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Spatial management in Indonesia : from planning to implementation : cases from West Java and Bandung : a socio-legal study

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Citation

Moeliono, T. P. (2011, December 13). *Spatial management in Indonesia : from planning to implementation : cases from West Java and Bandung : a socio-legal study*. Retrieved from <https://hdl.handle.net/1887/18242>

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Spatial Management in Indonesia: From Planning to Implementation

Cases from West Java and Bandung

A socio-legal study

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op dinsdag 13 december 2011
klokke 13.45 uur

door

Tristam Pascal Moeliono

Geboren te Bandung in 1965

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Dr. J.T. Lindblad

ACKNOWLEDGEMENTS

This book was written with the help and assistance of a great many people. I feel especially indebted to the government officials at Bandung municipality, Bandung district, Cimahi (municipality) and West Java province who patiently took the time to answer the many questions I asked. Even those who turned down my request for an interview must be mentioned, because thanks to them I forced myself to find other ways to gather valuable information. During the fieldwork, Cecep assisted me with his proficiency in Sundanese (the regional language in West Java) which opened many previously closed doors and paved the way for more laid back and informal interviews. In addition, I benefited much from discussions with my colleagues at Universitas Katolik Parahyangan, Bandung, especially from those with Joni Minulyo and Prof. Asep Warlan, who with their extensive knowledge of administrative law and the working of Indonesian bureaucracy opened my eyes to the intricacies of public private partnerships and how things are really done in Indonesia. In addition, I also benefited from Adriaan Bedner, my supervisor, who challenged me to change my “Indonesian” way of thinking and move from pure legal research to a different mode: the socio-legal approach.

I fondly remember the shared experience with other members (Kurnia Warman and Saldi Isra from Andalas University Padang; Myrna Safitri and Sandra Moniaga from HuMa, Jakarta; Djaka Soehendera from Pancasila University, Jakarta, Gustaaf Reerink from Leiden and Laurens Bakker from Nijmegen) of the INDIRA programme during the preparatory period at Leiden and also during several short meetings at Yogyakarta and Jakarta. Special reference should be made to Jamie Davidson and Daniel Fitzpatrick who entered the picture only briefly, but nonetheless inspired me to pay more attention to Indonesian politics and land law respectively. Djaka Soehendera, who unfortunately passed away after completing his PhD at the University of Indonesia, has been a good friend. Fortunately I have been able to return the favour by editing his dissertation which was published by HuMa, KITLV and the Van Vollenhoven Institute. I am also greatly indebted to Albert Dekker who with pride showed us, the INDIRA members, the huge collection of Indonesian legal literature of the Van Vollenhoven Institute. It is with sadness that I heard of his illness and later his death in 2011.

I owe special thanks to Jan Michiel Otto and (again) Adriaan Bedner who did not lose confidence in me pursuing this research. Their support, comments, and critique (especially those showed in silence) impressed and stimulated me during the whole research period. I hope I make them proud. Lastly I owe much gratitude to my family for their unremitting confidence and support.

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ABBREVIATIONS

AD: Angkatan Darat

AMAN: Aliansi Masyarakat Adat Nusantara

APBD: Anggaran Pendapatan dan Belanja Daerah

APRA: Angkatan Perang Ratu Adil

BAL: Basic Agrarian Law

Bangda: Bina Pembangunan Daerah

Bappeda: Badan Perencanaan Pembangunan Daerah

Bapedal-da/BPLHD: Badan Pengelolaan Dampak Lingkungan Daerah

Bappenas: Badan Perencanaan Pembangunan Nasional

BKPM: Badan Koordinasi Penanaman Modal

BPK: Badan Pemeriksa Keuangan

BPLHD: Badan Pengelola Lingkungan Hidup Daerah

BPN: Badan Pertanahan Nasional

BPS: Biro Pusat Statistik

BKTRN: Badan Koordinasi Tata Ruang Nasional

BSP: Bandung Spatial Plan

BUMN: Badan Usaha Milik Negara

CIFOR: Center for International Forestry Research

CSIS: Center for Strategic and International Studies

CV: Commanditaire Vennootschap

DKI-Jakarta: Daerah Khusus Ibukota Jakarta

DPD: Dewan Perwakilan Daerah

DPKLTS: Dewan Pemerhati Kehutanan dan Lingkungan Tatar Sunda

DPR: Dewan Perwakilan Rakyat

DPRD: Dewan Perwakilan Rakyat Daerah

DR: District Regulation

DVMBG: Direktorat Vulkanologi dan Mitigasi Bencana Geologi

EIA: Environmental Impact Assessment

ELSAM: Lembaga Studi dan Advokasi Masyarakat

EMA: Environmental Management Act

ESCAP: Economic and Social Commission for Asia and The Pacific

FAO: Food and Agriculture Organization

FKRJ: Forum Komunikasi Rakyat Jatigede

GBHN: Garis-garis Besar Haluan Negara

GDP: Gross Domestic Product

GTZ-SfDM: Gesellschaft für Technische Zusammenarbeit-Support for Decentralization Measures

HGB: Hak Guna Bangunan

HGU: Hak Guna Usaha

HIIL: The Hague Institute for the Internationalization of Law

HIR: Herziene Indonesisch Reglement

HKTI: Himpunan Kerukunan Tani

HMN: Hak Menguasai Negara

Huma: Hukum untuk Rakyat

ICESCR: International Covenant on Economic-Social and Cultural Rights

ICG: International Crisis Group

ICRAF: International Centre for Research in Agro Forestry

IFRI: International Forestry Resources and Institutions

ILCD: International Reference Life Cycle Data System

IMF: International Monetary Fund

INDIRA: Indonesian-Netherland Studies on Decentralization, Agrarian Reform and Rule of Law

IPPT: Izin Peruntukan Penggunaan Tanah

IRSA: The Indonesian Regional Science Association

ISEAS: Institute of Southeast Asian Studies

ITB: Institut Teknologi Bandung

Jabar: Jawa Barat

Jabotabek: Jakarta Bogor Tangerang Bekasi

Jabodetabekjur: Jakarta Bogor Depok Tangerang Bekasi Cianjur

JATAM: Jaringan Advokasi Tambang

JUKLAK: Petunjuk Pelaksanaan

JUKNIS: Petunjuk Teknis

KAPET: Kawasan Pengembangan Ekonomi Terpadu

KANDEP: Kantor Departemen

KANWIL: Kantor Wilayah

KBU: Kawasan Bandung Utara

Kep: Keputusan

KepPres: Keputusan Presiden

KepMenKimpraswil: Keputusan Menteri Permukiman dan Prasarana Wilayah

KHN: Komisi Hukum Nasional

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KITLV: Koninklijk Instituut voor Taal, Land- en Volkenkunde

KK: Kontrak Karya

KNUPKA: Komisi Nasional untuk Penyelesaian Konflik Agraria

Koppasus: Korps Pasukan Khusus

Kpts: Keputusan

LAP: Land Administration Project

LBH-Bandung: Lembaga Bantuan Hukum-Bandung

LH: Lingkungan Hidup

LSM: Lembaga Swadaya Masyarakat

MA: Mahkamah Agung

MenLH: Menteri Lingkungan Hidup

MHAR: Ministry of Home Affair Regulation

MKRI: Mahkamah Konstitusi Republik Indonesia

MoU: Memorandum of Understanding

MPR: Majelis Permusyawaratan Rakyat

MPWR: Ministry of Public Works Regulation

Musrenbang: Musyawarah Perencanaan Pembangunan

NGO: Non-Governmental Organization

NLA: National Land Agency

NUDS: National Urban Development Strategy

OECD: Organization for Economic Cooperation and Development

PCA: People's Consultative Assembly

P4D: Proyek Pendukung Pemantapan Penataan Desentralisasi

PAD: Pendapatan Asli Daerah

Pakto: Paket Oktober

PCA: People's Consultative Assembly

PD: Presidential Decree

Pemkot: Pemerintah Kota

Perda: Peraturan Daerah

PerMenAg: Peraturan Menteri Agama

PerMenDagri: Peraturan Menteri Dalam Negeri

PMA: Penanaman Modal Asing

PMDN: Penanaman Modal Dalam Negeri

PP: Peraturan Pemerintah

PR: Presidential Regulation

Propeda: Program Pembangunan Daerah

Propenas: Program Pembangunan Nasional

PRSCO: Pacific Regional Science Conference Organization

PSDA: Pengelolaan Sumberdaya Air

PT. DAM/DUSP: Perseroan Terbatas Dam Utama Sakti Prima

RDTRK: Rencana Detail Tata Ruang Kota

REI: Real Estate Indonesia

RGL: Regional Government Law

RIS: Republik Indonesia Serikat

RKL/RPL: Rencana Kelola Lingkungan/Rencana Pemantauan Lingkungan

RPJM: Rencana Pembangunan Jangka Menengah

RPJP: Rencana Pembangunan Jangka Panjang

RTBL: Rencana Tata Bangunan dan Lingkungan

RTRW: Rencana Tata Ruang Wilayah

RTRWN: Rencana Tata Ruang Wilayah Nasional

RTRWP: Rencana Tata Ruang Wilayah Propinsi

RTRWK: Rencana Tata Ruang Wilayah Kota/Kabupaten

RUTK: Rencana Umum Tata Kota

RUTRK: Rencana Umum Tata Ruang Kota

RUU: Rancangan Undang-undang

SK: Surat Keputusan

SMEC: Snowy Mountains Engineering Corporation

SNPP: Strategi Nasional Pembangunan Perkotaan

SPL: Spatial Planning Law

STTNAS: Sekolah Tinggi Teknologi Nasional

SVO: Stadsvormings-Ordonnantie

SVV: Stadsvormingsverordening

TGHK: Tata Guna Hutan Kesepakatan

TKPRD: Tim Koordinasi Penataan Ruang Daerah

TKPRKP: Tim Koordinasi Penataan Ruang Propinsi

TUN: Tata Usaha Negara

UDHR: Universal Declaration of Human Rights

UGM: Universitas Gadjah Mada

UKM: Usaha Kecil Menengah

UN: United Nations

UNBRAW: Universitas Brawijaya

UNFPA: United Nations Population Fund

UNPAD: Universitas Padjajaran

UNPAR: Universitas Katolik Parahyangan

UUD: Undang-undang Dasar

UUDS: Undang-undang Dasar Sementara

UUPA: Undang-undang Pokok Agraria

WALHI: Wahana Lingkungan Hidup

WCED: World Commission on Environment and Development

WDR: World Development Report

WRR: Wetenschappelijke Raad voor het Regeringsbeleid

Yantap: Pelayanan Terpadu

ZEF: Zentrum für Entwicklungsforschung

CHAPTER I

GENERAL INTRODUCTION

1.1. Introduction

Indonesia has had a long history of land disputes in both rural and urban areas. According to the Consortium for Agrarian Reform, a Bandung-based non-governmental organization (NGO), there were 813 land dispute cases nationwide by 2001, encompassing over 1,460 villages and 1.9 million hectares of land.¹ The same report mentioned that the province of West Java, bordering on the capital city of Jakarta, had borne the brunt of these land disputes. However, other provinces have also experienced numerous land disputes. In 2003, Parliament recorded 1,000 land disputes throughout Indonesia.² The National Land Agency (NLA), the government authority dealing with land administration in Indonesia,³ provided a much higher number of disputes in 2006-2007 (2,800-2,810 cases).⁴ Inevitably, these numbers sketch an incomplete picture. But at least they illustrate the widespread occurrence of disputes with regard to ownership and user claims by different actors in Indonesia and the ineffectiveness of the state in resolving them.

However, the seriousness of this problem goes beyond the number of disputes. Hidden behind these numbers are social injustice and inequity, and massive environmental degradation suffered by perhaps a majority of the population. The question is why the government has continued conducting land use policies resulting in such massive injustice and potentially harmful effects on the environment? The same question applies to the way the government has interpreted the existing legal framework on land- and spatial planning laws and other related laws and regulations to develop its land use policies.

If left untreated (or worse, mismanaged), land disputes give rise to widespread societal distrust of the government and impair the ability of the government to rule by law. The majority of the population will resort to informality in regulating land ownership and use, or

¹ Dianto Bahcriadi and Noer Fauzi. "Konflik Agraria dan Peluang Pelembagaan untuk Penyelesaiannya di Indonesia secara Tuntas dan Menyeluruh", paper presented in preparation for the establishment of the National Commission for the settlement of agrarian disputes (KNUPKA), Jakarta, 2004.

² I Nyoman Gunawan (Ketua Pansus Sengketa Tanah DPR) as quoted in "Jalan Berliku Perjuangan Hak atas Tanah (Sinar Harapan, 29 September 2003)

³ The National Land Agency (*Badan Pertanahan Nasional*) is a non-ministerial government agency under and directly accountable to the President (Presidential Regulation 10/2006).

⁴ "56% Aset Indonesia Dikuasai Hanya 1% Penduduk, (Suara Merdeka cyber news, 17 April 2007).

in some extreme cases reject the applicability of state law altogether. This has already happened in Aceh and Papua. In these provinces, social unrest and demand for independence have been fuelled by the way the central government has allowed for the plunder of natural resources by both foreign and domestic investment companies and the displacement of local people in the process.⁵

This does not mean, however, that the Indonesian government has completely ignored land dispute issues. During the New Order, such disputes already caught the attention of President Soeharto, who instructed the head of the NLA in 1989 to pay attention to the plight of those land owners losing their land to development projects. In fact, by that time, insecure land tenure, the by-product of public infrastructure development projects and natural resource management policy had become a problem for millions of citizens in urban as well as rural areas. Nonetheless, Soeharto saw the problem in terms of how to secure consensus in the land appropriation process by providing compensation for loss of homes and sources of income – in fact only a small part of the natural resource management system.⁶ In this view individual or communal claims on land must always yield to the overriding interest of the state to exploit natural resources. No attention is thus given to the legitimacy of the land appropriation process, nor to the impact of its consequences on those concerned and society at large. Other problems with regard to access to land, tenure security, and subsequent land use were thus ignored. This perspective may be contrasted to the way the government perceived land disputes after the fall of the New Order regime, as indicated in a decree issued by the Consultative Assembly in 2001.⁷ Nonetheless, land disputes have continued to occur and to contribute to worsening environmental degradation, social inequity and injustice, as the numbers quoted above indicate.

⁵ For a general description of the situation in Aceh and Papua see: “Aceh’s Forest (Down To Earth no. 68, February, 2006. Cf. “Aceh: Logging A Conflict Zone, October 2004, available at http://www.aceh-ye.org/data_files/english_format/ngo/ngo_eoa/ngo_eoa_2004_10_00.asp (last accessed 15 August 2009), and “West Papua” (Down to Earth, Special Issue October 1999). Both articles are available at <http://dte.gn.apc.org>.

⁶ As quoted by Asep Warlan Yusuf, from Kompas, 7 November 1989 in “Aspek Pertanahan dalam Perencanaan Kota (Pro Justitia No. 4/VIII, October 1990): 28-43.

⁷ The People’s Consultative Assembly’s (PCA) Decree 9/2001 re. Agrarian Reform and Management of Natural Resources. For a short commentary on the Agrarian Reform policy see: Prof. Boedi Harsono, Menuju Penyempurnaan Hukum Tanah Nasional dalam hubungannya dengan TAP MPR RI IX/2001 (Jakarta: Universitas Trisakti, 2003). See also PCA Decree 5/2003 (recommendations to State Organs), which recommends “the settlement of various agrarian conflicts and problems in a proportional and just manner beginning from legal issues up to its implementation”.

Disputes related to land have moreover become increasingly common and acute because of the staggering pace of urbanization in Indonesia, like in other developing countries.⁸ In terms of land use control and management, it is indeed extremely challenging to find workable solutions to a complex of social and environmental problems brought about by the densification of cities combined with their rapid and massive expansion into the countryside. In the process, many self-sustaining rural communities lose their ancestral and agricultural land to urban development. Previously semi -autonomous villages become part of the growing number of slum areas, the potential locus of environmental and human disasters for years to come. Particularly disturbing is the problem of rapid and massive conversion of prime agricultural land, which threatens the nation's food security⁹. This problem has been raised and discussed by several authors noting the mass conversion of agricultural land in residential areas and other urban uses in Indonesia¹⁰ as well as in other countries.¹¹ In sum, land disputes are rooted in competing views on how to best utilize scarce land. It is this issue which forms the topic of the present thesis.

1.2. Review of Theoretical Approaches to Land Disputes

Seen from the above perspective, it would be logical to look at land disputes and conflicts in the context of Indonesia's institutional and legal framework for spatial planning. Yet, most scholars writing about land disputes and conflict have focused only on how to improve the land acquisition process.¹² Thus, core issues underlying land disputes and challenging the government's legitimacy have remained unaddressed.

⁸ State of the World Population 2007: Unleashing the Potential of Urban Growth (UNFPA, June 2007).

⁹ Food security is defined by the Food and Agriculture Organization of the United Nations (UN FAO) as "the access of all people at all times to the food they need for an active and healthy life". See FAO's web site: www.fao.org.

¹⁰ Peter H. Verbrug, Tom (A.) Veldkamp, Johan Bouma, "Land Use Change under Conditions of High Population Pressure: The Case of Java, (Global Environmental Change 9 (1999): 303-312. See also Tommy Firman, "Major issues in Indonesia's urban land development" (Land Use Policy 21 (2004): 347-355.

¹¹ For example, Ayman Ibrahim Kamel El-Hafnawi, "Protecting" agricultural land from urbanization or "managing" the conflict between informal urban growth while meeting the demands of the communities (Lessons learnt from the Egyptian policy reforms), paper presented before a symposium on "Land, Development, Urban Policy and Poverty Reduction", The World Bank- Institute of Applied Economic Research, April 2005).

¹² The New Order government promulgated Presidential Decree 55/1993 in relation to criticism directed against past land acquisition practices and allegedly to provide better legal protection to land owners. It was revoked on the same grounds after 1999, by virtue of Presidential Regulation 36/2005 revised by 65/2006. See also Arie

Some observers have examined the ideology underlying the land acquisition process and the subsequent utilization of the land in the name of development.¹³ The importance of ideology has been underscored by Fischer who has theorized the interrelationship between ideology and practical policy choices.¹⁴ However, missing in his scheme as well as in the work of many others is the attention to legal rules and regulations and how these inform practical deliberations taken by government agencies as well as citizens. There are some exceptions, such as Kamsma and Bras, who have analyzed how state development planning influenced the structure of land ownership and resulted in the marginalization of local people and dispossession of land owners.¹⁵ Likewise, Arnscheidt has examined how the “*pembangunan*” discourse on man-nature relations was institutionalized in development plans and legislation regulating the exploitation of natural resources.¹⁶ The point is that adequate attention should be given to how *ideological* ideas on development inform actors and how they deal with the law and translate it into actual land use policies. The relevance of this became clear to me when I realized that everybody in the field, from government officials to academicians, perceives *pembangunan* as inevitable and the driving force behind the implementation of rules and regulations pertaining to land management and use.

A more appropriate position to address the land dispute issue than to simply focus on land acquisition follows from Soemardjono’s observation that it was the New Order government’s

Sukanti Hutagalung, “Penyelesaian Sengketa Tanah Menurut Hukum yang Berlaku”(Jurnal Hukum Bisnis, Vol. 18, March 2002); Boedi Harsono, “Penyelesaian Sengketa Pertanahan sesuai Ketentuan-ketentuan dalam UUPA”, paper presented in a seminar commemorating the 36th birthday of the Basic Agrarian Law, organized by the Office of the State Minister of Agrarian Affairs/National Land Agency at Jakarta, 22 October 1996, and Maria SW Sumardjono, “Implikasi Pertahanan dan Penyelesaian Secara Hukum”, a paper presented before a seminar on land disputes resolution organized by Sigma Conferences Jakarta, 26 March 1996.

¹³ Anton Lucas, “Land Disputes, the Bureaucracy, and Local Resistance in Indonesia”, in Jim Schiller and Barbara Martin Schiller (eds.), *Imagining Indonesia: Cultural Politics and Political Culture* (Center for International Studies: Ohio, 1997), pp. 229-260.

¹⁴ Frank Fischer, “Citizens and Experts in Risk Assessment: Technical Knowledge in Practical Deliberation” in *Technikfolgenabschätzung*, Nr. 2, 13 Jahrgang-Juni 2004) S. 90-98. He developed a scheme comprising of the four level discourse model linking logic of practical reason (ideological choice, systems vindication, situational validation and warrant) to types of discourses, and claimed that this scheme should be able to plug facts into normative policy deliberations.

¹⁵ Theo Kamsma & Karin Bras, “Gili Trawangan-from desert island to ‘marginal’ paradise: local participation, small scale entrepreneurs and outside investors in an Indonesian tourist destination”, in Greg Richards and Derek Hall (eds.) *Tourism and Sustainable Development* (London: Routledge, 2000): 170-184.

¹⁶ J. Arnscheidt, ‘Debating’ Nature Conservation: Policy, Law and Practice in Indonesia: a discourse analysis of history and present (Leiden: Leiden University Press, 2009). p. 163

spatial (management) policy that ignored social justice and caused land disputes to this day.¹⁷ Unfortunately, few people have carried this line of thinking any further.

Others have taken a wider view and focused on the legal and institutional framework of Indonesian land law and its dualistic nature, arguing that this understanding should form the basis for discussion of the root causes of land disputes in Indonesia.¹⁸ The adamant refusal of the Ministry of Forestry to relinquish its monopolistic claim on state 'forest land' has been seriously criticized by this literature.¹⁹ As an alternative, it has been proposed to re-establish the Basic Agrarian Law 5/1960 ((BAL) as an "umbrella act", positioning this law as the primary statute all natural resource management laws should defer to.²⁰ Whether this is feasible for present day Indonesia, and what institutional changes must be performed as a consequence, - for instance downgrading the Ministry of Forestry or changing the whole system of forest management and incorporating it into a comprehensive law on natural resource management - are issues that have not been addressed satisfactorily yet. Another question is whether such an approach could change the embedded sectoralism in natural resource management. It also discounts the possibility that the core problem may be spatial mismanagement which has resulted in massive environmental degradation.

A related but different approach popular within NGO circles have been to push for agrarian reform. Their argument can be summarized as follows: land disputes and conflicts have been caused by the existing situation of unequal ownership and control of land. Hence one solution is to distribute land to the poor and landless.²¹ The primary proponent of this solution, the Federation of Indonesian Peasants, has suggested distributing all state controlled land considered idle to peasants and farmers, thus targeting the Ministry of Forestry's claim on 60-70% of Indonesian land territory as state forest and large scale plantations. However,

¹⁷ Maria SW, "Pembaruan Agraria: Arti Strategi dan Implementasinya" (paper presented before STPN, Yogyakarta, 2002).

¹⁸ Chip Fay, Martua Sirait and Ahmad Kusworo, *Getting the Boundaries Right: Indonesia's Urgent Need to Redefine its Forest Estate*. (International Centre for Research in Agro-Forestry, Bogor, 2000)

¹⁹ Sandra Moniaga, "Ketika Undang-undang Hanya Diberlakukan Pada 39% Wilayah Daratan Indonesia" (Forum Keadilan, no. 27, November 2006).

²⁰ Syaiful Bahari, "Kontroversi RUU Sumber Daya Agraria" (Kompas, 15 July 2004); "LSM Minta DPR Kaji Ulang Semua UU Bidang Pertanahan" (Hukum Online, 30/11/04). See also Usep Setiawan's statement as the KPA secretary general in a press release dated 22 September 2006 "entitled: Kembali Ke Semangat Awal UUPA N0.5/1960 dan Jalankan Pembaruan Agraria,. Available at <http://www.kpa.or.id/>, last visited 15 August 2009).

²¹ See: "Agrarian Conflict and Violence" a statement prepared on behalf of the Federation of Indonesian Peasants" available at <http://www.viacampesina.org>, last visited 15/08/2009).

this solution disregards environmental concerns and also seems to disregard indigenous people's claim to forested land.²²

Next is the 'legalization of land tenure approach'. The World Bank in particular has promoted systematic and sporadic land titling as an effective measure to increase tenurial security and thus prevent land disputes. This approach to formalization has been influenced by Hernando de Soto's basic claim that "formalization will surely increase land owners' economic opportunities to enter into the market".²³ Presently, this claim has come increasingly under fire as being too simplistic and not fitting third world realities.²⁴ Instead, much field research has proven the contrary, i.e. that land titling does not automatically improve the condition of the urban or rural poor,²⁵ nor does it offer more protection against competing claims and appropriation by third parties.

A more theoretical approach contesting the land titling approach is the one by Fitzpatrick. He attempts to trace the chaos in land management to how property rights have been understood in the third world.²⁶ In his own words:

"(...) the problem of establishing and enforcing property rights is closely connected to the problem of social order. Unless social order is established, most commonly through legitimate and capable government, the process of allocating and enforcing property rights will tend to cause conflict because different claimants will resort to competing legal, normative and coalitional enforcement mechanism."

²² But see also: Agrarian Reform: Is it really pro-poor? (Down to Earth, 72/March 2007).

²³ Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere*, 1st ed., (Basic Books, 2000).

²⁴ Jan Michiel Otto, "Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto" in *Hague Journal on the Rule of Law* (vol.1, 2009, no. 1), pp. 173-194.

²⁵ Djaka Soehendera, *Pembangunan, Sertipikat Tanah dan Warga Miskin: Kasus di Kampung Rawa, Jakarta Pusat* (dissertation written in relation to the INDIRA project, Post Graduate Study Program University of Indonesia. 2006). Cf. Reerink G., van Gelder, J.L., "Land titling, perceived tenure security, and housing consolidation in the kampongs of Bandung Indonesia, (Habitat Internasional (2009), doi:10/1016/habitatint.2009.07.002.

²⁶ Daniel Fitzpatrick, "Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Areas", (the Yale Law Journal 115: 996, 2006): 996-1048.

He further points out that:

“ (..) numerous attempts to replace non-state systems with unitary state law have succeeded only in creating a polynormative system of official law, semi-legal practice, and widespread illegality. “

Such a pluralistic legal system had made possible rampant ‘discourse shopping’.²⁷ In another article, Fitzpatrick traces the chaos in Indonesian land law to the dubious nature of the state right of avail and the failure at defining proper areas of operation for public and private law.²⁸ He argues that land law in an effort to increase transactional certainty should rather be developed as private than as public law. Running through his argument is the insistence of separating the public law dimension from the private law dimension of land law.

While Fitzpatrick provides useful insights, his reducing all land disputes to the conflicting nature of property rights itself in Indonesia is not convincing. Surely the Indonesian government has taken advantage of this legal ‘chaos.’ But it fails to explain the underlying issues of conflicting interests in land use. It is also questionable whether his recommendation to separate the public from the private law sphere and to mainly promote private law for ordering land use will resolve much. In most modern states this distinction has become blurred, with states intruding upon what was formerly regarded as to be exclusively within the private sphere. What to me seems to matter more is the extent to which the government’s power regulated in public law should provide adequate and effective protection to citizens. It does not matter whether land law should be predominantly of a public or private law nature, as long as such protection is provided for. Hence land use regulation can be analyzed more productively in terms of governance issues than in those of blurred boundaries between public and private law.

In both articles Fitzpatrick actually mentions the issue of governance, but unfortunately has not elaborated it any further. Wallace, on the other hand, has stressed the importance of

²⁷ See Renske Biezeveld, “Discourse shopping in a dispute over land in rural Indonesia” (Ethnology Vol. 43, March 2004).

²⁸ Daniel Fitzpatrick, “Private Law and Public Power: Tangled Threads in Indonesian Land Regulation”, in H. Schulte-Nordholt (ed.) *Indonesia in Transition* (Yogyakarta: Pustaka Pelajar, 2006).

governance.²⁹ He argues that, “land disputes undermine efforts to establish civil peace and good governance and are incapable of being addressed in the existing policy and legal environment.”³⁰ Insecure land tenure, a problem faced by many millions of citizens, is thus thought to be a result of political and legal failure, in other words of bad governance. Noer Fauzi in this regard used the term “structural agrarian disputes” and very roughly translated this means that no rule of law exists in Indonesia.³¹ They may have a point here. Land disputes, in this view, cannot but be perceived in relation to the government’s capability (or rather incapability) to adequately address basic human needs, and, specifically in the context of urban areas, to enjoy decent housing within a clean and healthy (urban) environment.

While the problems are well-described by Wallace and Noer Fauzi, their conclusion that it would be impossible to find a solution to the issue within the existing policy and legal environment is not convincing. Obviously Indonesia’s policy and legal environment suffer from many shortcomings, but land grabbing and self help measures by the supposedly landless peasant – as promoted by many NGOs are unlikely to resolve the problem without risking a possible break down of the social order. In my view, a preferable approach is to take a step back and look at the issue from the perspective of spatial management policy and regulation. The advantage of this approach that it also considers aspects of good governance, which enables me to evaluate the extent to which the government had been able to effectively formulate and implement sound policies in spatial management.³²

²⁹ The concept of good governance was coined by the World Bank in 1989 to identify the crisis of governance in Africa (World Bank, *Governance and Development*, (World Bank: Washington DC, 1992): 5. It refers to the manner in which power is exercised in the management of a country’s economic and social resources for development (p.1). The concept is thus important in terms of public administration and evaluating the central and local government bureaucracy ability to deliver public service. See also Agus Pramusinto, “Building Good Governance in Indonesia, Cases of Local Government Efforts to Enhance Transparency”, paper presented at the EROPA Conference: Modernizing the Civil Service Reform in Alignment with National Development Goals, Bandar Seri Begawan Darussalam, 13-17 November 2006.

³⁰ Jude Wallace, “Indonesian land law and administration” in Tim Lindsey (ed.), *Indonesia: Law and Society*, 2nd edition, (the Federation Press, 2008), pp.191-223. However, she focused her analysis of the present land law and registration system further on and disregards the importance and influence of spatial management. Important as reform in land law may be in my view, such an attempt may not be sufficient to address the issue at hand.

³¹ Noer Fauzi, “Sendi-sendi Pembaruan Hukum Agraria” (Seminar, Jakarta, 1999): p. 9.

³² Cf. Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobaton, “Governance Matters”, paper available at http://www.worldbank.org/wbi/governance/gov_pdfs, last accessed 20 August 2007. They define governance broadly as the traditions and institutions by which authority in a country is selected, which includes (1) the process by which governments are selected, monitored and replaced, (2) the capacity of the government to effectively formulate and implement sound policies, and (3) the respect of citizens and the state for the institution that govern economic and social interaction among them.

1.3. Land Disputes and Conflicts from the perspective of Spatial Management

In summary, the existing literature dealing with land disputes in Indonesia has mainly focused on some specific aspects of it or looked at it with the intention to promote a certain view of what the ideal property right regime should look like. While such endeavors are useful, what is missing from them is a comprehensive analysis on the governance aspect which underlies many land disputes. Central to this approach is the question to what extent the law serves as an instrument in guiding and controlling government behavior to protect citizens from abuse and mismanagement in determining their access to land.

The present study attempts to provide such an analysis. It will thus go beyond the understanding of land disputes as mere conflicts of ownership or in case of land appropriation contesting claims about the appropriate form or adequacy of compensation. It will treat land disputes as the result of the way decisions affecting spatial management have been made and put into practice, and what goals the decision seeks to realize.³³ Land disputes in this view may be perceived as a manifestation of government failure in spatial management, and as a result of dysfunctional government. In fact it shares this view with People's Consultative Assembly's Decree 10/2001, whose general conclusion was that for a long time the Indonesian government had been mismanaging its natural and agrarian resources, resulting in various forms of social injustice and environmental disasters. This natural resource mismanagement was justified in the name of pursuing economic growth in the public interest, with the Indonesian spatial management system implemented without concern about the consequences of these policies for common people. The focus on national economic growth has blinded the government to the fact that the policies developed resulted in the sale of land at less than fair prices, loss of access to land and habitat, displacement and resettlement without due compensation, and environmental degradation.³⁴

This already points ahead at a central issue in this thesis: how the notion of public interest – which is central to spatial management – has been interpreted in relation to the overall development process and goals.³⁵

³³ Cf. Patrick McAuslan, "The Legal Environment of Planned Urban Growth" (Public Administration and Development, Vol. 1. 1981), pp. 307-317.

³⁴ The National Development Planning Agency & National Land Agency and financed by the IBRD, "Displacement of People and Resettlement-Indonesian Context", (Bappenas, 2000)

³⁵ Kuniko Shibata. See Kuniko Shibata, "The Public Interest: Understanding the State and City Planning in Japan", research papers in Environmental and Spatial Analysis no. 107, London School of Economics, Dept. of Geography and Environmental, March 2006).

1.4. Research Question

These issues will be addressed from a case study. It addresses is how spatial management, i.e. the formation and implementation of law and policy pertaining to the use of land, in Bandung and West Java Province has evolved since the 1990s, what its results have been, which factors underlie it, and finally how spatial management in West Java and Bandung can potentially be improved. The study will describe the transformation process of law into lower and detailed regulations, following existing levels of governments, and how it informs decision makers at the 'street level' dealing with permit applications. Considering the impact of the Regional Government Law 22/1999 (RGL 1999) as amended by Law 32/2004 (RGL 2004) on the government structure and power distribution between different government levels, this study also will trace how decentralization has influenced the distribution of authorities in spatial management. It will and analyze in detail the unexplored map of how permits -- possessing the dual function of informing citizens what to do and not to do, as a government instrument to protect the 'public interest' -- function in practice. Particular attention will be paid to how public officials interpret major 'open' concepts in implementing spatial management policy and law such as sustainable development, public interest, social and environmental cost, and the like. This is related to how the social and environmental cost has been internalized in the whole spatial management process. Another point of attention in this study is how such government instruments (permits) influenced peoples (comprising of landowners and investors or government actors acquiring land in the name of development) access to land. It will analyze who get most benefit from existing spatial planning and the permit system which putatively controls who gets access to land and to what purpose available land should be put to use. While the focus of this study is West Java and Bandung many of its findings and conclusions are likely to be applicable at a more general and theoretical level.

