even planes, were required to go through Jakarta.⁵¹

2.3 Economic Crisis, Political Reform and the Decentralisation of Forestry

The New Order's political legitimacy was maintained by the fact that it managed to deliver sustained economic growth for over thirty years. When the macroeconomic success ended with the Asian Financial Crisis of 1997, Suharto was forced to resign. This was followed by rapid transition to democratic governance, called *Reformasi*, which saw the legalisation of independent political parties and the emergence of civil society – including the 'dramatic invigoration' of environmental organisations and village communities.⁵² The consequent weakening of the Central Government, including the military, emboldened local communities to express their discontent about the way in which they had been systematically excluded from the exploitation of local resources. At the village level, many communities took direct action against timber companies by 'blocking roads, seizing heavy equipment, and demanding compensation from firms involved'.⁵³ At the provincial level, resource-rich provinces demanded greater political and fiscal autonomy and some – such as East Kalimantan and Riau – even began to make rumblings about secession similar to those in areas such as Aceh and Papua, where serious separatist movements appeared to be gathering strength.

42 See generally Tania Murray Li, 'Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia's Forest Zone', 35 *Modern Asian Studies* 645 (2001). See also Duncan, note 36 above at 714 and Frederick Rawski and John MacDougall, 'Regional Autonomy and Indigenous Exclusivism in Bali', 11 *International Journal on Minority and Group Rights* 143, 145 (2004).

43 See McCarthy, note 35 above at 78-79 and Purwanto, note 9 above at 215.

44 See Campbell, note 37 above at 118.

45 See Barr, note 14 above at 24. See also Ida Aju Pradnja Resosudarmo et al., 'Fiscal Balancing and the Redistribution of Forest Revenues', in Barr et al. eds, note 1 above.

46 Syarif Hidayat and Hans Antlöv, 'Decentralization and Regional Autonomy in Indonesia', in Oxhorn, Tulchin and Selee eds, note 8 above.

47 *Id.*

48 See Duncan, note 36 above at 719.

49 Syarif Hidayat, *Too Much Too Soon: Local State Elite's Perspective on, and the Puzzle of, Contemporary Indonesian Regional Autonomy Policy* 30 (Jakarta: RajaGrafindo Persada, 2007).

50 Peter Holland, 'Regional Government and Central Authority in Indonesia', in Timothy Lindsey ed., *Indonesia: Law and Society* 200, 211 (Sydney: Federation Press, 1999).

51 Muriel Charras, 'The Reshaping of the Indonesian Archipelago after 50 Years of Regional Imbalance', in Erb, Sulistiyanto and Faucher eds, note 9 above.

52 Alan Khee-Jin Tan, 'The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia', 13 *New York University Environmental Law Journal* 647, 719 (2005).

53 John McCarthy et al., 'Origins and Scope of Indonesia's Decentralization Laws', in Barr et al. eds, note 1 above.

In this context, decentralisation emerged as a way of ‘saving the nation’⁵⁴ – and the ruling *Golkar* party – from political upheaval and territorial disintegration. Offloading the responsibility of delivering public services to sub-national governments was also seen as a way for the Central Government to satisfy structural adjustment requirements, including a reduction of Central Government expenditures, as part of an International Monetary Fund loan to support the country’s economic recovery.⁵⁵ The international financial institutions and other international actors, whose leverage had grown in Indonesia due to the financial crisis, generally supported demands for more decentralised governance. This was in part because it was seen as consistent with the Washington Consensus’s calls for smaller government and the devolution of power to a place ‘where civil society can work its magic better’.⁵⁶ It was clear that the perceived *inabilities* of the Central Government were more of a consideration than any perceived *abilities* on the part of sub-national governments.⁵⁷

In 1999, the central Executive hurriedly drafted two laws to devolve power to the regions, both of which were then passed by the People’s Representative Council:⁵⁸ one in relation to the division of political and administrative authority⁵⁹ and the other in relation to the division of public revenues.⁶⁰ These *Otda* laws, which came into effect in 2001, transferred power to the regions in all sectors except those deemed to be the exclusive jurisdiction of the Central Government, as discussed in Part III (B)

below. This led some commentators to refer to the laws as making Indonesia one of the most decentralised countries in the world.⁶¹ Due to concerns that empowering provincial legislatures and executive governments may encourage separatism, these laws essentially bypassed provinces (*provinsi*), instead transferring power directly to the next level of government: districts (*kabupaten*) and municipalities (*kotamadya*).⁶² As forestry was not on the exclusive jurisdiction list, it was to be decentralised. Intense pressure from the regions even led the Central Government to pass a series of decrees allowing district/municipal governments to issue small-scale logging licenses (up to 100 hectares) prior to the date upon which the laws came into effect.⁶³ The Central Government later began to claw back power in the field of forestry, most notably by reference to a new forestry law, also passed in 1999, and a new set of *Otda* laws passed in 2004. It is to this legal framework that the essay now turns.

3

THE LEGAL FRAMEWORK FOR GOVERNING FORESTS IN DECENTRALISED INDONESIA

3.1 The Constitution

The *Constitution of the Republic of Indonesia 1945* contains a number of provisions relating to forestry and regional governance. Chief among these is Article 33(3), which holds that ‘the land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people’. This clause therefore provides

54 See Hidayat and Antlöv, note 46 above at 271.

55 See Barr et al., note 1 above at 10.

56 See McCarthy, note 9 above at 156.

57 Oxhorn notes that this is a common phenomenon worldwide. See Oxhorn, note 8 above at 13.

58 The People’s Representative Council (*Dewan Perwakilan Rakyat*, or DPR) is the chamber of the national legislature, the People’s Consultative Assembly (*Majelis Permusyawaratan Rakyat*), with the power to make National Laws (*Undang-Undang*).

59 Law No. 22 of 1999 concerning Regional Governance. Hidayat and Antlöv note the subtle but important difference in title from the New Order law it replaced, Law No. 5 of 1974 on Governance in the Regions. See Hidayat and Antlöv, note 46 above at 273.

60 Law No. 25 of 1999 concerning Fiscal Balance between the Centre and the Regions.

61 Gary F. Bell, ‘Indonesia: the New Regional Autonomy Laws, Two Years Later’, *Southeast Asian Affairs* 117 (2003).

62 This is the same level of government, the only difference being that the former refers to predominantly rural regions while the latter refers to urban region. There are currently 370 districts and 95 municipalities in Indonesia, with an average population of 500,000 per region.

63 See Casson and Obidzinski, note 9 above at 65-66.

the basis for the state's claims over Indonesia's forests, as indicated by the fact that the current Forestry Law mentions this clause in its preamble. However, the clause does not of itself preclude the ownership of forests by forest communities; the state need only 'control' forests, which it could do through minimum standards stipulated in legislation. This position would be consistent with the recently inserted Article 18B (2), which requires the state to recognise the rights of customary communities to practice *adat* to the extent that this is consistent with social development and the unitary state.

Following the passing of the first *Otda* laws, the Constitution was amended⁶⁴ to insert several provisions relating to regional autonomy. These provisions, expressed in Articles 18, 18A and 18B, are very broad and ambiguous. For example, the main provision on the division of authority, Article 18A(1), merely states that:

The relationship between the central government and provincial, district and municipal governments, or between provinces and districts and municipalities, is to be regulated by National Law with regard to regional characteristics and diversity.

These provisions stand in contrast to the role of constitutions in most federal states, where the rights of the central government and other jurisdictions are to some extent spelt out. The essence of the regional autonomy provisions in the Indonesian Constitution is rather to mandate a system of decentralised governance and simply require that it be regulated by law. These provisions therefore do not shed any meaningful light on the division of authority between the centre and the regions. Due to the limited scope for judge-made law within the Indonesian legal system – which at present is best described as a civil law system – it is likely that, without legislative changes, the uncertainty created by these provisions is likely to persist.

In relation to forestry, there is an additional requirement that centre-region relations in relation

to the exploitation of natural resources be 'implemented in a just and harmonious way' (Art.18A(2)). It remains to be seen exactly what this means. In the meantime, this lack of clarity has opened space for the unsustainable management of forests.

Neither the Constitution nor any piece of legislation has ever clarified the content or precise status of *adat*, though recent legislation has begun to make reference to it. In fact, there is no unified set of *adat* law; the term *adat* continues to be used to refer to the diverse collection of local-level customary rules which have existed alongside – sometimes in harmony with and other times in spite of – other sources of law. The resultant uncertainty has led to the continuation of debates about the role *adat* has and should have in Indonesia's legal system, a debate that dates back to colonial times but has been reinvigorated since the collapse of the New Order.⁶⁵

3.2 The *Otda* Laws

In 2004, the original *Otda* laws were repealed and replaced with a new Regional Governance Law⁶⁶ and Fiscal Balance Law.⁶⁷ These are National Laws (Undang-Undang or UU), which have been passed by the People's Representative Council and are the highest source of law within the Indonesian legal system after the Constitution. The substance of the 2004 laws remains similar to their 1999 predecessors, with the major change being that Regional Heads (Kepala Daerah) are now directly elected at both provincial and district/municipality levels,⁶⁸ as

⁶⁵ See generally Peter Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (Leiden: KITLV, 2004) on the legacy of the debate in the early twentieth century between Dutch legal scholars based at the University of Leiden – who were of the opinion that colonial laws should accommodate *adat* – and those at the University of Utrecht – who were less sympathetic to such arguments. For an account of *adat*'s role in a contemporary context, see Craig Thorburn, 'Adat, Conflict and Reconciliation: The Kei Islands, Southeast Maluku', in Tim Lindsey ed., *Indonesia: Law and Society* 115 (Sydney: Federation Press, 2nd ed. 2008).

⁶⁶ Law No. 32 of 2004 concerning Regional Governance.

⁶⁷ Law No. 33 of 2004 concerning Fiscal Balance between the Central Government and the Regions.

⁶⁸ Article 24, Law No. 32 of 2004 concerning Regional Governance.

