CHAPTER I

INTRODUCTION

1.1 Background

Although the state is deemed successful in growing democratically mature and vibrant, nevertheless continues to find itself in more divisions and conflict, as remarked by *Global Peace Foundation*.[1] Until today, Indonesia has yet to dissipate all of its struggles in economic, political, social and legal issues which have existed since its pre-independence. Though some issues have been diminished to some degree, however, the state is advancing forward but with an issue that has negative implications and causes inconvenience unto its customary communities.

The foundation also articulates that when issues or crises, in many forms, whether be conflicts or problems which lead to divisions, arise within a state it would not be unusual for us to direct attention to the 'founding, unifying, self-evident' principles that bind a nation "together in common agreement,"[2] which were laid out by the forefathers. In relation to this notion, I think that keeping in check of our actions and procedures, within equitable legal practices or in making laws, implementing and practicing them, with the fundamental principles and values, for instances: the 1945 Constitution and, the Pancasila as philosophical

[1] "Universal Principles and Shared Values in Indonesia: Bhinneka Tunggal Ika, Unity in Diversity." *Universal Principles and Shared Values in Indonesia: Bhinneka Tunggal Ika, Unity in Diversity | Global Peace Foundation*, www.globalpeace.org/approach/universal-principles-and-shared-values-indonesia-bhinneka-tunggal-ika-unity-diversity.
[2] Ibid.

basis of the Unitary State of the Republic of Indonesia;[3] would mean a more fair and impartial state with order.

One of the principles of Pancasila that states "Social justice for the whole of the people of Indonesia"[4] is a reminder to us that social justice, in its broadest scope, entails a more equitable spread of welfare for the whole Indonesian people, dynamically and progressively. This refers to the utilization of Indonesia's natural resources and potentials to attain the greatest good and happiness for the Indonesian people. In a narrow scope, social justice protects the weak, but does not exclude their participation of work in the fields, in relation to their abilities.[5]

For some time, the indigenous peoples in Indonesia have been subject to unjust treatment over their rights to their customary lands due to development projects throughout the nation. In fact, former Indonesian President, Susilo Bambang Yudhoyono, affirms such situation concerning them.[6] Some companies would intrude and obtain their customary lands or territories, without legal permission or proper legal procedures, and develop their companies' business there to take advantage of them and their fertile and abundant land, in which embeds a sacred symbol of spiritual, tradition and culture for the indigenous peoples. And as a result, the indigenous peoples' ancestry, livelihoods and rights are on the line.

3 Article 1 subsection 1 of the 1945 Constitution.
4 5th principle of Pancasila.
5 *The Republic of Indonesia*, www.indonezia.ro/republic.htm.
6 "The Situation of Human Rights of Indigenous Peoples in Indonesia." *INDONESIA_AMAN_AIPP_UPR_3rdCycle.Pdf*, Sept. 2016, www.forestpeoples.org/sites/fpp/files/publication/2016/09/indonesiaamanaippupr3rdcyclefinal.pdf.

Many agrarian conflicts in Indonesia have been around since its colonial government, under which numerous policies were carried out. Agrarian conflicts, due to lack of legal certainty over ownership, use and procurement and perhaps, control or management, throughout Indonesia among peasants, indigenous peoples, companies and government make the implementation of new policies challenging. Thus, addressing these land disputes attempted to eliminate inequality and injustice would mean well for the nation, with a goal of fair and just reforms for securing marginalized and indigenous peoples' traditional rights to their lands.

The policies changed throughout time with society. As they changed, adjustments or, amending them so that they were up-to-date, was necessary. In retrospective, land law in Indonesia mind-bogglingly composed of traditional *adat* law, Dutch colonial laws, Western civil law, and corresponding Indonesian laws from the time of its complete independence in 1949.[7] However, since its establishment in September 1960 until today, Indonesia uses Law Number 5 of 1960 regarding Basic Provisions concerning the Fundamentals of Agrarian Affairs as its basic land law, thereby abolishing the colonial dualistic system of agrarian rights of the Dutch and Indonesian.