As regards land acquisition, the thesis explores how the current system of land acquisition and utilization for development purposes could be improved by making it more sensitive to social and environmental issues. This entails questions such as how immaterial losses associated with land alienation can be translated into monetary compensation. According to the law, land use has a social function³⁶, which potentially facilitates the idea of compensation for the environmental degradation brought about by changing patterns of land use. For all of those who lose their land in the name of development, those who are forced to

³⁶ Art. 6 (every land has a social function) and 15 (obligation of every land owner to maintain and preserve the land fertility and prevent its damage, with special consideration to the poor).

seek employment in cities and who come to live in the poorer quarters of these cities, how do we compensate for the loss of their basic right to enjoy a clean and healthy environment?³⁷ How do we balance the needs of the greater good against the individual rights of those adversely affected³⁸?

These issues will not only be analyzed in their socio-political context, but also evaluated as part of the continuing struggle to establish the Indonesian *Negara Hukum* (or *Rechtsstaat*). In my opinion, the struggle to establish a *Negara Hukum* is the most appropriate framework to evaluate spatial management, which includes but is not limited to land disputes. The primary reason is that the *Negara Hukum* framework provides the most promising blueprint to establish an orderly and civilized society ruled by law in its broadest sense.

To put it differently, the *Negara Hukum* concept, understood as an universal human good in the sense that the government should be constrained by law and be held legally accountable to the people it is supposed to serve³⁹ should provide a standard - a base line - for the way governmental power as exemplified in legal rules and policies is to be exercised.⁴⁰ It should function as a guarantee for the proper exercise of state power. My focus will thus be on processes offering guarantees that the state (or government) will not abuse power or authority, even if this offers no guarantee for substantively good outcomes. My focus is on how the state formulates and implements laws and policies, how it can be held accountable for its actions, and how the *Negara Hukum* should provide a starting point in legal reform efforts at the national and regional level, including attempts at reforming the existing spatial management laws and regulations.

A practical reason for choosing the above approach is that the spatial management framework is an important instrument to secure formally stated development goals. According to the Constitution, the state exists in order to realize a just and prosperous society and therefore has a monopoly on determining how and when to exploit natural and agrarian

³⁷The Stockholm Declaration of 1972 asserts that “both aspects of man’s environment, the natural and man-made, are essential to his well being and the enjoyment of the basic human right, even the right to life itself”. Art. 5(1) of the Environmental Management Act (23/1997) stipulates that the right to a clean and healthy environment is a basic human right. This is affirmed in Art. 28 H of the 1945 Constitution and Art. 9(3) Law 39/1999 on Human Rights.

³⁸ Maria SW, Kebijakan Pertanahan: Antara Regulasi dan Implementasi (Jakarta: Kompas, 2001), p.73-75.

³⁹ See Chapter 11 (a universal human good) of Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, (Cambridge University Press, 2004), pp. 137-141. He offered three clusters of the meaning of rule of law: that the government is limited by the law; formal legality – rule by rules and that law should rule not man.

⁴⁰ The Hague Institute for the Internationalization of Law (HILL), *Rule of Law: Inventory Report* (discussion paper for the high level expert meeting on the rule of law of 20th April 2007).

resources, and for what purposes (Art. 33(3)). The same claim underlies the most important framework laws pertaining to spatial management, i.e. the Basic Agrarian Law, the Environmental Management Law 32/2009 (EMA 2009), the Spatial Planning Law 26/2007 (SPL 2007), and all other basic laws regulating utilization of specific natural resources (oil and gas, minerals and forestry). In fact, the whole top-down development planning mechanism in use during the New Order government and more or less preserved after 1999, was established on this foundation.

Situating my research in the context of the struggle to establish Indonesia as a *Negara Hukum* (a state based on law), my research will do three things, i.e. 1) look to what extent the legal framework for spatial management in West Java conforms to the requirements of the *Negara Hukum* idea, 2) look to what extent state practices in spatial management in West Java conform to the requirements of the *Negara Hukum* and 3) consider what state officials involved in designing and implementing spatial planning law and policy think of the *Negara Hukum* and to what extent this influences their behavior.

1.5. Research Site

The site selected for this study is the province of West Java, and more in particular the Bandung region. West Java has probably more than any other province in Indonesia been confronted with social-environmental problems caused by land acquisition and land use in the name of development.⁴¹ As the national capital's hinterland, West Java must buttress Jakarta's expansion and growth as a megapolitan city.⁴² In return, West Java is supposed to enjoy the trickle-down benefit of Jakarta's growth, but at the same time it is extremely vulnerable to the negative effects of governmental mismanagement of land use. Pressure on land in West Java is extremely high if we consider its rate of urbanization and population density. Data compiled by the National Bureau of Statistics (*Biro/Badan Pusat Statistik*) reveal that West Java, covering an area of 34, 736 km² and providing homes to 39,960,869

⁴¹ Surono, head of the Subdit Mitigasi Bencana Geologi Direktorat Vulkanologi dan Mitigasi Bencana Geologi (DVMBG) has been quoted as saying that in 2005 West Java province suffered most natural and man made disasters from all provinces in Indonesia. He added that policy and land use conversion aggravates the probability of man made disaster. Jabar, Kawasan Paling Rawan Bencana Longsor: Musibah Terbesar Terjadi di TPA Leuwigajah, (*Pikiran Rakyat*, 30 December 2005). But this is not to belittle the fact that other areas have also borne the social and environmental cost of land acquisition and utilization justified in the name of development.

⁴² Sri Hartati Samhadi, "Dilema Megapolitan", (*Kompas*, 17 February 2007): 33.

people, with an average of 1,074 people/km² is the most densely populated province in the country after Jakarta.⁴³ Bandung, the capital city of West Java, like Jakarta, expands into the surrounding areas, putting similar pressure on the existing patterns of land use.

The first case study looks specifically at West Java Province and Bandung municipality and how these different levels of government have dealt with spatial planning in an unstable and quickly evolving legal and political context. This reveals much about the difficulties in formulating a working and dependable spatial plan. The choice for looking at both levels of government allows me to demonstrate what working relationship exists between them and how this influences legal and policy formulation of spatial management. The second case study is situated in Puncut, North Bandung. Control of this area, officially a conservation zone, has been shared by three autonomous district level governments, which has seriously hindered the development of a coherent and integrated spatial management policy. Special attention will be paid to the way permits determine actual land use and influence the relationship between government institutions on the one hand and the private sector on the other. The third case study concerns the Jatigede hydro-electrical dam development project at Majalengka, West Java Province. Its focus is how the government has justified land acquisition for a government development project by referring to the public interest and how in the process it has dealt with inter-regional equity and tenurial security of land owners. I think that these three cases are fairly representative of how spatial management, land use planning and development planning have been intertwined in law and practice. By describing the whole process of land acquisition and subsequent land utilization for development purposes, both according to the law and how it works in practice, I will provide a general insight into the extent to which the law has effectively restrained the government and provided protection to land owners. The conclusions are therefore likely to have wider applicability.

1.6. Approach

This study applies a socio-legal approach, meaning that it combines a study of legal rules and regulation within the context of the legal system, with an analysis of social and political factors influencing how actors respond to and transform the law in daily practice. It shall not primarily focus on finding and explaining the existing gap between the normativity of

⁴³ Biro Pusat Statistik (Katalog 2120), December 2002

law and empirical practice, but instead attempt to look into the interrelationship between law and government institutions that are the main producers and users of the law and, finally, its impact on society. In this respect, I follow Schiff who stated that in a socio-legal approach⁴⁴:

“Analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation”

Brian Tamanaha has advocated a comparable approach, which he calls ‘realistic socio-legal’⁴⁵. He suggests that law be understood both as state law and institutions and actual patterns of behavior, arguing that these are mutually reinforcing, since institutionally enforced norms are derived from actually lived norms and law instrumentally shapes (and influences) routine behavior, thereby creating new lived social rules.⁴⁶

Considering what the socio-legal approach has to offer, I believe that this is the best way to study the issue at hand. Consequently, the spatial planning management system as manifested in legal rules shall be situated in a broader social, cultural, and political context. The focus therefore will be on describing the way law is “implemented” and how it interacts with informal rules and practices.⁴⁷ Thus, the way government institutions deal with the law when issuing permits will be analyzed not simply in terms of deviation or transgression of the law, but in terms of the interplay between legal, political and social factors.

This does not mean, however, that this study is one of politics in the manner of the late professor Lev. It was he who already in the 1950s and 1960s used this approach and who

⁴⁴ David N. Schiff, “Social Legal Theory: Social Structure and Law (The Modern Law Review Vol. 39 No. 3 (May 1976) pp. 287-310.

⁴⁵ Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (New York: Oxford University Press, 1997)

⁴⁶ Ibidem, pp.116-117.

⁴⁷ Cf. Timothy C Lindsey, “Paradigms, Paradoxes and Possibilities: Towards Understandings of Indonesia’s Legal System” in Veronica Taylor (ed.), *Asian Laws through Australian Eyes* (Sydney: LBC Information Services, 1997), pp. 90-110. Cf. Reza Banakar and Max Travers, “Law, Sociology and Method”, in Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Oxford: Hart Publishing, 2005), pp.1-22. Arguing for a socio-legal approach, they note that there is interdependence between legal discourse (i.e. reflecting factors internally constructed by law) and social discourses (institutional factors external to law). They further argue that focusing the reflexive lenses of sociological analysis on the practice based features of the law, can potentially enable us to uncover the institutional limits of the legal practice, in a way that traditional forms of legal studies cannot. (p.22)

inspired other legal scholars writing about the Indonesia legal system and state to do the same.⁴⁸ While the changing political situation is important and surely influences the whole legal setting, the nature of my material does not allow me to push the law into the background, since legal analysis is needed to do it justice.

There is a practical reason as well. My own experience working as a practicing lawyer has taught me that a socio-legal approach, although not referred to as such, has been used for a long time by legal consultants or legal practitioners in Indonesia when advising their clients. The same applies to volunteers working at legal aid institutions. Sound legal advice will always convey information about the law (prescriptive), but also about practice (descriptive), and what the law and practice should look like (normative)⁴⁹. The advantage of this socio-legal approach is that it enables me to focus not only on how “black letter law” (as found in legal documents) has been articulated, but, more importantly, on how it has been further interpreted and put into practice by real actors in the field. Such an approach moreover has the potential to demonstrate that state law and the formal legal system are not merely discrete entities and as such unproblematic⁵⁰.

1.7. Data Collection

I have been interested in the issues raised in this study for a long time. Having lived in Bandung for more than 40 years I have noticed how the city has changed over the years. From a small, quiet city, a mix of residential areas left over from the Dutch colonial time and a large number of hamlets (urban or agricultural), it has become increasingly urbanized with all the characteristics of big cities in Indonesia: traffic jams during rush hours, flash floods, night life, expanding commercial-business areas, and so on. For me, most disturbing has been the change in land use patterns. Villages have disappeared to make way for shopping malls and huge real estates mixed residential areas with hotels and golf courses. The villages that

⁴⁸ Daniel S. Lev, “Judicial Unification in Post Colonial Indonesia”, Indonesia 16 October 1973; “Judicial Institutions and Legal Culture”, in *Culture and Politics in Indonesia*, edited by Claire Holt (Ithaca, NY: Cornell University Press, 1972).

⁴⁹ Ms. Robert made this important and useful distinction to study the normative content of legal rules and evaluate its implementation in practice. See Anthea Elizabeth Robert, “Traditional and Modern Approaches to Customary International Law: A Reconciliation” (*The American Journal of International Law*, Vol. 95, 2001), pp. 757-791.

⁵⁰ A point stressed by Michael Freeman, “Law and Sociology” in *Law and Sociology*, edited by Michael Freeman, *Current Legal Issue 2005* (Oxford, Oxford University Press, 2005), pp.1-2.

remain have lost their open agricultural space and become slum-like areas with little or no access to basic needs. Even quiet urban neighborhoods have been affected in some way or another. Hospitals and schools formerly situated ideally within a spacious and green open area are currently encircled by hotels, supermarkets, restaurants, and street vendors. The city has lost most of its open-green areas to development initiatives. Even artificial lakes found on the outskirts of the city, established by the Dutch colonial government, as part of the flood control system, have been reclaimed as the demand for land increased. Except for a small number of environmentalist and other planning specialists, the municipal government seems to be unaware of the highly unsustainable manner in which the city has been managed. This initial observation based on long time personal experience provides the basic framework for the data of this research.

I started to gather a more targeted and organized data collection between 2003 and 2009, and early 2010, after having conducted a library search and a desk study. The first place I visited was the Technical Faculty (Department) of the Bandung Institute of Technology (Bandung). A literature study of issues revealed what land use planning systems has been used in Indonesia. In addition, it showed what kind of discussions had taken place in this particular field. I then compared the results to a second literature review of spatial planning and land law. Unfortunately, not much has been written about spatial or urban planning law in Indonesia. There are only a few serious discussions on the law of spatial planning, many books containing a compilation of spatial plans made by various government levels, and a few articles criticizing the disarray in land use and the way it threatens the environment's carrying capacity.

The main result of my findings was rather disturbing. Apparently, land use planning has been treated merely as a technical tool to create order. While regional planning and maps are important tools to control and direct patterns to land use, attention for real people seemed to have been largely absent. Patterns of urban and rural land use are strongly related to infrastructure development policies and development planning. I therefore decided that my next step would be to visit provincial development planning boards. The intended strategy was to interview some well-informed people and from the information gathered decide which other institution or informants I should see. This resulted in a series of rather open semi-structured interviews with government officials employed at the Provincial and District Development Planning Boards (*Badan Perencanaan Pembangunan Daerah*). In general, my idea was to find out what kind of planning system existed at various government levels and

how they related to existing development-spatial plans. Nonetheless, while those officials interviewed were quite helpful I felt that I missed out on something important.

It was at this stage that I derived the idea from reading de Soto's book,⁵¹ to follow the trail of permits and (binding) recommendations that relates to land use and determines access to land, as it is the combination of government interventions in the form of permits and recommendation which eventually determines land use patterns. Therefore, I needed to discover what permits and recommendations relate to land use and which government institution had been authorized to issue those. I then arranged an interview with staff from Real Estate Indonesia, an association of real estate/housing construction companies and legal affair specialists of real estate firms in Bandung. The first went well, but with regard to the second, I had very limited success. Only two out of four real estate companies responded to a request for an interview and that was due to the fact that a personal relationship had been established earlier. From these and other interviews, both formal and informal, I obtained an outline of government institutions and permits influential in determining patterns of land use. As a bonus, I received inside information about the way government institutions perceived themselves and other institutions. By way of follow-up I interviewed government officials responsible for receiving applications of permits and recommendations and processing them at different levels and in various institutions. The results have been incorporated in this study.

I also interviewed a number of NGOs. With regard to the North Bandung Area, I organized a seminar on behalf of Wanadri, an association of environmentalists and mountain climbers. The seminar took place in 2006 in Bandung in cooperation with the Training Division of the Army Special Forces (Kopassus) of Batujajar, and intended to raise awareness regarding the threat of the unbridled urban expansion for the effort to preserve and protect the ecosystem of the mountains surrounding Bandung. In the context of this seminar, I gathered data on the status of the North Bandung Area and, in addition, discussed the issue with other stakeholders (municipal governments, environmentalists, academicians, representatives of the ministry of forestry).

Two NGOs in particular, the DPKLTS and the Bandung Legal Aid Institute, have been helpful in providing data for this research. Both organizations had been active in assisting communities threatened with expulsion due to land acquisition, and the data and other

⁵¹ Hernando de Soto, *The Other Path: The Economic Answer to Terrorism* (New York: Harper & Row Publishers, 2000).

information collected with their assistance later formed the basis for the two case studies reflecting practices in land acquisition (the Punclut Integrated Tourism Development Area and Jatigede hydro-electrical dam project case). Both NGOs had been active in assisting land owners being evicted to bring their case before the administrative court and other political forums.

An important source were also media reports, in particular those from the local newspaper *Pikiran Rakyat*. And obviously, living in North Bandung, I have had many informal discussions with many of the *kampung* dwellers who are the main victims of spatial planning and development in that area.

1.8. Theoretical Framework

In this section, a number of key concepts important for this study will be elaborated. This will provide a frame of reference for all the chapters of this study. For that purpose, the *Rechtsstaat* concept is related to what the government does in terms of spatial management and protection of the public interest. Lastly, considering that this umbrella concept of *Rechtsstaat* also relates to the state and government reform initiated after 1999, I will also provide a brief elucidation on the concept of decentralization.

(a) The Indonesian *Rechtsstaat* as ideal norm and empirical fact

The formation and implementation of laws and policies related to spatial management shall be evaluated using the yardstick provided by the rule of law as an ideal normative concept. Rule of law implies a government under law, meaning that the organs of government must operate not only through the law but in accordance with it. Likewise, in the *Rechtsstaat*, all government action must be based on law (due process) and in this way government power is restrained by law. This understanding of the *Rechtsstaat* as due process significantly determines the legitimacy of government action which should be based on the law. On that particular basis the state may demand that all citizens obey the law⁵².

More detailed in terms of evaluation is the scheme developed by Bedner, which does not provide a definition of the term “rule of law”, but instead divides the concept into three

⁵² This notion of *Rechtsstaat* forms the basis of the WRR analysis of the future of the Dutch *Rechtsstaat*. See WRR, *De Toekomst van de Nationale Rechtsstaat* (Den Haag, Sdu Uitgeverij, 2002).

interlinking categories (procedural, substantive and controlling mechanisms) to be used to ask legal and empirical questions about rule of law formation.⁵³ Inherent in Bedner's scheme is the recognition that undoubtedly there exists a gap between what the government ought to do in the context of realizing the *Rechtsstaat* (Rule of Law) as a normative ideal and what happens in practice.⁵⁴ Not all parts of this scheme will be equally important for this research. Of specific relevance is the first part on procedural elements, which applied to this research has resulted in a combination of empirical and legal question about the quality of law making, the ability of the law to limit government actions or otherwise leave room for discretionary powers, and the extent of public participation in law-making and controlling its implementation. Legal and empirical questions asked within the heading of the procedural elements have been used as guidance in writing this research study.

An additional, but equally important, problem is how to embed abstract and general values or norms falling under the broad notion of rule of law (as a normative ideal) in the national or local milieu⁵⁵. Hence, besides knowing exactly what the notion of *Rechtsstaat* as ideal norm implies the attempt at understanding the extent to which the state (or government) as well as law is being embedded or manifests itself in society is equally important. As argued by other authors⁵⁶, "(t)he notion of [*Negara Hukum*] refers to the relationship between the State and law. Not a more or less accidental relationship, but an essential one." Similar assertions stressing the point that the *Rechtsstaat* should be understood as an ideal type of normative ordering of society have been made by other authors as well. O'Hagan argued that "the characteristic form of the most advanced modern social order is that of a *Rechtsstaat*" which he defines as a "more or less sovereign state made up by citizens who are united by abstract impersonal ties of recognition of the state as an authoritative source of power and

⁵³ Bedner, A.W. (2010) 'An Elementary Approach to the Rule of Law', in *The Hague Journal on the Rule of Law*, vol. 2(1), pp. 48-74.

⁵⁴ Marc Hertogh, *De levende rechtsstaat: een ander perspectief op recht en openbaar bestuur*, (Utrecht: Lemma, 2002), pp. 26-36. Cf. WRR, *De Toekomst van de Nationale Rechtsstaat* (Den Haag, Sdu Uitgeverij, 2002), which also makes a point of distinguishing the *Rechtsstaat* as an ideal norm and as empirical fact. A similar approach underlies articles compiled and edited by R. Perenboom (ed.), *Asian Discourses on the Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (London/New York: Routledge, 2004).

⁵⁵ Joon-Hyung Hong, "The Rule of Law and Its Acceptance in Asia: A View from Korea", in *The Rule of Law Perspective from the Pacific Rim* (The Mansfield Centre for Pacific Affairs, 2000): pp. 145-154.

⁵⁶ M.C. Burkens, H.R.B.M. Kummeling & B.P. Vermeulen, *Beginnelsen van de Democratische Rechtsstaat: Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, derde druk (Zwolle: W.E.J. Tjeenk & Willink, 1994). See especially Chapter 3 (*Rechtsstaat*), pp.31-32.,

who are endowed with a more or less extensive set of legal constitutional rights against the state”.⁵⁷

The same concern lies at the core of Asshiddiqie’s redefinition of the Indonesian *Rechtsstaat* in which he requires the state to be established on democratic principles and recognition of human rights⁵⁸. He asserts that: “in a *Rechtsstaat*, law not men governs. Law here is understood as an integrated normative legal ordering [of society] with the constitution at its apex (*kesatuan hierarkhis tatanan norma hukum yang berpuncak pada konstitusi*). On that basis, he further declares that Indonesia ought to be established as a constitutionally democratic *Rechtsstaat*. As argued by Asshiddiqie elsewhere, in the Indonesian *Rechtsstaat* it is important not to separate the *cita Negara* (the ideal state) from the *cita hukum* (the ideal law)⁵⁹. Historically, the *Rechtsstaat* idea cannot be understood separately from the development of the Indonesian state (and government) since Independence,⁶⁰ the effort at modernizing the Indonesian legal system as captured in the term legal development (*pembangunan*) or legal renewal (*pembaharuan*)⁶¹ and the broad notion of development.

The main point here is that the Indonesian *Negara Hukum* refers to a specific understanding of the state-society relationship, with law expected to function as an instrument in realizing the state goals of bringing welfare and prosperity to Indonesian society. State-made laws (and policies) have been an important tool in social engineering efforts to modernize Indonesian society from a traditional society into a modern industrialized one.⁶² The effort at realizing the Indonesian *Negara Hukum* is thus linked to nation-building and development.⁶³

⁵⁷ Timothy O’Hagan, “Four Images of Community” (Praxis International 2/1998), pp. 183-192.

⁵⁸ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, edisi revisi, (Jakarta: Konstitusi Press, 2005), pp. 152-162. Cf. by the same author, “Demokrasi dan Hak Asasi Manusia” (paper presented before the 1st National Conference Forum for Community Development, Jakarta, 19 December 2005).

⁵⁹ Jimly Asshiddiqie, “Cita Negara Hukum Indonesia Kontemporer” (Simbur Cahaya no. 25 tahun IX Mei 2004).

⁶⁰ Ibidem.

⁶¹ See: Satjipto Rahardjo, *Sisi-sisi Lain dari Hukum di Indonesia* (Jakarta: Kompas, 2003).

⁶² See Mochtar Kusumaatmadja, *Pembinaan Hukum dalam rangka Pembangunan Nasional*, (Bandung: Binacipta, 1975 & 1986) and *Fungsi dan Perkembangan Hukum dalam Pembangunan Nasional*, (Bandung: Binacipta, 1986). See also Teuku Mohammad Radhie, *Politik Hukum dan Konsep Keadilan* (Bandung: Pusat Studi Hukum Unpar, 1986). Cf. Romli Atmasasmita, “Membangun Sistem Pemerintahan Yang Bersih dan Berwibawa Bebas dari Korupsi, Kolusi dan Nepotisme”, (Dies Natalis speech at the State University of Padjadjaran (UNPAD), Bandung, 11 September 2004).

⁶³ Soenaryati Hartono, *Hukum Ekonomi Pembangunan Indonesia* (Bandung: Binacipta, 1982), especially chapter 2 (fungsi hukum dalam pembangunan dan hukum pembangunan), and *Peranan Kesadaran Hukum Masyarakat dalam Pembaharuan Hukum* (Bandung: Binacipta, 1976).

As indicated earlier, an important part of the effort at rule of law formation is legislative engineering. In Indonesia legal development and reform are the result of legislative engineering rather than of the slow process of judicial lawmaking, which is thought to better serve the nation building and modernization effort. One major objective is to substitute legal pluralism⁶⁴ for a unified national legal system applicable to all citizens. Whilst Tamanaha and others argue that⁶⁵ legal pluralism is actually a common situation observed in developing as well as developed countries, from a developing state perspective and the need to promote, initiate, control and regulate the process of political, economic and social development of a nation in the post independence era⁶⁶, the same phenomenon understandably is perceived as obstructing the nation and state building effort and moreover as hindering the attainment of development goals as initiated by the government. This explains why rule of law formation is often – incorrectly – equated with establishing uniform laws applicable to all.

(b) Rechtsstaat and Development

The 1945 Constitution has established Indonesia as a *Negara Hukum* (*Rechtsstaat*) where law, not men, should reign supreme. Before the third amendment to the 1945 Constitution in 2001, reference to the *Rechtsstaat* concept could be found in the General Elucidation of the 1945 Constitution, which at that time was considered an inseparable part of the main text. It is stated that Indonesia is a *Rechtsstaat*, a state based on law and not on power alone (*machtsstaat*). After 1999, it was thought that the concept should be incorporated into the main text of the Constitution rather than being briefly referred to in the general elucidation and Article 1(3) of the 1945 Constitution (fourth amendment, 2002) explicitly states that: “*Negara Indonesia ialah Negara Hukum*” (the state of Indonesia is a State based on law).

⁶⁴ The term in general refers to a situation in which different groups within society recognize, through its practice in a given social arena, different, and sometimes competing and conflicting sets of legal norms. Tamanaha in explaining legal pluralism emphasizes the non-essentialist or conventionalist understanding of law as “whatever people identify and treat through their social practices as ‘law’ (or recht or droit, etc.). Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, (Oxford: Oxford University Press, 2001), p. 194.

⁶⁵ Sally Falk Moore in *Law as Process: An Anthropological Approach*, (London: Routledge, 1978) develops the concept of semi autonomous social fields in explaining the legal pluralism as a normal and common phenomenon. See also Benda-Beckmann, F.von (2002), ‘Who’s afraid of legal pluralism?’ *Journal of Legal Pluralism*, 47, 37-82. He asserts that legal anthropologists have looked at the state and state law as representing one political organization only beside other local, territorial or tribal or religious organizations with their own laws.

⁶⁶ Nobuyuki Yasuda, “Three Types of Legal Principle: A New Paradigm for the Law and Development Studies”. Whilst acknowledging the operation of legal pluralism, he also underlines the importance of development law (state law) as miscellaneous legislation aiming at state and nation building.

Consequently, the effort to realize the *Negara Hukum* ideal is an important part of development goal in Indonesia.⁶⁷ This has been translated into a continuous effort at simultaneously empowering the government to act in the public interest when bringing development to the people and into reducing governmental arbitrariness⁶⁸.

However, this conflating the *Negara Hukum* concept with the broad notion of development is confusing and unhelpful for the present analysis. As indicated, the term development in Indonesia is very much linked to state and nation building and, sometimes even only to attempts at inducing continuing economic growth or infrastructure construction. It has a different meaning from the term habitually used in the international literature. For instance, development (*ontwikkeling*) as referred to by Otto is a much broader concept. And as he has elaborated, it encompasses rule of law as one of the goals of development.⁶⁹ What his scheme points out is the fact that trade-offs between various goals and processes of development are even more complex than just the choice between, for instance, security-political stability and legal certainty (one important element of the *Negara Hukum* concept). His elaboration should be a warning to avoid the trappings of New Order government thinking, which equated the effort to bring welfare to the people with rule by law rather than rule of law.

In conclusion, the notion of rule of law or the *Rechtsstaat* is quite broad and is easily misinterpreted to encompass other goals and purposes. It is hoped that the attempt at clarifying and unbundling the term will adequately serve the purpose of this research, which is to portray the issues at hand from a *Rechtsstaat* perspective and how it relates to Indonesia's development agenda. Departing from this notion, we now will turn to clarify the concept of spatial management which serves as an important policy tool in making possible the development of a just and equitable land use arrangement in the public interest.

⁶⁷ See PCA Decree 4/1999 (Broad Guidelines of State Policies 2004-2009), chapter III.

⁶⁸ A theme which runs through the successive amendment to the 1945 Constitution, the decentralization law of 1999 and 2004 and which also underlies the whole development policy package, i.e. *Program Pembangunan Nasional* (National Development Program) of 2000-2004; *Rencana Pembangunan Jangka Menengah/RPJM* (Middle Term Development Planning) of 2005-2009) and *Rencana Pembangunan Jangka Panjang/RPJP* (Long Term Development Planning) of 2005-2025 (Law 17/2007).

⁶⁹ Jan Michiel Otto, *Lokaal Bestuur in ontwikkelingslanden: een leidraad voor lagere overheden in de ontwikkelingssamenwerking* (Bussum: Coutinho, 1999), pp.18-19. Cf. J.M. Otto, *Law and Governance in Developing Countries: Some Introductory Remarks on Law, Governance and Development*, (Van Vollenhoven Institute: Leiden, 2006), pp. 15-18.

(c) Spatial Management

As indicated earlier, spatial management is an umbrella concept encompassing the formation and implementation of law and policies pertaining to land-use. It involves such issues as regulating access to land, the maintenance of tenure security, and the balancing of various and sometimes conflicting interests in land use. Land (agrarian) law and spatial planning law are the most important constituting parts of the spatial management policy framework.

The existing Law on Spatial Planning (SPL 2007 amending SPL 24/1992) refers to the concept of “*penataan*” which includes both the act of determining and managing spatial use, and therefore is broader than mere planning. Article 1 par.(5) of the Law on Spatial Planning explains that spatial ordering (*penataan ruang*) encompasses efforts at developing a system of spatial planning (*perencanaan*), utilization (*pemanfaatan*) and spatial (utilization) supervision and control. Spatial planning in this sense involves the identification of problems, the exploration and analysis of alternative courses of action and the making of decisions by government officials and their implementation. This system of spatial management is built on the basis of certain principles, the most important ones being sustainability (*keberlanjutan*), protection of the public interest (*perlindungan kepentingan umum*), and legal certainty and justice (*kepastian hukum dan keadilan*) (article 2). Heeding these principles should help accomplish a harmonious relation between human-made and natural environments (article 3).

In that sense, spatial management in Indonesia as elsewhere has been linked with the notion of the environment’s carrying capacity and sustainable development, in particular of urban areas.⁷⁰ Lurks, in comparison, argues that:⁷¹ “spatial planning (in a broad sense) is focused on determining the best division of spatial use with the purpose of optimizing its use by society. Spatial planning involves taking into account and coordinating all societal development with spatial aspects and effects⁷²”.

In Indonesia, spatial management is likewise also connected to other specific developmental goals. These are explicated in the law, and several officials and scholars have addressed this

⁷⁰ Peter Nas, “Urban Planning and Sustainable Development” (European Planning Studies, Vol. 9, No. 4, 2001): pp 503-524. Cf. Robert B. Potter & Sally Llyod-Evans, *The City in the Developing World*, (Singapore: Addison Wesley Longman Limited, 1998). See, especially chapter 9 (Cities and environmental sustainability in the developing world), pp. 187-202.

⁷¹ Marco Lurks, *De Spanning tussen Centralisatie en Decentralisatie in Ruimtelijke Ordening*, dissertation Univ. Leiden, 2001, p.3.

⁷² Ibidem. “de ruimtelijke ordening is gericht op de best denkbare indeling van de ruimte ten behoeve van een optimaal gebruik daarvan door de samenleving. Ruimtelijk ordenen bestaat uit het afwegen en coördineren van alle maatschappelijke ontwikkelingen met ruimtelijke aspecten en effecten”.

topic. Thus, the incumbent director general of Spatial Planning, Ministry of Public Works, Mr. Dardak, has argued that spatial planning should be deployed so as to utilize state owned natural resources (*dikuasai oleh Negara*) as efficiently as possible and be geared towards realizing people's welfare (*kemakmuran rakyat*).⁷³ He continues, however, by asserting that the spatial planning (framework) law should be understood as one important legal tool to secure development goals, i.e. maintaining a productive, comfortable and sustainable environment (*ruang kehidupan yang nyaman, produktif dan berkelanjutan*). He asserts that any attempt at pursuing development goals must take into account the interest of present and future generations.

The following are the main legal and empirical issues involved in spatial planning:

1. boundaries and area jurisdiction;
2. the who-does-what question-conflicts between authorities;
3. the land question; what is the relationship of the authority to the land and who allocates plots for development;
4. the planning framework; the need to follow procedures,
5. housing conditions and their enforcement; including questions of sewerage and drainage; and
6. building contracts and agreements with consultants.⁷⁴

This list does not say anything about how land ought to be used, but apart from that it is fairly complete. In this study it will be used to evaluate the institutional arrangements regarding spatial planning and how they have changed over time. Thus, in this study spatial management denotes legal instruments and policies through which the government makes decisions pertaining to allocation and subsequent utilization of land (agrarian and natural resources) to secure some predetermined goals and objectives⁷⁵. Such decisions, taken in the

⁷³ A. Hermanto Dardak, "Perencanaan Tata Ruang Bervisi Lingkungan sebagai Upaya Mewujudkan Ruang yang Nyaman, Produktif, dan Berkelanjutan", paper presented at a seminar "Revitalisasi Tata Ruang dalam Rangka Pengendalian Bencana Longsor dan Banjir", organized by the Ministry of Environment, Yogyakarta, 28 February 2006. A. Hermanto Dardak, "Perencanaan Tata Ruang Wilayah dalam Era Otonomi dan Desentralisasi", paper presented before a seminar organized by Post Graduate Program City and Regional Planning (perencanaan kota dan daerah) of University of GadjahMada, Yogyakarta, 5 May 2003.