⁶⁴ Second Amendment to the Constitution of the Republic of Indonesia 1945, 18 August 2000.

opposed to being appointed by regional legislatures. The new laws also differ from the original laws in that they provide the Central Government more opportunities to monitor and intervene in regional affairs. For example, Regional Heads must now tender reports to the Central Government (Art. 27) and can be dismissed by the President if convicted of certain crimes (arts 30-31). The Central Government has also clawed back some budgetary authority, with the Ministry of Home Affairs permitted to control 'budget deficits' in the regions (Art. 175) and scrutinise regional budgets (Art. 85). Interestingly, Article 22 lists a number of regional government 'responsibilities', which include 'improving the community's quality of life', 'developing productive resources', 'conserving the natural environment', 'conserving social and cultural values' and 'other responsibilities as stipulated by law'. The precise legal status of these 'responsibilities' is unclear, though they could conceivably be used to justify further clawing back of power by the centre.

The specific ways in which the Regional Governance Law and Fiscal Balance Law specifically relate to forest management are discussed below in turn.

3.2.1 Devolution of Political and Administrative Authority over Forests

The Regional Governance Law addresses the decentralisation of political (policy-making) and administrative (policy implementation) powers from the Central Government to provinces and districts/municipalities. Article 10(3) sets out six areas which remain the exclusive jurisdiction of the Central Government. These include the three areas usually allocated solely to central governments in federal systems – foreign affairs, defence and national monetary and fiscal policy. The three further areas retained by the Central Government in Indonesia are internal security, the justice system and religious affairs⁶⁹ – a selection which reflects perceived fault lines in the nation's territorial integrity. In other

areas, including forestry, the regions are to 'exercise autonomy to the broadest possible extent... with the goal of enhancing social welfare, public service and regional competitiveness' (Art. 2(3)). This autonomy is divided between provinces and districts according to the principle of subsidiarity, with provinces granted jurisdiction over matters of a 'provincial scale' (Art.13) and districts/municipalities jurisdiction over everything else (ie matters of a 'district/municipal scale') (Art. 14). A recent implementing regulation, Governmental Regulation 38/2007,⁷⁰ states that provinces can 'delegate' authority to districts/municipalities, and districts/municipalities can delegate authority to villages (Art.16). This Regulation also creates a distinction between 'compulsory' and 'optional' regional jurisdictions, with forestry placed in the latter (Art. 16). This means that the Central Government is to retain authority over forest management in regions which choose not to assume this authority.

Regional autonomy applies to both executive governments and regional legislatures (Art.3), both of which are downwardly accountable through Regional Head elections (Art.56) and parliamentary elections⁷¹ respectively. Regional legislatures, with the approval of the Regional Head, have the right to set their own budgets (Arts.25 and 42) and raise their own revenues. Regional legislatures, also with the approval of the Regional Head, can pass Regional Regulations (Peraturan Daerah, or Perda) on any matter within their jurisdiction (Art.136). However, unlike in a federal system, the People's Representative Council retains the power to pass National Laws on any matter, and Regional Regulations must not be inconsistent with a National Law (Art.136(4)).⁷² Given the fact that National Laws (and other types of national legislation which rank above Regional

⁶⁹ An exception exists for the Province of Nanggroe Aceh Darussalam, where a peace accord reached between the Central Government and Acehese rebels in 2005 excludes religious affairs from the exclusive jurisdiction of the Central Government.

⁷⁰ Governmental Regulation No. 38 of 2007 concerning the Division of Authority between the Central Government, Provinces and Districts/Municipalities.

⁷¹ Law No. 10 of 2008 concerning General Elections for Members of the People's Representative Council, Regional Representative Council and Regional People's Representative Councils.

⁷² Confusion has arisen, however, as to the status of Regional Regulations vis-à-vis Ministerial Regulations passed by a single department of the Central Government. See Part V below.

Regulations⁷³) are generally drafted in very broad terms, *Otda* could be categorised as a ‘devolution’ model of decentralisation, where broad decision-making authority has been transferred to sub-national levels of government.⁷⁴ However, the Regional Governance Law states that Provincial Heads (Gubernur) are, in addition to being a component of an autonomous regional government, ‘also representatives of the Central Government in their respective provinces’ (Art.37). This indicates that, with respect to provinces, *Otda* may to some extent represent a mere ‘deconcentration’ of power, where accountability ultimately remains with the centre.⁷⁵ No such provision applies to District/Municipality (Bupati/Walikota) Heads.

The Regional Governance Law contains a confusing qualification concerning the relationship between the Central Government and the regions with respect to forestry. It states that regional governments have a special ‘relationship’ with the Central Government in matters relating to, among other things, the exploitation of natural resources (Art.2(5)). This relationship, echoing the Constitutional provision discussed above, is to be ‘implemented in a just and harmonious way’ (Art.2(6)). There is no indication within the Law or its Elucidation as what this entails, other than that this special relationship is to be regulated by law (Art.17(3)). However, the Law does expressly state that regional governments have a right to share in revenues from natural resources (Art.21) and a responsibility to ensure their sustainable management (Art.22). It also grants the Central Government the power to declare Special Areas (Kawasan Khusus) in the national interest (Art. 9(1)), which the Elucidation describes as areas of ‘strategic national interest’, including ‘environmental’ interests. This forms one of the bases upon which the Ministry of Forestry continues to exercise direct authority over conservation areas.

73 Central Government Regulations (Peraturan Pemerintah) and Presidential Regulations (Peraturan Presiden). See Part V(A)(i) below.

74 See Oxhorn, note 8 above at 5.

75 Arun Agrawal and Jesse Ribot, ‘Accountability in Decentralisation: A Framework with South Asian and West African Cases’, 33 *Journal of Developing Areas* 473, 475 (1999).

3.2.2 Devolution of Fiscal Authority over Timber Revenues

An abundance of case studies – from decentralised forest management in Senegal⁷⁶ to decentralised pasture management in Mongolia⁷⁷ – demonstrate the fact that decentralisation is usually meaningless if sub-national governments do not have independent access to financial resources.⁷⁸ The Fiscal Balance Law attempts to address this by establishing various formulae for the sharing of revenues between the Central Government and the regions. Timber revenues come in three forms: approximately two thirds is derived from compulsory contributions to a Reforestation Fund (Dana Reboisasi or DR), which timber companies pay based on their harvest volumes. The remaining third comes from one-off licence fees (Iuran Hak Pengusahaan Hutan or IHPH) and volume-based royalties (Provisi Sumber Daya Hutan or PSDH).⁷⁹

The Fiscal Balance Law allocates 40 percent of revenues from the Reforestation Fund to the district/municipality where the timber was extracted and 60 percent to the Central Government (Art.14(b)).⁸⁰ The Central Government is to receive only 20 percent of revenues from licence fees and volume-based royalties, with the relevant provincial government receiving 16 percent (Art.14(a)). 64 percent of these revenues flow to district/municipal governments: for licence fees all of this goes to the producing district/municipality, while royalties are split such that the producing district/municipality receives half of this amount and the remainder is shared evenly between other districts/municipalities in the province (Art.15). This arrangement therefore

76 *Id.* at 474.

77 See generally Robin Mearns, ‘Decentralisation, Rural Livelihoods and Pasture-Land Management in Post-Socialist Mongolia’, in Ribot and Larson eds, note 3 above.

78 See generally Arnoldo Contreras-Hermosilla, Hans M. Gregersen and Andy White eds, *Forest Governance in Countries with Federal Systems of Government: Lessons and Implications for Decentralization* (Bogor: CIFOR, 2008).

79 See Resosudarmo et al., note 45 above at 63.

80 These funds are likely to be ultimately transferred to district/municipal Forestry Offices through earmarked grants called *Dana Alokasi Khusus (DAK)*, as provided for by the Fiscal Balance Law.

allocates a significant portion of timber revenues to districts/municipalities, particularly if compared to their twelve percent share of income tax (Art.13) or six and twelve percent respective shares of oil and gas revenues (Art.19). This has the potential to encourage over-production in the timber sector, as described below in Part V(A).

3.3 The Forestry Law

Several months after the passing of the *Otda* laws, the Basic Forestry Law of 1967 was repealed and replaced with a new Forestry Law.⁸¹ This Law reasserts state control over all forests (Art.4(3)), continuing the massive appropriation of forests under the Basic Forestry Law. It establishes three categories of forest: 'production forest', the main purpose of which is to support the commercial exploitation of forest products; 'protection forest', the protection of which provides direct benefits for human ecosystems, such as through controlled waterways and the prevention of erosion; and 'conservation forest', which contains ecosystems deemed worthy of protection due to their intrinsic value (Art.1). Production forests can be made the subject of timber concessions or a licence to harvest non-timber forest products, with only the latter available over protection forest. The Forestry Law prohibits the granting of commercial licenses over several sub-categories of conservation forest,⁸² and requires licensing over other sub-categories to be expressly authorised by law. Importantly, the authority to classify forest remains with the Central Government (Arts.1(14) and 6), which at present has classified 56 percent of the areas deemed to be forested as production forest, 26 percent as protection forest and 18 percent as conservation forest.⁸³

The assertion of state control over forests in the new Forestry Law contains some important space for the recognition of other interests. The Law stipulates that state 'control' gives the state the authority to 'regulate and organise' forests, 'determine the status of areas

as forests or non-forests', and 'regulate and determine legal relationships between people and forests' (Art.4(2)). Within this framework, the Law goes beyond its predecessor in requiring the state to 'pay regard to the rights of *adat* communities', provided that doing so does not conflict with the national interest (Art.4(3)). The Law makes provision for the recognition of *adat* forests, though makes it clear that these are simply regions within state forests where *adat* communities can exercise particular rights (Art.5). According to the Elucidation to the Law, this is a 'consequence of... the principle of the Unitary State of Indonesia'.⁸⁴ The legal existence of *adat* communities is therefore dependent on recognition by the state,⁸⁵ and the Law implies in three different provisions that this can be withdrawn at any time: articles 4, 5 and 67 all state that *adat* rights will only be recognised to the extent that '*adat* communities continue to exist and their existence is recognised [by the state]'. The rights of *adat* forest communities are therefore very insecure, particularly if compared to Ancestral Domain Claims in the Philippines or *Communidades* in Mexico.⁸⁶

The Forestry Law does not clarify a process for recognising *adat* rights, the exact content of these rights or how such rights interact with other forestry interests. It does state, however, that *adat* communities, once recognised, have rights to harvest timber for subsistence purposes, 'conduct forest management activities' according to *adat* and gain access to 'empowerment for the purposes of enhancing their welfare' (Art.67). The Law requires a Governmental Regulation to regulate the matter in further detail, but no such legislation has been formulated to date. However, in what appears to be a substitute for such legislation, the Minister of Forestry promulgated a Ministerial Regulation in 2007⁸⁷ creating a system of licences in relation to Community Forests (Hutan Kemasyarakatan).