As mentioned in previous paragraphs, what emerges as the issue is the fact that many customary lands of the indigenous peoples are being taken away. Due to the lands' richness in natural resources, such as mineral, oil and gas, etc., some rich private sectors or companies would compete to exploit their lands to gain a lot of

[7] "Gary Dean - Indonesian Land Law and Foreign Ownership of Land." *Gary Dean Profile*, garydean.id/works/indonesian-land-law.

profits from the natural resources, without acknowledging the indigenous peoples' rights. These customary lands are considered *adat*, or lands of traditional communities in which the indigenous peoples, or adat law communities, have entitlement over[8], supposedly. Adat law governs the traditional communal land tenure system of Indonesia. Vital to the context of land, land tenure is "the relationship that individuals and groups hold with respect to land and related resources. Land tenure rules define the ways in which property rights to land are allocated, transferred, used, or managed in a particular society."[9]

Though varies throughout the nation, however land tenure is a communal approach to regulating rights of land. In rural areas, legal pluralism is commonly used as their norm, i.e. the national state law and adat laws (customary) coexisting. Such coexistence of the national state law with adat or customary law can be found implied in Article 5 of Law Number 5 of 1960 regarding Basic Provisions concerning the Fundamentals of Agrarian Affairs (hereafter referred as BAL):

> **Article 5.** "The agrarian law applicable to the earth, water, and airspace is *adat* provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislations, all with due regard to elements which are based on religious law."

Essentially, all the laws and regulations, e.g. BAL, adat or *ulayat rights* and other legislations, formally or customarily, shall comply and not conflict with the higher

8 "Adat Land Rights: the Solution for Land Conflicts in Indonesia?" *Leiden University*, www.universiteitleiden.nl/en/news/2018/12/adat-land-rights-the-solution-for-land-conflicts-in-indonesia.

9 "What Is Land Tenure?" *LandLinks*, www.land-links.org/what-is-land-tenure/.

laws and regulations of the State, as well as not in conflict with the national interest.[10]

There has been progress made by the Indonesian government to lessen the number of indigenous land conflicts. Where used to be that indigenous peoples had mere authority to use their lands and not to own them, now the regulations allow them to request and register their lands to the National Land Agency (or BPN) and procure the proper legal document for evidence of entitlement to their lands. Furthermore, a new legal term known as communal tenure (or *hak ulayat*, interchangeably used hereafter) was introduced and bestowed specifically for the indigenous communities by the Ministry of Agrarian and Spatial Planning through the Ministerial Decree No. 9 of 2015.[11]

Communal tenure or hak ulayat is a legal term that connotes communal rights of land ownership for the indigenous peoples.[12] At the core, the 1945 Constitution of Indonesia mandates that the Indonesian State control all land, water, airspace and natural resources and all shall be used for the purpose of welfare of the citizens.[13] But particularly speaking in this case, the State also recognizes and respects the *adat* communities or indigenous peoples, as stipulated in the 1945 Constitution, of article 18 B section 2, stating:

> "The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal

[10] Article 3 of Indonesian Basic Agrarian Law No. 5 of 1960.
[11] Anggraini, Nesita and Umery Lathifa. "Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group." Vol. 7, No. 8, Aug. 2017, pp. 513-516. https://pdfs.semanticscholar.org/b5f9/c3f251ba0b6b11f8dbf6cedf91058befa90b.pdf
[12] Indonesia: "Food Security and Land Governance Factsheet." http://www.landgovernance.org/assets/2014/09/Indonesia-Factsheet-20121.pdf
[13] Article 33 (3) of the Republic of Indonesia Constitution of 1945.

development and with the principle of the Unitary State of the Republic of Indonesia."[14]

Moreover, indigenous peoples are also human beings that shall have equal measures of human rights as well as these fundamental freedoms without hindrance or discrimination[15] and, they shall too, be recognized and protected, of their values and practices;[16] which obviously is contradictory to the practical sense of current events throughout Indonesia.