⁷⁴ Patrick McAuslan, op. cit.

⁷⁵ See Atsushi Koresawa and Josef Konfitz, "Towards a new role for spatial planning" in OECD (organization for Economic Cooperation and Development), Towards a New Role for Spatial Planning, OECD Proceedings, Paris, 1999-2000), pp. 11-30.

context of spatial management, affect the interests of different groups in different ways⁷⁶ and reflect the distribution of political, social and economic power⁷⁷. As such, it is also the product of a specific legal and government culture, to be studied in the context of its relation to a broader social system⁷⁸.

(d) Spatial Management and Sustainable Development

As indicated above, most literature links the notion of spatial management to sustainable development⁷⁹. Sustainable development itself has been defined in many ways, but the most frequently quoted definition is from the Bruntland report 'Our Common Future'. This report defines sustainable development as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs⁸⁰". As further explained in the Report, the notion of sustainable development contains two key concepts: the concept of needs aimed in particular at the essential needs of the world's poor, to which overriding priority should be given; and the idea of the environment's ability to meet the present and future needs in relation to existing social organizations and advances in science and technology. This suggests that poverty reduction and environmental protection should be incorporated into development strategies and policies. The concept thus combines ethical norms of welfare, distribution and democracy while recognizing that nature's ability to absorb human-made encroachments and pollution is limited. Consequently, a sustainable

⁷⁶ This description of spatial (or land-use) planning is borrowed from Nigel Taylor, *Urban Planning Theory since 1945* (London: Sage Publications, 1998) and is developed to counter the argumentation that spatial (town) planning merely involves decisions about the physical use of land and does not concern itself with economic-social or political planning. See pp. 3-19.

⁷⁷ Daniel S. Lev, "The Colonial Law and the Genesis of the Indonesian State" in Daniel S. Lev, *Legal Evolution and Political Authority in Indonesia: Selected Essays* (The Hague: Kluwer Law International, 2000), p. 13. See also Vedi R. Hadiz "Decentralization and Democracy in Indonesia: A Critique of Neo-Institutionalist Perspectives", in *Development and Change* 35(4): 697-718 (2004).

⁷⁸ See Delik Hudalah and Johan Woltjer, "Spatial Planning System in Transitional Indonesia" (*International Planning Studies* Vol. 12, No.3, August 2007); 291-303.

⁷⁹ See Agenda 21. Promoting sustainable human settlement development is the subject of Chapter 7 Agenda 21. Programme areas include: (a) providing adequate shelter for all; (b) improving human settlements management; (c) promoting sustainable land use planning and management; (d) promoting the integrated provision of environmental infrastructure: water, sanitation, drainage and solid waste management; (e) promoting sustainable energy and transport system in human settlements; (f) promoting human settlements planning and management in disaster prone areas; (g) promoting sustainable construction industry activities; and (h) promoting human resource development and capacity building for human settlements development.

⁸⁰ World Commission on Environment and Development (WCED), *Our Common Future*, (Oxford: Oxford University Press, 1987), p.43.

development strategy will create healthy economic growth, preserve environmental quality, lead to wise use of environmental resources and enhance social benefits⁸¹.

One can easily imagine why this concept holds much appeal to developing countries. While relatively rich in natural resources, most of them continue to grapple with issues of underdevelopment and widespread poverty. The problem is that the sustainable development concept may degenerate into a justification for development policies which focus merely on ensuring economic growth, as measured by increases in real per capita income. The trickle down effect or “economic growth comes first” development strategy pursued by many developing countries, including Indonesia, may become the direct cause of social inequity and ecological disasters. Alternatively, the definition of sustainable development may be undercut by incorporating every desirable goal into it that relates to social and ecological issues. The concept has even been used to advocate the supremacy of the free-market against state-led development⁸².

The central problem is that the sustainable development concept fails to define the term ‘needs’ and does not provide any indication as to how the needs of the present and future generations should be met. “Needs” is a subjective concept: people in different times, or with different income levels different cultural or national backgrounds will differ about the importance they attach to different “needs”. Another weakness is that the concept fails to define what should be sustained. Continued economic growth certainly cannot be sustained forever. There is an absolute limit to nature’s capacity to support continued economic growth. On this basis, the Brundland report’s definition has been considered meaningless in terms of satisfying the needs of future generations.⁸³ Nonetheless, the concept remains appealing in that it conveys the need to incorporate social and ecological concerns into whatever development strategy is being pursued. It points out the need to seriously reconsider our understanding of development and limits put by nature to economic growth.⁸⁴

⁸¹ See chapter 2 (sustainability an evolving framework) of the 2003 World Development Report; World Bank, *Sustainable Development in a Dynamic World: Transforming Institution, Growth and Quality of Life* (2003 World Development Report), (World Bank & Oxford University Press, 2003).

⁸² As attempted, amongst others, by James A. Dorn, “Sustainable development: a market-liberal vision” (*The electronic journal of sustainable development* (2007)1(1)): pp.27-34. The author asserts that central planning and state ownership suppress individual freedom and that individual freedom is qualified (determined) by the establishment of a market based economy.

⁸³ Wilfred Beckerman, “The Chimera of “Sustainable Development”, (*the Electronic Journal of Sustainable Development* (2007) 1(1)), pp. 17-26.

⁸⁴ Cf. Herman E. Daly. He presented a speech titled “Sustainable Development: Definitions, Principles, Policies” (World Bank, Washington DC, April 30, 2002). The author suggests that what should be sustained is the

One way to accomplish that is by seeking a reasonable balance between desired goals of development and the available means and resources⁸⁵.

(e) Spatial management and the Government

Spatial management as seen from the government's point of view is an important instrument to secure certain development goals or other particular national or regional interest. Not surprisingly, spatial management has been predominantly regulated by the state, which is supposed to represent the people and the public interest. Spatial management should be used to advance the public interest against the interest of private property, if necessary.⁸⁶

That the government should represent the public interest is also strongly present in the idea of the Indonesian *Rechtsstaat* mentioned earlier. The government is entrusted with the task of governing,⁸⁷ which in its widest sense encompasses the duty to realize the state's goals (as written in the constitution or other official documents), make policies, and promulgate general laws and regulations and issuing decrees.⁸⁸ As one author puts it, the development of

entropic physical flow from nature's source through the economy and back to nature's sink. In other words, natural capital (the capacity of the ecosystem to yield both a flow of natural resources and a flux of natural services) is to be kept intact.

⁸⁵ Jonathan M Harris, "Basic Principles of Sustainable Development". (Working Paper 00-04, Global Development and Environment Institute, Tufts University, 2000).

⁸⁶ Patrick McAuslan, the Ideologies of Planning Law (Pergamon Press, 1980), p. 179. He mentioned two other compelling philosophies or ideologies underlying planning law; i.e. law exist and should be used to protect private property and its institutions and law existence and use should predominantly used to advance the cause of public participation.

⁸⁷ As contrasted with the term governance, which according to United Nation-ESCAP should be understood as the process of decision making and the process by which decisions are implemented or not. The UN also linked good governance to eight general characteristics, i.e. 1. participation; 2. rule of law; 3. transparency; 4. responsiveness; 5. consensus oriented; 6. equity and inclusiveness; 7. effectiveness and efficiency and 8. accountability. See further United Nations-ESCAP, "What is Good Governance?" www.gdrc.org/u-giv/escap-governance.htm. Cf. Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, "Governance Matters" (Policy Research Working Paper, the World Bank, October 1999).

⁸⁸ Victor Simamorang, Dasar-Dasar Hukum Administrasi Negara (Jakarta: Bina Aksara, 1988): pp. 18-19. Cf. Safri Nugraha et al., Hukum Administrasi Negara (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005). Cf. Kuntjoro Purbopronto, Beberapa Catatan Hukum Tata Pemerintahan dan Peradilan Administrasi Negara (Bandung: Alumni, 1981), p. 41.

the modern state led to the growth of political institutions entrusted with representing the public against the private or individual interest.⁸⁹

So far, I have avoided the term of governance, which we should now consider. The term governance as contrasted to government refers to:⁹⁰

“(...) the formation and stewardship of the formal and informal rules that regulate the public realm, the arena in which state as well as economic and societal actors interact to make decisions.

Within this concept of governance, government is but one arena amongst others (civil society, political society, the bureaucracy, economic society and the judiciary). Nonetheless, Hyden acknowledges that the way a government organizes itself and the rules it puts in place for its own operation are also important aspects of how society functions, in other words: governance influences popular perception of the regime.⁹¹ Following Hyden, it is this perception which the government must maintain to make spatial management workable. Another advantage of looking at spatial management from a governance perspective is that it sensitizes us to the important role other actors than the government may play in rule formation and standard setting.

(f) Public Interest in Spatial Management

As argued above, spatial management functions as an important tool to secure the public interest understood as development goals. This presupposes a division between the governing body and the governed, or between government and society⁹². The governing body is positioned above the governed and has the task to steer society for the good of the governed. The only actors that have the authority to take decisions are part of the governing body. They are the ones able to articulate the public interest, to determine the need for

⁸⁹ Kuniko Shibata, “The Public Interest: Understanding the State and City Planning in Japan”, (research paper in Environmental and Spatial Analysis no. 107, London School of Economics, Dept. of Geography & Environment, March 2006): pp.1-39.

⁹⁰ Goran Hyden, Julius Court and Kenneth Mease, *Making Sense of Governance: Empirical Evidence from 16 Developing Countries* (London: Lynne Rienner Publishers, 2004).

⁹¹ Ibidem p.18-22.

⁹² Karel Martens: “Actors in a Fuzzy Governance Environment”, in Gert de Roo and Geoff Porter (eds.) *Fuzzy Planning: The Role of Actors in a Fuzzy Governance Environment* (AshgatePublishing, 2007), pp. 43-66 Martens calls this the coordinative model, which has its roots in notions of rationality, bureaucracy and system theory.

intervention, and to select the best policies and programs, serving the needs of all groups and working for the common good.⁹³

However, there is obviously a serious danger of marginalizing society by conflating state or developmental goals with the public interest. State goals and those that have been developed by the government into programs and projects are not always and cannot always be in the interest of society at large. This is a problem exacerbated by the difficulty of separating the public from the private interest. As indicated by Weintraub:⁹⁴

“the use of the conceptual vocabulary of public and private often generates as much confusion as illumination, not least because different sets of people who employ these concepts mean very different things by them – and sometimes, without quite realizing it, mean several things at once”.

Weintraub further argues that the basis for using the term “public” to describe the acts and agents of the state is based on the state’s claim to be responsible for the general interest and the affairs of a politically organized collectivity as opposed to “private” – that is, merely a particular interest. Treating the state as the locus of the public may be combined with arguments for the openness or “publicity” of state actions⁹⁵. The end result would be a clear separation of the public and private sphere, where public officials would pursue the public interest in contrast to private or commercial interest. The same basic idea underlies the

⁹³ Jane Hobson, “New Towns, the Modernist Planning Project and Social Justice: the cases of Milton Keynes, UK and 6th October, Egypt”, working paper no. 108 (September 1999). She asserts that by the post -1945 era, planning had been institutionalized as a tool of the interventionist state (...) planning was a top down endeavor because planners were considered to have a comprehensive perspective which allowed them to recognize the “overall public interest”, (p. 2). An approach successfully applied in Singapore. See Belinda Yuen, “Guiding Spatial Changes: Singapore Urban Planning”, paper presented for the 4th Urban Research Symposium 2007 Urban Land Use and Land Markets, the World Bank, Washington DC, 14-16 May 2007

⁹⁴ J.A. Weintraub & K. Kumar (eds.), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: Chicago University Press, 1997). pp. 1-8. Jeff Weintraub argues that there are four major themes which distinguish public from private. These are: 1. the relation of the state to the market (liberalism); 2. the republican emphasis on the political community (public sphere) as opposed to the market and private life (citizenship: from the polis to the “public sphere”), 3. the contrast between sociability, for example, in urban space, and private life, in the sense of intimacy or domesticity (public life as sociability); and 4. the distinction between the larger economic and political order and the family (feminism: private/public as family/civil society).

⁹⁵ Ibid. But he also adds that other arguments are equally applicable, to wit that in order to advance the public interest, rulers must maintain “state secrets” and have recourse to the arcane imperii. p. 5.

inception of principles of good governance and the public accountability of government officials to the people.

Although spatial management law will always be the result of political processes and compromises, legal arrangements setting boundaries to government authority in spatial management are of much importance. Likewise, we must accept that the notion of public interest is inherently problematic, and even more so in the light of the shift from government to governance, but this should not restrain us from recognizing an acute and concrete need to protect individuals and even communities against state abuse of power or the mis-use of public interest. No matter how vague and difficult to define, the notion of public interest remains a key concept in spatial management and sustainable development. Therefore, this book will focus on the way the Indonesian government has defined and administered the public interest, especially in interpreting laws and formulate policies pertaining to spatial management. In the final analysis, this will be evaluated against the effort at establishing a genuine *Rechtsstaat* in Indonesia.

(g) Defining decentralization

Decentralization may be defined in different ways depending on one's legal/political perspective, ideology and practical needs.⁹⁶ Several scholars suggest that at present decentralization should be understood in the context of the attempt to reconcile two contrary tendencies: globalization and the wish for local self-governance⁹⁷. Decentralization has thus been described⁹⁸

“(...) as an alternative system of governance where a “people centered” approach to resolving local problems is followed to ensure economic and social justice. The entire process would be for locating people at the centre of power so that they become the basic engine of the development process and not, as hitherto, merely its beneficiaries.”

⁹⁶ See e.g. Aspinall, E. and G. Feally, “Introduction: Decentralization, Democratization and the Rise of the Local”, In: Aspinall, E. and G. Feally (ed.), *Local Power and Politics in Indonesia: Decentralization and Democratization*, (Singapore: Institute of Southeast Asian Studies (ISEAS), 2003), pp. 1-11 and Syaikh Usman, “Regional Autonomy in Indonesia: Field Experiences and Emerging Challenges”, paper prepared for the 7th PRSCO Summer Institute/the 4th IRSA International Conference: Decentralization, Natural Resources, and Regional Development in the Pasific Rim”, Bali 20-21 June 2002.

⁹⁷ Rajni Kothari, “Issues in Decentralized Governance”, in Aziz, A. and D.D. Arnold, *Decentralized Governance in Asian Countries* (New Delhi/Thousand Oaks/London: Sage Publications, 1996), pp. 34-41.

⁹⁸ Ibid. p. 35.

In this conception decentralization is considered instrumental in transforming state-centered development into something more people-centered. This implies that decentralization is primarily about governance, which itself has two interlinking meanings. One refers to a complex of institutions and organizations regulating the life of society and encompassing rules and social aggregations. The other denotes the act of governing, meaning how institutions are established and organizations behave, manage affairs and govern people.⁹⁹ A similar understanding underlies the development of the worldwide governance indicators used by the World Bank.¹⁰⁰

In short, hope has been raised that decentralization will enable society to achieve the goals of poverty reduction, sustainable livelihood, environmental regeneration and gender equity at the sub-national and local levels.¹⁰¹ In a similar fashion, decentralization has been suggested as the solution for all the problems brought about by rapidly growing cities in developing countries. Its aim then is to improve urban living conditions by addressing needs as directly as possible and by enabling city dwellers to participate in local decision making.¹⁰² By enabling them to participate in the policy process, transparency and predictability of the local government will increase. Decentralization also has the principal advantage of allowing communities greater levels of monitoring and control over local officials than was previously provided by the central government (if the rule of law exists at the local level).¹⁰³

In the Indonesian context, decentralization is best understood as a policy instrument introduced to completely reform the existing state and government structure (and to some extent the legal system) thought to be the root cause of the financial, economic and political

⁹⁹ As defined by Lawrence D. Smith in *Reform and Decentralization of Agricultural Services: A Policy Framework* (Rome: FAO of the UN, 2001). p. 13.

¹⁰⁰ Daniel Kaufmann, Aart Kray, Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006*, World Bank Policy Research Paper 4280, July 2007. The six dimensions of governance are: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption.

¹⁰¹ Walter Stohr in "Introduction to Walter Stohr, Josefás Edralin & Devyani Mani (eds.), *New Development Paradigms: Decentralization, Governance and the New Planning for Local Level Development*", (Contribution in Economic and History Series, No. 25, UN & UN Centre for Regional Development, 2001).

¹⁰² See also Cecilia Kinuthia-Njenga (eds.) *Local Democracy and Decentralization in East and South Africa: experiences from Uganda, Kenya, Botswana, Tanzania and Ethiopia* (UN Habitat-2002).

¹⁰³ Joachim von Braun & Ulrike Grote, *Does Decentralization Serve the Poor?* (Centre for Development Research ZEF-Braun, University of Bonn, Germany) paper presented at IMF-Conference in Fiscal Decentralization 20-21 November 2000 in Washington DC, p.7.

crisis. A good example of this view is the 2003 World Bank report, which sees decentralization as a panacea to all Indonesia political, social and economic ills.¹⁰⁴

Some authors have warned against putting too much trust in decentralization as the principal solution for underdevelopment. Stohr warns that decentralization should not be considered a magic potion which can solve problems such as lack of participation, poverty and inequality all at once.¹⁰⁵ In a similar fashion, Rondinelli argues that decentralization (of which the regional government law is but one part) must not be seen as a general solution, but as a range of administrative and organizational devices that may improve a government's efficiency, effectiveness, and responsiveness under suitable conditions.¹⁰⁶ Any decentralization effort should aim for establishing a legal framework with well-defined responsibilities for all actors concerned. This should be seen as a determinant for successful decentralization.¹⁰⁷ To conclude, inherent in the idea of decentralization is the notion that different problems (and communities) require different solutions. In order to resolve local problems, a new more decentralized government system should be formed. Decentralization should result in a local government possessing the powers necessary to bring development to local people and be held accountable for its efforts in doing so.¹⁰⁸ Implicit in this approach is the understanding as argued by Otto and Frerks, that decentralization should not be treated as a static concept or state of affairs but more as a process.¹⁰⁹ Therefore to understand the real nature of any particular case of decentralization, these authors suggest that the focus should be on what types of power and activities are transferred; the levels to which they are transferred; the individuals or organizations to which they are transferred; the type of

¹⁰⁴ World Bank, *Decentralizing Indonesia: A regional public expenditure review*, June 2003. (Report no. 26191-IND)

¹⁰⁵ Stohr, op.cit.

¹⁰⁶ D.A. Rondinelli, J.R. Nellis and G.S. Cheema, *Decentralization in developing countries, a review of recent experience* (Washington: World Bank, 1984).

¹⁰⁷ D. Oluwu and P. Smoke, "Determinants of Success in African Local Governments: An Overview. (Public Administration and Development, Vol. 12, no. 1, 1992) pp. 1-18; P. Mc Auslan, The legal environment of planned urban growth, (Public Administration and Development, Vol. 1, no. 4, 1981), pp. 307-317.

¹⁰⁸ See also Jan Michiel Otto, *Lokaal bestuur in ontwikkelingslanden: een leidraad voor lagere overheden in de ontwikkelingssamenwerking*, (Bussum: Coutinho, 1999). He discussed briefly the question whether decentralisation is good for development (*ontwikkeling*) and democratization. His quick response to both questions seems to be it depends. (pp. 25-26),

¹⁰⁹ Georg Frerks & Jan Michiel Otto, "Decentralization and Development: A Review of Development Administration Literature, in commemoration of Dr Haile K. Asmeron", Research Report 96/2, Leiden: Van Vollenhoven Publication Series, no year), p.11.

political, administrative or legal machinery used to make the transfer; and finally its impact on the state's development effort.¹¹⁰

Decentralization, as used in this book, thus means the transfer of power, tasks and resources from central government to lower levels of government. It implies a change in the working relationship between the central government and all other public and private institutions. Different forms of transfer are deconcentration; delegation; and devolution. The important issue here is what is involved in the transfer process: what form it takes and what is actually transferred.¹¹¹ Some authors speak of the need to develop a good design of the goals to be achieved first to avoid the negative aspects of decentralization¹¹². In order to successfully decentralize, one should focus on such issues as how territory is to be divided, what institutions will be used to govern, which functions, authorities and resources will be assigned to what levels of government and what means of popular and sectoral participation will be introduced to which territories.

If many tasks, resources and powers are passed on from the central to lower levels of government, the latter need a reformation of their internal structure in order to adjust. Decentralization only works if lower levels of government become more proficient. The effort at decentralizing powers to regional governments encompasses more than capacity building and transfer of skill. It must also enable them to coordinate work performed by various government institutions and incite greater public participation.¹¹³ Local populations should also be empowered to have better voice and exit options including the possibility to demand legal accountability from the local government.¹¹⁴ These issues are highly relevant for the present discussion of Indonesia's reform of the whole centralized and top down spatial management and development planning system.

¹¹⁰ Ibid, p.11 and again in the article conclusion (pp.26-27).

¹¹¹ Jan Michiel Otto, op.cit. p. 23.

¹¹² Mark Turner & Owen Podger (with Maria Sumardjono & Wayan K. Tirthayasa), *Decentralization in Indonesia: Redesigning the state* (Canberra: Asia Pacific Press, 2003), pp.6-7.

¹¹³ See Abdou Maliq Simone, *Principles and Realities of Urban Governance in Africa* (UN Habitat, 2002). pp. 10-12.

¹¹⁴ Anwar Shah & Theresa Thompson, *Implementing Decentralized Local Governance: A Treacherous Road with Potholes, Detours and Road Closures* (World Bank Policy Research Working Paper 3353, June 2004).

1.9. Course of the Research

This study is part of a wider research project initiated by the van Vollenhoven Institute, Faculty of Law, Leiden University in cooperation with Indonesian private and state universities. The INDIRA project (as it is better known) started in 2004 and focuses on three broad topics, i.e. the effects of the 1999 decentralization laws, of agrarian reform and of efforts made at rule of law formation. Indonesian and Dutch researchers involved in the project have been given the freedom to specify and break down the topics into other relevant questions, as long as they addressed questions posed under these three broad topics.

Initially, I must admit that I had my doubts about my eligibility to be involved as one of the Indonesian researchers, for the research issues being proposed were topics I was not quite familiar with, especially agrarian and decentralization law. Nonetheless, my experience as a legal practitioner in Jakarta during the 1990s and as a volunteer at the Legal Aid Institution of Law Faculty of Parahyangan Catholic University (UNPAR) Bandung showed me that agrarian reform and decentralization were only a small part of the continuous effort to establish a genuine *Negara Hukum*. Two particular incidents shaped the idea for the present research. The first concerned my experience as junior associate at *Makarim and Taira* Law Office, the second concerns my small contribution to handling land acquisition cases for public or development purposes.

My first job was at a large and well known legal firm in Jakarta, namely Makarim & Taira, affiliated with the Australian firm Freehill & Hollingdale. Here I first got acquainted with the process of law making at the national level as further transformed into permits and binding recommendations that were the legal instruments of development and social change at the local level. Among other duties in Lombok I was ordered to assist a large national conglomerate (Radjawali Group), established by one of President Soeharto's offspring, to acquire land with the purpose of establishing the Lombok Tourism Development Centre (on Lombok). Apparently, the local District Head acquired direct orders to support this development project initiated by a private commercial company whose head office was in Jakarta. Supplied with the necessary permits and recommendations, the company successfully acquired all the land it needed for the project. The involvement of *Makarim & Taira* as legal consultants in Jakarta helped to secure the cooperation and support of important government institutions at the central and local level and assured that every step the company took was performed in accordance with the law. Nonetheless, as another well-known tourist destination area (Bali), clearly showed, land acquisition on such a grand scale

will displace (and has been displacing) local people from their ancestral land, and moreover has destroyed local initiatives to develop small scale tourism.

The second formative experience was my involvement through the Legal Aid Institution of the Law Faculty of UNPAR with the *Jatigede* case in 2003-2004, and a few other smaller cases concerning spatial management. The Legal Aid Institution was asked to represent and assist local people in their effort at demanding a more just and equitable compensation. What struck me most was the government authorities' feeling of righteousness when they spoke about the need to bring development to the people at all cost. Government officials seemed to hold on to the belief that they, as servants of the State (*abdi Negara* or *pegawai-negeri*), were merely following the dictates of the law, which aimed at bringing development to the people. This sentiment was voiced in its most extreme form by the former Armed Forces Chief of Staff, General (ret.) Wiranto when he tried to avoid the army's accountability for past human rights violations. He argued that in former times the security apparatus (armed forces personnel) were performing their duty in accordance with the law. (...) they were acting on the basis of written orders based on State policy¹¹⁵. The same argumentation in various forms and gradations was used by prominent officials and even lower ranking civil servants at regional governments (provincial and district/municipal level) whom I interviewed for this research project. They all seem to be convinced of their righteousness when performing their legal duty in the service of the state. Underlying this belief is the never questioned assumption that the overarching duty of government acting on behalf of the state is 'bringing development to the people'. These officials strongly believe that all existing laws are tools legitimizing the effort to pursue national or regional development goals in the public interest. The second incident opened my eyes to the impact that development as an ideology has had on all aspects of spatial management law, including the prevailing legal regulation concerning land acquisition. This also prompted me to place land disputes in a wider context of spatial management, which in the end determines who will have access to natural resources and who will enjoy the freedom to utilize them. In addition, both incidents showed the need to approach the issue not merely as a problem of 'corruption, collusion and nepotism' – a problem that, however, does offers a strong indication– of the extent to which the distinction between state and society has been blurred.

Conflating state goals with the broad ideological notion of development has some serious drawbacks. It reduces the option to address the whole spectrum of development goals and processes and seek alternative perspectives. As many cases attested, including the widely

¹¹⁵ "Purnawirawan AD Risaukan HAM: Purnawirawan Matra Lain Akan Bersikap" (Kompas, 23 April 2008).

criticized *Kedung Ombo* Case during the 1990s, any criticism voiced against development projects initiated or supported by the government in the New Order period tended to be treated as a challenge to the state and the government's legitimacy¹¹⁶. This study will show that not much has changed. As a matter of fact many government officials I spoke to for my research just could not understand why individuals or local communities would not accept and welcome "development". The possibility of government error (in terms of spatial management or natural resource planning) is thereby categorized as non-existent: there are no bad (development) projects and mistreated people, but only "misunderstood" projects and "misunderstanding" people or NGOs¹¹⁷. Against such a position one should well keep in mind that the end does not necessarily justify the means. Following the law to the letter, even with the purpose of bringing about development, may certainly not be equated with the effort at bringing justice and treating citizens fairly.

1.10. Structure of the Book

This first Chapter has described briefly how land conflicts and disputes emerge in Indonesia and brought about social injustice, inequity and massive environmental degradation. It has sought to explain how spatial management played a role in curbing or on the contrary sowing the seeds for protracted land conflicts and disputes. These disputes and conflicts may well go beyond mere issues of ownership to the question of the proper use of scarce land in the interest of the public. Tenurial security is thus linked to efficient implementation of spatial plans. I have situated this analysis against the background of the attempt of Indonesia to establish a state based on law (*rechtsstaat*) and the decentralization effort initiated after 1999. The basic contours of the Indonesian state and government and what changes have occurred post 1999 is described in Chapter 2.

An historical overview of how the Dutch colonial urban planning developed into spatial-development planning after independence is given in Chapter 3. It describes how the pre-independence master plans of autonomous municipalities were transformed into a top-down spatial-development planning system. Chapter 4 discusses how the spatial management

¹¹⁶ Stanley, Seputar Kedung Ombo, (Elsam: Jakarta, 1994)

¹¹⁷ A point made by Charles Victor Barber, "The Case Study of Indonesia", occasional paper: Project on Environmental Scarcity, State Capacity, and Civil Violence, (Cambridge: American Academy of Arts and Sciences and the University of Toronto, 1997). His paper amongst others attempts to explain why the New order government so far has been able to avoid social instability and civil strife in the face of growing scarcities of renewable natural resources.

system as established by the Spatial Planning Law 24/1992 was implemented by the West Java province and the Bandung municipal and highlights problems related to it. The next chapter (Chapter 5) offer an analysis of how the Regional Government Law of 1999 which had a profound impact on the Indonesian state and government structure, led to changing perceptions on how the SPL should be implemented. For a short period, spatial planning became the attributed authority of autonomous districts, which resulted in a more district-up spatial management system. The effect this had on land use permits, one of the primary tools to implement spatial planning, will be analyzed as well.

How the central government reacted against “unbridled self-autonomy” in spatial management will be discussed in Chapter 6. It describes what legislative changes the central government implemented to regain some of its powers. In the process spatial management became a delegated responsibility instead of attributed power of the autonomous districts. Against the background of spatial management offered in the previous chapters, I will in the next chapter (Chapter 7) offer a detailed analysis of the most important tool in spatial management practice: permits which regulate access to land and restrict individual freedom in land use. The chapter describes also how these permits relate to land acquisition processes in the private or public interest. This chapter also provides the background for the next two chapters which discusses two different land acquisition cases. Chapter 8 pertains to a land acquisition process performed by a private commercial company in a conservation zone in Bandung. It describes the role of permits/licenses and recommendations and how in the end environmental and societal concerns were marginalized. The other case, described in Chapter 9, regards land acquisition performed in the public interest in Jatigede, the district of Sumedang. It contains a discussion on the evolution of land acquisition procedures in the public interest and their relationship with existing spatial plans. Both cases highlight the way the district government perceives the public interest and regulate people’s access to land.

In the Conclusion, the main questions outlined in Chapter 1 are answered. In addition, findings in the previous Chapters are summarized and provide the basis for a number of recommendations.

CHAPTER II

INDONESIA AT A GLANCE:

THE PEOPLE, THE STATE AND THE GOVERNMENTAL INSTITUTIONAL AND LEGAL FRAMEWORK

2.1. Introduction

This book is concerned with the ways in which government agencies in the West Java Province and the city of Bandung formulate land use planning in the context of spatial management. Issues raised in the following chapters will discuss how government units use the law and what the law's impact is on their ability to govern. Accordingly, to better understand the issues at hand, it will be necessary to offer readers an overview of the legal and institutional framework of the Indonesian state and formal legal system. The legal situation pertaining to land use planning will be dealt with separately and discussed in the ensuing chapters.

This chapter is divided into three parts. The first part will be a general territorial and demographic description of Indonesia. The reason for this is that the legal and institutional framework cannot be properly understood without having information, even if superfluous, about the demographic and geographical condition of Indonesia and related governance problems related to it. The second part will describe the latest relevant changes to the state and government structure. The final part will be an account of the formal legal system.

2.2. Territory, population and relevant issues

Indonesia is one of the world's largest and most complex "imagined communities". It comprises around 240 million people from well over two hundred different ethnic groups, professing diverse religious denominations and beliefs (although Islam is the dominant one) scattered over some 17,400 islands. These people live scattered within an area of 1,826,440 sq. km of land, with internal and territorial waters amounting to 93,000 sq. km.¹¹⁸ Such

¹¹⁸ These numbers do not yet include the Indonesian archipelagic waters. As an archipelagic state, Indonesia covers a large marine area consisting of around 2.9×10^6 Km² archipelagic waters, 0.3×10^6 Km² Territorial sea, 2.7×10^6 Km² Economic Exclusive Zone. For a brief discussion on Indonesian archipelagic waters see: Tri

numbers determine not only the administrative borders of the state but, more significantly, the scope of Indonesia's territorial jurisdiction. The Indonesian state's claim that it possesses sole authority to manage "land, water, airspace and natural resources within its territory"¹¹⁹ is of great importance to this book.

Figure 2-1: Map of Indonesia



Considering the existing diversity and cultural pluralism, there is no clear ethnic, social or economic logic to the state's boundaries – the modern Indonesian state simply adopted the former limits of the Dutch colonial power in the region. As a result, the island of Timor is divided between Indonesia and the newly independent state of Timor Leste. Likewise, Papua is divided into two parts. One half belongs to Indonesia and the other part forms part of the territory of the independent state Papua New Guinea.

The unity of this territory is not recognized by all of Indonesia's inhabitants, for instance by insurgents in Aceh and West Papua.¹²⁰ Efforts to secede from Indonesia and gain

Patmasari et al., "The Indonesian Archipelagic Baselines: Technical and Legal Issues and the Changing of Environment" (unpublished paper, Bakosurtanal).

¹¹⁹ Art. 33(3) of the 1945 Constitution stipulates that the land, waters and the natural resources within it will be under the powers of the State and shall be used to the greatest benefit of the people.

¹²⁰ The Acehnese People claimed that they were never subjugated by the Dutch colonial government and consequently their land was never a part of the Dutch colonial state and thus not part of the newly independent Indonesian state as well. See M.C. Ricklefs, *A History of Modern Indonesia since 1200*, 3rd ed. (London:

independence have been partly fuelled by perceived injustice stemming from the central government's decision to exploit natural richness in both areas on behalf of the Indonesian nation on the basis of the much discussed state's right to avail or right of disposal (*hak menguasai Negara*),¹²¹ the monopolistic claim on the possession and/or the management of all natural and agrarian resources found within its borders.