⁸¹ Law No. 41 of 1999 concerning Forestry.

⁸² 'Nature reserves', 'core zones' and 'forest zones in national parks', Art. 24.

⁸³ Aulia Marti, 'Pengelolaan Hutan Masih Memprihatinkan [Forest Management Still Concerning]', *Borneo Tribune*, 2 July 2007.

⁸⁴ The Unitary State of Indonesia is discussed in Part II(A) above.

⁸⁵ Christina Eghenter, 'Social, Environmental and Legal Dimensions of *Adat* as an Instrument of Conservation in East Kalimantan', in Fadzillah Majid Cooke ed, *State, Communities and Forests in Contemporary Borneo* 163, 171 (Canberra: ANU Press, 2006).

⁸⁶ See Wollenberg and Kartodihardjo, note 23 above at 83.

⁸⁷ Regulation of the Minister of Forestry No. 37 of 2007 concerning Community Forests.

Community forests differ from *adat* forests in that they are not linked to customary law and do not involve management rights or connotations of traditional ownership.⁸⁸ Instead, the Regulation provides for two types of licences, to be granted by the Minister, which afford limited rights to forest communities. In relation to timber usage, the first kind, a Community Forest Concession (Izin Usaha Pemanfaatan Hutan Kemasyarakatan or IUPHKm), simply allows forest communities to extract up to 50 cubic metres of timber per year for non-commercial purposes from production forest zones which are not subject to other concessions (Arts.7 and 17). The second kind, a Community Forest Timber Concession (Izin Usaha Pemanfaatan Hasil Hutan Kayu dalam Hutan Kemasyarakatan, or IUPHHK HKm), allows forest communities to plant and harvest timber in areas within production forest zones which are not subject to other concessions, provided they pay royalties on harvests (Art.22).⁸⁹ Forest communities are therefore granted inferior rights to other timber concession-holders, who are not obliged to harvest only forest that they have planted. Additionally, the fact that the Regulation is a Ministerial Regulation rather than a Governmental Regulation could mean that regional governments ignore it, as discussed below.

Even though it was passed after the *Otda* laws, the Forestry Law essentially ignores the role of regional governments. Given that the Law was drafted by the Ministry of Forestry, this situation appears to be the result of ‘a systematic effort by the [Ministry] to reconsolidate the Central Government’s authority in the forestry sector’.⁹⁰ The Law only mentions regional governments in a handful of provisions, including to say that they share a responsibility with the Central Government to ‘monitor forestry’ (Art.60) and ‘forest management by third parties’ (Art 62). The Law also states that the Central Government has a responsibility to monitor the forestry activities of regional governments (Art.61) and that the

decentralisation of forestry functions is to be regulated by a Governmental Regulation (Art.66).

Governmental Regulation 6/2007⁹¹ purportedly undertakes to transfer forestry powers to the regions but in effect it transfers only a selection of minor powers – possibly because it was most likely drafted by the Ministry of Forestry. Most importantly, the Minister retains the exclusive authority to grant large-scale timber concessions (Art.62), called Licence to Exploit Forest Timber (Izin Usaha Pemanfaatan Hasil Hutan Kayu or IUPHHKs) under the Forestry Law. Under this provision, the Minister must base his/her decision on a recommendation from the relevant Provincial Government Head, who in turn must ‘obtain input’ from the District/Municipal Head in which the forest is located. Given the fact that the Provincial Government Head is not bound by this input and is a representative of the Central Government, this provision effectively circumvents any decentralisation of the process of issuing IUPHHKs. Instead, Government Regulation 6/2007 transfers powers to districts/municipalities to issue a range of ‘lesser permits’,⁹² such as licences for the extraction of timber for non-commercial purposes. As such, despite the passing of the *Otda* laws, according to the Forestry Law the Central Government retains key decision-making powers in relation to both the classification of forests and the regulation of logging.

4

THE DYNAMICS OF DEFORESTATION UNDER OTDA

Deforestation has continued at rapid rates since the introduction of *Otda*. Current estimates, for

⁸⁸ Community forests are in fact not mentioned in any provision of the Forestry Law. The Elucidation, however, distinguishes them from *adat* forests, simply stating that their purpose is to ‘empower communities’ (as distinct from recognising customary rights).

⁸⁹ It appears that there is no obligation here to make contributions to the Reforestation Fund.

⁹⁰ See Barr et al., note 1 above at 14.

⁹¹ Governmental Regulation No. 6 of 2007 concerning Forest Designs, Forest Management Plans and the Exploitation of Forest. This repeals an earlier version, Government Regulation 34/2002.

⁹² See McCarthy et al., note 53 above at 47-48 (describing the situation under the predecessor to Governmental Regulation 6/2007).

example, put the annual loss of Indonesian forest at 2.76 million hectares (around three percent of the total forested area).⁹³ The dynamics behind this pattern, however, differ greatly from those under the New Order. The primary cause of deforestation prior to *Otda* was the over-issuing of HPHs by the Central Government. This was complemented by 'non-collusive corruption' between HPH-holders and Central Government officials, with the latter extracting rents in exchange for turning a blind eye to the breaches of the HPH conditions.⁹⁴ Under *Otda*, the conflicting interests of forest communities, regional governments and the Central Government have surfaced and created a far more chaotic situation. The result has been an increase in the number of actors involved in deforestation,⁹⁵ and a general state of lawlessness to the point where Indonesian forests to some extent resemble open-access regimes.⁹⁶ Illegal logging is now the main cause of deforestation, accounting for approximately 70 percent of all harvested timber.⁹⁷ To be sure, *Otda* is not the only cause of deforestation in present-day Indonesia. Commentators correctly point out that the forestry sector was already characterised by over-capacity by the end of the New Order,⁹⁸ and that factors such as the economic crisis and subsequent weakening of the state are also key contributors.⁹⁹ It is clear, however, that *Otda* shapes the current dynamics of deforestation in very significant ways.

Although *Otda* has fallen far short of granting substantial forest management rights to local forest

communities, it has clearly opened up some space for such communities to vent their 'accumulated historical frustrations'¹⁰⁰ at the extent to which they had been excluded from decision-making processes and benefit sharing in relation to the use of local forests during the New Order. Some communities have, for example, engaged in disputes with plantation and timber companies over land control. These disputes have often involved the use of fire by both sides to clear the land so as to make stronger claims to it by demonstrating a more profitable use, such as the establishment of cash crop plantations.¹⁰¹ In other cases, local communities have instead cooperated with (or been coopted by) timber companies in exchange for promises of financial compensation, employment, the building of schools and the provision of seeds.¹⁰² For their part, these communities promise to refrain from interfering with logging activities. Prior to recent efforts to recentralise commercial licences, companies colluded with communities to obtain small-scale timber concessions – which were often only granted to local ethnicities¹⁰³ – in order to log wider areas of forest as well as pay lower royalties and licence fees.¹⁰⁴ As such, accelerated deforestation has generally taken place regardless of whether communities have opposed or cooperated with timber companies.

Despite the fact that the bargaining power of local communities vis-à-vis timber companies has probably strengthened under *Otda*, they remain essentially disenfranchised from the management of their local forests. As discussed above, the legal framework makes no serious effort to recognise *adat*

93 See Idris Arief, 'Janji pada Anak Cucu Jangan hanya Slogan [Promises to the Grandchildren are Only Slogans]', *Fajar Makassar*, 17 March 2008.

94 See generally Joyotee Smith et al., 'Illegal Logging, Collusive Corruption and Fragmented Governments in Kalimantan, Indonesia', in Tacconi ed, note 9 above.

95 See McCarthy, note 9 above at 165.

96 See Purwanto, note 9 above.

97 See Contreras-Hermosilla, Gregersen and White, note 78 above at 37. See also Sukowaluyo Mintorahardjo and Bambang Setiono, 'Mengendalikan Illegal Logging melalui Perbankan [Controlling Illegal Logging through Banking]', *Indonesian Financial Transaction Reports and Analysis Centre*, 4 July 2003.

98 See Barr, note 14 above at 19. See also International Crisis Group (ICG), *Indonesia: Natural Resources and Law Enforcement – Asia Report No. 29 of 2001* (Jakarta/Brussels: ICG, 2001).

99 See Resosudarmo, note 2 above at 237.

100 See Resosudarmo, note 3 above at 112. See also Christopher Barr et al., 'Decentralization's Effects on Forest Concessions and Timber Production', in Barr et al. eds, note 1 above.

101 See generally Rona Dennis et al., 'Fire, People, and Pixels: Linking Social Science and Remote Sensing to Understanding Underlying Causes and Impacts of Fires in Indonesia', 33 *Human Ecology* 465 (2005).

102 See Palmer and Engel, note 2 above at 2134. See also G. A. Guritno, M. Agung Riyadi and Hendri Firzani, 'Belantara di Ketiak Cukong [Jungles Under the Thumbs of Brokers]', *Gatra*, 30 January 2004.

103 Often referred to as *putra daerah*, literally 'sons of the region'. See McCarthy, note 9 above at 165.

104 See Casson and Obidzinski, note 9 above at 54. See also Barr et al., note 100 above at 102.

forests and provides few commercial rights over community forests. In addition, the commercial exploitation of timber under *Otda* still favours medium- and large-scale exploitation. The complex application procedures, cost of applying and finance required to conduct commercial logging mean that most local communities remain locked out of the market.¹⁰⁵ Communities that 'cooperate' with timber companies are therefore not equal partners. They may not be sufficiently informed of their partner's logging strategy¹⁰⁶ or have the capacity to ensure that it is sustainable. Evidence is also emerging that, although *Otda* has led to an increase in the number of forest community households receiving financial benefits from logging (from one percent to 90 percent according to one sample¹⁰⁷), local community shares are very small (according to one study, local communities were paid only nine percent of the market value of the harvested timber¹⁰⁸), agreements are often not fully honoured¹⁰⁹ and the benefits are not spread equitably.¹¹⁰ As discussed below, this ongoing disempowerment of forest communities serves to undermine attempts to promote sustainable forest management.