Thus, Basic Agrarian Law or BAL was issued and is meant to make available all Indonesian lands for distribution unto all of its citizens. BAL stipulates the types of rights on land in article 16. Originally, BAL was established upon *hak ulayat* (or *ulayat* / indignesous right, or communal tenure). *Ulayat* right is defined in the Minister of Agraria/Head of BPN ministerial regulation Number 5 of 1999 concerning 'Guidelines to Solving the Problem of *Adat* Communities' as follows:

> "'*Ulayat* right is a right of land, enjoyed by a specified indigenous community to a specified territory that is the everyday environment of its member to exploit the profit of its natural resources, including land, in the aforementioned territory, for the benefit of their survival and daily needs, which are made clear by physical and spiritual relations of decent between the aforementioned indigenous community and said territory.'"[17]

The former President Suharto's New Order policy alludes to his authoritative ruling of the State. During that period, his government had control over all land, state land and forest areas, and exclusive authority over all aspects of human activities within the forest territories (McCarthy 2000: 93) and any forest

[14] Article 18B section 2 of Indonesia Constitution of 1945.
[15] Article 3 of No. 169 of the Indigenous and Tribal Peoples Convention of 1989.
[16] Article 5 of No. 169 of the Indigenous and Tribal Peoples Convention of 1989.
[17] Anggraini, Nesita and Umery Lathifa. "Communal Rights of Land: Indonesia Government Effort to Protect the Rights of Indigenous Group." Vol. 7, No. 8, Aug. 2017, pp. 513-516. https://pdfs.semanticscholar.org/b5f9/c3f251ba0b6b11f8dbf6cedf91058befa90b.pdf

areas, including the power to separate forest areas into different land use categories with various policy objectives (e.g. timber production, conversion of forest areas into agricultural land) by the Basic Forestry Law No. 5 of 1967 as legal framework. This resulted in the establishment of a Forest Land Use Consensus Plan (Tata Guna Hutan Kesepakatan) in 1982, which categorized 144 million hectares or 75% of the country's land as forest areas (Evers 1995: 6), but still, nonetheless, holds power over the process of planning for these areas. Even after the end of Suharto's reign and time after that, the pre-existing problems that arose from the Forestry Law of 1967 had to be dealt with by Habibie's government. As a result, the new Basic Forestry Law No. 41 of 1999 was released. It recognizes adat law communities and communal tenure (or hak ulayat), but does not permit them of any right to own their adat land, only the right to use and manage it as long as they (indigenous peoples) are 'evidently in place and their presence is acknowledged.'[18] There is an opportunity for mapping or documenting of the adat communities or areas and communal tenure.[19]

With the end of Suharto's reign in 1998 marked policy and legal breakthroughs for struggles of recognition of the indigenous peoples, realized at the Constitutional Court Ruling in May 2013, though it took a while. It was the State's acknowledgement and declaration of the wrong appropriation of customary forests and, a demand that they must be returned to the adat communities.[20] Mind you, the whole notion of Agrarian reform, or land reform, was initiated as far back

18 Article 67 of Basic Forestry Law No. 41 of 1999.
19 *Land Tenure and Natural Resource Conflict in Indonesia*, press-files.anu.edu.au/downloads/press/p123701/html/ch05s02.html.
20 "Indonesia." *Tenure Facility*, thetenurefacility.org/timeline/indonesia/.

as 1950s to tackle on the problematic land ownership of the Dutch Indies colonial administration.[21] Moreover, the purpose of a land reform is to redistribute lands ["lands and/or regulatory changes that increase land access and/or tenure security"] that had been confiscated or taken by the government or administration previously, by which then improves the people's, in this case, the indigenous peoples' livelihoods (Besley and Burgess, 2000).[22]

This thesis attempts to analyze the current situation and conditions surrounding the legal uncertainty of the implementation of agrarian policies and its effects on the indigenous peoples, as well as how these agrarian reform policies could provide protection of the indigenous peoples' rights to their ancestral lands, granted that they are recognized by the State. All of which is for equality, fairness and justice of every human being, based on the Constitution of the Republic of Indonesia of 1945, the C169 Indigenous and Tribal Peoples Convention of 1989 (No. 169), the Indonesian Agrarian Law No. 5 of 1960, and MPR Decree No. IX of 2001 on Agrarian Reform and Natural Resources Management.

Based on the aforementioned, I, as the author, have titled this paper as **"Analysis of Indonesia's Agrarian Reform Policies with Regard to the Protection of The Indigenous Peoples' Rights to Their Customary Land"**.

[21] Nnoko-Mewanu, Juliana. "Indonesia Pledges Accelerated Agrarian Reform." *Human Rights Watch*, 9 Oct. 2018, www.hrw.org/news/2018/09/27/indonesia-pledges-accelerated-agrarian-reform.