A related debate concerns the issue regarding to what extent indigenous communities may be recognized and enjoy their right to self determination within the unitary state of Indonesia. During the New Order government, there was little or no room at all to discuss this matter openly. All this changed after Soeharto stepped down as president of Indonesia in 1998. The demands of indigenous people for state recognition of their existence and claims on communal land culminated in the establishment of *Aliansi Masyarakat Adat Nusantara* (Alliance of the Indigenous People of the Archipelago).¹²² At its first congress in 1999, AMAN demanded the return of sovereignty over natural resources to *masyarakat adat* and, as argued by one author, led the Ministry for Agrarian Affairs to issue Ministerial Decree 5/1999 about the formal recognition of *adat* lands through a new category of land rights, *hak kepunyaan*.¹²³ However, its results have been limited.¹²⁴

Palgrave, 2001). This book has been translated into Indonesian: *Sejarah Indonesia Modern 1200-2004*, (Jakarta: Serambi, 2005). In contrast, the decision to incorporate West Papua into Indonesia, had been based on the right of self determination of the Papua people conducted in 1969 (pepera) under the auspices of the UN. For a brief account on the struggle of the OPM for self determination see: Ralph R. Premdas, "The Organisasi Papua Merdeka in Irian Jaya: Continuity and Change in Papua New Guinea's Relation with Indonesia (Asian Survey 25 (10) October 1985) pp. 1055-1074.

¹²¹ The official translation of the 1945 Constitution translated the *hak menguasai Negara* as the right to control.

¹²² For general information on AMAN see <http://www.aman.or.id> or <http://dte.gn.apc.org/AMAN/Index.html>.

¹²³ See further: Carolyn Marr, "Forest and Mining Legislation in Indonesia" in: Tim Lindsey (ed.). *Indonesia Law and Society*, 2nd ed. (The Federation Press, 2008): pp 247- 265. Cf. AMAN, "Masyarakat Adat dan Pertambangan: Community Development, jalan sesat menuju penyerahan kedaulatan" (paper presented in a national seminar "Memahami Persepsi Community Development di Sektor Pertambangan dan Migas Ditinjau dari segi Perspektif Otonomi Daerah," Yogyakarta 14 May 2002). Nonetheless the quoted Ministerial Regulation (Peraturan Menteri Agraria 5/1999 concerning guidelines to resolve problems of ulayat rights of adat communities/*pedoman penyelesaian masalah hak ulayat masyarakat hukum adat*) in fact should be read more as a directive to state and government institutions how to render recognition to adat communities and their claim to exclusively "manage, take possession of and use" on the basis of local customary law (*pengurusan, penguasaan dan penggunaan berdasarkan ketentuan hukum adat setempat*). See also Chip Fay, Martua Sirait, Ahmad Kusworo, *Getting the Boundaries Right: Indonesia's Urgent Need to Redefine its Forest Estates*. (Southeast Asia Policy Research Paper no. 25, no year), p. 16.

¹²⁴ Quoting a assessment report made under the World Bank Land Administration Project, Colchester states that the (Indonesian) government entirely lacks the capacity to recognize or administer collective tenures which are required in legally securing communal ownership claims made by between 1.2. and 6 million peoples classified as *suku terasing* (isolated and alien tribes), *masyarakat terasing* (isolated and alien people) or *masyarakat*

Running through this debate is the concern for a more just and balanced system of natural resource management. As will be seen later, the issue regarding how to distribute power to manage Indonesia's vast natural resources is central to Indonesia's government structure and legal system. This will become clearer in the chapters which deal with the subject of development/spatial planning and its translation into permits and forms of public private partnership.

2.3. Uneven Population Distribution, Population Density and Urbanization

Looking at statistical data from the BPS (*Biro/Badan Pusat Statistik*, central statistic bureau),¹²⁵ most of the Indonesian population resides on Java. This island amounts to less than 6% of the total land mass but is home to 59.19% of the total population. The population density on Java is 945 people/km². This is far above the national average (106/km²). In comparison, Sumatera, even though it has been the primary destination for migrants (voluntary or government sponsored) for years and the location of one of Indonesia's largest and fastest growing urban centres (Medan-Binjai-Deli-Serdang), has a population density of only 199 people/ km². Kalimantan (Borneo) with more than 28% of Indonesia's land mass has only five percent of the country's population.¹²⁶

Unsurprisingly, the urbanization rate on Java has been higher than in other areas in Indonesia (34.6%).¹²⁷ Most of Indonesia's major cities are on Java. In addition to Jakarta, which expands into its periphery (Bogor, Depok, Tangerang and Bekasi), Bandung, Semarang, Yogyakarta, and Surabaya (Gresik-Bangkalan-Mojokerto-Surabaya-Sidoarjo-Lamongan) are all major mega-cities and important national/regional engines of growth. In comparison, Medan is the only city of importance in all of Sumatera. In Sulawesi, Makassar is considered the only city of significance for the regional development of the whole eastern half of Indonesia.

(*hukum*) *adat* (adat communities). He further states that many lawyers argue that a fundamental revision of the Basic Agrarian Law is necessary before collective tenures can be legally secured which has yet to be materialized. See Marcus Colchester, "Indigenous peoples and communal tenures in Asia", (Rome: FAO Corporate Document Repository, 2009): p. 6.

¹²⁵ Biro Pusat Statistik (Katalog 2120) December 2002.

¹²⁶ See: Bappenas, BPS and UN Population Fund, *Proyeksi Penduduk Indonesia* (Indonesia Population Projection 2000-2025 (Jakarta, 2005). See also: www.datastatistik-Indonesia.com

¹²⁷ BPS, op.cit. BPS in this report states that the urbanization rate shall reach 68% in 2025. The urbanisation rate in the four provinces on Java (Jakarta, Banten, West Java, Central and East Java – excluding Yogyakarta) will be higher than 80% in 2025.

The statistical numbers provided by the BPS also reveal that population density differs within Java. West Java is the most populous province.¹²⁸ It is home to 39,960,869 people covers an area of 34,736 km² and, aside from Jakarta, it is the most densely populated province in the country, with an average of 1,150 people per km². The capital city of the province, Bandung can also boast the dubious claim of having the most densely populated slum area in Indonesia, although all major cities have slum areas within or outside their borders. In such areas, managing equitable land use policies poses a direct challenge to local governments.

There are a number of factors to explain this uneven distribution. One is that Java is the most fertile island in the archipelago, and therefore its ability to support population growth is relatively high compared to the outer islands. In addition, Batavia, due to the VOC and the Dutch colonial government's decision to make it their capital, has become the economic and political centre of all the islands comprising Indonesia.¹²⁹ As a result, financial capital flight to the centre has led to disparities in development and infrastructure between Java and the outer islands with a continuing brain drain in the latter and increasing urbanization in the former, specifically around Jakarta.¹³⁰

It is therefore unsurprising that Java, and especially Jakarta was and still is positioned as the nation's primary engine of growth.¹³¹ In 1999, Java's contribution accounted for 56.1% of the national income. Foreign investment on Java reached 63.25% and domestic investment was recorded at 49.58% for the period of 1967-2000.¹³² In the following decade the numbers have not changed much as indicated in the Middle Range National Development Planning (*Rencana Pembangunan Jangka Menengah Nasional/RPJMN*) 2000-2010.¹³³ Java also contains

¹²⁸ Historically speaking, West Java is the first province in Indonesia (staatsblad number 378). In 1950 by virtue of Law 11/1950, West Java officially became a province of Indonesia. On October 17, 2000, as part of a nationwide political decentralization, Banten separated from West Java and was established as a new province according to Law 23/2000. See also <http://www.jabarprov.go.id> (last visited 10 August 2009).

¹²⁹ See M.C. Ricklefs, op.cit..

¹³⁰ Cf. Adriaan Bedner, "Indonesië en zijn natuurlijke hulpbronnen: the Incredible Shrinking State" (Jason Magazine, no. 3, 2000), pp. 16-21. He argued that under the New Order government, much of the revenues earned in the exploitation of natural oil and gas mostly benefits Jakarta. Not so in regard to the forestry industry, where most illegal earning benefits local government.

¹³¹ Tommy Firman, "Pola Spasial dan Restrukturisasi Perkotaan di Jawa (Kompas, 31 Mei 1996)

¹³² Hall Hill, Budy P. Resosudamro, and Yogi Vidyattama, "Economic geography of Indonesia: location, connectivity and resources", in Yukon Huang and Alessandro Magnoli Bocchi, *Reshaping Economic Geography in East Asia*, (Washington DC: The World Bank, 2009), pp. 115-134.

¹³³ As argued by Mariana Prianti, quoting the RPJMN 2000-2010, one of six obstacles facing investment in Indonesia is the fact that it has been much too concentrated on Java alone Mariana Prianti, "Realisasi Investasi: Enam Hambatan Investasi di Indonesia", (Kontan Online, 4 February 2010, last accessed 28 May 2010).

most of the primary agriculture centres. Out of 239 national food centres (*sentra pangan nasional*) throughout Indonesia, 125 can be found on Java and contribute to 63% of total production.¹³⁴ Considering that the majority of the population resides on Java, it would be important to protect and preserve the productivity of these food centres. Failure to do so will threaten the national food security and devastate Java.

There has been no reverse in this trend indicated in the numbers mentioned above. Jakarta and Java will still be the centre of economic growth in Indonesia for quite a number of years. This also means that Jakarta and Java will continue to accumulate power and resources from the outer regions. Such a course by design will increase rather than diminish economic inequality between Java and the outer islands. To put it differently, the policy choice to focus development on Java allows the centre (Jakarta and Java) to expand its ecological footprint¹³⁵ to the outer regions. For instance the biggest urban area in Indonesia, Jakarta's true ecological footprint is said to be enormous:¹³⁶

“Every man, woman and child in the city requires the equivalent of 1.2 hectares of land to provide the resources they consume each year. That adds up to an area 165 times larger than the city itself – an area the size of South Korea”.

The numbers may be exaggerated, considering that not every person in Jakarta would consume resources in equal proportion. The majority of the urban poor living in abject poverty in slum areas certainly does not consume or have access to much. But that is not the point. Suffice it to say here that the ecological footprint perspective gives a convincing picture of the negative effect of unbridled growth and expansion of such cities as Jakarta to the outer regions. What it also points out is arguably:¹³⁷

¹³⁴ Direktorat Pangan dan Pertanian, Kementerian Negara Perencanaan Pembangunan Nasional/Bappenas, Profil Pangan dan Pertanian 2003-2006, (Jakarta: Bappenas, 2006). Cf. “Revitalisasi Pertanian dan Ketahanan Pangan: Beras dan Jagung”, (Republika Online, 25 June 2009).

¹³⁵ Ecological footprint is defined as “the area of productive land and water ecosystem required to produce the resources that the population consumes and assimilate the waste that the population produces, wherever on Earth the land and water is located. Mathis Wackermagel and W. Riss. Our Ecological Footprint. (Gabriola Island, BC: New Society Publishers, 1996). Footprint in combination to biocapacity is a way to measure historical human carrying capacity.

¹³⁶ Edward McMillan, “Jakarta's environment: Good lessons from abroad” (Jakarta Post, 12/31/2005).

¹³⁷ Jorge. Hardoy, Diana Mitlin and David Satterthwaite, Environmental Problems in the Third World Cities (London: Earthscan, 1992).

“(...) that land management within the regions must be dramatically improved if the negative impacts of land use conversions and conflicts are to be reduced, to allow an environmentally sustainable development process”.

The necessity to develop a sustainable land management system is also underscored by existing challenges in land use pattern threatening the national food security and sustainability of the whole development process.¹³⁸ Most relevant for this study is the notion that pressure on land is thus greater on Java compared with other regions and that there is an urgent need to establish a working spatial management system on Java and in Indonesia. The sustainability of the whole of Indonesia depends on this. The issue is then to what extent the existing spatial and development planning system takes cognizance of this issue and develops strategies to ease the ecological burden on the most densely populated areas. This is a question of increasing importance given the vulnerability of big urban centres to global and national economic crises.¹³⁹ Similar questions will arise when we look at the rate of urbanization in Indonesia, which require urgent attention given the rate and spread of urban areas and the threat they pose to the carrying capacity of the environment.

We shall now discuss what kind of state and government system was put in place to govern the Indonesian territory and populace.

¹³⁸ For a short discussion on the relationship between the rate of agricultural land conversion to food security see: Ato Suprpto, *Land and water resources development in Indonesia* in FAO, *Investment in Land and Water: Proceedings of the Regional Consultation BANGKOK, Thailand 3-5 October 2001* (RAP Publications 2002/09: Bangkok, March 2002). Another issue is the rapid and unabated conversion of forest due related to regional fragmentation. See: “Tekanan pada hutan makin berat: pengusaha butuh ketegasan sikap” (Kompas, 8 August 2008) & The World Bank, *Indonesia Environment and Development: A World Bank Country Study* (The World Bank: Washington DC, 1997), especially “Chapter II: Challenges in the Management of Natural Resources”.

¹³⁹ As pointed out by Tommy Firman, “From ‘Global City’ to ‘City of Crisis’: Jakarta Metropolitan Region Under Economic Turmoil” (Habitat International Vo. 23, no. 4. 1999), pp. 447-466. He observed that the slum areas in Jakarta which covered only 58 sub-districts in early 1998 expanded to include 106 sub-districts in early 1999, in which almost 645,900 families live. The economic crisis has driven more people to live in overcrowded houses which have practically no ventilation or adequate flooring.

2.4. Brief Overview of the State and Government System

2.4.1. The Unitary State

Given the vast expanse of Indonesia's territory, the diversity of its regions and the pluralistic nature of its society, one would logically expect that Indonesia would have been created as a federal state which would allow for a more decentralized form of governance. But that has never been the case. From the start, the founding fathers preferred to rule Indonesia from the centre, although it should be mentioned that Indonesia briefly experimented with a federal state after the formal recognition of independence in 1949. The Republic of the United States of Indonesia (*Republik Indonesia Serikat*) existed from 27 December 1949 to 17 August 1950.¹⁴⁰ However it was soon decided that an Indonesian federal state was not a feasible option considering the real and imminent threat of the nation's disintegration.¹⁴¹ In addition, the federal arrangements, as embodied in the RIS, were accepted only reluctantly, since state-elites perceived them as externally imposed and as a threat to national unity.¹⁴² They perceived the Indonesian federation, the result of an internationally brokered agreement that ended the armed conflict between the Indonesian Republic and the colonial Dutch government, as an instance of neo-colonial "divide and rule" policy, aimed at weakening the political and territorial unity of Indonesia. The outbreak of several rebellions in the outer regions, (*Angkatan Perang Ratu Adil-APRA*: literary the *ratu adil* army) in West Java; January 1950 and Andi Azis in Makassar; April 1950)¹⁴³ reinforced the political elites' conviction that power must be centralized in order for the state to survive. As a result the RIS was officially dissolved on 17 August 1950.

¹⁴⁰ The RIS comprised of (1) seven units (*Negara*) among which the prominent state was the Republic of Indonesia claiming jurisdiction on territories it successfully defended against the incoming Dutch army; (2) nine autonomous entities referred to as region (*daerah*); (3) a federal district and (4) three left over entities not listed in the constitution: the traditional polity of Kota Waringin on Kalimantan and the territories of Padang and its environs and Sabang. See "Indonesian States 1946-1950, available at http://www.worldstatesmen.org/Indonesia_state_1946-1950.html (last visited 10 Aug. 2009).

¹⁴¹ M.C. Ricklefs, op.cit. pp. 467-468. Cf. Gerald S. Maryanov, "Decentralization in Indonesia as a political problem", Interim Report Series, (New York, Ithaca: Southeast Asia Program Department of Far Eastern Studies Cornell University, 1958)

¹⁴² Thomas Goumenos, "The pyrrhic victory of unitary statehood: A comparative analysis of the failed federal experiments in Ethiopia and Indonesia" in Emilian Kavalski and Magdalena Žolkoš (eds.) *Defunct Federalisms: Critical Perspectives on Federal Failure*. (Aldershot: Ashgate, 2008), pp. 31-46. Cf. Marwati Djoened Poeponegoro & Nugroho Notosusanto, *Sejarah Nasional Indonesia VI: zaman Jepang dan zaman Republik Indonesia* (Jakarta: Balai Pustaka, 1993), pp. 261-269.

¹⁴³ Ibid.

The promulgation of the Temporary Constitution of 1950 (*Undang-Undang Dasar Sementara* 1950) marked the end of the federal arrangement and a return to the unitary state system.¹⁴⁴ This temporary Constitution lasted for about nine years before being replaced by a unilateral act by President Soekarno who in a period of severe constitutional crisis decreed a return to the 1945 Constitution.¹⁴⁵ This not only meant a return to the unitary system, but an acceptance of the idea that sovereignty vested in the people was exercised by the People's Consultative Assembly's and further implemented by the President as the Assembly's mandate holder.¹⁴⁶

Simply stated, the People's Consultative Assembly determined the Broad Guidelines of State Policies (*Garis Besar Haluan Negara* or GBHN) comprising of development programs to be translated into action plans. The President being the mandate holder, head of state and, most importantly, head of the government was obliged to take all necessary action to guarantee the realization of development programs set out in the GBHN. In doing so, he was accountable to the Assembly, but not the parliament.¹⁴⁷ Likewise, ministers were directly accountable only to the president. Governors and district heads were appointed by the Minister of Home Affairs. This effectively sidelined the regional parliaments.

¹⁴⁴ Article 1 par.(1) declared that the independent and sovereign Republic of Indonesia is a democratically and unitary State based on law (*Republik Indonesia yang merdeka dan berdaulat ialah suatu Negara-Hukum yang demokratis dan berbentuk kesatuan*).

¹⁴⁵ Questions about the legality of this action aside, President Soekarno in his unilateral decree (5 July 1959) stated that the *Konstituante* (a board established with the special task of drafting a more permanent Indonesian Constitution to replace the temporary 1950 Constitution) had refused to endorse the President's proposal to enact the 1945 Constitution and refused to continue the tasks attributed to them. Therefore, the President decreed simultaneously that the UUDS should be declared void by virtue of power vested in him and reinstated the 1945 Constitution.

¹⁴⁶ Art. 1(1) of the 1945 Constitution determines that the state of Indonesia is a unitary state in the form of a republic and that sovereignty is vested in the population and shall be performed by the People's Consultative Assembly. The elucidation of this article further stipulated that: "(..) the President elected by the Assembly, pay obeisance to and is responsible to the Assembly. He is the "mandate holder" of the Assembly. This elucidation is based on Art. 1 par.(2) and Art. 6 par.(2). A more explicit ruling on the president's relation to the People Consultative Assembly is to be found in PCA Decree 3/1978. It is stipulated in this decree that (Art. 5): The President shall pay obeisance to and be accountable to the Assembly in regard to the implementation of the broad state policy guidelines as decreed in accordance to the 1945 Constitution or by the Assembly before the Assembly' session".

¹⁴⁷ As argued by Attamimi, the President's position as a mandate holder was not clear. See: A. Hamid A. Attamimi, *Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis Mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I – Pelita IV* (unpublished dissertation, University of Indonesia, 1990).

When Soeharto stepped down, for a short period, the idea to re-establish Indonesia as a federal state was taken seriously by some Indonesian politicians and scholars as well.¹⁴⁸ One scholar argued:¹⁴⁹

“Federalism fits with the enduring values and current plight of Indonesia. The essence of federalism, ‘the primacy of bargaining and negotiated coordination among several power centers’ connects well with the Indonesian principle of “*musyawarah-mufakat*” (consensus through deliberations). (...) the emerging exploration of ‘federalism within the unitary state’ could lead to a ‘made in Indonesia solution.’”

Wahid during his term as the President of Indonesia, during one interview allegedly claimed said:¹⁵⁰

“You know federalism is a dirty word in our politics. People don’t like it –Mrs, Megawati, my vice president, for one. On this matter we have to be very careful. But, of course, the idea of giving the people full autonomy, which is not very different from the federal system, can be accepted. So in essence we do what we don’t talk about.”

In regard to the question whether a federal system is the solution to separatist movements he said:

“Yes, in essence. I think that because the Indonesian archipelago is so big and that there are so many islands—certainly, if we want to enlarge the number of provinces, we need a kind of federalistic state—in nature, but not in word”.

¹⁴⁸ Denny Indrayana, *Amandemen UUD 1945: Antara Mitos dan Pembongkaran* (Bandung: Mizan, 2007). Cf. Ikrar Nusa Bhakti, Riza Shibudi & Nina Nurmila, *Kontroversi Negara Federal: Mencari Bentuk Negara Ideal Indonesia Masa Depan* (Bandung: Mizan, 2002). Cf. Anhar Gonggong, *Amandemen Konstitusi, Otonomi Daerah & Federalisme: Solusi untuk Masa Depan* (Yogyakarta: Media Pressindo, 2001).

¹⁴⁹ Gabriele Ferrazzi, “Using the “F” Word: Federalism in Indonesia’s Decentralization Discourse”, (*The Journal of Federalism* 30:2 (Spring 2000): 63-85.

¹⁵⁰ Excerpt from an interview with Indonesian President Abdurrahman Wahid by Yomiuri Shimbun, available at <http://www.yomuri.co.jp/index-e.htm>.

And even during the deliberation to amend the 1945 Constitution (second amendment) one MP, the spokesperson of one of the faction in the Assembly argued that:¹⁵¹

“A centralistic system already ended in massive injustice. The threat of the nation’s disintegration had been caused by the recurrence of such injustices. Therefore a decentralized system should be developed. On this basis, the Reformation Fraction (*Fraksi Reformasi*) supports the idea of federalism. Nonetheless we are strongly against allowing any separation initiatives to prevail”.

The conceptual mix-up of decentralization and federalism aside, the message voiced is loud and clear, a serious rethinking of the Indonesian state structure was required. In the end the People’s Consultative Assembly decided against forming a federal state. Nonetheless, the amendments to the 1945 Constitution modified the entire structure of the state.

The new social contract lay down the foundation of a more democratic state arrangement and a decentralized government system.¹⁵² The former was achieved by establishing a checks and balance mechanism strengthened the legislative role of Parliament, which abolished the Assembly’s supremacy as highest state organ and the sole holder of the people’s sovereignty, and finally expanded the human rights provisions to embrace most of the Universal Declaration of Human Rights (Chapter XA, article 28).¹⁵³ A total reform of the state organizational structure is illustrated below in Figure 2.

¹⁵¹ A.M. Lutfhi as quoted by Indrayana, op.cit., p. 209.

¹⁵² Saldi Isra, “Perangkap Konstitusi Hasil Amandemen”, in Saldi Isra, *Dinamika Ketatanegaraan Masa Transisi 2002-2005*, (Padang: Andalas University Press, 2006). pp. 148-151.

¹⁵³ For a brief review on these changes see; R. Herlambang Perdana Wiratraman, “Hak-hak Konstitusional Warga Negara Setelah Amandemen UUD 1945: Konsep, Pengaturan dan Dinamika Implementasi, (Jurnal Hukum Panta Rei, Vol.1, Desember 2007, Jakarta: Konsortium Reformasi Hukum Nasional). He, rather bleakly, concludes that recognition of human rights by the State does not automatically translate into better protection. Conversely, human rights violations will increase in proportion to completeness of human right instruments adopted by the state.

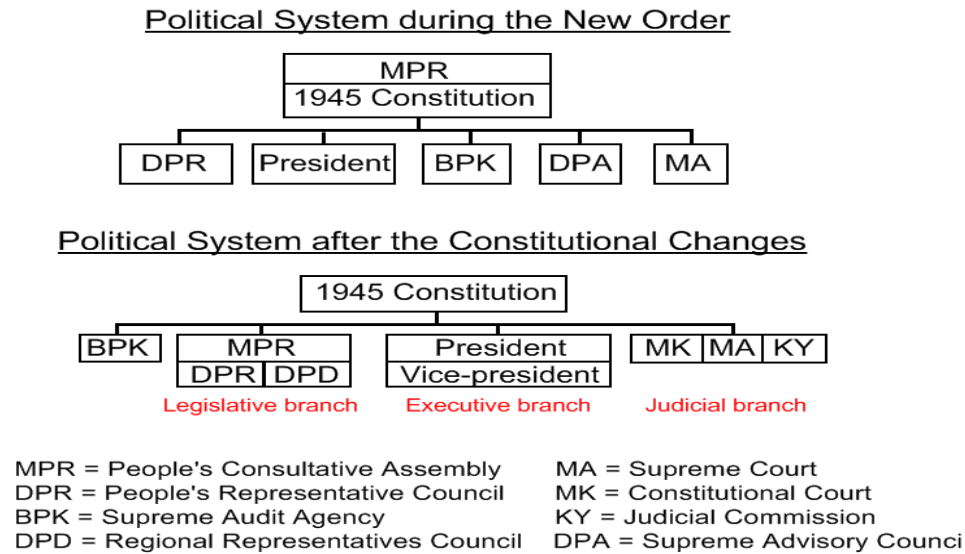


Figure 2-2: State Organizational Structure

Indonesia now has a strongly Presidential system. In regard to legislative power, the President holds the upper hand as only jointly agreed upon bills with Parliament may be enacted.¹⁵⁴ The President also holds veto power on bills not approved during his/her current term.¹⁵⁵ The Parliament's power to impeach the President is greatly curtailed. He may only be impeached in a number of situations following a strict procedure.¹⁵⁶ Another fundamental change is that whereas the Assembly previously elected the President and Vice-President, the amended version of the Constitution stipulates that both are to be elected directly by the people, and may not hold office for more than two five-year terms (Art. 7).

The establishment of a more decentralized government system was achieved by Constitutional amendment and by the 1999 and 2004 laws on regional government. The

¹⁵⁴ Art. 20 (2): each bill shall be discussed between the parliament and the President so as to reach a joint agreement; (4) the president shall endorse into law a bill that has reached a joint agreement.

¹⁵⁵ Art. 20 (3): if a bill fails to reach a joint agreement, it may not be introduced to the parliament again during its current term.

¹⁵⁶ Art. 7b: (1): a proposal to dismiss the President/Vice President can only be submitted by the People's Consultative Assembly to the PCA after filing first a request to the Constitutional Court to investigate, to trial and pass judgment (on the request). The basis of this request is stipulated restrictively in Art. 7a: The President/Vice President may be dismissed from the PCA based on the proposal of the parliament (DPR), either when proven guilty of violating the law by betrayal of the state, of corruption, of bribery, of any other felony, or because of disgraceful behaviour, as well as when proven no longer capable to fulfil the conditions as President and/or Vice President.

revised version of the Constitution established a new organ of the state, the Regional Representative Council (*Dewan Perwakilan Daerah*), a form of senate to represent Indonesia's 33 provinces.¹⁵⁷ In the new regional government laws of 1999 as amended in 2004, local government with elected parliamentary bodies are given new and broad law making powers restricted only by the retention of a few residual powers by the national government (Art. 18). We will turn to this issue next.

2.4.2. Government structure: Decentralization and Regional Autonomy

(a) The Central Government

The President is assisted by a cabinet comprised of ministries heading departments, ministries or state ministers without portfolio and coordinating ministers. The president may also establish special bodies and appoint the heads of such bodies. These non-ministerial bodies are directly answerable to him.¹⁵⁸ The president's power to establish his cabinet and form other non-ministerial bodies is, however, limited by a rule laid down in RGL 22/1999 and maintained in RGL 32/2004. It states that the central government will retain power to manage certain matters not being devolved yet to the autonomous regions (outside those attributed to the central government in matters of foreign relations, national defence-security, the administration of justice, monetary and national fiscal issues and religious affairs). In order to conduct such affairs, the central government possesses a residual power and may have the option to directly manage by itself, or delegate said task either completely or only in part to the autonomous regions (Art. 10).

¹⁵⁷ The third amendment to the 1945 Constitution (August, 2001), established the DPD, which function is to voice the region's interest and aspiration in the parliament (*aspirasi dan kepentingan daerah di dalam lembaga legislative*). The DPD's authority is further elaborated in Art. 22 of the 1945 Constitution, and cover amongst others, the power to submit draft legislation concerning regional autonomy, give advice or recommendations with regard to the establishment or merger of provinces or districts, the management of natural or other economic resources and other matters related to issues on fiscal balance. See further: Ginandjar Kartasmita, (head of the DPD), "Dewan Perwakilan Daerah Dalam Perspektif Ketatanegaraan Indonesia" (Jakarta: Sekretariat Negara Republik Indonesia, 2010).

¹⁵⁸ See also: Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006). Figure 2 depicts only the primary constitutional organs (*lembaga tinggi negara*). In total, there are 34 state organs, 28 of which are specifically named in the 1945 Constitution. Other state organs (*lembaga negara*) are established either by virtue of a law, presidential regulation or decree.

The new system made the central government (deconcentrated) regional representative office situated at the provincial (*kantor wilayah/kanwil*) and district level (*kantor departemen/kandep*) redundant. A slimmer, more efficient central government structure would be expected as the end result. That this ideal government structure has not been easy to obtain is evidenced by the reluctance of powerful ministries or other central government bodies to give up their former statutes and standings. Notably, the National Land Agency and Ministry of Forestry and Estate Crop have been successful in resisting the move to devolve most of their powers to the regions. This issue will be discussed more at length in other chapters. A different question is what kind of control can and should be exercised by the central government in relation to the now autonomous provinces and districts. This particular issue will also be dealt with in different chapters of this book.

The President still holds wide discretionary powers to determine the structure and powers of his own cabinet. Each department or ministry, as determined by their 'structural organization, tasks and functions' (*struktur organisasi tugas dan fungsi*), is responsible to manage its own specific affairs. An important part of this task is to formulate policies and programs, mostly in the forms of implementing rules and regulations, on the basis of higher ranking laws and regulations. Within its scope of authority, each department or non-ministerial body is allowed to develop its own 'semi-autonomous' legal regime.

The primary cause of this sectoralism or silo-ism, which is often criticised for hampering the development of synchronized, comprehensive and well-coordinated government policies or programs, can be traced back to this approach of dividing tasks and responsibilities between government institutions. Such a division of tasks seems to be breeding ground for inter-department rivalry. A by-product of such rivalry is the maintenance of, as mentioned earlier, 'semi-autonomous' legal regimes.

One notorious example is the dualism in land administration between the National Land Agency and the Ministry of Forestry and Crop Estate. Following the division of tasks between governmental bodies, the development of land law falls under the responsibility of the National Land Agency/State Minister of Agrarian Affairs, whereas the development of forestry law is the responsibility of the Ministry of Forestry and Crop Estate. A similar situation exists in spatial planning management. A number of government institutions have overlapping duties and responsibilities regarding spatial management, namely the Ministry of Home Affairs, the Ministry of Public Work and the State Minister of Development/National

Development Coordinating Board. But, in the words of Otto, the impact is more far reaching:¹⁵⁹

“the 1960s and 1970s were a time of unprecedented growth and differentiation of legislation and public administration in general. Some of the adverse effects of this growth have been: (a) the overcomplexity, lack of transparency and inaccessibility of certain areas of law and administration; (b) the vagueness and inconsistency of certain areas of law and policy; and (c) the complex division of task within the administrative organisation”.

In such cases, finding what the law is and which government agency is responsible for what can be an arduous task demanding patience and a thorough understanding of the complex relationship between the Indonesian state and its government and legal system.

(b) Provinces and Districts

During the New Order a centralistic and hierarchical government system was established and maintained. The legal basis for this system was Regional Government Law 5/1974 (RGL 1974), which established the basic framework of regional and local government.¹⁶⁰ It was this law which provided the New Order government with a tool to simplify and establish a uniform mode of government throughout Indonesia.¹⁶¹ The land was to be governed using both decentralization (giving rise to autonomous regions) and de-concentration (giving rise to administrative entities). By combining such categories the government established a system subdividing Indonesia into:¹⁶² (a) autonomous regions comprising of 27 1st tier

¹⁵⁹ Jan Michiel Otto, “Incoherence in Environmental Law and the Solution of Co-ordination, Harmonisation and Integration”, in Adriaan Bedner & Nicole Niessen (eds.), *Towards Integrated Environmental Law in Indonesia?* (Leiden: Research School CNSW, 2003), pp. 11-20. In his conclusion, Otto warns that the internal unity and coherence of a legal system is vital for achieving at least a degree of legal certainty and effective governance.

¹⁶⁰ This may be considered a deliberate misreading of the 1945 Constitution (art. 18) which actually demanded the establishment of a more decentralized government system. It was RGL 5/1974 which changed the principle “*otonomi yang riil dan seluas-luasnya*” (real and wide autonomy) embodied in the RGL 18/1965 with the principle “*otonomi yang nyata dan bertanggungjawab*” (real and responsible autonomy). Elucidation of RGL 5/1974 (*Dasar Pemikiran, Ayat e*).

¹⁶¹ See RGL 5/1974 (*tentang Pokok-Pokok Pemerintahan Di Daerah*)

¹⁶² Departemen Penerangan RI., *Sistem dan Mekanisme Penyelenggaraan Pemerintahan di Daerah*, (Direktorat Publikasi Ditjen Pembinaan Pers & Grafika Dept. Penerangan, Jakarta, 1992), p. 34.

governments and 292 2nd tier governments (248 districts and 50 municipalities) and (b). administrative regions, encompassing the territories of 27 provinces subdivided into 242 districts, 542 municipalities, 34 administrative municipalities and 3,639 sub-districts. At the bottom of the governmental ladder were: 56,998 villages and 3,639 quarters (*kelurahan*), with very limited autonomous powers.¹⁶³

The overriding interest in running this government system was national political integration, political stability and central command. At the government level, integration meant control by the central government, and political stability was equated with centralization in contrast to decentralization which was believed to cause political instability.