With only a few minor exceptions,¹¹¹ regional governments have done little to stem deforestation. By most accounts, their monitoring of logging activities has failed to prevent concession-holders from extracting timber outside the boundaries of their concessions.¹¹² They have been criticised for

neglecting to invest economic gains from the forestry sector into improved regulation,¹¹³ mismanaging reforestation programmes¹¹⁴ and generally failing to adopt a sustainable development paradigm. The problems are not limited to executive governments; sub-national legislatures have generally failed to prioritise sustainable forestry too. A survey of Regional Regulations of districts in East Kalimantan, for example, revealed that they virtually all lacked provisions to support the monitoring of logging and the prosecution of violators.¹¹⁵

The role of regional governments in deforestation under *Otda* is not limited to sins of omission; many have engaged in practices that have actively supported it. To the newly autonomous regional governments, greater economic independence from the Central Government spells broader and more secure political independence. As happened in Bolivia following decentralisation there, regional governments throughout Indonesia have seen logging as a key to establishing independent revenue streams.¹¹⁶ Before the *Otda* laws even came into effect, many district/municipal governments proceeded to issue great numbers of small-scale commercial timber licences.¹¹⁷ Most of these carried no obligations to engage in reforestation activities, or to refrain from clear-felling or logging in catchment areas.¹¹⁸ As some districts had not even established a regulatory agency, they clearly had no intention of ensuring that the holders of these licenses logged strictly according to the terms of their licences anyway.¹¹⁹ In addition, many of these

105 See Purwanto, note 9 above at 222. See also Resosudarmo, note 2 above at 234-239.

106 Moira Moeliono and Ahmad Dermawan, 'The Impacts of Decentralization on Tenure and Livelihoods', in Barr et al. eds, note 1 above.

107 See Palmer and Engel, note 2 above at 2138. See also McCarthy, note 9 above at 165.

108 See Moeliono and Dermawan, note 106 above at 117.

109 In one area, 67 percent of communities reported some kind of non-compliance with their respective agreements on the part of the company. See Palmer and Engel, note 2 above at 2139.

110 See Moeliono and Dermawan, note 106 above at 118.

111 See, e.g., Resosudarmo, note 3 above 124 (discussing pro-conservation policies in the provinces of West Sumatra and Jambi). See also 'Mulai 2008, Tak Satupun Kayu Keluar Papua [From 2008, Not A Single Piece of Wood Will Leave Papua]', *Gatra*, 5 December 2007 (discussing initiatives in Papua).

112 See Resosudarmo, note 2 above at 237.

113 *Id.* at 243.

114 Khairul Saleh, 'South Sumatra told to Heed to Reforestation', *The Jakarta Post*, 22 January 2008.

115 See Casson and Obidzinski, note 9 above at 49.

116 See McCarthy, note 35 above at 83-84.

117 See generally Barr et al., note 100 above.

118 James J. Fox, Dedi Supriadi Adhuri and Ida Aju Pradnja Resosudarmo, 'Unfinished Edifice or Pandora's Box? Decentralisation and Resource Management in Indonesia', in Budy P. Resosudarmo ed, *The Politics and Economics of Indonesia's Natural Resources* 92, 99 (Singapore: Institute of Southeast Asian Studies, 2005). See also Ali Akbar, 'Pemerintah Daerah Rejang Lebong Memberikan Izin Penebangan di Hulu DAS Musi [Rejang Lebong Local Government Grants Logging Permit in Musi River Catchment Area]', *Friends of the Earth Indonesia*, 26 March 2007.

119 See Resosudarmo, note 2 above at 237.

permits were in fact issued within zones on which large-scale concessions had been issued by the Central Government.¹²⁰ This in turn led to a 'race to the bottom', with large-scale concession-holders claiming that this was 'forcing' them to abandon selective cutting requirements within their licence zones.¹²¹ Districts/municipalities continued to issue these licences even after a Governmental Regulation was passed which clearly prohibited this,¹²² but it now appears most regions have ceased this practice in the hope of being able to negotiate a share of the revenues from large-scale concessions.¹²³ As such, logging remains a prioritised source of revenue.

The negative impact of regional governments on deforestation extends beyond the issuing of logging concessions. District governments in Kalimantan, for example, have passed legislation allowing illegally logged timber to be transported out of the district provided that the party transporting the timber pays certain fees to both the relevant district government and the Central Government.¹²⁴ At the time the *Otda* laws were passed, one district, East Kotawaringin, produced almost as much of this 'legalised' timber as it did legally logged harvests.¹²⁵ By allowing the private sale of illegally logged timber, these policies essentially condone its extraction. Regional governments have also promoted deforestation by issuing Plantation Permits (Izin Usaha Perkebunan or IUP), over large expanses of forested land. The main type of plantation is oil-palm, which now covers over six million hectares throughout Indonesia and is growing at the astonishing rate of 400,000 hectares per year.¹²⁶ Given that approximately 80 percent of new oil-palm plantations are approved on forested

land,¹²⁷ this has become an important driver behind deforestation. The problem is exacerbated further by the fact that, in addition to actually establishing plantations, many companies (and village cooperatives) simply use Plantation Permits as pretexts for logging.¹²⁸ Of the 2.5 million hectares of land cleared for oil-palm in East and West Kalimantan, for example, plantations have been established on only about 20 percent.¹²⁹ It is unclear whether this is done with the prior knowledge of the regional governments concerned or whether they are genuinely conned by companies using the promise of oil-palm revenues to engage in the clear-cutting of forest. The former scenario certainly appears to be the case in relation to recent proposals to develop a giant oil-palm plantation in the mountainous and infertile areas of Malinau District in East Kalimantan.¹³⁰

The Central Government is also playing a key role in supporting deforestation under *Otda*. Where it has retained decision-making powers it has not exercised them in support of sustainable forest management. For example, regional governments blame the Ministry of Forestry for being slow to formulate key policies.¹³¹ The Ministry has also been accused of breaching the Forestry Law by issuing an IUPHHK over protected peat land,¹³² and of being complicit in allowing the release of forested land for the granting for Plantation Permits.¹³³ Where decision-making has been devolved, the Central Government has proved ineffective at ensuring that it is compliant with laws relating to environmental sustainability.

120 *Id.* at 234. See also McCarthy, note 9 above at 163.

121 See Barr et al., note 100 above at 101.

122 Government Regulation 34/2002, as discussed in Part III(C) above.

123 See Barr et al., note 100 above at 105.

124 See Resosudarmo, note 2 above at 237.

125 See Casson and Obidzinski, note 9 above at 57.

126 Norman Jiwan, 'Realitas Kebijakan dan Perizinan Usaha Perkebunan: Pembelajaran dari Sektor Perkebunan Skala Besar Kelapa Sawit [Policy Reality and Plantation Licences: Lessons from the Large-Scale Oil-Palm Plantation Sector]', (paper presented at the Annual Congress of the Indonesian Customary Communities Alliance (AMAN), 18 March 2007).

127 Douglas Sheil and Imam Basuki, 'Future Rides on Land Use', *The Jakarta Post*, 30 March 2005, available at <http://www.thejakartapost.com/news/2005/03/30/future-rides-land-use.html>.

128 Letter from Friends of the Earth Indonesia to the Minister for Forestry and the Governor of Central Kalimantan, 7 July 2006. See also Casson and Obidzinski, note 9 above at 53.

129 Marieke Sandker, Aritta Suwarno and Bruce M. Campbell, 'Will Forests Remain in the Face of Oil Palm Expansion? Simulating Change in Malinau, Indonesia', *12 Ecology and Society* 37, 40 (2007).

130 *Id.*

131 See Saleh, note 114 above.

132 Setri Yasra et al., 'Menyingkap Surat Izin Menteri Kaban [Exposing Minister Kaban's Licence]', *Tempo Interaktif*, 3 December 2007.

133 See Jiwan, note 126 above.

Although many of the Regional Regulations discussed above clearly contradict higher laws, such as the Constitution and the Forestry Law, only a small portion of Regional Regulations have been annulled.¹³⁴ As discussed below, some of these problems arise from the way in which the Central Government has attempted to retain decision-making rights over key aspects of forestry while offloading the responsibility to fund and implement forestry management on the ground. This is one of several problems brought about partly as a result of the legislative weaknesses to which this essay now turns.

5

HOLDING LAW RESPONSIBLE

As the preceding discussion has demonstrated, *Otda* and the political economy in which it emerged have brought a range of new challenges for sustainable forest management in Indonesia. Many of these challenges involve the classic tale – common to tropical forest management worldwide – of gaps between law-on-paper and law-in-practice. However, to stop the analysis here would be to ignore another type of gap: gaps *within* law-on-paper. If the call of one environmental lawyer to ‘take Indonesian statutory law seriously’¹³⁵ is to be heeded, it is necessary to mind this other type of gap. Doing so exposes the ways in which Indonesian law both passively and actively supports deforestation, and in turn points to ways law can be used to support sustainable forest management in the country. With this purpose in mind, the following sections highlight five ways in which law

is partly responsible for the current dynamics driving deforestation.

5.1 Flawed Division of Authority between the Central Government and the Regions

The laws governing *Otda* and forest management are seriously flawed in the way they purport to divide authority between the Central Government and the regions. These flaws can be separated into three inter-related categories: an acute lack of clarity in relation to divisions of authority, inappropriate allocations of authority and an absence of secure rights for the regions. Each of these problems, discussed in turn below, result in practices that facilitate deforestation.