[22] Resosudarmo, Ida Aju Pradnja, et al. "Indonesias Land Reform: Implications for Local Livelihoods and Climate Change." *Forest Policy and Economics*, vol. 108, 2019, p. 101903., doi:10.1016/j.forpol.2019.04.007.

1.2 Research Questions

Based on the topic of this thesis, this paper will attempt to discuss on the following formulation of questions:

1. What are the Agrarian Reform policies that protect the rights of the indigenous (*adat*) peoples in respect to their *adat* lands?
2. How does the Indonesian Agrarian Reform policy or program protect the indigenous (*adat*) peoples and their *adat* lands?

1.3 Research Purpose

In response to the formulation of research issues proposed above, this thesis attempts:

1. To discuss about what the agrarian reform policies entail and the rights which have been given to the indigenous adat communities with regard to their *adat* or customary lands;
2. To analyze how the government of Indonesia, through the agrarian reform policies and programs, strives to attain the protection of the indigenous peoples' rights to their *adat* or ancestral lands.

1.4 Research Benefits

1.4.1 Theoretical Benefits

The hope is that these legal theories and regulating laws pertaining to protection of indigenous peoples' rights to their customary lands in Indonesia would provide us with a deeper understanding of the occurring issues and a further

comprehension on how Indonesia is managing the policies and administrative-related affairs in implementation to produce a fair and just agrarian system.

1.4.2 Practical Benefits

In practicality, this thesis seeks to provide awareness to the Indonesian people and government (as to remind again) on these agrarian issues and help Indonesia to effectively and efficiently deal with them by considering these analyses of the reform policies. By addressing these agrarian reform policies and issues, this thesis encourages for the protection of indigenous peoples' rights to their customary lands through proper implementation of related laws and policies by the government, which must be consistent and congruent with the main Law (namely the 1945 Indonesian Constitution), national land law (Basic Agrarian Law 1960) and other regulations, as well as established policies. In addition, the author hopes for the government to act fast in handling and managing these issues, as they have been deferred for over a period of time; considering that, more delay can most likely exacerbate the situation.

1.5 Framework of Writing

The systematic of writing provides short, concise and a more direct and clearer picture of information regarding what each chapter contains, which as follows:

CHAPTER I: INTRODUCTION

As the starting point of this thesis, the first chapter will briefly touch on the occurring situation of agrarian policies and the state of development which promised to be carried out by the government of Indonesia, as well as the underlying basic root problems. In general, the chapter will discuss the background of the issues surrounding agrarian policies and/or programs, a formulation of the issues, purpose of the research, the benefits and systematics of writing of the research.

CHAPTER II: LITERATURE REVIEW

The second chapter will discuss the theoretical background which provides pertinent information on legal provision, theories, concepts, and terminology; all of which are related to answering the formulation of issues and related to the previous and subsequent chapters. This entails explaining what legal analysis is and how it assists in reaching a conclusion as well as what legal protection is according to a legal provision. The chapter also entails describing the concept of policy as well as *Adat* law in the Indonesian legal system, along with description of state of affairs of the current situation and condition of land reform and indigenous peoples in Indonesia. Lastly, the chapter describes the research design, which is the blueprint for analysis of data of this research paper, and ends with the conceptual framework to guide the author in relation to the

concepts contained in the paper, which assist in answering the formulation of issues.

CHAPTER III: RESEARCH METHODS

The third chapter will explain the types of research approaches and methods, and the kinds of data techniques and procedures that assist the author in obtaining the legal research materials.

CHAPTER IV : DISCUSSION AND ANALYSIS

The fourth chapter will discuss the two research problems formulated in Chapter 1. By logically processing the concepts of policy and the background of Indonesian agrarian reform and its development as well as conditions of the indigenous communities in Indonesia, this chapter will identify the pertinent legal issues and address the role of accountability and responsibility of the Indonesian government in redressing the conflicts. Moreover, this chapter seeks to promote awareness to all of the Indonesian people, government officials included, regarding these issues concerned by including a land conflict case, which will also be a supporting evidence of the research paper.

CHAPTER V: CONCLUSION AND RECOMMENDATION

The fifth chapter will close the thesis and summarize the analysis, as well as provide suggestions or recommendations for a fair and just agrarian system in Indonesia, responding more effectively and

efficiently in the future to issues arising from land conflicts among various communities of Indonesia.