As already discussed this system was no longer viable after Soeharto stepped down in 1998. The question then emerged to what extent Indonesia should decentralise, or even become a federal state.¹⁶⁴ Rather than following the path of federalism, the People's Consultative Assembly chose the middle path: it rejected federalism and opted for granting autonomy to the districts rather than allowing provinces to become states within a federal arrangement.

It would be erroneous to assume that the initiative to re-evaluate the state and government structure was solely driven by considerations to avoid disintegration and appease demands for independence voiced by a number of regions. Other considerations also played a role, notably how to appease the demand for a more just and equitable share of power in the management of natural resources¹⁶⁵ and the nationwide and disturbing wide-spread practice of 'corruption, collusion and nepotism'.¹⁶⁶ Both of these considerations also influenced the demand for more autonomy and democracy at the district level.

The discourse on allowing regions greater levels of self rule and self governance was reflected in the amended version of Art. 18 of the (1945) Constitution. It presently allows for the establishment of autonomous and more democratic regional governments at the provincial

¹⁶³ See further Village Government Law 5/1979. It was revoked by RGL 22/1999.

¹⁶⁴ Former ministry of home affairs, Lieut.Gen.(ret.) Rudini, argued in an interview that federalism would only make matters worse if implemented and that one feasible solution for Indonesia would be to speed up regional autonomy. "Konsep Federal Perburuk Situasi" (Media Indonesia, 23-12-1999). A belief apparently shared by the Assembly.

¹⁶⁵ See PCA Decree 9/2001 on Agrarian Reform (Renewal) and Natural Resources. The decree prepared by Indonesian NGOs, provides a strategic legal opening for Indonesia's marginalized indigenous peoples, peasant farmers and the poor. It is regarded as a step toward bringing fundamental changes in the management of natural resources in the country. See further for a brief discussion of this Decree: "MPR's Natural Resources Decree under threat" (Down to Earth no. 57, March 2003).

¹⁶⁶ See PCA Decree 11/1998 on the recommendation of policy direction to the removal and prevention of KKN (corruption-collusion-nepotism).

and district level. District and provincial heads as well as parliaments at the same level are directly elected by the people. Both levels of regional government are granted the power to govern themselves. In addition, Art. 18b (2) stipulates that the state shall recognize (*mengakui*) and respect (*menghormati*) *adat* communities and their traditional rights subject to the condition that those communities still exist and that such recognition shall be in line with societal development and the Unitary State principle. Apparently autonomy or self rule is to be granted to traditional or indigenous communities and may reflect the success of *adat* communities' efforts in seeking to establish special indigenous rights to land and natural resources, as well as self government by their own institutions.¹⁶⁷

The drive to change the centralized and complex system of government was initiated by Habibie who replaced Soeharto as president in 1998. During his tenure, RGL 1999 and Law 25/1999 on fiscal balance were promulgated. It was widely believed that these laws were hastily drafted to assuage demands for independence from central control rather than driven by a well considered action plan in improving government.¹⁶⁸ Chapter II of the RGL 1999 detailed a new administrative division in Indonesia, declaring that provinces shall become the main administrative units but remain directly part of the central government. It is the districts (*kabupaten*) and municipalities (*kota*) which are "authorized to govern and administer the interest of the local people according to their own initiatives based on people's aspirations" (Art. 9). The district leaders were, in contrast to the previous system, accountable to the locally elected parliament. As indicated earlier, the decision to grant autonomy to the districts rather than the provinces was arguably influenced by political considerations, i.e. to safeguard the nation against provincial governments' potential ambition to secede. However, many argued that it was the provinces which should enjoy autonomy rather than the districts.¹⁶⁹

Taking note of this situation, the central government, under the presidency of Megawati decided to correct a number of shortcomings of the Regional Government Law in 2004. The

¹⁶⁷ Adriaan Bedner and Stijn van Huis, "The return of the native in Indonesian law: Indigenous communities in Indonesian legislation" (Bijdragen tot de Taal-, Land- en Volkenkunde (BKI), 2008, 164-2/3: 165-193. Here it is argued that the current position of indigenous communities in Indonesian law presents a mixed picture and that the current legal situation is still characterized by conceptual inconsistency and conflicting rules. Cf. Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law", 1997, 22 Yale J. Int' L. 171-212.

¹⁶⁸ See "Regional autonomy, communities and natural resources" (Down to Earth no. 46 August 2000). For a more elaborate critique on the implementation of this law see: Richard Seymour & Sarah Turner, "Otonomi Daerah: Indonesia's Decentralization Experiment" (New Zealand Journal of Asian Studies 4, 2 (December, 2002): 33-51.

¹⁶⁹ Ibid. p. 40.

major change with the 1999 law was that provincial government regained some of its former standing. Here follows an overview of the changes in the government system¹⁷⁰:

Table 2-1: comparison between the three laws on regional government

Substance	RGL 5/1974	RGL 22/1999	RGL 32/2004
Government structure	Hierarchical 1 st tier Provincial Government; 2 nd tier district-municipal government	Non-hierarchical The provincial government and districts-municipalities are on the same level, but have different government tasks and functions.	Mixed The equal status between provincial and district governments is maintained but the distribution of government powers is based on a recognition of existing hierarchy between the centre, provinces and districts.
Distribution of powers	Centralized Executive and legislative power is held by the head of the autonomous regions, but most tasks are deconcentrated.	Dispersed Executive and legislative powers are separated and the legislative is relatively strong	Id. + Position of district head: directly elected.
Scope of Service delivery authorities	Dispersed by and between the regional government and central government offices at the provincial level (<i>kanwil</i>) and those	In the hand of the regional autonomous government, notably the districts <i>Kanwil</i> and <i>Kandep</i> are in principle abolished.	Id.

¹⁷⁰ The structure of comparison had been adopted from a similar table made by Drajat Tri Kartono, "Reformasi Administrasi: Dari Reinventing ke Pesimisme" (Spirit Publik, Vol. 2, no. 1, 2006): 51-62.

	at the district level (<i>kandep</i>).		
Fiscal Balance	Tends to be centralized; budget is allocated to the regions but not followed by delegation to determine use.	Dispersed. Central government allocates block grant (DAU) to the regions. In addition regions may allocate their own budget.	Id.
Supervision	Preventive and Repressive oversight mechanism (regional regulations must be approved and endorsed by the Ministry of Home Affairs before being promulgated and implementation is strictly controlled by the same Ministry.	Repressive oversight mechanism: regional-local regulation may be directly promulgated and implemented. The Ministry of Home Affairs supervises only the implementation.	Mixed oversight mechanism with focus on repressive measures based on the re-established government hierarchy; the central government regains its power to supervise the provinces and the provinces may supervise and control the districts/municipalities.
Program Characteristic	Development programs are made and decided by the central government (transfer of budget will be followed by implementing and technical directives (juklak/juknis)	Development (government) programs are made giving wide amounts of opportunity for local participation and involvement	Id.

2.4.3. Administrative Fragmentation or Involution

An unexpected consequence of the regional government law in 2004 was the breaking up of regions (provinces as well as districts) into smaller autonomous regions. In 2001, there were 336 districts (excluding Jakarta) and 30 provinces (4 new provinces were established immediately after 1999). Three year later, in 2004 there were 32 provinces and 434 districts. Since 2007, 7 new provinces, 135 districts and 32 municipalities have been established.¹⁷¹ And more will follow in the coming years.¹⁷² Presently Indonesia is divided into 530 autonomous regions comprising of 33 provinces, 398 districts, 93 municipalities, 5 administrative municipalities and 1 administrative district.¹⁷³

The demand to separate and establish new autonomous regions may be based on political or historical considerations or, most commonly, on the official reason that it serves to boost economic growth.¹⁷⁴ Cultural identities may well play a role too. Banten, for example, demanded and obtained approval to cede from West Java on the basis of having a separate history and local identity.¹⁷⁵ On the other hand, the real reason often is money politics and aspirations for political power.¹⁷⁶

Other authors have rightly warned against this regional fragmentation. It has been pointed out that carving up regions into smaller government units may not have been genuinely driven by the idea of 'bringing government closer to the people'.¹⁷⁷ Splitting may be a vehicle

¹⁷¹ A complete list of provinces and districts and the legal basis of their establishment is provided by the BPS. See Daftar Nama Provinsi/Kabupaten/Kota menurut dasar hukum pembentukan wilayah, available at <http://www.bps.go.id/mstkab/mfd2007.pdf>.

¹⁷² See Ali Masykur Musa, "Konstruksi Pemekaran Wilayah" (Harian Seputar Indonesia, 11 Februari 2009). The author criticised this administrative involution by arguing that it shows the non-existence of a grand design.

¹⁷³ See: M. Zaid Wahyudi and Susie Berindra, "Menata Ulang Pemekaran Daerah" (Kompas, 7 January 2010). Cf. the Ministry of Home Affairs Basis Data on the number of provinces/districts in Indonesia: June 2009, available at <http://www.depdagri.go.id/basis-data/2010/28/daftar-provinsi>, last accessed 21/07/2010.

¹⁷⁴ An exception to this general rule is the case of Papua. It was the central government which pushed the idea of splitting up Papua into several provinces (Irian Jaya Barat, Irian Jaya Tengah and Irian Jaya Timur). See Lili Romli, "Pro-Kontra Pemekaran Papua: Sebuah pelajaran bagi pemerintah pusat" (Papua Menggugat, jurnal penelitian politik vol.3, no.1, 2006): 25-40.

¹⁷⁵ The separation and establishment of Banten as an autonomous province was performed by virtue of Law 23/2000. In vague terms, the consideration and elucidation stipulate the following as rationale for the decision: "society's aspiration and demand as voiced by local political elite which runs back into the 50s".

¹⁷⁶ Marco Bunte, "Indonesia's protracted decentralization: contested reforms and their unintended consequences" in Marco Bunte & Andreas Ufen (eds.) *Democratization in Post-Suharto Indonesia* (New York: Routledge, 2009), pp. 102-204.

¹⁷⁷ Ali Masykur Musa, op.cit. Cf. ICG, *Indonesia: Managing Decentralization and Conflict in South Sulawesi*, (ICG Asia Report no. 60, Jakarta/Brussel). Cf. Anne Booth, "Splitting, splitting and splitting again: A brief history of the development of regional government in Indonesia since independence" (Bijdragen tot de Taal-,

for “outsiders” to enter the region in cooperation with the local elite to exploit regional natural resources. Some local leaders have voiced their suspicion that:¹⁷⁸

A number of “outsiders” (meaning foreign investors) for long had an eye on natural wealth and economic potentials of the southern areas of West Java. The *pemekaran* had been a ruse to capture local political interest and enable them to exploit natural resources. It is the local population which in the end will suffer the impact of such natural resource exploitation.”

Moreover, the fragmentation of administrative units into smaller and smaller territories, ironically named *pemekaran* (literally blossoming) but more aptly denoted by the term administrative involution has important consequences for efficient policy and law making. It also puts the central government’s capability to maintain an integrated and well synchronized national legal system to the test. As is the case, autonomous regions presently promulgate and implement quite a number of local regulations competing with national laws and regulations. How should the central government keep informed about on what going on in the districts? What kind of administrative and judicial review process and powers should be put into place?

Likewise, is it advisable to allow the regional governments to enjoy unlimited power to formulate their own natural resource management policies and regulations? By what legal mechanism should the central government establish a well coordinated natural resource management system between regions? Should the region’s autonomy be limited by regional equity and ecological considerations? Such issues will be discussed extensively in the nextn parts of this book.

Land- en Volkenkunde (BKI) 167-1(2011): 31-59. The central government in response attempted to halt this trend by promulgating GR 129/2000 on the requirement to establish and criteria for the establishment, abolition and the joining of regions (*persyaratan pembentukan dan criteria pemekaran, penghapusan, dan penggabungan daerah*) and GR 78/2007 (on the procedure for establishment, abolition and joining of regions (*tentang tata cara pembentukan, penghapusan dan penggabungan daerah*)).

¹⁷⁸ Wakil Ketua Legiun Veteran Jabar, HR Wikusumah as reported in “Waspada! Upaya Pemekaran Wilayah di Jabar” (Pikiran Rakyat, 30 Mei 2009).

2.4.4. The (formal) Legal System¹⁷⁹

Indonesia aspires to become a *Rechtsstaat* (*Negara Hukum*), a state ruled by law. To know the law and to be able to find what rules apply to any kind of situation is thus of crucial importance. Guidance regarding what is to be considered law is provided by the People's Consultative Assembly's Decree of 2000.¹⁸⁰ Considering that the amendment to the 1945 Constitution down-graded the Assembly's position, there should be no place for such decree in the Indonesian legal system. Hence, a new law was quickly promulgated to regulate the issue of hierarchy and ranking of laws and regulations (Law 10/2004).¹⁸¹ This law on law-making reasserts the status of Pancasila as the primary source of law (mentioned earlier in the revoked 1966 People's Consultative Assembly's Decree on the Indonesian legal order), while also providing a similar hierarchic structure of legal sources in Art. 7 as the People's Consultative Assembly's Decree of 2000:

Table 2-2: Sources and Hierarchy of Laws in Indonesia (since 2000)¹⁸²

Sources of law, sequence according to hierarchy		
1	The (Amended) 1945 Constitution	(<i>Undang-Undang Dasar (Diamendemen)</i>)
2	Parliament Enacted Law/Government Regulation in Lieu of Legislation	(<i>Undang-Undang / Peraturan Pemerintah Pengganti Undang-Undang</i>)
3	Government Regulation	<i>Peraturan Pemerintah</i>
4	Presidential Decree	<i>Keputusan Presiden, since 2004 Peraturan Presiden</i>
5	Regional Regulation	<i>Peraturan Daerah</i> comprising of:

¹⁷⁹ This particular part about the Indonesian legal system was written on the basis of the INDIRA Joint Paper written by Laurens Bakker, Sandra Moniaga, Tristam Moeliono, Gustaaf Reerink, Myrna Safitri and Jacqueline Vel, The Legal Framework for Spatial Planning, Land, and Natural Resources Management in Indonesia (unpublished 2007).

¹⁸⁰ PCA Decree 3/2000 on the Formal Legal Sources and Hierarchy of Law (*TAP MPR III/MPR/2000 tentang Sumber Hukum dan Tata Urutan Perundang-undangan*).

¹⁸¹ Law 10/2004 on Law-making (*UU 10/2004 tentang Pembentukan Peraturan Perundang-Undangan*).

¹⁸² This table is a summary of the preceding text.

		1. <i>peraturan daerah propinsi</i> (provincial regulation) 2. <i>peraturan daerah kota/kabupaten</i> (district/municipality regulation), and 3. <i>peraturan desa</i> (village regulation)

The term “regional regulation” refers to all regulations issued by the head of autonomous regions in conjunction with regional parliaments at the provincial, district and village levels (Art. 7(2) of Law 10/2004). The RGL 1999 and 2004 and its implementing regulation (Government Regulation 25/2000,¹⁸³ later revoked and replaced by GR 38/2007), provide guidance on which competences or powers are delegated to the autonomous regions and which are retained by the central government. At the village level, what powers are delegated and thus what kind of regulations the village government may issue are limited by GR 72/2005.

The result aimed for by this legislative engineering was a strengthening of the positions of both the central and provincial governments *vis-à-vis* the districts. After 1999 the districts took the opportunity for self regulation very seriously by producing quite a staggering number of district regulations. It was also fuelled by the practice of considering most national-provincial regulations as not directly implementable and enforceable at the regional level. These rules and regulations were argued to have to be translated first into district regulations and other implementing regulations at the district level. The proliferation of regional regulations had also been exacerbated by the tendency of regions (provincial as well as districts) to split up and form new “autonomous self governing regions”.

In addition, Art. 7 of Law 10/2004 opens up the possibility of considering other forms not specifically mentioned as a source of law subject to the conditions that higher ranking laws recognize such forms as binding law. In other words, public agencies and officials at all levels may issue binding regulations of a general nature on the condition that they are empowered by law. As a result all decisions and decrees issued by ministries and other government agencies made within their respective competence, whether of a general abstract nature or concrete and individual are to be recognized as having the same binding effects as the forms of law mentioned above. In other words, Cabinet Ministers and Heads of Region each in their own special field of competence retain the authority to issue regulations of a general nature (Ministerial Regulations (*Peraturan Menteri*) or Decisions/Decrees of Governors or District Heads/Mayors (*Keputusan Gubernur* or *Bupati/Walikota*)) or of an

¹⁸³ GR 25/2000 on the scope of authorities of the central government and the province as autonomous region (*PP 25/2000 tentang Kewenangan Pemerintah dan Kewenangan Propinsi sebagai Daerah Otonom*).

individual and concrete nature in the form of decisions or decrees. Permits and recommendations fall under this heading. Consequently, finding what the law is mostly involves a thorough search concerning how certain basic rules have been elaborated upon by ministerial regulations, decisions, and decrees, and what other implementing regulations exist at the provincial and district level.

Nonetheless, any attempt at finding what the legal norm is would never be complete without taking into consideration the existence and influence of internal memos. Hard laws (statutes and implementing regulations) are not the only source of law. Soft law in the form of executive guidelines in whatever form should also be taken into account. As indicated by Otto, policy rules in the form of circular letters or directives is one of such approach used by the central government to encourage co-ordination and harmony in regional and local public bodies, organs and institutions.¹⁸⁴ In this sense they are legally binding.¹⁸⁵

Consequently, regarding Indonesian legal practice, we should never discount the (binding) power of internal memos in whatever forms, i.e., circular letters, directives or guidance. All of these internal rules and regulations – notwithstanding the fact that they were never intended to replace statutes – can influence how and when a law may be implemented and sometimes even used to fill in legal lacunae. This importance of circular letters in Indonesia is undisputed.

Instructions provide lawyers and citizens with an indication as to why certain policies or even legal rules are not implemented or implemented in a strange way. For example, a couple wishing to register their marriage is required to enclose a receipt showing that they have paid building and land tax, a rule established to increase efficiency in land collection. Apparently, civil registrar officials receive explicit instructions to do so. Accordingly, in order to find out what the law is, how it should be implemented and why it is implemented in a certain way, it is very important to know what implementing directives (*petunjuk pelaksanaan*) and technical instructions (*petunjuk teknis*) exist. Both inform government officials when and how a rule or government policy has to be implemented. As the head of

¹⁸⁴ Otto, op.cit, p 18-19.

¹⁸⁵ Such quasi legislation is the product of discretionary power granted to the bureaucracy or administrative branch of government. See: Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia: Pasca Reformasi* (Jakarta: Bhuana Ilmu Populer, 2007), pp. 263-266. Cf. M.C. Burkens, H.R.B.M Kummeling, B.P. Vermeulen, *Beginnelsen van de democratische rechtsstaat: Inleiding tot de grondslagen van het Nederlandse staats- en bestuursrecht*, derde druk (Utrecht: Tjeenk Willink, 1994), p. 4-8 (on the necessity of government producing and implementing binding regulations)

the spatial planning office (*kantor tata ruang*) of the public work service (*dinas pekerjaan umum*) of the provincial government of South Sumatera stated:¹⁸⁶

“We realize that the provincial government issued a policy to provide housing to the poor but we are still waiting for the *juklak*. Until then, we shall not take any action”

These instructions work as a kind of operating manual. Legally speaking, they should not have external binding power. However in legal practice, even in cases where such internal memos are specifically addressed to the government institutions or certain officials, the way it works will be felt by the general public in the end. To illustrate the importance of such internal rules it is sufficient to take only a quick look at any compilation of Indonesian legal rules. A major part of such compilations consists of a list of those internal memos.

Briefly stated all “unwritten-informal and even internal rules” should be considered an inseparable part of the Indonesian legal system. They provide outsiders with an idea of the complexity of the Indonesian legal world. This must be taken into account in legal practice as well as in research.

Negligible is however the use of Court decisions as a source in finding what the law should be. While in general, the Supreme Court’s decisions are acknowledged as an authoritative source of the law, their use as such is questionable. A consideration of a decree issued by the President of the Indonesian Supreme Court stipulated that:¹⁸⁷

“a. that “*yurisprudensi*” compiled from and comprising of binding and final first instance courts, the appellate courts and supreme court decisions shall have informative value to be used as directive and is one of the national legal sources”.

¹⁸⁶ “PU CK: Kami Masih Tunggu Juklak” (Sriwijaya post online, 19 december 2008)

¹⁸⁷ Decree of the President of the Supreme Court of the Rep. of Indonesia, 019/KMA/SK/II/2007 dated 19 February 2007 concerning the appointment of a research team to conduct evaluation on law making through Jurisprudence (*penunjukan tim penelitian pembentukan hukum melalui yurisprudensi*).

This is not a very convincing acknowledgment. Eventually even the Supreme Court does not seem to expect much from its compilation of previous decisions. In its official website, the Supreme Court wrote in its introduction that:¹⁸⁸

“the compilation of the Supreme Court Decisions since 1977 comprises of well considered decisions in all fields of law which can be used (*yang dapat dipakai*) as basic knowledge and reference (*dasar dan pedoman*) by the judges in their deliberations. (...) The greatest hope (*sangat diharapkan*) is that the compilation will appeal (*menggugah*) the Judges to refer to it when deliberating a case, as *yurisprudensi* is or should be considered a source of law (*sumber hukum*).”

No doubt that the scope of application for such decisions is very limited. Considering the proliferation of written “formal and informal” rules and regulations mentioned earlier, the use of *yurisprudensi* as a reference to find what the law is limited.

2.5. Conclusion

I have given a bird’s eye view of the basic contours of the Indonesian state, government and legal system and structure and how they relate to each other. The hope is that this description will be useful for the reader through the ensuing discussion on how the planning system works and has been influenced by the changing state and government structures. A recurring theme has been the concern for what the ideal state and government structure is for Indonesia and what role the law should play. Several hints have been given as to what issues will become the core concern of this book, namely how a decentralized government attempting to establish a state ruled by law uses law to bring justice and prosperity to the nation. The overarching focus will be on how the government constructs and uses the law to achieve certain objectives and how such objectives have been legitimized.

The ensuing discussion also shows the complex relationship between the Indonesian government system and legal structure. The extent to which good governance is attainable depends on the efficient working of both the government system and the legal instruments available to the government. On the other hand, the limits of government power (also in

¹⁸⁸ <http://www.ma-ri.go.id/Html/Basisdata.asp> But see also: Paulus Effendi Lotulung, “Peranan Yurisprudensi sebagai Sumber Hukum”(Jakarta: BPHN, 1997/1998).

spatial management) to a great extent depend on the distribution of power by and between the central and regional government. Influential is also how legal rules, as the primary government instrument, have been used to bring about society's welfare. These are the major ingredients for the inquiry into how spatial management is performed by the government.

CHAPTER III

THE TRANSFORMATION OF CITY MASTER PLANS INTO SPATIAL MANAGEMENT

3.1. Introduction

This chapter looks at the extent to which regional governments in Indonesia during the Old and New Order enjoyed genuine autonomy in making and implementing spatial management policy and what factors influenced these processes. My contention is that the Town Planning Law of 1948 (*Stadsvormingsordonnantie* or SVO 1948) and its successor, the Spatial Planning Law 24/1992 (SPL 1992) became part of the top down development planning system introduced in the early 1960s. This system was adopted by the New Order and preserved in part after *Reformasi*. As a result, district and municipal governments have never been allowed to formulate land use planning autonomously, or supervise its implementation without interference from the central government. Consequently, district spatial plans have become far removed from the concerns of individual and communal land owners and have ultimately failed to function as a government tool to control land use.

Unfortunately, there is not much literature on Indonesian spatial management which discussed the issue raised above. With one exception,¹⁸⁹ a good overview and critical analysis of the legal and historical aspects of spatial planning that also addresses the practice of planning is lacking. Conspicuously absent are also writings about spatial management dealing with the relationship between land use planning and natural resource management in Indonesia.

Yet, there are good reasons to take a closer look at the latter subject in particular. The SPL 1992 was officially meant to play a similar harmonizing role for land use planning as the Environmental Management Act of 1982 for environmental management. The SPL 1992 attempted to put into place a comprehensive approach to natural resource management, and

¹⁸⁹ Niessen, Nicole. "Municipal Government in Indonesia: Policy, Law, and Practice of Decentralization and Urban Spatial Planning", (Research School CNWS, 1999) & Nicole Niessen, *Municipal Government in Indonesia: Policy, Law and Practice of Decentralization and Urban Spatial Planning*, dissertation, Leiden University, 1999.

as such constituted what in Indonesia is usually referred to as an 'umbrella act'.¹⁹⁰ Even its predecessor, the SVO 1948 contained a number of principles that were to be implemented by all government levels (central, provincial and districts). This should have created a hierarchical system of spatial-development planning, but with clear realms of authority at lower levels.

However, this attempt at harmonization of law and policy-making regarding spatial planning created tension between the top-down but fragmented approach to natural resource management (in oil & gas, mining and forestry) and the supposedly integrated and comprehensive approach to land use adopted by the SPL 1992.¹⁹¹ This conflict of principles and interest determining land use between natural resource management and spatial planning has been long disregarded by Indonesian authors and even NGOs in their critiques of Indonesian land administration policies and expropriation practices. Fortunately more recently this insight has gained more currency, even if it has not yet led to better harmonized natural resource management. But at least spatial and land use planning are now considered and discussed as inseparable from land management, including land administration.¹⁹² And yet, increasing appreciation does not lead to better implementation. To understand why this I will look at the development of the idea of city planning which emerged in Indonesia in the late 1940 and how the same concept changes over time during the Old and New Order.

This chapter is divided into four sections. The first one presents a historical overview of the evolution and transformation of town planning, paying special attention to the similarities and differences between colonial city planning and urban planning after Indonesia became independent. The second section discusses development planning under the Old and New

¹⁹⁰ Bedner, A.W. 'Amalgamating Environmental Law in Indonesia', book chapter in Otto, J.M., Arnscheidt, J. Stoter, S. en B. van Rooij (eds) *Lawmaking in Developing Countries*, (Amsterdam: Amsterdam University Press, 2008).

¹⁹¹ For a discussion of the terms co-ordination, harmonization and integration, see Otto. See: Jan Michiel Otto, "Incoherence in Environmental Law and the Solution of Co-ordination, Harmonisation and Integration", in Adriaan Bedner & Nicole Niessen (eds.), *Towards Integrated Environmental Law in Indonesia?* (Leiden: Research School CNSW, 2003), pp. 15-16. Otto suggests that coordination should be used to refer to the act of adjusting separate parts aiming at bringing the parts into a proper relationship, while harmonization should refer to the attempt at bringing separate parts into conformity leading to a coherence that produces agreeable effects, and lastly that integration be understood as the merger or fusion of separate parts.

¹⁹² UN Habitat, *Handbook on Best Practices Security of Tenure and Access to Land*, (Nairobi: UN Habitat, 2003); Cf. FAO, *Good Governance in Land Tenure and Administration*, (Rome, 2007). The same attitude has also been reflected in the PCA 9/2001 on agrarian reform and natural resource management issued after the fall of the New Order government.

Order governments and how this provided the basis for the sectoral approach to natural resource management. To counter the negative effects of such 'sectoralism', the New Order introduced a special spatial management scheme, including town planning, which will be discussed in the third section. The final part will look at the SPL 1992 and its relation to other land use planning legislation, notably as developed by the Ministry of Forestry. The central theme linking all of this is the relation between urban development, including sectoral development planning, spatial management, land acquisition and the dispossession of land owners. The Chapter demonstrates the importance of spatial management for land owners' access to land and their tenure security. It further provides the basis for discussing the changes during Reformasi in Chapters 5 and 6.

3.2. The Dutch Colonial Town Planning Regulatory Framework

As noted by Van Roosmalen, Indonesian city planning originated at the beginning of the twentieth century with changes in the structure of the Dutch colonial government.¹⁹³ City planning was introduced in order to accommodate the needs of a growing urban population in Dutch colonial towns.¹⁹⁴ Briefly stated, the need for a city planning regulatory framework law arose with the creation of autonomous *gemeentes* in the Netherlands Indies in the 1904s, which were to accommodate the demands for influence on the government among the

¹⁹³ *Wet Houdende Decentralisatie van het Bestuur in Nederlands-Indie* (Law on the decentralization of the government of Netherlands-Indies, dated 23 July 1903), consisted of three articles, which were inserted into the Dutch Indies constitution (*Regerings Reglement of 1854: reglement op het beleid der regering van Ned-Indie*, Art. 68a, 68b and 68c). On the basis of the 1903 decentralization law, several *gemeente's* were established with powers to: establish taxes /local revenue to engender their own financial means and manage government affairs delegated by the governor general or heads of the *gewesten* (provinces) to the regions. Ph. Kleintjes, *Het Staatsrecht van Nederlandsch-Indië: Eeerste Deel*, (Amsterdam: J.H.de Bussy, 1911), pp. 268-270. For a concise history of the decentralization laws and movement during the colonial period see Soetandyo Wignyosoebroto, *Desentralisasi dalam Tata Pemerintahan Kolonial Hindia-Belanda: Kebijakan dan Upaya Sepanjang Babak Akhir Kekuasaan Kolonial di Indonesia (1900-1940)*, first edition, (Banyumedia Publishing: Malang, 2004). Cf. Soegijanto Padmo, "Desentralisasi Pemerintahan Daerah di Indonesia", <http://sejarah.fib.ugm.ac.id/artdetail.php>. (last accessed June 30, 2006)

¹⁹⁴ Pauline K.M van Roosmalen, "Expanding Grounds: The Roots of Spatial Planning in Indonesia", in Freek Colombijn, Martine Barwegen, Purnawan Basundoro and Johny Alfian Khusyairi (eds.) *Kota Lama Kota Baru, Sejarah Kota-Kota di Indonesia*, (Yogyakarta: Penerbit Ombak, 2005), pp. 75-117. See also: "Blaricum sous les tropiques. Les principes de l'urbanisme moderne néerlandais en Indonésie" in: Marc Paboïs, Bernard Toulhier, *Architecture coloniale et patrimoine. Expériences européennes*, (Editions Somogy, Paris 2006), 58-75.

growing European population.¹⁹⁵ It was based on the system found in the Netherlands at the time.¹⁹⁶

None the less, only in 1938 did the Dutch colonial government submit a draft of a city planning ordinance (*Stadsvormings-ordonnantie* or SVO) to the *Volksraad*. Its explanatory memorandum described the purpose of town planning as follows:¹⁹⁷

“(...) to organise construction and building, by local governments as well as by others, in order to guarantee the development of towns in accordance with their social and geographical characteristics and their expected growth. Town planning needed to strive for a proportional division of the needs of all population groups corresponding to their disposition, and to create a harmonious functioning of the town as a whole. All this must take into consideration the environment and the position of a town in a wider context.”

The promulgation of the SVO was delayed for some ten years due to the outbreak of World War II, the Japanese occupation of Indonesia (1942-45) and the war between the newly declared Indonesian state and the Netherlands (1945-1949). By then, the SVO was to answer completely different needs: the reconstruction of badly damaged cities under Dutch occupation forces¹⁹⁸ and, in particular, the urgent need to provide housing for the urban population.¹⁹⁹

In 1949, the Netherlands Indies' government enacted an implementing regulation of the SVO (the *Stadsvormingsverordening 40/1949* or *SVV*), which further specified the municipal government's obligation to provide general and detailed city planning maps. These were to indicate building zones for general and particular purposes, as well as the network of roads connecting the various parts of the city zones. The SVV also stipulated that detailed land use

¹⁹⁵ Soetandyo Wignyosoebroto, op.cit, pp.22-26.

¹⁹⁶ Peter J.M Nas, “The Origin and Development of Urban Municipality in Indonesia”(Sojourn, vol. 5, no.1, 1990), pp. 86-112.

¹⁹⁷ As quoted from Van Rosmalen, 2005, op.cit, p. 2.

¹⁹⁸ Johan Silas, “Perjalanan Panjang Perumahan di Indonesia dalam dan sekitar Abad XX”, (dissertasi ITB, 1989).

¹⁹⁹Ibid. See also: Martine Barwegen and Freek Colombijn, “Renting Houses in Indonesian Cities, 1930-1960”, paper presented before the First International Conference on the History of Indonesian Cities, Surabaya 23-25 August 2004. The Bill was promulgated by “Besluit van de Luitenant-Gouverneur-Generaal van 23 July 1948 no. 13”.

planning was to guide the formulation of detailed technical rules pertaining to road and building construction.

In addition, the SVV (the third chapter) provided for the municipal government's authority to acquire land for urban development in realizing urban development blueprints. The bases and procedures for expropriation were provided by the Expropriation Ordinance (*Onteigeningsordonnantie* S.1864-6 as amended by S.1920-574). The city plan would provide clarity to the government and urban citizens alike on the future of the land. Urban planning thus influenced the extent to which inhabitants of a city enjoyed tenure security and would have equal access to the end result of city planning: a well managed city with a sufficient amount of open spaces, providing basic necessities to all.