5.1.1 Lack of Clarity about Divisions of Power

The lack of clarity as to the division of authority has led to a situation in which *both* regional governments and the Central Government engage in the exploitation of timber but *neither* the regions nor the Central Government is prepared to accept responsibility for ensuring sustainable forest management. This is evident, for example, in the treatment of ex-timber concession land. While both levels of government have scrambled to issue timber licences, neither appears particularly interested in monitoring the forests left standing following the completion of logging in a particular area. This is despite the fact that these areas are particularly vulnerable to deforestation given that access roads already exist in most of them, thus decreasing the cost of bringing heavy machinery into the area.¹³⁶

One of the causes of the lack of clarity is the lack of a system for resolving inconsistencies between different legislative instruments. Rather than allowing the development of jurisprudence on the resolution of conflicts of laws, Indonesia has a tradition of simply issuing new laws to clarify

134 See, e.g., Yance Arizona, Disparitas Pengujian Peraturan Daerah: Suatu Tinjauan Normatif [Disparities in Reviewing Regional Regulations: A Normative Appraisal] (unpublished paper, 2008) available at <http://yancearizona.wordpress.com>. See also ‘Thousand-Island Dressing’, *The Economist*, 12 November 2004.

135 Sarah Waddell, *The Role of the ‘Legal Rule’ in Indonesian Law: Environmental Law and Reformasi of Water Quality Management* (Doctoral thesis completed at the University of Sydney, 2004).

136 See generally Nana Suparna, ‘Illegal Logging dari Sisi Sistem Pengelolaan Hutan [Illegal Logging from a Forest Management System Perspective]’, unpublished paper (on file with author) produced on behalf of the Indonesian Forest Concession Holders, May 2005.

inconsistencies.¹³⁷ When it is not politically feasible to do this, the inconsistencies simply remain in force. The direct contradiction between the *Otda* laws, which demand the decentralisation of forest management, and the Forestry Law, which ignores decentralisation, is a classic example of this. This has given rise to the current situation where regional governments cite the *Otda* laws to further their interests while the Ministry of Forestry cites the Forestry Law.

The lack of a clear hierarchy of laws also leads to unclear centre-region power divisions. For example, districts/municipalities have issued Regional Regulations which contradict Ministerial Regulations from the Minister of Forestry¹³⁸ on the basis that Ministerial Regulations (Peraturan Menteri or PerMen) are not mentioned in Article 7(1) of Law 10/2004,¹³⁹ which sets out a hierarchy of Indonesian legal instruments. Regional Regulations, on the other hand, are mentioned in this hierarchy. However, Law 10/2004 also mentions that Ministerial Regulations are 'binding' (Art.7(4) and the Elucidation), which in turn allows the Ministry of Forestry to ignore Regional Regulations that it deems are inconsistent with its Ministerial Regulations. This mismatch is compounded by the vague drafting of many of the legislative provisions which purport to allocate authority. One example of this is the way Governmental Regulation 6/2007 states that Forest Management Units (Kesatuan Pengelolaan Hutan or KPH) are to be established in order to manage forests on an ecosystem basis, but does not describe how exactly these units will interact with regional governments. Another example is Governmental Regulation 45/2004,¹⁴⁰ which makes vague calls for government agencies to coordinate with each other for the protection of

forests. According to this Regulation, the protection of forests ultimately comes under 'the authority of the Central Government *and or* Regional Governments' (Art.3(1)) (emphasis added). Such provisions – predictably – lead to systemic buck passing, as has also occurred under similar circumstances with decentralisation in the neighbouring Philippines.¹⁴¹

5.1.2 Inappropriate Allocations of Power

Where the division of authority is actually clear, it is often poorly suited to the goal of sustainable forest management. This is particularly the case with the *Otda* laws. As discussed above, for example, the Fiscal Balance Law allows regions to obtain a much larger share of forestry revenues than of revenues from income tax, oil or gas. This creates clear incentives to over-exploit timber at the expense of investment in other sectors. This over-exploitation is exacerbated by the fact that policing remains under the exclusive jurisdiction of the Central Government. This means that, even where there is regional political will to support conservation, law enforcement efforts remain unaccountable to regional governments and largely unresponsive to local conditions. This goes against lessons from decentralisation in countries as diverse as South Africa¹⁴² and Finland,¹⁴³ which instead point the importance of decentralised policing. The same can be said of the justice system, which the Regional Governance Law also makes the exclusive jurisdiction of the Central Government. This has resulted in situations like the refusal of the West Tanjung Jabung District Court to apply Regional Regulations in relation to forest crimes,¹⁴⁴ with the

137 Jason M. Patlis, 'New Legal Initiatives for Natural Resource Management in a Changing Indonesia: the Promise, the Fear and the Unknown', in Resosudarmo ed, note 118 above. (discussing how a new piece of legislation was passed to resolve inconsistencies between legislation relating to mining in protected forests).

138 McCarthy, note 9 above at 162. See also Resosudarmo, note 2 above at 242.

139 Law No. 10 of 2004 concerning the Formation of Legislation.

140 Governmental Regulation No. 45 of 2004 concerning the Protection of Forests.

141 See generally Leonora C. Angeles and Francisco A. Magno, 'The Philippines: Decentralization, Local Government and Citizen Action', in Oxnorth, Tulchin and Selee eds, note 8 above.

142 Steven Friedman and Caroline Kihato, 'South Africa's Double Reform: Decentralization and the Transition from Apartheid', in Oxnorth, Tulchin and Selee eds, note 8 above.

143 See generally Sofia R. Hirakuri, *Can Law Save the Forest? Lessons from Finland and Brazil* (Bogor: CIFOR, 2003).

144 Sudirman, Dede Wiliam and Nely Herlina, *Local Policy-making Mechanisms: Processes, Implementation and Impacts of the Decentralized Forest Management System in Tanjung Jabung Barat District, Jambi, Sumatra 17* (Bogor: CIFOR, 2005).

regional government powerless to order it to do so. For reasons such as this, an emerging best practice in relation to the decentralisation of forest management is to decentralise the adjudication of local disputes.¹⁴⁵ The current *Otda* laws do the opposite.

The Forestry Law also contributes to a division of authority unsuited to halting deforestation. The Law is, in the words of the Regional Representative Council (Dewan Perwakilan Daerah, or DPD), 'centralistic and absolute'.¹⁴⁶ This contributes to deforestation in three ways. Firstly, as discussed above, the retention of decision-making power with the Central Government has led to all levels of government profiteering from forest exploitation while none fully accepting conservation obligations. Secondly, the fact that the Forestry Law has allowed the Ministry of Forestry to recover its monopoly on commercial timber licences is a driving force behind the authorisation of clear-felling for plantations (whether or not these eventuate), because regional governments are keen to exercise the greater relative authority they now have in the issuing of Plantation Permits as compared to commercial timber licences.¹⁴⁷ Thirdly, it has also allowed the Central Government to revoke positive steps taken by regional governments in support of sustainable forest management. This occurred in relation to Wonosobo District's Community Forestry Regional Regulation,¹⁴⁸ which promoted greater involvement of forest communities in forest management.¹⁴⁹ The Regulation was ultimately annulled by the Ministry of Home Affairs, allegedly on the instigation of the Minister of Forestry, for conflicting with higher sources of law.¹⁵⁰ Many of these problems could be improved if the Forestry Law was consistent with the *Otda* laws and clearly devolved decision-making authority to the regions while reserving an

informational, coordination and minimum standard-setting role for the Central Government.¹⁵¹

5.1.3 Insecure Transfer of Power to the Regions

Where powers have been transferred to the regions, the legal framework has ensured that this is done in a tenuous manner. Although the *Otda* laws are quasi-constitutional in nature, in that they govern the distribution of power between different levels of government, they are not constitutionally entrenched – the Constitutional provision in relation to regional autonomy essentially creates a *carte blanche* for the Central Government to determine decentralisation policy at will.¹⁵² Rather, the *Otda* laws are of the same status as other National Laws, meaning that they can be revoked or amended with relative ease at any time.¹⁵³ The status of political power in the regions is therefore very insecure. In fact, the Regional Governance Law states that 'regions can be abolished and merged with other regions if they are unable to carry out regional autonomy' (Art. 6(1)). This insecurity has led to the situation described in Part IV above, where regional governments have chosen to over-exploit timber resources in order to assert their political autonomy, through independent revenue streams, to a point beyond which it cannot be wound back.¹⁵⁴

The ways in which the Ministry of Forestry has attempted to wrest back power from the regions demonstrates that the perceived insecurity of regional powers is not without grounds. Although the Central Government's catchcry is that regional

145 See Agrawal and Ribot, note 75 above at 492.

146 'PAH II Usulkan Sinkronisasi Sejumlah Undang-Undang [Ad Hoc Committee II Recommends the Synchronisation of Laws]', *Kompas*, 24 November 2006.

147 Barr et al., note 100 above at 106. See also Part IV above.

148 Wonosobo District Regional Regulation No. 22 of 2001 concerning Community-based Forest Management.

149 The importance of community-based forestry is discussed in Part V(D) below.

150 Carolyn Marr, 'Forests and Mining Legislation in Indonesia', in Lindsey ed, note 65 above.

151 See, e.g., Wicky Meynen and Martin Doornbos, 'Decentralising Natural Resource Management: A Recipe for Sustainability and Equity?', in Ribot and Larson eds, note 3 above. See also Jesse C. Ribot, *Waiting for Democracy: The Politics of Choice in Natural Resource Decentralization* 5 (Washington, D.C.: World Resources Institute, 2004).

152 See Part III(A) above. See also Gary F. Bell, 'The New Indonesian Laws relating to Regional Autonomy: Good Intentions, Confusing Laws', 2 *Asian-Pacific Law & Policy Journal* 1, 11 (2001).

153 See Patlis, note 137 above at 232.

154 This situation is not without precedent, as a similar situation occurred in Kumaon, India, during a colonial experiment with decentralisation in the 1930s. See Ribot, note 151 above at 54.

governments are 'not yet ready for regional autonomy', in reality the Central Government is at least equally unready for it¹⁵⁵ – as demonstrated by initiatives such as Governmental Regulation 6/2007. Such attempts by central governments to thwart the transfer of power to sub-national governments constitute, unsurprisingly, a worldwide phenomenon that has affected almost every attempt to implement decentralisation.¹⁵⁶ It is therefore crucial for decentralisation to involve the transfer of powers as 'secure rights' rather than 'retractable privileges'.¹⁵⁷ In this way, law can play a key role in supporting the willingness of all stakeholders to trust in the long-term continuity of the *Otda* reforms and hence act in a more sustainable manner.¹⁵⁸

5.2 Inconsistent, Ambiguous and Hollow Legislation

The laws governing forest management under *Otda* are replete with examples of inconsistent and ambiguous provisions, many of which serve to support unsustainable forest practices. The Forestry Law contains provisions such as a requirement that commercial loggers 'work together with local community cooperatives' (Art. 30, emphasis added) without properly defining what 'working together with' actually means. Even the Elucidation, which is intended to shed light on the meaning of ambiguous provisions, simply states that this means allowing these cooperatives to obtain 'direct benefits from the forest in order to improve their welfare and quality of life, while fostering a sense of ownership'. The Forestry Law is equally vague as to whether breaches of timber concessions within concession zones should be the subject of criminal or administrative penalties. This lack of clarity recently led to the acquittal of a well-known timber baron, Adelin Lis, after the Minister of Forestry wrote a letter to the court claiming that the criminal charges against Mr Lis for illegal logging should be

processed administratively by the Ministry of Forestry.¹⁵⁹

The uncertainty created by such provisions is compounded by ambiguities within the *Otda* laws, such as an implied repeal provision which states that 'all legislation relating to regional governance remains in force to the extent that it is not replaced or inconsistent with this Law' (Art.238). This provision provides no guidance as to how to determine exactly which provisions have been replaced or are inconsistent.¹⁶⁰ Poor legislative drafting also characterises Regional Regulations, many of which are inconsistent with higher legislation. In fact, some Regional Regulations even claim revoked National Laws as their legal basis.¹⁶¹

Apart from some recent examples from the newly established Constitutional Court, the Indonesian judiciary is generally highly subservient to the Executive¹⁶² and constrained by tradition and politics in its capacity to introduce the kind of creative statutory interpretation required in order to resolve the ambiguities and inconsistencies described above.¹⁶³ The result of this is that the ambiguities and inconsistencies have undermined law's authority as a useful tool for regulating decentralised forest management. Instead, these problems have become a pretext for all stakeholders to simply ignore the law entirely.¹⁶⁴ To paraphrase one observer, the current situation is characterised more by de facto than de jure decentralised forest management.¹⁶⁵ Inconsistencies between legislation

155 See Hidayat and Antlöv, note 46 above at 279.

156 Anne M. Larson and Jesse C. Ribot, 'Democratic Decentralisation through a Natural Resource Lens: An Introduction', in Ribot and Larson eds, note 3 above.

See also Meynen and Doornbos, note 151 above at 244.

157 See Ribot, note 151 above at 81.

158 *Id.* at 54.

159 Agus Supriyanto, 'Walhi: Menteri Kaban Harus Tanggung Jawab [Friends of the Earth: Minister Kaban Must Take Responsibility]', *Tempo Interaktif*, 15 July 2007.

160 A similar provision is found in Article 82 of the Forestry Law. Patlis describes implied repeals such as this as a key force in undermining legislative certainty in Indonesia: Patlis, note 137 above at 245.

161 See Sudirman, Wiliam and Herlina, note 144 above at 13.

162 See generally Tim Lindsey and Mas Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia', in Lindsey ed, note 150 above.

163 See Bertrand, note 6 above at 595.

164 See Purwanto, note 9 above at 218.

165 See Resosudarmo, note 2 above at 242.

can also lead to norm shopping. In some cases, for instance, offenders have been charged and convicted under Regional Regulations with softer penalties than those under the relevant National Laws.¹⁶⁶ Similarly, various National Laws undermine each other by stipulating vastly different sanctions for the same or similar actions. For example, the maximum financial penalty for intentional violation of the Conservation of Living Organisms Law¹⁶⁷ is IDR 200 million (Art.40), while the same violation may be subject to an IDR ten billion fine under the Forestry Law (Art.78). This opens up opportunities for the ‘cherry picking’ of penalties, where prosecutors may be pressured or bribed into charging alleged offenders under the legislation with most lenient penalties.¹⁶⁸ Needless to say, this weakens the overall enforcement of these laws.

Another serious weakness with the legislative framework for the governance of forestry under *Otda* (and with Indonesian law generally) is a tendency for the framework laws to delegate legislative powers over entire matters to the executive. While it is good legislative practice to defer the regulation of technical or fast-changing matters to subordinate legislation, in the case of the Forestry Law and the *Otda* laws this has been done across the board, without any clearly identifiable rationale and in relation to some of the most crucial issues.¹⁶⁹ The Forestry Law, for example, contains no substantive provisions on monitoring; altering the classification of forests; forest rehabilitation; *adat* forests; the division of authority between different levels of government; public participation; or administrative sanctions. All these areas are simply mentioned and left to subordinate legislation.¹⁷⁰

166 Editorial, ‘Lemah, Penegakan Hukum Lingkungan [Environmental Law Enforcement is Weak]’, *Bali Post*, 3 September 2007.

167 Law No. 5 of 1990 concerning the Conservation of Living Organisms and their Ecosystems.

168 See Patlis, note 137 above at 240.

169 See, e.g., USAID Democratic Reform Support Program, Stocktaking on Indonesia’s Recent Decentralization Reforms (USAID: Jakarta 2006) (discussing this issue in relation to the *Otda* laws) and Patlis, note 10 above at 15 (in relation to the Forestry Law).

170 See Forestry Law Arts. 65 (monitoring), 19 (altering classification), 42 (forest rehabilitation), 67 (*adat* forests), 66 (division of authority), 70 (public participation) and 80 (administrative sanctions).

This ‘hollow legislative drafting’ undermines sustainable forest management in three ways. Firstly, the drafting of subordinate legislation is done behind closed doors by unelected public servants. Secondly, in many cases the executive simply does not follow-up with any subordinate legislation,¹⁷¹ thus allowing key issues to slip from the agenda – as has apparently occurred with the issue of *adat* forests. Thirdly, as discussed above, subordinate legislation has opened up opportunities for the Central Government to claw back rights, without responsibilities, from the regions.¹⁷²

The problems described above are most likely the result of both poor capacity and deliberate efforts to undermine the rule of law in the forestry sector.¹⁷³ Both these factors in turn pose difficulties for attempts to improve legislative drafting so that law can play a more effective role in combating deforestation. To be sure, tackling these inconsistencies, ambiguities and patterns of excessive delegation in statutory law – even where it is politically possible – is unlikely of itself to bring about instant improvements in implementation. However, better-drafted laws and elucidations are likely to give more leverage to stakeholders seeking positive changes to forest management.¹⁷⁴

5.3 Legislatively Entrenched Departmentalism

Under the New Order, the People’s Representative Council simply acted as a rubber stamp for legislation that was drafted entirely by the Executive arm of government. Although the Council now has the right to draft its own legislation, in practice this rarely happens; National Laws continue to be formulated almost exclusively by the Executive. When this happens, it is rarely a whole-of-government approach. Instead, Executive-drafted National Laws are drafted by a single Central Government department. This is not simply a common practice but actually a legislated

171 See, e.g., Colchester, note 12 above at 47.

172 See Fay and Sirait, note 27 above at 134 and Ribot, note 151 above at 54.

173 See Patlis, note 10 above at 7.

174 *Id.* at 13. See also Bertrand, note 6 above at 602.

requirement under Law 10/2004.¹⁷⁵ Article 18(1) of this Law states, for example, that '[d]raft National Laws proposed by the President are to be prepared by a Minister... according to the scope of duties and responsibilities concerned'.

This legislatively entrenched departmentalism hampers law's capacity to reduce deforestation in several ways. Firstly, it often results in a lack of coordination with other government departments. This in turn can result in conflicting laws, as occurred with the drafting of the Forestry Law and the *Otda* laws. The problems associated with such conflicts have been addressed above. Secondly, drafting by a single department can open up opportunities for the department concerned to deliberately develop the law to serve its own interests rather than the national interest.¹⁷⁶ Thirdly, the departmental approach to legislative drafting prevents the emergence of holistic and innovative legislative solutions. As discussed above, it is clear that deforestation under *Otda* is characterised by complex dynamics that will require a range of integrated solutions spanning several areas of governance.¹⁷⁷ One important solution, for example, is to support the livelihoods of forest communities in ways consistent with sustainable forest management. However, the system of legislatively entrenched departmentalism means that forestry legislation must be developed by the Minister of Forestry, whose department's expertise and responsibilities do not cover the socio-economic welfare of forest communities. The result is the persistence of scientific forestry approaches, underscored by a view that only the Ministry of Forestry and its scientifically-trained public servants are capable of effectively managing forests.¹⁷⁸

5.4 Marginalisation of Forest Communities

By marginalising forest communities, Indonesian law actively undermines efforts to combat deforestation. A clear consensus is emerging worldwide on the importance of abandoning scientific forestry in favour of policies that recognise the rights of forest communities to meaningfully participate in forest management and obtain an equitable share of the benefits from forest exploitation. Principle 22 of the United Nations' *Rio Declaration on Environment and Development*,¹⁷⁹ for example, declares that indigenous people and other local communities 'have a vital role in environmental management and development' and that states should support their interests and 'enable their effective participation in the achievement of sustainable development'. It is now becoming best practice for governments and non-governmental agencies to treat forest communities as 'natural allies'¹⁸⁰ in the conservation of forests. Almost a quarter of the entire Brazilian Amazon, for example, is being demarcated for indigenous people.¹⁸¹ In one of Indonesia's neighbours, the Philippines, Ancestral Domain Claims now cover almost 20 percent of all forests.¹⁸²

The rapid rates of deforestation in Indonesia provide a lucid demonstration of why Indonesian law needs to reflect an understanding of forest communities as natural allies in attempts to curb deforestation. Firstly, it is clear that without the assistance of forest communities, no level of government has the capacity to effectively monitor the sustainable management of the 70 percent of Indonesia's land mass currently classified as forests.¹⁸³ In the Betung

¹⁷⁵ See Patlis, note 137 above at 244.