3.3. Adaptation and Transformation of the SVO/SVV into Indonesian Law

The SVO and the SVV were declared applicable between 1948 and 1949 in the following Dutch controlled municipalities: Batavia (and certain suburbs), Surabaya, Semarang, Malang, Cilacap, Pekalongan, Padang, and Palembang.²⁰⁰ However, implementation in these and other municipalities did not follow after the transfer of sovereignty by the end of December 1949, even if the newly independent Indonesian state incorporated the SVO and SVV into national law.²⁰¹ Factors inhibiting implementation were, among others, the perception that the SVO was part of the Dutch colonial agrarian law, more suitable for Dutch-colonial *gemeentes*, and likely resulting in the maintenance of western enclaves and the colonial spatial segregation of different races.²⁰² Another plausible explanation would be that lack of financial and managerial capabilities of town administrators prevented successive municipal governments in the 15 cities mentioned to prepare city planning in line with the SVO/SVV. The only exception was the plan to build a new town in Kebayoran Jakarta, which was launched in 1948 and implemented after independence.²⁰³

²⁰⁰ Nicole Niessen, 1999, op.cit, pp. 223-228. Cf. Lambert J. Giebels, Jabotabek: An Indonesian-Dutch Concept on Metropolitan Planning of the Jakarta Region, especially his chapter on development of physical planning in Indonesia in Peter J.M. Nas (ed), *The Indonesian City: Studies in Urban Development and Planning*, (Foris Publications: Dordrecht-Holland/Cinnaminson-USA, 1986), p. 100-101.

²⁰¹ Asep Warlan Yusuf, *Aspek-Aspek Hukum dalam Perencanaan Kota di Daerah Tingkat II Kotamadya Bandung*, (unpublished, master thesis, faculty of post-graduate studies, University of Padjadjaran, 1990)

²⁰² J.M Otto & Ateng Syafrudin, "Hukum Tata Ruang di Indonesia dan Belanda" (*Pro Justitia* 2/VIII, April 1990): 5-35.

²⁰³ Van Roosmalen, 2005, op.cit. p. 12.

Only in 1973 were the SVO and SVV 'revitalized', following the start of an 'open door' policy by the New Order government in 1966-1967. It was argued that the attempt at re-incorporating Indonesia into the global commercial network must be supported by a policy of turning urban areas into engines of economic growth²⁰⁴. Reinvigorating city planning and declaring it applicable to other cities aside from the 15 municipalities mentioned earlier thus became a tool for economic development. In 1973, the Ministry of Home Affairs declared the applicability of SVO for cities other than those 15 already appointed by the colonial government, by Circular Letter (Pemda 18/3/6) dated 15-5-1973 on the Formulation of City Planning).²⁰⁵ The letter, addressed to the heads of provincial regions (governors), stipulated that 'awaiting the issuance of more specific regulations, the SVO, as adjusted to changes made in the state and government structure²⁰⁶ should serve as the legal basis for drawing up urban development plans'. The letter further declared that an urban development plan should consist of physical, social and economic planning and be drawn up in support of (economic) development (article 2), regulate and coordinate different kinds of land use planning (zoning) (article 3) and be made for a period of 20 year with the possibility to be evaluated every five years (article 4).

However, real efforts to implement the SVO only started in 1976, when a new system of regional government was established on the basis of RGL 5/1974. In 1976, the President

²⁰⁴ Deputi Bidang Pengembangan Regional dan Otonomi Daerah-Bappenas, Koordinasi Pembangunan Perkotaan dalam USDRP, launching proyek urban sector development reform project, Jakarta 24 July 2006. For a historical perspective on urban development strategy commencing from the 1960s, see: Ruchyat Deni & Maman Djumantri, "Pergeseran Pendekatan dalam Perencanaan Pengembangan Wilayah Indonesia", in Haryo Winarso, Denny Zulkaidi, Miming Miharja (ed), *Pemikiran dan Praktek Perencanaan dalam Era Transformasi di Indonesia* (Bandung: Departemen Teknik Planologi ITB, 2002), pp. 9-26. Cf. Howard Dick, *Surabaya, A City of Work: A socio-economic history 1900-2000*, (Athens-Ohio: Ohio University Press, 2002). Cf from the same author, "Urban Development and Land Rights: A Comparison of New Order and Colonial Surabaya, in Peter J.M. Nas (ed), *The Indonesian Town Revisited*, (Singapore: Institute of Southeast Asian Studies, 2002), pp. 113-126. Dick argues that the decline of town planning between the 1930s and 1970s may be partly explained by the declining importance of cities as economic centres in the international economic network.

²⁰⁵ Nicole Niessen, *op.cit.*, pp.230-231; Cf. Budhy Tjahjati, *Pembangunan Perkotaan dengan Pendekatan Penataan Ruang: Implikasi dan Prospeknya*, sumbangan tulisan untuk sejarah tata ruang Indonesia 1950-2000, Jakarta, Agustus 2003. Cf. Ir. H. Sjarifuddin Akil (direktur jenderal penataan ruang, depkimpraswil), *Pengembangan Wilayah dan Penataan Ruang di Indonesia: Tinjauan Teoretis dan Praktis* (makalah dalam kuliah terbuka proram magister KAPET, Unhas, Makassar, 2007).

²⁰⁶ As the consequence of the reintroduction of the 1945 Constitution and the enactment of Law 18/1965 jo. RGL 6/1969.

issued Instruction 1/1976,²⁰⁷ point 25 of which stipulated the obligation of every city government (municipality) to draw up city plans. These would be declared valid after approval by the Minister of Public Works and ratification by the Ministry of Home Affairs. This was apparently how the President interpreted the SVO's Article 10, which stipulated that autonomous municipalities must negotiate with departments holding legal authority to determine land use.

Thus, under the New Order city planning came firmly under the authority of the central government. A top down and centralized approach to spatial planning was established which seriously curtailed the right of inhabitants to participate in the planning process. This was a radical change from what had been envisaged by the SVO and SVV, both of which stressed the autonomy of *stadsgemeenten* in this matter. This was partly a logical consequence of the hierarchical government structure established by RGL 5/1974 which defined “provinces and districts” at least partly as autonomous regions (*Daerah Tingkat I* and *Daerah Tingkat II*) with viz. governors and mayors/regents as their heads, and elected councils to hold them accountable to their constituencies. However, in fact regional governments were run from the top down by developmental interventions initiated by the central government, and accompanied by strict surveillance.²⁰⁸ Land use planning and access to natural resources thus became dependent on centrally determined development planning.

The removal of (urban) spatial planning from the sphere of local autonomy is evident from a study conducted by a consultancy firm in 1986.²⁰⁹ During the plan preparation stage, the regional government was required to consult with the provincial *Badan Pembangunan Daerah* (Regional Development Planning Board or *Bappeda*) and the *Badan Pengembangan Kota* (Urban Development Board or *Bangkota*), in order to assure conformity in planning at the local, provincial and national level. After consultation with the Directorate of Regional Legislature Development (*Direktorat Pengembangan DPRD*) of the Directorate General of Public Administration and Regional Autonomy of the Ministry of Home Affairs the master plan was adopted by regional regulation and then submitted to the provincial government before being sent to the Minister (of Home Affairs) for ratification. District or municipal

²⁰⁷ Presidential Instruction 1/1976 concerning the synchronization of task and responsibilities between agrarian issues, forestry, mining, transmigration and public works (*pedoman sinkronisasi pelaksanaan tugas keagrariaan dengan bidang tugas kehutanan, pertambangan, transmigrasi dan pekerjaan umum*).

²⁰⁸Henk Schulte Nordholt and Gerry van Klinken, in their introductory chapter in *Renegotiating Boundaries: Local Politics in post-Soeharto Indonesia* (KITLV Press: Leiden, 2007), p.21.

²⁰⁹ DHV Consulting Engineers, *Legal and Institutional Framework of Urban Development, Physical Planning & Land Management in Indonesia*, (January 1986).

parliaments played no role at all. After ratification, the local regulation containing the master plan would become legally binding and serve as the basis for the approval of regional budgets and the allocation of development grants.²¹⁰

In practice both the Ministers of Home Affairs and Public Works claimed a monopoly over the formulation of urban master plans. Both were adamant in defending their scope of authority. In the end, in a joint decree, they agreed to share competence.²¹¹ Henceforth, the Minister of Home Affairs would only deal with administrative matters and the Minister of Public Works with all technical issues.²¹²

Pursuant to this Joint Decree the Minister of Home Affairs amended its City Planning Regulation 4/1980 by Ministerial Regulation 2/1987 instead of drawing up a new one. This was rather peculiar from a legal point of view, because Article 23 of the Joint Decree declared Regulation 4/1980 and all its implementation directives (*petunjuk pelaksanaan*) invalid. However, no one questioned this matter and in practice the new Ministerial Regulation was considered valid. Its Article 15 reaffirmed that city planning had to follow the five-yearly General Guidelines of State Policy issued by the People's Consultative Assembly, as well as the general development planning made by the provinces and municipal/district governments. Conversely, development projects, either initiated by the government or even individual entrepreneurs, could only be realized if proposed land use was declared in conformity with existing town planning.

The same approach of linking spatial planning to centrally made development plans underlied the 'technical' side of urban spatial planning as regulated by the Ministry of Public Works in Decree 640/KPTS/1986 on town planning (*tentang perencanaan kota*). This decree regulated all technical aspects of urban planning in detail, including criteria to be met by those formulating urban spatial planning (*rencana tata ruang kota*), i.e. an urban area master plan (*rencana umum tata ruang perkotaan*), detailed urban spatial planning (*rencana detail*

²¹⁰ Cf. Nicole Niessen, op.cit.

²¹¹ Joint Decree (*surat keputusan bersama*) Ministry of Home Affairs and Ministry of Public Works (650-1595; 503/KPTS/1985) on the tasks and responsibilities with regard to town planning (*tugas-tugas dan tanggungjawab perencanaan kota*).

²¹² See Article 2, 3 and 4 of this joint decree which established the division of tasks and responsibilities for both ministries. Article 3 stipulated the scope of responsibilities for the Ministry of Home Affairs which included laying down the rules and procedures for the formulation of municipal regulations on town planning and the ratification of town planning regulations drafts after completion with technical recommendations issued by the Ministry of Public Works. Article 4 defined the Ministry of Public Works' authority in drawing up or assisting municipalities in drawing up city master plans (*rancangan rencana umum tata ruang perkotaan*); providing technical standards for master plans and monitoring implementation by town planners.

tata ruang kota) and a technical urban spatial plan (*rencana teknik ruang kota*).²¹³ These planning documents were to guarantee consistency with the national urban development strategy issued in 1985 and made in support of existing sectoral development programs.²¹⁴ The Ministry of Public Works Decree also provided that the formulation of these documents could be delegated to a third party, i.e. a consultancy firm.²¹⁵ Apparently, this option was to take care of the lack of technical planning expertise of local government agencies.

The authority of the Ministers of Home Affairs and Public Works in urban spatial planning was also confirmed at a higher level. In 1987, the central government issued GR 14/1987 which defined the authorities (in public works) that were to be delegated to municipal/district governments.²¹⁶ The point of departure of the regulation made it quite clear that the authority to formulate district spatial planning was in the hands of the Minister of Public Works. Moreover, the Minister of Public Works had the discretion to decide when and how certain tasks (related to urban spatial planning) were to be delegated to district/municipal governments, taking into consideration the Minister of Home Affairs' evaluation on the technical and financial capability of the region concerned (Art. 5). Delegation was to be effected through a ministerial decree and direct supervision remained in the hands of both the Minister of Home Affairs and the Minister of Public Works (Art. 8 and 9).

While these ministerial regulations were officially based on the SVO and the SVV, their scope and content had little to do with these statutes. The SVO 1948 and SVV 1949 were meant to establish municipalities with the autonomy to formulate urban and land use planning. However, nothing of the sort eventuated. Niessen argues that it was primarily due

²¹³ For the distribution of authority in drawing up those levels of city or town planning see Article 14 of the joint decree. The Ministry of Public Works' Directorate of City and Regional Planning (*Tata Kota dan Tata Daerah*) was responsible for formulating the *rencana umum tata ruang perkotaan*, while municipal governments elaborated this basic plan into a town master plan (RUTRK, RDTRK and RTRK). See also Article 3(1) of Ministry of Public Works decree 640/KPTS/1986 providing for the hierarchy and level of town planning.

²¹⁴ See Peter Gardner, "The Indonesian National Urban Development Strategy and its Relation to Policy and Planning" in Gavin W. Jones and Pravin Visaria (eds.), *Urbanization in Large Developing Countries: China, Indonesia, Brazil, and India* (Clarendon Press Oxford, 1997), pp. 160-180.

²¹⁵ Article 4 of Ministry of Public Works Decree 640/KPTS/1986. Consultancy firms must meet certain technical qualifications in urban planning to be regulated in another decree. Thus the Ministry of Public Works possesses the power to decide not only when planning documents are declared acceptable but also which consultancy firms may assist in the formulation of such documents.

²¹⁶ GR 14/1987 on the delegation of parts of central government authority in public works to the regions (*tentang penyerahan sebagian urusan pemerintahan di bidang pekerjaan umum kepada daerah*).

to the on-going inter-ministerial rivalry,²¹⁷ but even where no such rivalry existed, it was highly unlikely that municipalities were allowed to draw up their own spatial plans. It seems more likely that these ministerial regulations departed from an altogether different premise than the one underlying the SVO and SVV: that urban land use planning is an aspect of top down development planning and can never be left to provinces or districts/municipalities. Moreover, under RGL 5/1974 there was no possibility for municipalities to draw up their own spatial plans to express their autonomy. Municipal governments, declared autonomous as *daerah tingkat II*, in fact had no autonomy at all in terms of legislative power.

While municipalities were at least supposed to have a master plan, this was considered unnecessary for the districts and rural areas within the districts. However, in 1983 the People Consultative Assembly decreed that urban development should be managed with due regard to the relationship between cities, the environment and surrounding villages.²¹⁸ The focus was on urban development rather than empowering district or rural governments to draw up their own spatial plans. Rural areas situated within districts were considered important only in relation to urban (municipal) development. This may have been prompted by the rapid urbanization rate of the big cities and the impact it had on surrounding rural land on Java, particularly in Jakarta, during the 1970s and early 1980s.

Thus, district governments were not allowed to formulate land use plans. Instead, the president took this matter into his own hands – and in fact he also usurped part of the municipal planning. Presidential Decree 13/1976 declared spatial planning in Greater Jakarta of strategic importance.²¹⁹ Later the area was extended to encompass ‘Jabotabek’ (Jakarta-Bogor-Tangerang-Bekasi) region (48/1993). Similar decrees were issued for the Puncak area (79/1985); and Batam Island (41/1973). The direct involvement of the president in determining spatial management for these areas reinforces the conclusion that spatial planning had been separated from local concerns and did not relate to local government autonomy.

²¹⁷ Nicole Niessen, op.cit, p.228.

²¹⁸ PCA Decree 2/1983 (*bab IV Pola Umum Pelita Ke-empat, butir 12*): *pembangunan daerah (g) pembangunan perkotaan perlu dilakukan secara berencana dengan lebih memperhatikan keserasian hubungan antar kota dan dengan lingkungan dan antara kota dengan daerah pedesaan sekitarnya serta keserasian pertumbuhan kota itu sendiri.*

²¹⁹ In addition, the President held the authority to determine land use policy in regard to rice fields (54/1980), industrial estates (53/1989), tourism (15/1983) and housing (8/1985). Those areas in effect were declared to be outside the jurisdiction of provinces and districts.

To conclude, the SVO/SVV was incompatible with the government's structure as established by RGL 5/1974. The promulgation of RGL 5/1974 and the way in which it was implemented eliminated any illusion of autonomy for the regions, especially with regard to managing and implementing city planning and building regulations.²²⁰ The tendency of the New Order regime to centralize political power in the hands of the military and one political party (Golkar) had far-reaching consequences for regional autonomy.²²¹ Malaranggeng has related this tendency to the idea of the Indonesian unitary state as established by the 1945 Constitution.²²² Other authors, such as Antlov, have focused on the way a centralized patronage system was developed down to the village level.²²³ In this situation, no initiative from below could survive. This extended to how the central government perceived "development" in relation to state and nation-building and how it perceived its role in development and spatial planning. To this issue we will now turn.

3.4. The Emergence of Development and Spatial Management

What we have seen so far is that the SVO and SVV were difficult to implement because under Soeharto the autonomous *stadsgemeente* ceased to exist. The municipality that came to replace the *stadsgemeente* did not have the legal authority to enact a city plan on its own. What remained was the idea that planning should only apply to urban areas. The relevant decrees from the Ministry of Home Affairs and the Public Work subscribed to this idea and remained in place even after the promulgation of the Spatial Planning Law (the SPL) 24/1992 whose scope was much wider.

This section discusses the next stage of the evolution of city planning, or rather its reduction to a corollary of the state driven development programmes aimed mainly at the exploitation of natural resources. This development provided the basis for replacing city planning with spatial management. Two schemes were of particular influence in this process. The first was

²²⁰ The village government law 5/1979 came much later. However, the express intention was similar to RGL 5/1974; to create a uniform government structure down to the village level. The diverse forms of traditional communal government systems at the village level were thus effectively abolished.

²²¹ Syarif Hidayat, "Desentralisasi dan Otonomi Daerah Masa Orde Baru (1966-1998) in Soetandyo Wigjosoebroto et al, *Pasang Surut Otonomi Daerah, Sketsa 100 Tahun*, (Institute for Local Development and Yayasan TYFA, 2005), pp. 113.

²²² Andi A. Malarenggeng and M. Ryaas Rasyid, "Otonomi dan Federalisme" in Adnan Buyung Nasution dkk, *Federalisme untuk Indonesia*, (Jakarta: Kompas, 1999), pp. 7.

²²³ Hans Antlov, *Negara dalam Desa: Patronase Kepemimpinan Lokal* (Puska Utama: Yogyakarta, 2002), translated from his dissertation, *Exemplary Centre and Periphery*.

the national planning development scheme as it evolved under the Old and New Order government and the second the sectoral development strategy to natural resource management. These schemes led to turf fights between sectors of government, which sparked new interest in spatial management as a tool to reduce negative effects of sectoralism in natural resource management. Urban planning at this stage was reduced to a less important element of the spatial management scheme.

3.4.1. A comprehensive “state driven development planning scheme”?

Urban or city planning clearly concerns areas within the administrative jurisdiction of municipal governments. Thus, the SVO and SVV were only concerned with urban master plans concerning the development of city infrastructure. The effort to build the Indonesian nation and state required more than this and therefore under Soekarno Indonesia started developing a comprehensive national development planning scheme. This approach was carried further under Soeharto and has remained influential to this day. The term development (*pembangunan*), which is very much connected to the notion of modernization, became central.

Pembangunan indicates the effort to boost and maintain a steady rate of national economic growth,²²⁴ but is also seen more broadly as the effort to realize the state’s constitutional objectives. Soeharto is generally considered as the ‘champion’ of this form of ‘development’ and was even officially granted the title “father of development” (*bapak pembangunan*) by the People’s Consultative Assembly.²²⁵ None the less, in the early 1960s, the Soekarno

²²⁴ See Muhamad Ali, “Islam and Economic Development in New Order Indonesia (1967-1998), unpublished East-West Center Working Paper, no year). The author suggests that this particular definition of “development” is different from how the term is used and understood by for instance UNESCO and other authors (M. Esman, Jan Michiel Otto, for instance).

²²⁵ PCA 5/1983. The reasoning was as follows: “The Indonesian people have accepted with full gratitude the wise leadership and statehood of General Soeharto in the struggle for saving and implementing the *Pancasila* and the 1945 Constitution purely and consistently both in the life of the state and that of society since the establishment of the New Order. In the framework of the continuity of the national struggle in meeting the goals of independence, General Soeharto has become a pioneer and a leader in solving critical times in the life of the nation by remaining obedient to the will of the people and the Constitution, in rebuilding social and political lives which are based on the Pancasila and the 1945 Constitution, in maintaining national stability which is strong and dynamic as well as national unity, and in managing Five Years Development successfully, all of these leading towards an advanced, prosperous, and just society.” This Decree was eventually revoked in 2003 by PCA Decree 1/2003.

government already developed a top down (national) development planning system that intended to promote natural (including agrarian) resource exploitation.

This began with a speech by President Soekarno dated 28 August 1959 in which he instructed the *Dewan Perancang Nasional* (the precursor of the National Development Planning Board/Bappenas) to formulate policy guidance for “*Pembangunan Semesta Berencana*” (Planned Development), which was to put to use Indonesia’s rich natural resources in order to ‘develop’ the nation. The Temporary People’s Consultative Assembly then adopted the country’s first general development plan: the *Garis-garis besar Pola Pembangunan Nasional Semesta Berencana Tahapan Pertama, 1961-69* (PCA Decree 2/1960). It must be read in conjunction with two other decrees: 1/1960 on the political manifesto as part of the Broad Guidelines of State Policies (*tentang manifesto politik republic Indonesia sebagai Garis-garis Besar Haluan Negara*), and 4/1963, which contained guidelines for implementation (*Pedoman-pedoman pelaksanaan Garis-garis Besar Haluan Negara dan Haluan Pembangunan*). These three decrees formed the basis for the national development planning system under the Old Order regime. In addition, the Temporary People’s Consultative Assembly instructed the government not to accept foreign (western) aid (5/1965 and 6/1965).²²⁶

These decrees, issued by the highest state organ, provided the legal basis for state development policy. They constituted an instruction addressed to the President (as the sole executive mandate holder of the Temporary People’s Consultative Assembly) to industrialize and modernize Indonesia, and achieve political and economic self-reliance. It also served as a post-hoc justification for the nationalization of Dutch mining and plantation companies in Indonesia through Law 86/1958 (on the nationalization of foreign companies).²²⁷

The Old Order’s development planning scheme made it possible to appoint different Ministers to manage different natural resources and secure their utilization in support of the

²²⁶ Temporary PCA Decree 5/1965 (*Amanat Politik Presiden/Pemimpin Besar Revolusi/Mandataris MPRS yang Berjudul “Berdikari” sebagai Penegasan Revolusi Indonesia dalam Bidang Politik, Pedoman Pelaksanaan Manipol dan Landasan Program Perjuangan Rakyat Indonesia*), and Temporary PCA Decree 6/1965 (*Banting Stir untuk Berdiri di Atas Kaki Sendiri di Bidang Ekonomi dan Pembangunan*). On the other hand, it would be wrong to assume that Soekarno was fully against foreign investment. His administration also promulgated Law 37/Prp/1960 on Mining and Law 44/Prp/1960 on natural oil and gas, the latter allowing for profit-sharing agreement (PSA) with foreign parties, combined with a divestment scheme. Profit sharing was 60:40 and control over exploitation areas was to be gradually returned to the Indonesian government in stages (25% within 5 years; and another 25% after 10 years).

²²⁷ For a historical review of this nationalization policy see: Bondan Kanumoyoso, *Nasionalisasi Perusahaan Belanda di Indonesia: Menguatnya Peran Ekonomi Negara* (Jakarta: Pustaka Sinar Harapan, 2001). One of the justifications used to legitimise this unilateral action was the need to assert political (and economic) sovereignty.

overarching development goals. This meant the start of autonomous policies and regulations in the mining, oil and gas, and forestry sectors.

Soekarno also promulgated the Basic Agrarian Law (4/1960), which is still in place and of fundamental importance for the topic of this book. Article 14 of the BAL stipulates that the central government, based on the BAL concept of the state right to avail (or state right to control),²²⁸ must regulate the reservation, allocation and utilization of land for various development purposes in a comprehensive manner.²²⁹ This includes the authority to make a detailed land and natural resource plan, an attributed power of the central government which can be delegated to lower level government bodies or autonomous regions. The distribution of tasks is as follows: the central government on the basis of the state rights, shall provide a comprehensive “regional development” policy, which is to function as an instrument of co-ordination, harmonization and integration of separate development policies, while the autonomous regions (meaning provinces and districts/municipalities) shall establish their own land use plans. Whether the autonomous regions actually have sufficient authority to do so depends on what kind of development and natural resource management system applies apart from the BAL. Much also depends on how planning authorities are distributed by the central government, a point discussed earlier.

The legal importance of such land use plans can hardly be exaggerated. The Dutch colonial *Onteigeningsordonnantie* stipulated that expropriation could only occur on the basis of a pre-existing master (town) plan. The BAL (Art. 14) provides that every region (provinces and districts) must endorse their own land use plan (*Rencana Tata Guna Tanah*), which should provide the regions with justification to expropriate land using the procedures established by Law 20/1961 on the revocation of land rights and property claims on land (*pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*)²³⁰ which replaced the

²²⁸ *Hak Menguasai Negara* as enshrined in the 1945 Constitution and elaborated further by the BAL. See for a discussion on this right: Boedi Harsono, 2003. Menuju Penyempurnaan Hukum Tanah Nasional dalam hubungannya dengan TAP MPR RI IX/MPR/2001, (Jakarta: Universitas Trisakti). See especially chapter VI (hak menguasai Negara), pp. 47-55. *Tanah Negara (tanah yang dikuasai langsung oleh Negara* on which no other rights or claims exist), on the other hand, is distinguished from the state right to avail (*hak menguasai Negara*)

²²⁹ This state’s right to control has often been defined in relation to the welfare state (or development state) idea within which the state is positioned as the most important institution managing natural resource for the purpose of securing the attainment of the people’s prosperity. Tri Hayati, dkk, 2005. Konsep Penguasaan Negara di Sektor Sumber Daya Alam berdasarkan Pasal 33 UUD 1945, (Jakarta : Sekretariat Jenderal MKRI dan CLGS FHUI), p. 17.

²³⁰ Art. 2 of Law 20/1961 on the revocation of property rights on land and other objects on land (expropriation law) determined that applicant requesting the revocation of land rights should support his/her request with justification, which may refer to pre-existing land use plans.

Dutch colonial regulation above on land expropriation.. However unlike the previous regulation it replaced, the Law 20/1961 carries a very broad conception of justification allowing dispossession of land owners: ²³¹

“public interest, including the state and nation’s interest and the common interest of the people, as well as the interest of development”.

Moreover, Law 20/1961 made it possible for non-public entities to use an expropriation procedure²³², i.e. to dispossess land owners on the basis of the argument that their land is needed for development, which can be defined as the need to exploit natural resources, including land, in support of development projects initiated by the public or private sector.

However, the Old Order’s development planning scheme and natural resource management policy did not correspond well with the intentions of the BAL. The BAL as earlier mentioned is supposed to provide the central government with uncontested power, derived from the state rights to avail, to establish a comprehensive land use and natural resource management plan. In reality, as will be explained later, instead of such a comprehensive plan the government adopted several competing sectoral land use plans. This internal inconsistency was later adopted and carried out further by the New Order government.

Unfortunately, for political and economic reasons the Soekarno government ultimately failed to start the development programs espoused under the first People’s Consultative Assembly Decree on national development planning.²³³ Following the 1965 aborted coup and the subsequent pogroms against communists initiated by the army, Soeharto replaced Soekarno as President in 1966. We will now examine what this transition meant for development and land use planning.

²³¹ Art. 1: *untuk kepentingan umum, termasuk kepentingan Bangsa dan Negara serta kepentingan bersama dari rakyat, sedemikian pula kepentingan pembangunan, maka Presiden dalam keadaan yang memaksa setelah mendengar Menteri Agraria, Menteri Kehakiman dan Menteri yang bersangkutan dapat mencabut hak-hak atas tanah dan benda-benda yang ada di atasnya.*

²³² See the General Elucidation of Law 20/1961 point 4 (b).

²³³ The official explanation advanced by the New Order government was that political instability during Soekarno’s administration was the primary reason developmental concerns had become marginalized and that the national economy was in disarray. See: Muridan S. Widjojo, “Pembakuan Petanda: Politik Semiotik Orde Baru” in Muridan S. Wijoyo & Mashudi Noorsalim, *Bahasa Negara versus Bahasa Gerakan Mahasiswa: kajian semiotik atas teks-teks pidato presiden Soeharto dan selebaran gerakan mahasiswa* (Jakarta: Lipi Press, 2003). He argues that the New Order attempted to distance itself by juxtaposing its position against the Old Order

3.4.2. New Order Development Planning: Perfecting the fragmented approach to natural resource management

Following the transition from Soekarno's Guided Democracy to Soeharto's New Order, the Temporary People's Consultative Assembly issued Decree 23/1966 on the Renewal of the Ecconomic, Financial and Developmental Basis (*tentang Pembaharuan Landasan Ekonomi, Keuangan dan Pembangunan*). On this foundation,²³⁴ the government implemented a comprehensive economic policy package, abolishing Soekarno's self reliance policy and opening the doors to foreign investors and development aid from international donors. Central pieces of legislation were Law 1/1967 (on foreign investment as amended by Law 11/1970), Law 6/1968 (on domestic investment as amended by Law 12/1970), Law 5/1967 on forestry and Law 11/1967 on mining (amending Law 37/Prp/1960).

These laws established regimes of foreign exploitation and were based on quite similar profit sharing idea as developed earlier for natural oil and gas, i.e. that the government as the holder of the state's right to control needed investors to exploit Indonesia's natural resources and split the profit gained. The main difference was that to represent its interests in the natural oil and gas sector, the government established a special state owned company (*Perusahaan Negara Pertambangan Minyak Negara/Pertamina*)²³⁵ which represented the state in the production sharing agreement²³⁶, where the Ministers of Mining and Energy viz. Forestry²³⁷ themselves represented the state in signing work contracts for profit sharing

²³⁴ Other relevant Decrees are 4/1965 (*banting stir untuk berdiri di atas kaki sendiri di bidang ekonomi dan pembangunan*); 21/1966 (*pemberian otonomi seluas-luasnya kepada daerah*); and 23/1966 and 33/1967 (*pencabutan mandataris MPRS dari Presiden Soekarno*).

²³⁵ In October 1957, the Chief Army, Gen. A.H. Nasoetion instructed Colonel Dr. Ibnu Sutowo to establish a limited liability company (*PT. Permina/Pertambangan Minyak Nasional Indonesia*) entrusted to manage oil and gas extraction and production. By virtue of Law 19/1960 and GR 27/1968, PT. Permina was taken over by the state. In 1968, by virtue of GR 27/1968 this state owned company was fused with another state company in the same field (PT. Pertamina).

²³⁶ For a brief overview of the production-sharing agreements in the oil-gas industry see Kirsten Bindemann, "Production-Sharing Agreements: An Economic Analysis" (Oxford Institute for Energy Studies, WPM 25, October 1999).

²³⁷ In the forestry sector the government (ministry of forestry) established a state owned company (*badan usaha milik negara*): Perum Perhutani (GR 15/1972 as amended by GR 2/1978, GR 36/1986 and GR 30/2003) and PT. Inhutani (I-IV, established by virtue of GR 21/1972). Perum Perhutani's attributed task is planning, managing, exploitation and protection of forest within its working area (all state forest on Java, except conservation forest). In March 2001, Perhutani became fully privatized. PT. Inhutani has as its core business wood manufacturing, natural and production forest management and manage forest, mostly outside Java (Kalimantan, Sulawesi, Maluku and Sumatera). For more detailed information on PT. Inhutani see <http://www.inhutani1.co.id>. These state (owned) companies in contrast to Pertamina does not have the power to sign comparable profit sharing contracts with investors or possess the authority to grant licenses to exploit to third parties. The licensing power remains with the Ministry of Forestry. For a general overview on the forestry licensing system see: "Forest, people and Rights, A Down to Earth Special Report, June 2002" in <http://dte.gn.apc.org> (last accessed 21 March 2011).

and/or granting concessions.²³⁸ A different legal scheme, albeit under the same basic idea of profit sharing was developed to exploit state forest and forest products. In the forestry industry, the Ministry of Forestry utilized licenses to enable and control private parties wishing to exploit the forest.²³⁹ The government thus determined who had access to natural resources and how the benefits were to be distributed. By claiming exclusive authority to obtain natural resources on the basis of the state right to avail, the government also claimed the power to dispossess land owners found on land to be exploited. In the course of time, the same power came to be claimed by private investors holding exploitation licenses and contracts.²⁴⁰ In short, each sector (mining, oil and gas, forestry) developed quasi-autonomous “development planning and land use” schemes.

Other sectors, such as trade and industry (including tourism), agriculture, etc. also started making their own development plans. Since the Soeharto government paid special attention to developing the industrial sector, providing land to support industrial investment became a pressing concern. In order to overcome the limitations imposed by Law 20/1961 on expropriation Soeharto issued an instruction in 1973 which once more stressed the importance of “development plans” (*rencana pembangunan*) and “master development plans for the regions” (*rencana induk pembangunan daerah*) and thus provided a justification for land dispossession.²⁴¹ It was followed by a ministerial regulation in 1974 which focused on support for land acquisition for foreign and domestic investment initiatives.²⁴² A year later, the Ministry of Home Affairs issued another regulation on the procedure for ‘land release’.²⁴³

²³⁸ While the terms and conditions of the work contract system differ from the Production Sharing Contract they are based on the same idea: allowing investors to explore Indonesia’s natural resource and obtain the profit resulting from the exploitation. Article 10 of the 1967 Mining Law enables the Ministry of Mining and Energy to appoint another party as contractor to perform certain work the government or state-owned company has not yet mastered. The private party granted a *kuasa pertambangan* should enter into a work contract with the minister (Art. 10 par. 2 & 3).

²³⁹ See: Law 5/1967 and GR 21/1970 on logging concession and forest collecting rights in production forest (*tentang perusahaan hutan dan pemungutan hasil hutan pada hutan produksi*). Articles 1-7 of this GR authorized the Ministry of Forestry to grant licenses to private enterprises wishing to exploit forest products. Foreign or domestic investment companies could thus acquire logging concessions (*hak perusahaan hutan*) or forest product collecting rights (*hak perusahaan hasil hutan*) on the condition that they submit a forest management plan (*rencana karya perusahaan hutan*) to be approved by the Ministry of Forestry.

²⁴⁰ See “Forests, people and Rights, A Down to Earth Special Report” (June 2002).

²⁴¹ Presidential instruction (Instruksi Presiden RI) 9/1973 on the implementation (and procedure) to dispossess land owners (*pelaksanaan pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*).

²⁴² Ministry of Home Affairs Regulation (MHAR) 5/1974 regulating land reservation/allocation for private companies (*ketentuan-ketentuan mengenai penyediaan dan pemberian tanah untuk keperluan perusahaan*). Much later, in 1984, the Ministry of Home Affairs issued another regulation about the procedure and granting of rights to foreign and domestic investment companies (*tata cara penyediaan tanah dan pemberian hak atas tanah, pemberian izin bangunan serta izin undang-undang gangguan bagi perusahaan yang mengadakan penanaman modal menurut undang-undang 1/1967 dan undang-undang 6/1968*).

²⁴³ It is difficult to properly translate the term ‘*pembebasan*’ that is used in this context. It suggests that what is at stake is ‘releasing’ the land from ownership rights in a voluntary manner, but in practice amounted to

In 1976 this procedure was extended beyond government agencies to private companies (foreign/domestic investment).²⁴⁴

As these regulations contained no direct reference to town planning,²⁴⁵ the result was further marginalization of municipal planning as an instrument to control land use. More generally, it created a number of difficulties in harmonizing land use policy in Indonesia, as the various Ministries involved were not much inclined to take into account what their colleagues were doing. Not surprisingly, at some point certain officials within the central government became concerned about the implications of this situation and started to think about ways to integrate these different interests in land use. This led, in 1976, to a Presidential Instruction calling for a more synchronized effort at land use planning between sectors.²⁴⁶

However, it still took a few years before concrete legislative steps toward this objective were taken. The first one was the promulgation of the Environmental Management Act in 1982 (EMA 1982), followed ten years later by the Spatial Planning Law (SPL 1992). The next section discusses how these attempts failed in the face of an embedded sectoral approach to natural resource management.

expropriation. The term ‘release’ used here thus refers to ‘legal release’, not ‘factual removing of all objects on or attached to land’. MHAR 15/1975 on the procedure of land acquisition (*ketentuan-ketentuan mengenai tata cara pembebasan tanah*).

²⁴⁴ MHAR 2/1976 on the utilization of the land acquisition procedure for the government by private companies (*penggunaan acara pembebasan tanah untuk kepentingan pemerintah bagi pembebasan tanah oleh pihak swasta*).

²⁴⁵ MHAR 5/1974 refer to the importance of implementing development plan in general and the Pelita (five year development plan) II in particular. The regulation also mentioned that the head of the region (province or districts) in determining access to land to investors must take account the region’s plan (*dengan memperhatikan planologis daerah*). There is no further clarification what is meant by the term “*planologis daerah*”. MHAR 15/1975, in contrast, did not made any reference to pre-existing (regional) or town land use planning. To justify land “release”, applicant (state or government institution needing the land) should enclose statements referring to the land status (ownership, amount, location), site plan, purpose of land release and its future use, willingness to compensate or provide other facilities to the (to be) dispossessed land owners (Art. 4 par(3)). Likewise MHAR 2/1976 allowing private parties to utilize the land “release” procedure did not refer to pre-existing town or regional land use plans, but instead to the need for the government to support investors working in the name of development to access land.

²⁴⁶ Presidential Instruction 1/1976 on how to synchronize agrarian management tasks with tasks delegated to the forestry, mining, transmigration and public works. (*pedoman tentang sinkronisasi tugas keagrariaan dengan bidang tugas kehutanan, pertambangan, transmigrasi dan pekerjaan umum*).

3.4.3. Umbrella Acts: EMA 1982 and SPL 1992

The EMA 1982 was an attempt at imposing order on the fragmented approach to spatial management in an indirect way, by establishing an institutional framework to take care of environmental matters. It tried to do this through harmonization of substantive law and not through integration of licensing procedures.²⁴⁷ To this end the EMA 1982 was established as a so-called umbrella act, containing a number of principles that subsequently had to be implemented in sectoral pieces of legislation. This should then lead to uniform standards in all sectors.

Unfortunately, this approach did not work out well. The primary reason seems that the implementation of the EMA 1982 depended on the government's willingness to issue a number of implementing regulations. Without them, the EMA 1982 was reduced to a black letter law or, in the words of Niessen, "a collection of worthy but sterile principles".²⁴⁸ Concern about the environment was pushed into the background by the dominant discourse on *pembangunan*.²⁴⁹ Moreover, the tool used to guarantee synchronization, environment impact analysis assessment, was not effective in creating a more sustainable and integrated land use pattern.²⁵⁰ Only certain activities deemed to have an impact on the environment (establishment of industrial estates for instance) are required obtain an EIA and even then in general they have failed to force industries to comply with environmental standards. But in fact working indirectly through the field of environment could in itself not be effective in harmonizing or integrating land use planning.

In 1988, it was the People's Consultative Assembly to point at the need for more general and comprehensive spatial (or land use) management.²⁵¹ The 1988 Broad Guidelines of State Policies (*GBHN*) demanded sound spatial management (*penataan ruang*) to accommodate the increasing pressure on land, water and other natural resources for development purposes.

²⁴⁷Adriaan Bedner, "Introduction: Environment and Law in Indonesia" in Adriaan Bedner & Nicole Niessen (eds.), *Towards Integrated Environmental Law in Indonesia?* (Leiden: Research School CNSW, 2003), pp. 1-10.

²⁴⁸ Nicole Niessen, "The Environmental Management Act of 1997: Comprehensive and Integrated?" in Adriaan Bedner & Nicole Niessen (eds.), *Towards Integrated Environmental Law in Indonesia?* (Leiden: Research School CNSW, 2003), pp. 66-79.

²⁴⁹ J. Arnscheidt, 'Debating' Nature Conservation: Policy, Law and Practice in Indonesia (a discourse analysis of history and present) (Leiden: Leiden University Press, 2009)

²⁵⁰ See Dadang Purnama, "Reform of the EIA process in Indonesia: improving the role of public involvement" (Environmental Impact Assessment Review 23 (2003): 415-439. An early and timely Environmental Impact Assessment (EA) should be fostered by an open and continuous exchange of information between the EA team, the project management team and the local community. Such continuous and open communication in general is lacking in Indonesia. Another difficult aspect is determining the extent to which a project is environmentally sustainable or how much environmental impact should be tolerated. Every project proposal tends to be evaluated separately and independently from existing land use patterns.

²⁵¹ Point F (development policy) number 15.

They stated that the available space (land, water, air and natural resources) must be managed in an integrated manner, through a region based approach taking into account the existing natural and social environment. Land use planning should be developed specifically to prevent the conversion of agricultural land in ways endangering the ecosystem.²⁵²

The result, four years later, was the SPL 1992. The preamble of this law contained the following laudable consideration:

“the management of many varieties of natural resources and land, sea and air, must be co-ordinated and integrated, within the framework of sustainable development, with the management of human resources and artificial resources. Such co-ordination and integration must be realized by developing a spatial policy which will take into consideration the need to protect and preserve the natural environment in line with the national development policy based on the national ideology of *Wawasan Nusantara* and *Ketahanan Nasional* (the archipelago principle and national security)”

The drafters clearly intended the SPL to become the basis for a comprehensive policy on natural resource management. Spatial management should provide an integrated and comprehensive framework which the different sectors of natural resource management must defer to. Much later, the People’s Consultative Assembly supported this objective in Decree 4/1999, which stipulated:

“Within the sustainable development (strategy), a spatial planning strategy shall be developed which harmonizes the land-utilization plan, the water utilization plan, and other resource utilization plans. Such spatial planning (management) is to be placed within one harmonious and dynamic environment management plan supported by an underlying population strategy. Spatial utilization must be managed integratively using a spatial use approach taking into consideration specific natural and social environmental features.”

The EMA 1997, which replaced EMA 1982, offered another indication of the ‘superior’ position of the SPL 1992, stipulating in Art. 19 that ‘when issuing a business permit and/or

²⁵² PCA Decree 2/1988; Broad Guidelines of State Policies 1988) (chapter IV the fifth five year planning (*polanya umum pembangunan lima tahun kelima*), point F (13h) on natural resource and the environment. Point 18 reaffirms the need for spatial planning in the context of environmentally sustainable development.

any license related to an economic activity, points to be taken into consideration are: (a) (the existing) spatial plan (master plan) (...)"²⁵³

The next section explores whether the SPL 1992 was suitable to function as an umbrella act in the above sense and what instruments it made available to manage natural resources in a sustainable manner.

3.5. The Spatial Planning Law 24/1992

The SPL 1992 officially replaced the SVO and SVV. The introductory part referred to the 1945 Constitution (arts, 5(1); 20(1) and 33(3)) and to the BAL, and stipulated that the SPL 1992:

“(...) intended to promote a coherent, integrated and open approach to the different aspects of spatial planning, which include planning, utilization and oversight mechanism.”

This was elaborated in Article 3, which worded the main purpose of the law as follows:

“to achieve the integrated utilization of natural and artificial resources; to increase the utilization of these resources in an efficient, effective and appropriate way to improve the quality of human resources, embody the protective function of space as well as to prevent and overcome negative environmental impacts and maintaining the balance between prosperity and security interests.”

The law provided both several organizational facilities and substantive rules to realize these ambitious objectives. The first defined the authority and responsibilities of the various government agencies involved in spatial planning, while the latter provided them with the legal instruments to properly perform their task. Simply stated, the SPL1992 provided the government, from the central to the district level, with legal tools to regulate land use (or manage natural resources) in light of the need to realize development projects.

²⁵³ Asep Warlan Yusuf, “Spatial Planning and Environmental Management” in Adriaan Bedner & Nicole Niessen (eds.), *Towards Integrated Environmental Law in Indonesia?* (Leiden: Research School CNSW, 2003), pp. 60-65.

Hence, one of the most important features of this top down spatial planning system was its interconnectedness with existing top-down development planning.²⁵⁴ Spatial plans were intended to both support and control development programs. The major instrument introduced for this purpose was the distinction between cultivation and conservation areas. The government would assign areas to either one of these categories. The main question then became how to ascertain which government agency at what level held the authority to determine the assignment, borders, and use of cultivation and conservation areas.²⁵⁵

3.5.1. The attempt at establishing centralized and comprehensive Spatial Management

The spatial-development planning system was developed in adherence to the earlier existing hierarchical government structure detailed by RGL 5/1974 and the hierarchy of legislation.²⁵⁶ As provided in the SPL 1992, the National Spatial Plan (promulgated in a government regulation) would form an inseparable part of the long term national development plan (25 years). It would provide which areas were designated for conservation and cultivation - arguably encompassing all of the land in Indonesia - provide rules on spatial utilization, and provide general directives on monitoring and oversight. The National Spatial Plan could be revised before the end of the term in the event of national policy change (elucidation of Art. 20(4)). The central government also retained the authority to designate 'special areas'

²⁵⁴ See articles 8 and 19-23 SPL 1992. This was actually a restatement of an already entrenched trend. For a more detailed explanation of the development and spatial planning process before and after the enactment of the SPL 1992 see Syahroni dan Tim GTZ-SfDM, "Selayang Pandang tentang Perencanaan Pembangunan di Daerah Tingkat II, (Proyek Pendukung Pemantapan Penataan Desentralisasi (P4D), Indonesian-German Governmental Cooperation, October 1994). Cf see: Djoko Sujarto, Bunga Rampai: Penataan Ruang dan Pengembangan Kota Baru di Indonesia, (Bandung: Departemen Teknik Planologi-ITB, 2004); Pidato Purnabakti, "Bagaimana Penataan Ruang Kota Sekarang", (14 February 2004).

²⁵⁵ Article 11 of GR 47/1997 (on the national spatial planning (*rencana tata ruang wilayah nasional*)) stipulated cultivation areas consisted of production forest (*kawasan hutan produksi*) and people's forest (*hutan rakyat*); agricultural land; mining areas; areas reserved for industrial zones, tourism and residential areas. Conservation areas comprised areas providing protection to adjacent areas; locally protected areas; nature reservation (*suaka alam*); nature conservation areas (*pelestarian alam*); cultural heritage protection areas (*kawasan cagar budaya*); and areas prone to natural disasters and others (art. 10). For a more detailed definition of conservation areas, read Presidential Decree 32/1990 on the management of conservation areas.

²⁵⁶ See Temporary PCA Decree 20/1966, on the hierarchical system of Indonesian legislation: the 1945 Constitution, PCA decree, law/government regulation in lieu of law, Government Regulation, Presidential Decree, other implementing regulations, such as ministerial regulations, instructions and others. See Jimly Asshiddiqie, Tata Urutan Perundang-undangan dan Problema Peraturan Daerah, paper presented in a Lokakarya Anggota DPRD se-Indonesia, organized by LP3HET, Jakarta, 22 Oktober, 2000.

(*kawasan tertentu*) and further regulate these by presidential decree (Art. 23). The spatial plan for such special areas, considered of strategic importance, would be an ‘inseparable part’ of the provincial or district/municipal spatial plan, but thus fell outside the latter’s jurisdiction.

On the basis of Article 27 the provincial government should provide for a Provincial Spatial Plan (*Perda RTRW Propinsi*) valid for 15 years, which was to support the middle term development plan and must be synchronized with both the five and one year development plans (elucidation of art. 21(4)). The provincial spatial plan thus translated existing development planning into directions for future land use patterns. It also was to provide general directives addressed to districts and municipalities on the management of conservation and cultivation areas; rural, urban and specially designated areas; the development of settlements for forestry, agriculture, mining, industry, tourism and other uses; centres of settlement in rural and urban areas; infrastructure: transportation, telecommunication, energy, irrigation, and environmental management; prioritized areas; and policies on land, water, air and other natural resources.

These directives should be elaborated by the district/municipal governments into their own spatial plans (Article 22), which would be valid for 10 years. The elucidation of art 22(5) determined that the district/municipal spatial plan was to be further elaborated into a five year spatial utilization programme on the basis of their five year development plans, and into a one year development programme in line with the budget of that year.

Remarkably, the SPL 1992 held no indications what urban or rural spatial and detailed spatial plans should contain. As regards urban planning, the ministerial regulations provided by both the Ministry of Home Affairs (1987) and Public Works (1986), which was based on the SVO/SVV, could still be used.²⁵⁷ However, district spatial plans applied to rural areas and for these no rules had ever been promulgated. Probably for this reason most districts did not promulgate any detailed spatial plans before the end of the New Order period.

By contrast, the SPL 1992 did contain a number of rules about future land use within the districts more generally. Arts. 20(3c) and 21(3c) stipulated that the districts were to use the national and the provincial plan as their point of departure, especially when determining which areas were to be reserved for investment initiatives and therefore should indicate in their spatial plan which area within its administrative jurisdiction were to be allocated for

²⁵⁷ Ministry of Public Works Decree 640/1986 on town planning (*perencanaan tata ruang kota*) dan MHAR 2/1987 on guidance or directive for town planning (*pedoman penyusunan rencana kota*).

investment purposes (art. 22(3c)). In this manner, the national government could indicate which district areas were to become growth poles that should subsequently produce a trickle-down effect and spread the fruits of development to the regions. Consequently, land in the municipalities/districts was to be held in reserve for development purposes determined at the central level.

The SPL 1992 further made it quite clear that the district/municipal spatial plan was to be used as the yardstick for deciding on requests for permits allocating land for development purposes (*perizinan lokasi pembangunan*; art. 22(3) point 4). The elucidation of Art. 22 further introduced a recommendation on spatial utilization (*rekomendasi pengarahannya pemanfaatan ruang*) for this purpose. Another new feature was the spatial utilization permit (*izin pemanfaatan ruang*, Art. 26), which was defined rather vaguely. This permit would relate to ‘the determination of location, quality of space and architectural order in accordance with the prevailing written law, customary law and custom’. No further explanation was given as to how the recommendation related to the spatial utilization permit.²⁵⁸

The hierarchical spatial planning system implied that the central government was to take the first initiative in formulating spatial plans at the national level²⁵⁹. Only then could the provincial and subsequently the district/municipal governments formulate their own spatial plans. However, as will be explained in subsequent chapters, the absence of provincial and district spatial plans never became a reason to postpone the realization of the existing parallel development plans or related land acquisition projects. As mentioned earlier, the land acquisition procedure in place justified dispossession on the basis of development plans and did not require a spatial plan.

This changed in 1993, when these regulations were declared inapplicable with the promulgation of PR 55/1993 on land acquisition in the public interest.²⁶⁰ It provided in Art. 4

²⁵⁸ Niessen notes that the kinds of permits which fall into this category are as unclear as is the question regarding which permits fall within the category of “permit for development sites (*perizinan lokasi pembangunan*). Nicole Niessen, *Municipal Government in Indonesia: Policy, Law and Practice of Decentralization and Urban Spatial Planning*, dissertation, Leiden University, 1999 p. 245.

²⁵⁹ The first national spatial plan (RTRW Nasional) promulgated on the basis of Law 24/1992 was GR 47/1997. It contained general directives addressing the provincial and district/municipal governments on how to determine and assign areas falling under their respective administrative jurisdiction into the following categories: area for cultivation (*kawasan budidaya*), conservation area (*kawasan lindung*) (art.9) and specifically designated area (*kawasan tertentu*) (arts.8 & 20(3)). This national spatial planning was replaced in 2008 by GR 26/2008 which was promulgated on the basis of the new Spatial Planning Law 26/2007. See Chapter 6.

²⁶⁰ PD 55/1993 (*tentang pengadaan tanah bagi pelaksanaan pembangunan untuk kepentingan umum*).

that land reservation, allocation and acquisition to implement development projects performed in the public interest were only allowed when carried out in conformity with existing spatial plans. However, there was still a clause of escape: in case the district did not yet have a spatial plan ‘any regional plan’ should be used in its stead.

To conclude, the whole spatial planning system was concerned with how to establish and integrate top down centralized development planning, however fragmented, with spatial planning. The whole system was understood as an internal government affair and paid little attention to stakeholder participation. This was in line with the New Order’s conception of public participation as certainly not an inalienable right or even part of good governance. In 1996, a government regulation on this matter was promulgated, but the process was tightly regulated.²⁶¹

However, participation seemed to be the least of problems for implementing the SPL 1992, given the above analysis. The central question is whether the SPL actually succeeded in realizing its function as an umbrella act, integrating all systems of land use. Did other ministries or government agencies fall under the regulatory scope of the SPL 1992? Would their planning authorities be curbed? The next sections discuss how in practice the Ministry of Forestry and others defied the authority of provincial and district governments to control the management of specific natural resources found within their administrative borders.

3.5.2. Maintenance of a Separate System for Spatial Management and Forest Management

As indicated above, spatial planning was meant to be an umbrella - a primary point of reference - under which all natural resources would be managed. However, it is not the only law claimed to be an ‘umbrella’. Many Indonesian scholars and NGOs believe that any discussion on natural resource management, including land use planning, should start with the Basic Agrarian Law (BAL) which in Article 14 reaffirms the Constitution’s right of avail

²⁶¹ See GR 69/1996 on the form, procedure and implementation of people’s right to participate in spatial planning (*pelaksanaan hak dan kewajiban, serta bentuk dan tatacara peranserta masyarakat dalam penataan ruang*) and Ministry of Home Affairs Regulation 9/1998 (*tentang tata cara peran serta masyarakat dalam proses perencanaan tata ruang di daerah*). Both regulations seek to regulate the procedure, form and realization of public participation in spatial planning.

(right to control) and some among them have criticised the Minister of Forestry's monopolistic claim on forested land on this basis.²⁶²

Prominent scholars as Harsono and Sumardjono have argued that since the BAL provides the basic principles, other laws pertaining to natural resource management must refer to and be consistent with it. They further suggest that each Minister within his respective competence should hold land on the basis of *hak pengelolaan* (state management right), which is directly derived from the state's right to avail (Arts.1 and 2 of the BAL).²⁶³ Others, such as well-known NGO-activists Noer Fauzi and Dianto Bachriadi have criticized the issuance of separate laws for mining, oil and natural gas and forestry on more practical grounds. They argue that the marginalization of the BAL has led to widespread discontent and lies at the basis of land disputes throughout Indonesia. Likewise Tjondronegoro has contended that the BAL has been bypassed altogether by those sectoral laws managing specific natural resources and implicitly recommended that the BAL be revived as umbrella act in order to establish an integrated system of natural resource management.²⁶⁴

However, as already mentioned, the fragmented approach to natural resource management was not initiated by the Soeharto New Order Regime; as already under the Soekarno administration which promulgated the BAL, seeds of sectoralism already existed. This

²⁶² Arnoldo Contreras-Hermosilla and Chip Fay, *Memperkokoh Pengelolaan Hutan Indonesia Melalui Pembaruan Penguasaan Tanah: Permasalahan dan Kerangka Tindakan* (Bogor: World Agroforestry Center, 2006); see also Chip Fay and Martua Sirait, "Kerangka Hukum Negara dalam Mengatur Agraria dan Kehutanan Indonesia: Mempertanyakan Sistem Ganda Kewenangan atas Penguasaan Tanah" (ICRAF Southeast-Asia Working Paper no. 2005-3) presented before the International Conference on Land Tenure, Jakarta 11-13 October 2004. Cf. Dianto Bachriadi, Yudi Bachrioktara and Hilma Safitri, "Ketika Penyelenggaraan Pemerintahan Menyimpang: Mal-administrasi di bidang pertanahan" (laporan penelitian, kerjasama Komisi Ombudsman Nasional dan Konsorsium Pembaharuan Agraria, 2002), especially chapter III (karakteristik system hukum, kebijakan dan administrasi pertanahan), pp. 32-102

²⁶³ Boedi Harsono, *Hakikat Hak Pengelolaan* (unpublished paper, Pusat Studi Hukum Agraria, Fakultas Hukum Trisakti Jakarta, June 2001), "Menyempurnakan Hak-hak atas Tanah dalam Hukum Tanah Nasional Memasuki Era Reformasi dan Globalisasi" (paper presented at a national seminar "menyempurnakan hak-hak atas tanah dalam hukum tanah nasional memasuki era reformasi dan globalisasi), diselenggarakan oleh Bagian Hukum Administrasi Negara bekerjasama dengan Pusat Studi Hukum Agraria FH Trisakti Jakarta, 10 July 2001). Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan UUPA, Isi dan Pelaksanaannya*, Jilid I, cetakan ke-8 (Jakarta: Djambatan, 1977). Maria SW Sumardjono, *Kebijakan Pertanahan antara Regulasi dan Implementasi*, (Jakarta: Kompas, 2001). See especially Chapter II (state land and hak ulayat). She asserts that management of state land, legally speaking, should be administered by the NLA, while physical management may be entrusted to other ministries or governmental institutions.

²⁶⁴ Sediono M.P. Tjondronegoro, "Pengelolaan Sumber Daya Agraria: Kelembagaan dan Reforma Agraria" in *Jurnal Analisis Sosial* (Vol. 6 no. 2, Juli 2001): 1-11.

sectoral approach was further perfected during the Soeharto administration during which it was decided that the SPL 1992, and not the BAL, should be an umbrella act.²⁶⁵

However, just as the BAL the SPL 1992 was not taken seriously as an umbrella act. Powerful Ministers, notably Forestry, Mining, and the Head of Pertamina refused to interpret the SPL 1992 in this way. This was partly caused by the wording of the law. The stated purpose of the SPL 1992 was to provide a basis for evaluating (*menilai*) and harmonizing (*menyesuaikan*) existing regulations on spatial use – not to function as the ultimate point of reference for other natural resource management systems.

Still, this was not how the People's Consultative Assembly interpreted the SPL 1992. In its Decree 2/1993 the Assembly underscored the importance of this framework law in controlling the development process (i.e. exploitation of natural resources), stating that:²⁶⁶

“the utilization of agrarian resources (water-land and natural resources found on the surface or in the land) having economical value and social function should be regulated and developed within a spatial planning framework with the purpose of coordinating its various use (settlement, agriculture, forestry, industry, mining and energy, and other infra-structure development). Water use, land use and forestry planning should be performed in a comprehensive manner so as to ensure its sustainability”.

In addition the decree expressed the view that:

“urban development must be done in a planned and integrated fashion taking into consideration existing general spatial plans (*rencana umum tata ruang*) and taking account of population increase and rising demand for residential, commercial, work and other social-economic areas, that is to create an efficient urban management and the maintenance of an orderly, healthy, secure and comfortable environment (*tercipta lingkungan yang sehat, rapih, aman dan nyaman*)”²⁶⁷.

²⁶⁵ Noer Fauzi dan Dianto Bachriadi, “Hak Menguasai dari Negara (HMN): Persoalan Sejarah yang Harus Diselesaikan” (Kertas Posisi KPA/position paper no. 004/2001). Cf. Aedar Laudjeng & Arimbi HP, “Bayang-Bayang Cultur-Stelsel & Domein Verklaring dalam Praktik Politik Agraria” (Jakarta: Walhi-Friends of the Earth, 1997).

²⁶⁶ F. Kebijakan Pembangunan Lima Tahun Keenam (Pelita VI) (Umum).

²⁶⁷ F. Kebijakan Pembangunan Lima Tahun Keenam: Bidang ekonomi; sector 12 pembangunan daerah; butir (e).

However, not even the People's Consultative Assembly could convince the Ministers concerned. They continued to claim special authority in managing certain natural resources, pointing out that none of the laws on forestry, mining or oil and gas referred to either the BAL or the SPL 1992. Their own, sectoral laws, would directly authorize them to implement the state's right of avail. Considering the hierarchy of laws as established by the PCA Decree 20/1966, these laws were of the same standing as the BAL and the SPL 1992. In this they seem to disregard the well established principle that a new law should supersede older ones, which at least applied to the SPL.

Moreover, the Soeharto administration had a great stake in preserving the existing sectoral approach to natural resource exploitation which provided for the major part of the government budget between 1970-1990. Besides, implementing the SPL 1992 would in the end force the government to renegotiate the terms and conditions of existing production contract sharing agreements, work contracts or annul existing forest concessions which would undermine the existing public-private business network, the backbone of the Soeharto regime.²⁶⁸ Thus while the rhetoric seemed to provide justification for the implementation of the SPL 1992, the standing policy was to preserve the sectoral approach to natural resource management and thus support Ministerial claims on their monopolies.

In particular the claim of the Minister of Forestry had far-reaching consequences. The Minister held that forest land was not liable to comprehensive government spatial planning.²⁶⁹ He even claimed the authority to determine which areas fell under his exclusive

²⁶⁸ For an in-depth analysis of the development of the formal and informal arrangement of private-public business networks involving the political elite of the Soeharto regime see Richard Robison, *Indonesia: The Rise of Capital* (London: Allen & Unwin, 1986). Cf. George Junus Aditjondro exposure of Soeharto's family expansive business network in his article "Yayasan-Yayasan Soeharto" (Tempointeraktif, 14 Mei 2004).

²⁶⁹ In support of the above argument, one should note that the Directorate General of Land Issues (*Direktorial Jenderal Agraria*) under the Ministry of Home Affairs in 1960 did not get the task to realize the intention of Art. 14 of the BAL, i.e. providing a comprehensive natural resource and land use management plan. Its power had been limited to manage land issues related to providing certainty with regard to ownership of land for individuals and for legal persons (public-private). In the words of Harsono, the task of the Directorate General of Agraria (as later replaced by the NLA established by PD 26/1988) is limited to land administration. On the same basis, he differentiates *hukum tanah*, regulating what rights individuals or other legal entities may enjoy on land, from other sectoral laws such as forestry, mining, or fisheries. See further: Boedi Harsono, *Hukum Agraria Indonesia: Sejarah Pembentukan Undang-undang Pokok Agraria, Isi dan Pelaksanaannya*, jilid 1 (Jakarta: Djambatan, 2005):5-6. Here he seems to contradict his earlier remarks (in note 29 that the BAL should function as umbrella act and that all ministries managing natural resources may do so on the basis of a right to manage granted under the BAL).

jurisdiction and enclose areas as forest land (*kegiatan pengukuhan (kawasan) hutan*).²⁷⁰ Within the area thus assigned as forest, the Ministry of Forestry possesses exclusive authority in determining forest use and therefore determines what individual or communal rights may be tolerated or recognized on forest land.²⁷¹ The Minister also developed a distinct terminology, different from that used in the spatial planning law, when referring to conservation areas.²⁷²

In sum, the much criticized legal dualism of land administration spilled over into spatial management. The SPL 1992 was not applied to land declared forest by the Minister of Forestry. Likewise, in the oil-gas and mining sector, areas in which exploitation was assigned to a private company under a production sharing contract or contractual agreement fell outside its scope.

In order to prevent a total lack of co-ordination, the government then introduced the so-called “*padu serasi*” concept. It concerned a process to synchronize the consensus forest land use plan (*TGHK*) with existing provincial spatial plans. In provinces which already had a spatial plan (*RTRWPropinsi*), areas falling under the Minister of Forestry’s jurisdiction were established by a decree (*SK Penunjukan Kawasan Hutan*) based on the result of the synchronization of the *TGHK* with said *RTRWP*.²⁷³ In areas where the provincial government had not yet promulgated a spatial plan, the *TGHK* were deemed valid without

²⁷⁰ Decree of the Directorate General of Forestry 85/Kpts/DJ/I/1974; 102/Kpts/DJ/1983 as amended by Ministry of Forestry Decree 399/Kpts-II/1990. This decree was again amended by Decree 634/Kpts-II/1996. They provide for the procedure to determine borders and appoint areas as forest land (*pedoman pengukuhan hutan*). In 1985, several sectoral government agencies with responsibilities in administering land and natural resource management (the Ministry of Forestry, NLA, Ministry of Home Affairs, Ministry of Agriculture and the Provincial governments) agreed upon a system to be used to determine borders for forest land. The agreement provides the legal basis for the concept of consensus forest land use plan (*Tata Guna Hutan Kesepakatan/TGHK*). The legal basis of this THGK is provided by Ministry of Forestry Regulation 137/1986 and Decree 173/Kpts-II/1996. See, CIFOR, “Tata Ruang dan Proses Penataan Ruang” in *Warta Kebijakan* no. 5 August 2005. Cf. Ulrich Löffler, “Land Tenure Development in Indonesia”, (Guiding Principles: Land Tenure in Development Cooperation GTZ Abt. 45/Div. 45; 1996). For a more detailed analysis on forest policy see Ani Adiwinata Naur, Murniati & Lukas Rumboko (eds), *Forest Rehabilitation in Indonesia: Where to after more than three decades?* (Bogor: CIFOR: Bogor, 2007). After 1999, the legal basis for forest planning has become GR 34/2002 on forest planning, exploitation and use (*tata hutan dan penyusunan rencana pengelolaan hutan, pemanfaatan hutan dan penggunaan kawasan hutan*).

²⁷¹ See GR 33/1970 (forest planning). With the amendment to the Forestry Law by Law 41/1999, the government issued a new regulation on forest planning: GR 6/1997 as amended by GR 3/2008 (*tata hutan dan penyusunan rencana pengelolaan hutan serta pemanfaatan hutan*)

²⁷² Wiryono, “Klasifikasi Kawasan Konservasi Indonesia” in *Warta Kebijakan* (Bogor: Cifor, 11 May 2003).

²⁷³ See Chip Fay and Martua Sirait, op.cit.

further discussion. This practice demonstrated the single concession of the Minister of Forestry.

3.6. Conclusion

The system of urban development planning envisaged by the Dutch colonial government's SVO and SVV survived the revolution. After lying dormant for almost 30 years it was reintroduced under the New Order. However, due to radical changes in the government's structure in 1974 which stripped municipal governments of much of their autonomy, urban planning in reality became almost useless. This was exacerbated by the rules and regulations regarding land acquisition that departed from the overriding interest of "development" planning, as will later be discussed in more detail. Land use planning instead became secondary to the interests of various ministries (forestry, mining, the natural oil and gas sector, and much later industry).

Efforts at synchronizing the fragmented and sectoral land use policies culminated in the promulgation of the SPL 1992, which replaced the SVO/SVV. This law promised a comprehensive spatial management policy comprising of planning, implementation and oversight, to be developed by the central government. It also provided that spatial plans should be made in support of the realization of top-down development plans. While this would integrate spatial and general development plan, it did not leave much room for public participation, transparency and public accountability of spatial plans. The importance of this is demonstrated by the fact that spatial plans should provide the justification for public institutions as well as private parties in expropriating land in the public interest.

However, one should not be misled into thinking that spatial plans would be able to control land use planning by other ministries. Just as the BAL, the SPL failed to deliver what it promised to do. It was quite clear that spatial plans were made subservient to existing development planning, both from the regulation on land acquisition promulgated in 1993 and from the failure of the SPL 1992 to unequivocally embed the centralized and fragmented development approaches to natural resource management. While the SPL 1992 looked like a comprehensive and integrated legal framework on land use planning, it could not deliver on this promise. Aside from the lack of political will in implementing a comprehensive and integrated natural resource management system and challenge the embedded political and economical interests of the New Order regime which thrived under the existing fragmented and sectoral natural resource management system, other legal factors played a role as well.

There was no clarity on the meaning and scope of SPL as an umbrella act. It provided only a very weak invitation to integrate the existing fragmented natural resources regime. Efforts at land-use planning coordination were made as a concession rather than a fulfilment of a legal obligation under the SPL.