¹⁷⁶ *Id.* at 236.

¹⁷⁷ See McCarthy, note 35 above at 83.

¹⁷⁸ See, e.g., Campbell, note 37 above at 120. On the way 'technical' solutions can be used to marginalise local communities, see generally James Manor, 'User Committees: A potentially Damaging Second Wave of Decentralisation?', in Ribot and Larson eds, note 3 above.

¹⁷⁹ United Nations General Assembly, *Report of the United Nations Conference on Environment and Development (3-14 June 1992)*, Rio de Janeiro, Doc A/CONF.151/26 (Vol. I), Annex I (1992).

¹⁸⁰ WWF, *Statement of Principles on Indigenous Peoples and Conservation* (Gland 1996), paragraph 1.

¹⁸¹ Josef Leitmann, 'Lessons from Brazil in Tackling Deforestation', *The Jakarta Post*, 28 September 2004, available at <http://www.thejakartapost.com/news/2004/09/28/lessons-brazil-tackling-deforestation.html>.

Note that this demarcation does not involve ownership. ¹⁸² See Fay and Sirait, note 27 above at 137.

¹⁸³ *Id.*

Kerihun National Park of West Kalimantan Province, for example, each forestry official is responsible for monitoring an area of almost 30,000 hectares.¹⁸⁴ Secondly, the marginalisation of forest communities under the New Order and into the *Otda* era, as described throughout this essay, has driven many of these communities to directly engage in illegal logging or to support deforestation by commercial operators in exchange for employment and/or other forms of payment; after all, forest communities will only support sustainable options to the extent that these exist.¹⁸⁵ Thirdly, forest communities with customary ties to their local forests are likely to possess important indigenous knowledge relevant to their sustainability.¹⁸⁶ The Dayak of Kayan Mentarang National Park in East Kalimantan, for example, have managed to preserve some degree of *adat* rule despite the assault on it under the New Order. Their *adat* involves complex regulations about how frequently and intensely forest products may be harvested and, more recently, has shown it can evolve by incorporating rules about the trapping and hunting of rare fauna.¹⁸⁷

The transfer of power to levels of government that are closer to local communities should, theoretically, open more space for the participation of forest communities in forest management.¹⁸⁸ The *Otda* laws, however, are 'aimed at modern, non-*adat* spheres of public life'¹⁸⁹ and have done little to promote the devolution of forest management and benefit-sharing to forest communities.¹⁹⁰ 'Crackdowns' on illegal logging continue to target small-scale loggers, usually from forest communities,¹⁹¹ such that Indonesians often talk of

the law as being like a kitchen knife: sharp for those underneath it but blunt for those above it. Part of the problem is that forestry laws continue to exhibit a bias against the use of timber in pursuit of basic livelihoods.¹⁹² As discussed above, although the concept of community forests has emerged, this affords recognised communities only a weak range of rights. No serious legislative efforts have been made to wind back the suppression of *adat* under the New Order through its massive land grabs, hyper-centralised governance and refusal to acknowledge the indigeneity of forest communities. While the fact that *adat* is mentioned in the Forestry Law is an important step forward, that its recognition is left to subordinate legislation has so far nullified its legislative effect.

Even if subordinate legislation is eventually passed in relation to the recognition of *adat* forests, it will be within a legal framework that provides limited and insecure rights to forest communities. The Forestry Law creates *adat* forests as a subset of state forests and explicitly allows the interests of *adat* communities, where they are recognised, to be trumped by the national interest. The fact that this Law mentions in three different provisions that *adat* communities can cease to exist means that even where these communities can obtain rights, they rest on very insecure foundations. Unsurprisingly, these provisions have drawn criticism from the United Nations Committee on the Elimination of Racial Discrimination. The Committee noted in 2007, for example, that these provisions exist in the context of a legal framework which does not contain 'appropriate safeguards guaranteeing respect for the fundamental principle of self-identification in the determination of indigenous peoples'.¹⁹³

It is clear from the preceding discussion that law plays a key role in marginalising forest communities, which in turn has adverse effects on the conservation of forests. Law also has the potential to make these

184 See Resosudarmo, note 3 above at 123.

185 See Colchester, note 12 above at 67.

186 See Eghenter, note 85 above at 174.

187 *Id.* at 166-167.

188 See, e.g., Ribot and Larson, note 3 above at 3 and Barr et al. note 1 above at 7.

189 Mason C. Hoadley, *The Role of Law in Contemporary Indonesia* (Lund: Lund University Centre for East and Southeast Asian Studies, Working Paper No. 4, 2004) available at http://www.lu.se/images/Syd_och_sydstasiestudier/working_papers/mason.pdf.

190 See Resosudarmo, note 2 above at 236.

191 See generally Krystof Obidzinski, 'Illegal Logging in Indonesia: Myth and Reality', in Resosudarmo ed., note 118 above. See also Colchester, note 12 above at 49.

192 Luca Tacconi, Marco Boscolo and Duncan Brack, *National and International Policies to Control Illegal Forest Activities 27* (Bogor: CIFOR, 2003).

193 United Nations Committee on the Elimination of Racial Discrimination, *Seventy-first session: Concluding observations of the Committee on the Elimination of Racial Discrimination – Indonesia*, Doc CERD/C/IDN/CO/3, 15 August 2007, paragraph [15].

communities allies in efforts to support sustainable forest management. The *Otda* laws could, for example, establish sets of criteria which, when met by forest communities, would require district/municipal governments to de-concentrate (or even devolve) authority over certain aspects of forest management. This may entail the recognition of an *adat* council with policy-making and quasi-judicial powers. The Forestry Law could also establish *adat* forests or community forests as an independent category of forests rather than a mere subset of state forest.¹⁹⁴ Importantly, the Forestry Law should include more details on the recognition of community rights over forests (rather than delegating this to the Executive) and abolish the provisions which weaken the security of *adat* rights.

It is important to note that the recognition of *adat* is not without its own problems. These issues have been well-documented.¹⁹⁵ They range, for example, from the potential for elite capture and social marginalisation within customary communities to problems with the assumption that customary law is necessarily compatible with environmental sustainability. As the claims of *adat* communities are for collective rights based on shared traditions, difficulties may arise in reaching a consensus in a given community about the precise contents of its *adat* law. In addition, a particular danger in Indonesia is leaving trans-migrant forest communities out of the equation by preferencing groups with traditional ties to their local forests. Such problems call on law-makers to conceive community forest management

as a dynamic process;¹⁹⁶ they do not, however, detract from the importance of ensuring that Indonesian law facilitates the alignment of conservation and the rights of forest communities.

5.5 Lack of Legislative Support for Good Governance in Forestry

Another way in which law is partly responsible for deforestation in Indonesia is by its failure to support a number of principles which generally fall under the broad banner of good governance. Firstly, the forestry sector (like many others in Indonesia) is characterised by a lack of public participation in policy-making. In terms of preventing deforestation, this is problematic because it means laws are more likely to leave out important information about local conditions. Local communities are also less likely to feel a sense of 'ownership' over laws that have been formulated without broad-based participation, thus increasing the risk of gaps between law and practice.¹⁹⁷ The Forestry Law and *Otda* laws, however, were rushed through the People's Representative Council with minimal public involvement.¹⁹⁸ Participation in the formulation of Regional Regulations, despite being passed by levels of government that are supposedly closer to the people, is often even worse. Malinau District, for example, has simply borrowed almost verbatim a range of legislation on forestry matters from a nearby district with significantly different social and ecological conditions.¹⁹⁹ Law must shoulder some of the blame for this. The Forestry Law states that citizens have a right to provide 'information, suggestions and opinions' (Art.68(2)) in relation to forest management but, in the absence of an elaboration on what this entails, the view that only technical input is valuable has persisted. A National Law establishing mechanisms for participation in the formulation of both National Laws and Regional Regulations – such as making draft legislation publically available and allowing members of the public to contribute to parliamentary committee

¹⁹⁴ See Campbell, note 37 above at 122.

¹⁹⁵ See, e.g., Meynen and Doornbos, note 151 above (discussing traditional groups as 'male spaces'); Wollenberg and Kartodihardjo, note 23 above (discussing issues of representation and accountability); Lungisile Ntsebeza, 'Democratic Decentralisation and Traditional Authority: Dilemmas of Land Administration in Rural South Africa', in Ribot and Larson eds, note 3 above (discussing 'decentralised despotism'); Anne M. Larson, 'Decentralization and Forest Management in Latin America: Towards a Working Model', 23 *Public Administration and Development* 211 (2003) (questioning the sustainable use of forests by customary communities); Campbell, note 37 above (discussing the cooptation and corruption of traditional leaders); and Resosudarmo, note 3 above (discussing the capacity of customary communities to engage in long-term planning).

¹⁹⁶ See Campbell, note 37 above at 116.

¹⁹⁷ See generally Patlis, note 10 above. See also Colchester, note 12 above at 65 and McCarthy, note 9 above at 155.

¹⁹⁸ See, e.g., Resosudarmo, note 3 above at 127 and Tan, note 52 above at 695.

¹⁹⁹ See Patlis, note 10 above at 7.

hearings – may go some way toward improving this situation.²⁰⁰

Amending certain legislative provisions relating to the political system would also be an important step. Local participation is hampered, for example, by the Political Parties Law passed in January 2008,²⁰¹ which requires political parties to maintain branches in at least 60 percent of provinces and 50 percent of districts/municipalities within those provinces (Art.3(2)). The effect of this is to prevent the emergence of local political parties advocating local concerns.²⁰² This is compounded by the fact that the Regional Representative Council – the house of the national legislature charged with representing the interests of the regions – has no legislative teeth; it can essentially only propose and discuss draft legislation. Providing this institution with some real power, such as a veto right over certain categories of legislation, may encourage national legislators to consult more seriously with a broader range of citizens outside Jakarta.²⁰³

The legal framework for decentralised forest management also undermines good governance by not adequately supporting public interest litigation. Litigation is an important tool in combating

environmental violations such as deforestation, particularly where state monitoring is suboptimal.²⁰⁴ However, many of the ingredients necessary to make litigation effective are absent from Indonesian law. There is no comprehensive system for compelling other parties to disclose relevant information²⁰⁵ or a witness protection programme.²⁰⁶ Legal aid is chronically under-resourced and focussed mainly on large-scale test cases. Judicial reviews of administrative decisions are possible but rarely successful, partly due to an absence of a requirement for governments to tender written reasons for key decisions.²⁰⁷ In addition, recent jurisprudence in the Supreme Court (Mahkamah Agung or MA) has demonstrated serious flaws in the Regional Governance Law in relation to the judicial review of Regional Regulations. Although the Supreme Court would ordinarily have the right to undertake judicial reviews of Regional Regulations,²⁰⁸ the Regional Governance Law creates a provision whereby the President can annul Regional Regulations without specifying how this affects the judicial review of Regional Regulations. The Supreme Court has used this confusion to essentially withdraw from resolving disputes between the regions and the Central Government. For example, it has refused to review the substance of a Regional Regulation in a case brought by local citizens simply on the basis that the Regional Regulation was validly passed by a regional legislature.²⁰⁹ The Supreme Court has also

200 Some regional governments have taken the initiative to pass Regional Regulations on this issue. These appear to be having some success in improving public participation in policy-making: See, e.g., Edriana Noerdin, Siti Aripurnami and Yanti Muchtar, *Decentralization as a Narrative of Opportunity for Women in Indonesia* (Jakarta: Women's Resources Institute, 2007) (discussing *Mataram Municipality Regional Regulation No. 27 of 2001 on Community Stakeholder-based Development Consultations*).

201 Law No. 2 of 2008 on Political Parties.

202 Ati Nurbaiti, 'Autonomy at Local Party Level Urgent, Expert Says' *The Jakarta Post*, 28 August 2002, available at <http://www.thejakartapost.com/news/2002/08/28/autonomy-local-party-level-urgent-expert-says.html>. A detailed discussion of this concept in the context of forest management can be found in Jianchu Xu and Jesse C. Ribot, 'Decentralisation and Accountability in Forest Management: A Case from Yunnan, Southwest China', in Ribot and Larson eds, note 3 above.

203 See, e.g., 'Usulan Hak Veto DPD Cenderung Ditolak DPR [People's Representative Council Appears to Reject Right of Veto Proposal for the Regional Representative Assembly]', *Hukumonline*, 19 June 2006.

204 See generally Tom Tietenberg, *Private Enforcement of Environmental Regulations in Latin America and the Caribbean: An Effective Instrument for Environmental Management?* (Washington, D.C.: Paper prepared for the Inter-American Development Bank 1996).

205 Yoseph Suardi Sabda, 'Some Practical Problems in Stolen Asset Recovery', *The Jakarta Post*, 2 February 2008, available at <http://www.thejakartapost.com/news/2008/02/02/some-practical-problems-stolen-asset-recovery.html>.

206 See International Crisis Group, note 98 above at ii.

207 See Patlis, note 10 above at 16.

208 Law No. 5 of 2004 concerning the Amendment of Law No. 14 of 1985 concerning the Supreme Court Art. 1; Law No. 4 of 2004 concerning Judicial Authority Art 11.

209 'MA Tegaskan Perda Pelarangan Pelacuran Tidak bertentangan dengan UU [Supreme Court Emphasises that Prostitution Ban Regional Regulation does not Conflict with Law]', *Antara News*, 13 April 2007.

barred judicial review of Regional Regulations that are more than 180 days old.²¹⁰ These moves severely limit the capacity of local citizens to hold regional governments to account for passing legislation in support of unsustainable forest management.

Good forest governance is also compromised by a number of other weaknesses in Indonesian law. These include, for example, an absence of legislation covering conflicts of interest for politicians and public servants;²¹¹ a lack of freedom of information legislation;²¹² no independent auditing of forest management (unlike other significant timber-producing jurisdictions, such as Finland and British Columbia, Canada, where broadly constituted forest practice boards conduct extensive independent audits into the management of forestry by both the government and timber companies²¹³); no linkage of government procurement to good practices in the forestry sector;²¹⁴ and the non-existence of any law which would expressly require financial institutions to undertake reasonable steps to determine whether they are financing illegal logging or banking proceeds from illegally logged timber. These weaknesses add to the many ways law-on-paper facilitates deforestation in Indonesia, and point to the need for it to be held partly responsible for problems often attributed to law-in-practice.

210 Supreme Court Regulation No. 1 of 2004 concerning Judicial Review of Legislation Art 2(4). *See also* Arizona, note 134 above (discussing the likely human rights issues raised by this rule).

211 *See, e.g.*, Agam Fatchurrochman, 'Benturan Kepentingan Pengusaha-Pejabat [Conflicts of Interest between Businesspeople and Public Officials]', *Koran Tempo*, 22 December 2007.

212 On 3 April 2008, a national freedom of information law was approved by the People's Representative Council, but this will not come into effect until 2010.

213 *See, e.g.*, Hirakuri, note 143 above at 87. *See also* Contreras-Hermosilla, Gregersen and White, note 78 above at 33.

214 On the value of this, *see* Colchester, note 12 above at 68. *See also* Marco Boscolo and Maria Teresa Vargas Rios, 'Forest Law Enforcement and Rural Livelihoods in Bolivia', *in* Tacconi ed., note 9 above.

6 CONCLUDING REMARKS

With the inclusion of avoided deforestation on the agenda of the next United Nations Climate Change Conference,²¹⁵ ways of addressing deforestation are likely to gain greater global attention – particularly in relation to Indonesia, which is responsible for up to a third of global deforestation-related carbon emissions.²¹⁶ Addressing deforestation in Indonesia demands an understanding of the changing dynamics in forest management brought about by *Otda* and the crucial role that law plays in shaping these dynamics. While it is certainly important to question the assumption that right laws automatically lead to sustainable forestry, it is equally important not to assume that Indonesian laws are right and that the problems merely lie with implementation.²¹⁷

This essay has demonstrated that, to the contrary, Indonesian law is actually to some extent responsible for deforestation. Firstly, law has created key flaws in the division of authority between the Central Government and regional governments, namely an unclear division of power, an inappropriate allocation of power and an insecure transfer of devolved power. Secondly, the relevant laws – particularly the *Otda* laws and the Forestry Law – are characterised by ambiguous legislative drafting, inconsistencies within and between legislation and a tendency to refer core provisions to regulation by subordinate legislation. Thirdly, the law actively discourages whole-of-government approaches by promoting rigid sectoral management of the legislative process. Fourthly, Indonesian law at

215 United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Thirteenth Session (3-15 December 2007) – Part Two: Action taken by the Conference of the Parties*, Bali, Doc FCCC/CP/2007/6/Add.1 (2008).

216 Agus P Sari, 'Trees Don't Grow on Money', *The Jakarta Post*, 10 December 2007, available at <http://old.thejakartapost.com/climate/index.php?menu=stories&detail=123>.

217 Ribot describes this process as 'getting to the IF' of the 'IF the systems are in place THEN sustainable practice will follow' assumption. *See* Ribot, note 151 above at 1-2.

present continues the marginalisation of forest communities which became the hallmark of the New Order forest management. Fifthly, Indonesian law lacks important mechanisms for the promotion of good governance, such as broad-based participation in policy-making, support for public interest litigation and checks against the misuse of authority. These factors have combined to result in a situation in which: the Central Government and many regional governments have engaged in the exploitation of forests without taking responsibility for their sustainable use; the rule of law is undermined through legal loopholes and the way in which legislation serves the interests of its drafters; holistic approaches to forest management, such as integrating it with local economic development, are obstructed; forest communities participate in, or are coopted into being complicit about, unsustainable logging; and forest management is characterised by corrupt and unaccountable administration.

The argument expounded here for the importance of ‘minding the other gap’ – the deficiencies *within* law, as opposed to the gulf between law and practice – is not an argument against the importance of other approaches to combating deforestation in Indonesia. Non-legal approaches will be particularly necessary where legislative weaknesses are the result of deliberate efforts on the part of groups with vested interests in law not serving the goal of sustainable forest management. Indeed, the issue of deforestation in Indonesia is so complex and multidimensional that ‘a change in one factor without simultaneous changes in several others may not sufficiently alter the dynamics’.²¹⁸ Efforts to improve relevant legislation therefore need to be complemented by efforts such as improving the capacity of law enforcers and building civil society networks. International cooperation initiatives to prohibit the importation of illegally logged timber and encourage environmentally sustainable development are also of particular importance. These efforts can help shape the social forces which in turn affect the law; after all, laws-on-paper are, like law-in-practice, partly the result of other social forces. However, it is important not to forget that the process is dialectic and that, as this essay has attempted to show, law can also influence other social forces.

²¹⁸ See McCarthy, note 35 above at 83.

The impact of Indonesian law on deforestation under *Otda* points to the importance of developing better generalised understandings of the relationship between law, forest management and decentralisation. The intersection between these three concepts is of crucial importance given that between 70 and 80 percent of the world’s forests exist in countries with decentralised forms of government.²¹⁹ While some of the issues identified in this essay – such as legislatively enshrined departmentalism and the New Order’s hyper-centralisation – are possibly unique to Indonesia, it is likely that many of the ways in which Indonesian law facilitates deforestation will be common to the laws of a significant number of these countries. Given that natural resources in general have ‘historically been a point of struggle’ between centres and regions,²²⁰ many of these issues may also apply to natural resources other than forests. Regardless of the particular context, a key lesson from the Indonesian experience is that it is important not to let the law off the hook to the point where problems with enforcing law become an excuse for ignoring problems with its content and formulation. In Indonesia, this attitude has perpetuated a law of the jungle rather than a law which promotes the sustainable use of forests.

²¹⁹ Contreras-Hermosilla, Gregersen and White, note 78 above at 1. This is not surprising given that an estimated 80 per cent of developing countries are currently experimenting with some form of decentralisation: see generally United Nations Development Program, *Overview of Decentralization Worldwide*, presentation to the Second International Conference on Decentralisation, July 2002.

²²⁰ See Larson and Ribot, note 156 above at 4.

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