The next chapter will deal with the issue of how the SPL 1992 was further translated and transformed into spatial plans at the national, provincial and district levels. An examination of Bandung and West Java spatial planning will highlight how this happened and how spatial plans were related to permits regarding land acquisition and to land use. The litmus test will be to what extent spatial plans relate to good governance of land and other natural resources and to the effects they have had on the tenurial security of land occupants.

CHAPTER IV

IMPLEMENTATION OF THE 1992 SPATIAL PLANNING LAW BEFORE 1999: THE CASE OF WEST JAVA PROVINCE AND BANDUNG MUNICIPALITY

4.1. Introduction

The previous chapter discussed the transformation of city master planning into spatial-development planning so as to provide a comprehensive and integrated land use planning system. However, spatial planning remained limited to a 'residual' system: only land not falling under the jurisdiction of sectoral ministries managing natural resource management was to be regulated on the basis of the SPL 1992. Spatial planning was to be the basis for justifying land acquisition projects. This provided the central government with a tool to control land use, through the use of permits regulating access to land. As a result of the dominant development ideology, the central government relied heavily on a hierarchical and top down approach to manage land for development. What has not yet been discussed, however, is how central provincial and district governments implemented the SPL 1992 and how they utilised existing permits controlling land acquisition and land use.

This chapter will discuss how the existing spatial planning regulatory framework was translated into bylaws (provincial and district regulations on spatial planning) providing guidance for future land use by land owners and other occupants, with a focus on the province of West Java and the Bandung municipality. Taking into consideration the authoritarian top-down government system at that time, one would expect that translating the existing spatial planning regulatory framework into land use planning at the provincial and district level would have been an uncomplicated and straightforward matter. However, the establishment of a hierarchal system of spatial planning as envisaged by the Spatial Planning Law (24/1992) failed to materialize. This brings to mind Scott's analysis on the ways in which a central state's capacity for simplification to transform the world (development-spatial plans certainly falling into this category) must be balanced against the society's capacity (in this case including other lower level government institutions) to modify, subvert, block, and even overturn the categories imposed upon it.²⁷⁴

²⁷⁴ James C. Scott, *Seeing Like A State: How Certain Schemes to Improve the Human Conditions Have Failed* (Yale University, 1998), p. 49.

Other factors contributing to the ‘failure’ of the SPL 1992 will be identified in discussing the national, provincial and district spatial plans. The changes resulting from the decentralization laws post 1999 will be discussed separately in Chapter V. This chapter is structured as follows: the first part discusses the normative structure of the spatial planning system as envisaged by the SPL 1992 and the extent to which this ideal conformed to the government structure established by (RGL 5/1974). This will serve as a point of reference for evaluating the extent to which the government, from the central to the district level, could formulate planning according to this ideal. The second part focuses on how general planning rules were transformed into detailed regulation by the central government, West Java provincial government and the Bandung municipal government. It evaluates to what extent the government had established a hierarchal and top down development-spatial planning system at all levels. The last part focuses on the legal instruments provided by the central government, to bring these three interlinking aspects of spatial planning to fruition, i.e. the planning process (*proses perencanaan tata ruang*), the use of space (*pemanfaatan ruang*) and the control of use of space (*pengendalian pemanfaatan ruang*). Two central questions emerge here: 1. how were general or detailed spatial plans related to land use permits? 2. to what extent were the permits successful in influencing people to utilize land in a sustainable manner?

One of this chapter’s main concerns is the linkage between spatial-development planning and restrictions in exercising property rights on the basis of private law. As laid down in Art. 24 of the SPL, during all three phases of spatial planning existing rights on land in the possession of individuals or communities must be respected (*dengan tetap menghormati hak yang dimiliki orang*). This raises the question how this rule has been interpreted and how it has influenced individual/communal tenure security. This subject tends to be ignored in the literature on land law and spatial planning, with many authors restricting their view to one of the two topics and thus missing essential features of the overall picture.

Contemporary Indonesian authors writing on land law, specifically the process of land acquisition, tend to focus on how to best interpret the state’s right of avail (*Hak Menguasai Negara*) in relation to land acquisition in the public/private interest.²⁷⁵ In contrast, the literature on spatial planning tends to focus solely on planning issues and, with few

²⁷⁵ See, inter alia, Maria SW Sumardjono, *Tanah dalam Perspektif Hak Ekonomi, Sosial dan Budaya*, (Jakarta: Kompas, 2008); BF. Sihombing, *Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia* (Jakarta: Gunung Agung, 2005); Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Nasional: dalam hubungannya dengan TAP MPR RI IX/MPR/2001* (Jakarta: Univ. Trisaksi, 2003).

exceptions, ignores the role and function of regulations restraining individual freedom to enjoy possession of land.²⁷⁶ The World Bank also seems to miss the point by insisting that tenurial security rests primarily on the formalisation of land titles²⁷⁷. These approaches ignore the linkage between land use planning, land acquisition in the public or commercial interest, and land use restrictions. In addition, none of the relevant literature on Indonesia discusses how enjoyment of land ownership should be restrained or limited by land use policies made in the public interest and the limits to the state's authority in doing so. This chapter attempts to fill this gap.

Before I will address the ways in which different government levels implemented the SPL 1992, the law's basic contours will be outlined.

4.2. Spatial Management According to the SPL 1992

Unlike the SVO of 1948 and ministerial regulations about town planning issued after 1980, the SPL 1992 covered land (*bumi*), water (air) and air space (*ruang udara*). This suggests that the SPL should be perceived as an elaboration of Art. 33(3) of the 1945 Constitution (and Arts. 1-2 of the BAL) which provide the basis for the state's right to avail. The SPL attributed planning competences to the central government, provinces and districts (Art. 7 par.(2)). The integration (*keterpaduan*) of planning activities among the three government levels was to be assured by the establishment of a hierarchy of spatial plans (Art. 8). As pointed out by Niessen, the spatial planning system was built upon the understanding that the lowest spatial plan, as formulated by the districts government, should be an elaboration (*penjabaran*) of spatial plans prepared by the provincial and central governments.²⁷⁸

The National Spatial Plan (*Rencana Tata Ruang Wilayah Nasional*) was determined by Government Regulation (*Peraturan Pemerintah*) and corresponded with the Long-Term

²⁷⁶ Nicole Niessen, *Municipal Government in Indonesia: Policy, Law, and Practice of Decentralization and Urban Spatial Planning* (unpublished dissertation, University of Leiden, 1999). See specifically page(s) 259-271. A more elaborate discussion on permits as a government tool to control land use can be found in H. Juniarso Ridwan & Achmad Sodik, *Hukum Tata Ruang dalam konsep kebijakan otonomi daerah* (Bandung: Nuansa, 2008).

²⁷⁷ World Bank, *Policy Review Report: Land Policies for Growth and Poverty Reduction* (Washington DC: World Bank, 2003). See especially Chapter II (Property Right to Land).

²⁷⁸ Niessen op cit, p. 238. See Art. 21: the provincial spatial planning is a derivation of the national strategy and directives on land use policy (*rencana tata ruang wilayah propinsi daerah tingkat I merupakan penjabaran strategi dan arahan kebijaksanaan pemanfaatan ruang wilayah nasional*).

National Development Plan (*Pola Pembangunan Jangka Panjang*) (Art. 20). Therefore, it should be valid for 25 year (Art. 20 par.(4)). The Spatial Plan of the Province (*Rencana Tata Ruang Wilayah Propinsi Daerah Tingkat I*) was determined by a regional bylaw (*peraturan daerah*) (Art. 21) and should be valid for 15 years (Art. 21 par.(4)). Provincial Spatial Plans must be elaborated further in the Spatial Plans of a Municipality/District (*Rencana Tata Ruang Wilayah Kabupaten/Kotamadya Daerah Tingkat II*) within their jurisdiction (Art. 22). They too must be cast into a regional by-law (Art. 22 par.(6)) and were to be valid for 10 years (Art. 22 par(5)). This plan provided the basis for the formulation of a detailed spatial plans (*rencana rinci tata ruang*) (Art. 22 par(3d)). At all levels, such spatial plans should be integrated and match the corresponding development planning fashioned in a similarly hierarchical manner. An elucidation as to how the system was structured is provided in the table below:

Table 3-3: The hierarchal structure of development-spatial planning

Government Structure (RGL 5/1974)	Development Planning	Spatial planning	Term
Central Government	Long Term Development Planning (<i>Pola Pembangunan Jangka Panjang (PJP) 1969-1994 I and PJP II (1995-20</i>	<i>RTRW National</i> (Government Regulation)	25-30 years
Province	Middle range Development Planning	RTRW Propinsi (Provincial Regulation)	15 years
District/Municipality	Short term (<i>rencana pembangunan lima tahun/repelita</i>)	<i>RTRW Kota/Kabupaten</i> (District Regulation)	10 years (two consecutive 5 year development plans)
		RDTRK	

Due to time frame differences regulating the validity of the various levels of spatial plans, the lowest level of government had to renew its plans more frequently than the provincial and

central governments. As noted by Niessen, this could potentially result in bottom-up inspiration instead of the top down derivation intended by the law.²⁷⁹ However, this was not the case because other factors influenced when and how different levels of government formulated their respective spatial plans. This issue will be discussed below, when the question how different government levels implemented the SPL 1992 is examined.

With regard to the establishment of a hierarchical spatial planning system, other provisions were relevant as well. It was stipulated that the district spatial plan should encompass both rural (*rencana tata ruang kawasan perdesaan*) and urban spatial planning (*rencana tata ruang perkotaan*). Unfortunately, the procedure for formulating such spatial plans and which government level was authorized to do this was not addressed by the SPL 1992. Instead, the law determined that an implementing regulation should be promulgated to address this (Art 23 pars.(1) & (3)), and no such government regulation materialized before 2006 when the SPL of 1992 was amended. As will be discussed below, this legal lacuna resulted in the municipality of Bandung applying the SVO 1948 (as elucidated by ministerial regulations and directives) rather than using their authority under the SPL when drafting their spatial plans.

In addition, the SPL also provided the President with an option to assign specific areas (*kawasan tertentu*) within provinces or districts. Assignment of such specific areas should be effected by a Presidential Decree, but the spatial planning of such specific areas should be integrated into their respective provincial or district spatial plans (Art. 23). The wording of this article suggests that the president's authority was limited to assigning and declaring an area as being accorded the status of special area, with the competence to regulate land use within such areas remaining in the hands of provincial or district governments.

The SPL 1992 envisaged a central role for district spatial plans. These should provide guidance in determining which areas were to be reserved for investment purposes at the district level (*penetapan lokasi investasi*) and how land should be allocated for development projects (*pelaksanaan pembangunan dalam memanfaatkan ruang bagi kegiatan pembangunan*). Furthermore, they should serve as the basis for processing applications of development location permits (*perizinan lokasi pembangunan* (Art. 22 par.(3c) and par(4)) and as the legal basis upon which land acquisition and its subsequent use by individuals or corporations should be controlled and monitored. Simply put, the district spatial planning regulated who could get land and on what terms. Oversight power was granted to the district head. Art. 26 of SPL 1992 stipulated that land use permits (*izin pemanfaatan ruang*) granted

²⁷⁹ Ibid. p.238.

in violation of existing district spatial planning should be declared null and void (*batal*) by the district head.

Given the central position of the government in land management, two questions emerge. The first regards how the planning system established under the SPL restricted private rights of individuals and communities on land they owned or occupied. The second is to what extent such rights restricted the state's authority in spatial management.²⁸⁰ Keeping these questions in mind, we will now discuss how the SPL 1992 was transformed by various levels of governments into working spatial plans and analyse the extent to which those plans conformed to the ideal envisaged by the SPL.

4.3. Spatial Planning at the National Level

The first national spatial plan (*RTRW nasional*) promulgated on the basis of Law 24/1992 (SPL 1992) was Government Regulation (GR) 47/1997. As Table 1 above indicated, this national planning should be considered an elaboration of development programs enumerated in the long term national development plan. Accordingly, one would expect it to contain directives on how available land (and other natural resources) should be allocated to support these programs.

However, rather unexpectedly the GR was not a real plan, but rather an implementing regulation (*peraturan pelaksana*) for the SPL. This means that it contained general directives addressed to provincial and district/municipal governments on how to determine and assign areas falling under their respective administrative jurisdictions as areas for cultivation (*kawasan budidaya*), for conservation (*kawasan lindung*) (Art. 9) and specific areas (*kawasan tertentu*) (Arts.8 & 20(3)).²⁸¹ The GR further enumerated which particular areas fell under these two categories of cultivation and conservation areas (Art. 10). For an overview, see table 2 below.

²⁸⁰ See: Muhammad Bakri, *Hak Menguasai Tanah oleh Negara (Paradigma Baru untuk Reformasi Agraria)* (Yogyakarta: Citra Media, 2007). Quoting another author (Maria Rita Ruwiasuti), he raises the question on the extent of state power to limit the bundle of "private law" rights that individuals or communities may enjoy on their land.

²⁸¹ The lists of which areas fall under this specific criterion are provided for in the attachment (23 areas which includes Jakarta-Bogor-Bekasi; Gresik-Bangkalan-Kertosono-Surabaya-Sidoarjo-Lamongan and Medan-Binjai-Deliserdang). These areas are accorded special status due to their importance in inducing national economic growth.

Table 3-4. Classification of Area according to GR 47/1997

No	Category	Division
1.	Cultivation Area	a. forest production area (<i>kawasan hutan produksi</i>) b. communal forest (<i>hutan rakyat</i>) c. agricultural land d. mining areas e. industrial zones f. tourist area g. residential areas (urban-rural)
2.	Protected Area	a. areas serving to protect adjacent areas (<i>kawasan yang memberikan perlindungan kawasan bawahannya</i>) (i.e. protected forest, wetlands, water catchment areas); b. areas conserved to protect important natural features (<i>kawasan perlindungan setempat</i>) (i.e. springs, river basins, watersheds, beaches, urban forests; nature sanctuaries (<i>kawasan suaka alam</i>); c. conservation areas (<i>kawasan pelestarian alam</i>); cultural heritage areas (<i>kawasan cagar budaya</i>); d. areas prone to natural disasters (<i>kawasan rawan bencana</i>) and e. Other conservation areas (<i>kawasan lindung lainnya</i>), covering areas declared as hunting parks, biosphere sanctuaries, areas reserved for animal migration, and mangrove forests

The above elaboration suggests that provincial and district governments held the necessary authority to classify land, and plan and control the use of such areas. A contentious issue is whether provincial and district governments could enforce their authority in the planning and management of protected areas, in particular conservation areas,²⁸² as these fell under the exclusive authority of the Ministry of Forestry.²⁸³ In order to clarify this issue, the President

²⁸² The Minister of Forestry regularly used the term “*kawasan lindung*” in the context of nature conservation, which includes the protection of habitat, eco-systems and endangered species. To avoid confusion stemming from the use of similar terms with different meanings, this paper will distinguish between conservation areas (*kawasan konservasi*: whose assignment falls exclusively under the Ministry of Forestry’s authority) and protected areas (*kawasan lindung*; declared as such by virtue of the authority granted to provincial and district governments under the SPL).

²⁸³ Gamma Galudra, Chip Fay and Martua Sirait, “As Clear as Mud: Understanding the Root of Conflicts and Problems in Indonesia’s Land Tenure Policy” (unpublished paper, 2004). They argued that the Ministry of Forestry has designated 120 million ha of forest as state forest (*kawasan hutan*) corresponding to 60% of the total land surface in Indonesia.

issued Decree 32/1990 on the management of conservation areas. This decree was an elaboration of both the FL 1967 and GR 28/1985 on forest protection (*perlindungan hutan*) and created different categories, suggesting that a different regime was indeed applicable to land controlled by the Ministry of Forestry. See table 3 below:

Table 3-5: Classification of conservation areas according to Presidential Decree 32/1997

Conservation Area	1. areas serving to protect adjacent areas (<i>kawasan yang memberikan perlindungan di bawahnya</i>)	a. Protected forests (<i>kawasan hutan lindung</i>) b. Wetlands (<i>kawasan bergambut</i>) c. Catchments areas (<i>kawasan resapan air</i>)
	2. areas conserved to protect important natural features (<i>kawasan perlindungan setempat</i>)	a. Coastal areas (<i>Sempadan pantai</i>) b. River basins (<i>sempadan sungai</i>) c. Areas surrounding natural and artificial lakes (<i>Sempadan sekitar danau/waduk</i>) d. Areas surrounding springs (<i>Kawasan sekitar mata air</i>)
	3. Nature and Culture conservation areas (<i>kawasan suaka alam dan cagar budaya</i>)	a. Nature reserves (<i>Kawasan suaka alam</i>) b. Maritime and other fresh water nature reserves (<i>Kawasan suaka alam laut dan perairan lainnya</i>) c. Mangrove coastal areas (<i>kawasan pantai berhutan bakau</i>) d. National parks, forest parks and tourist nature parks (<i>Taman nasional, taman hutan raya dan taman wisata alam</i>) e. Cultural and scientific reserves (<i>Kawasan cagar budaya dan ilmu pengetahuan</i>)
	4. areas prone to natural disasters (<i>kawasan rawan bencana alam</i>)	

This suggests that the Ministry of Forestry held exclusive authority to assign and manage land use for different kind of conservation areas, whether forested or not. Therefore,

determination of conservation areas and planning of those areas fell outside the scope of competence of provincial and district governments.²⁸⁴ Briefly stated, the government's competence in spatial planning did not apply to areas categorized as state forests or forest land which covered 143.8 million ha of Indonesia's land surface (approximately 75% of the nation's land area).²⁸⁵ Such dualism as indicated earlier in the previous chapter prompted the necessity for synchronization (*padu serasi*) where appropriate for forest spatial planning and provincial spatial planning.²⁸⁶ While synchronization would surely involve a comparison and exchange of data regarding which areas had been classified as conservation areas under the Forestry Law or protected areas by provincial spatial plans, it did not necessarily mean a sharing of responsibilities in managing conservation areas.²⁸⁷ What it does signify is that the provincial government and the Ministry of Forestry maintained a division of responsibilities by agreeing on the boundaries of state forest land and non-state forest land which continued well after 1999.²⁸⁸

Such a dualism in spatial management did not exist regarding another important feature of GR 47/1997: its indicating which areas should be developed into centers of economic growth (growth poles) at the national, provincial and district levels and the way it linked these to future infrastructure projects, such as the construction of airports, harbors and roads, and electrical and water provision networks (art. 13-31).²⁸⁹ The elucidation of Art. 7(4) refers to

²⁸⁴ As further elaborated into Ministry of Forestry Decree 46/Kpts-II/1987 on Consensus Forest Land Use Plan (*tata guna hutan kesepakatan*) and Ministry of Forestry 399/Kpts-II/1990 (jo. 634/Kpts-II/1996) on forest determination directive (*pedoman pengukuhan hutan*). See: "Tata Ruang dan Proses Penataan Ruang", Warta Kebijakan CIFOR 5 August 2002. Regarding confusion over overlapping and competing concepts of conservation areas, see: Wiryono, *Klasifikasi Kawasan Konservasi Indonesia*, Warta Kebijakan CIFOR 11 May 2003).

²⁸⁵ John Mc Carthy, "Village and State Regimes on Sumatra's Forest Frontier. A Case from the Leuseur Ecosystem, South Aceh", paper presented in the Resource Management in Asia Pasific Project Seminar Series, November 1999, pp.3-4.

²⁸⁶ Since the 1980s, the Ministry of Forestry had demonstrated forest areas (*pengukuhan hutan*) by performing the forest area border delineation (*penataan batas kawasan hutan*) by means of the TGHK. Over 80% of forest area had its borders determined by this process. However the promulgation of the SPL 1982 forced (*memaksa*) the Ministry of Forestry to adjust the TGHK with provincial spatial planning. See: Karsudi, "Permasalahan Kepastian Kawasan Hutan, Identifikasi dan Saran Pemecahannya" (paper dated 7 August 2008 written in the website of the forestry service of the Papua province, at <http://kehutanan-papua.com/berita.php?ids=73&kel=2>, last accessed 30 July 2009).

²⁸⁷ Firsty Husbaini & Sulaiman Sembiring, *Kajian Hukum dan Kebijakan Pengelolaan Kawasan Konservasi Indonesia* (Jakarta: Lembaga Pengembangan Hukum Lingkungan, 1999).

²⁸⁸ See Putri Guillaume, Navitri. "State Building, Property Rights and the Problems of Deforestation in Indonesia", paper presented at the annual meeting of the International Studies Association, Town & Country Report Convention, San Diego, California, USA, March 22, 2006, available at <http://www.allacademic.com/meta/p100774.index.html>, accessed at 15/10/2009.

²⁸⁹ As affirmed by Ir. Djoko Kirmanto Dipl. H.E, Ministry of Public Work in his opening speech before a national seminar titled "RUU Penataan Ruang" organized by REI, HKTI and Dewan Maritim Indonesia, Jakarta, 2006.

the term '*kawasan andalan*', meaning urban areas which serve as primary centers for economic growth and are expected to bolster their region's development²⁹⁰. This provided the basis for the development of a comprehensive national urban development strategy (NUDS) which was to be included in provincial and district spatial planning.

Under this scheme, cities were ranked within a network hierarchy to serve as national or provincial centers for promoting the economic growth of adjacent regions. This approach adhered to the theory that widespread economic growth is facilitated by the emergence of an articulated and integrated settlement system of towns and cities of different sizes and functions. These centers must be sufficiently large and diversified in order to serve not only their residents, but also those in surrounding rural areas, as nodes of trade and commerce.²⁹¹ Positive as this may seem, such a NUDS policy influences actual land use and poses a threat to the tenurial security of land owners in subsidiary cities and the hinterlands (peri-urban and rural areas adjacent to primary cities). As will be elaborated upon below, the same policy brought about a multitude of other problems, including uncontrolled urban expansion and the loss and degradation of agricultural land and valuable ecological sites.²⁹²

Furthermore, in conformity with the SPL 1992, the GR granted the central government the authority to assign specific areas. Art. 8 of GR 47/1997 determined that the designation of an area as a special zone must serve the purpose of increasing society's welfare, boost economic growth, bring development to underdeveloped areas, warrant the need to protect and defend state security, strengthen national integration, reinforce environmental preservation and increase the environment's carrying capacity. In other words, the stated objective was to further a particular version of the public interest.

This seems to suggest that, prior to the inception of SPL 1992 and GR 1997, the president did not have this particular power. However, this was not the case. Even before 1992, the President had apportioned certain areas out of the control of provincial or district governments to protect national interest or promote national economic growth. The Puncak

²⁹⁰ The definition of *kawasan andalan* is not found in the main text. Instead, one must read the elucidation of Art. 7(par.4). Here, *kawasan andalan* are defined as: "centers of "regional" economic growth and, as such, expected to determine the most efficient land use of an area. Such areas shall be assigned on the basis of the region's potency, the existence of agglomerations of urban residential areas, their importance as centers of trade and business, and a consideration of the region's development".

²⁹¹ Dennis A. Rondinelli, "Towns and Small Cities in Developing Countries", *Geographical Review* Vol. 73 no. 4 (Oct. 1983), pp. 379-395.

²⁹² Cf. Adriana Allen with Nilvo L.A. de Silva and Enrico Carubolo, "Environmental Problems and Opportunities of the Peri-Urban Interface and Their Impact for the Poor", (Peri-Urban Research Project Team, Development Planning Unit, University College London, 1999).

area is an illustration of the former.²⁹³ As for the latter, the President declared Batam, an island directly off coast to Singapore, as an industrial and bonded zone in 1978 (it was changed into a free trade zone in 2007).²⁹⁴ Development and spatial planning for this area has been managed by a special board (*Badan Otorita*) directly responsible to the president.²⁹⁵

It is important to understand that the direct intervention of the President in designing specific areas had serious consequences for the provinces and districts. Not only were considerable plots of land removed from the latter's regulatory jurisdiction as a result, but the mechanism was in practice misused in order to evade related regulatory and controlling powers. For example, PD 1/1997 appointed Jonggol as a specific area in order to 'facilitate a particular national interest' – in this case creating a new settlement area to reduce the pressure on Jakarta. To this end all powers relating to planning, implementation and supervision were transferred from the province and the district to two specially established agencies managed directly under the president.²⁹⁶ This facilitated land acquisition by a consortium under Soeharto's son Bambang Trihatmodjo. The Decree sidelined the provincial and district governments and removed all legal guarantees to protect the public interest. Ironically, Bambang Trihatmodjo argued that this measure was necessary to provide legal certainty against any interference from the Governor of West Java, and that the provincial

²⁹³ The spatial management of Puncak area was regulated by Presidential Regulation 13/1963 (*tentang ketertiban pembangunan baru disepanjang jalan antar Jakarta-Bogor-Puncak-Cianjur*) as amended by Presidential Decree 48/1983 (*tentang Penanganan Khusus Penataan Ruang dan Penertiban serta Pengendalian Pembangunan pada Kawasan Pariwisata Puncak dan Wilayah Jalur Jalan Jakarta-Bogor-Puncak-Cianjur*), Presidential Decree 79/1985 tentang *Penetapan Rencana Umum Tata Ruang Kawasan Puncak* and further elaborated by Ministry of Home Affairs decree 22/1989 (*Tata Laksana Penertiban dan pengendalian pembangunan di Kawasan Puncak*).

²⁹⁴ Batam's (and environs) designation as an industrial zone was effected by virtue of Presidential Decree 41/1978 as renewed by Presidential Decree 94/1998. Only in 1983 did the government establish Kota Administratif Batam (Government Regulation 34/1983) to jointly manage the area.

²⁹⁵ See further Presidential Decree 65/1970 on Batam's spatial and development planning.

²⁹⁶ See Article 3 and Article 7.

government could draw benefits from the project ‘by watching and learning’ from it.²⁹⁷ A former Bupati referred to this practice as ‘being Presidential Decreed’ (*‘di-keppres-kan’*).²⁹⁸

By contrast, the President’s direct intervention in regulating the Puncak area did not go against the regional governments’ interests.²⁹⁹ Initially, the central government’s concern was limited to controlling construction in the area, as can be seen from GR 13/1963 (development of new buildings along the road between Jakarta – Bogor – Puncak – Cianjur). In 1985, GR of 13/1963 was complemented by Presidential Decree 79/1985 which provided for spatial planning in the Puncak Area. However, in contrast with Jonggol, jurisdiction over the area remained with the provincial and district governments. The provincial government established a special team to supervise the enforcement of the Puncak spatial plan and produced more detailed plans, while Bogor (5/1993) and Cianjur (3/1998) made plans to further fill in the details. In summary, this form of intervention can be seen as a way of guiding, rather than substituting, the jurisdiction of the province and district.

Thus, GR 47/1997 regulated how protected, cultivation, prioritized (*kawasan andalan*) and specific areas were to be classified and as such served as a directive for provincial and district governments which they must follow when drafting spatial plans. The GR contained no provision for regulating what should happen in the event of non-compliance, but compliance was effectively secured by the requirement that any draft of a (provincial-district) regulation must be validated or endorsed by the Ministry of Home Affairs before being promulgated.

The extent to which the SPL and GR 47/1997 were translated into a provincial spatial plan by the West Java provincial government and a district spatial plan by the municipality of Bandung will be discussed below.

²⁹⁷ See “Bambang Trihatmodjo: Soal Keppres Jonggol Asri”, (Jawa Pos, 21 December 1996). After 1999, President Habibie rescinded PD 3/1997, together with three others concerning controversial planning: PD 48/1983 (special arrangement for the spatial planning of and the control and ordering of the development of the tourism area of Puncak and the road connecting Jakarta – Bogor – Puncak – Cianjur outside the administrative territory of Jakarta, Bogor, Depok, Cianjur and Cibinong) and PD 79/1985 (General Spatial Planning of the Puncak Area), and PD 114 /1999 (Spatial Planning of Bogor-Puncak-Cianjur (Bopunjur) area). See: “75 dari 528 Keppres, Ternyata Menyimpang: Habibie Diminta Tanggapi Hasil Kajian MTT” (Yogyakarta, Bernas, 19 October 1998); “Dicabut Tiga Keppres Terkait Keluarga Cendana” (Jakarta Bernas, 19 October 1999).

²⁹⁸ Personal communication: lieutenant colonel (ret.) of the armed forces, Djamhari, Head of Bekasi District (1995-1999). 10 August 2005.

²⁹⁹ For a brief overview of the spatial planning of Puncak, see M. Daud Silalahi, “Kasus Puncak: Pelanggaran Hukum Tata Ruang dan Lingkungan Siapa yang Bertanggungjawab? (Kompas 20 February 2002).

4.4. Spatial Planning at the Provincial Level: West Java Province

As stated earlier, the SPL 1992 explicitly demanded that provincial and district governments formulated their own spatial plans as an elaboration of the directives made by the central government (Art. 22 and 27). GR 47/1997 provided the rules for such planning. First, the provinces should make a Provincial Spatial Plan (*Perda Rencana Tata Ruang Wilayah Propinsi*). This would be the basis upon which districts were to formulate their general and more detailed spatial plans. The overall scheme was clearly top down-oriented: spatial plans at the district level were to elaborate decisions made at the top. However, this is not quite what happened in practice.

In fact, a complete disregard for this top down scheme became generally accepted. Quite a number of provinces did not have a spatial plan and did not bother to prepare as much as a draft well into 1999. By contrast, others promulgated their spatial plan before GR 47/1997.³⁰⁰ Even after its promulgation GR 47/1997 was largely ignored. Thus Jakarta enacted its first provincial spatial plan in 1999 (6/1999) without even referring to it, and this became accepted practice.

West Java promulgated its first provincial spatial plan in 1994 (Provincial Regulation (PR) 3/1994). The consideration of PR 3/1994 stated that it was to support the provincial development planning policy, and consequently should be considered an inseparable part of the regions long-middle and short tem development plan (art. 5). It went on to elaborate which areas were to be assigned as protected and which as cultivation areas.

The North Bandung Area (*Kawasan Bandung Utara*) was specified for protection by Art.15-19. In this way, the PR provided a retroactive legal basis for the decision by West Java's Governor of 1982 that the Northern Part of the Core Area of Greater Bandung (*Wilayah Inti Bandung Raya Bagian Utara*, an area straddling Bandung district and Bandung municipality) was to be a protected area.³⁰¹ This practice seemed to have been modelled after the

³⁰⁰ See the list prepared by the Ministry of Public Works containing information regarding existing provincial and district spatial plans alongside their dates of promulgation. This list was prepared by the Ministry of Public Works (then called the Ministry for Settlement and Regional Infrastructure) –and later updated 24 September 2003- in light of the need to evaluate existing spatial planning for the western, central and eastern parts of Indonesia against the KepMenKimpaswil 327/Kpts/M/2002. Surprisingly, the Ministry did not bother to evaluate or comment upon the disorderly time frame.

³⁰¹ The borders of which were determined by virtue of Governor of West Java Decree 161.1/SK.1624-Bapp/1982 (*peruntukan lahan di wilayah inti bandung raya bagian utara*). Badan Perencanaan Pembangunan Daerah Tingkat I Propinsi Jawa Barat, Laporan Rancangan Rencana: Rencana Umum Tata Ruang Kawasan Bandung Utara, Februari 1998.

President's direct involvement in removing specified areas from under provincial or district jurisdiction as in the Puncak or Jonggol area mentioned earlier. Still, the Governor's decree was to be elaborated further into both Bandung district and Bandung municipality's spatial plan.

However, the above regulation was confined to this single protected area only. The province apparently assumed that the authority to determine other local conservation areas fell under the exclusive jurisdiction of the district governments, with the provincial governments and ministries only providing general directives³⁰².

Furthermore, PR 3/1994 provided a list of urban areas proper (*kawasan perkotaan*), residential areas (*kawasan pemukiman*), industrial estates (*kawasan industri*), and tourism areas (*kawasan pariwisata*) that should be developed as centres of regional economic growth (or growth poles) (Arts. 20 and 21). Similarly, Article 31 indicated future sites for infrastructure development projects, such as the construction of a new international airport at Majalengka and several hydro-electrical power centres, including Jatigede.

The naming of future development sites is significant in that it suggests that such projects were being reserved in the public interest. This made it difficult for land owners to contest the rationality of future land acquisition projects referring to the provincial spatial plan.³⁰³ One should wonder whether naming future development sites or protected areas in the PR should or should not be considered in violation of the requirement to involve and inform the public (especially land owners and other land occupants) in making decisions that have far reaching consequences for their freedom to use and enjoy land under their possession. In fact, public participation in spatial planning had been guaranteed by legislation.³⁰⁴ However,

³⁰² See Ministerial Regulation 63/PRT/1993 on the management of river basins (*sempadan sungai, daerah manfaat sungai, daerah penguasaan sungai dan bekas sungai*) and West Java Provincial Regulation 14/1989 on the management of roads and irrigation works (*garis sempadan jalan dan pengairan*); 20/1995 on the management of springs (*garis sempadan sumber air*) and 12/1997 on the construction of building on riversides and around springs (*pembangunan di pinggir sungai dan sumber air*)

³⁰³ In addition to demanding compensation in the event of dispossession, Article 4 of the SPL 1992 guaranteed that everyone would have the right to demand compensation in the event development projects in accordance with existing spatial planning resulted in damage or injury. A similar provision (art. 9) is found in GR 16/2004 on land use management (*penatagunaan tanah*).

³⁰⁴ See Art. 12 of SPL 1992 (spatial planning is conducted by the government with the involvement of the public (*penataan ruang dilakukan oleh Pemerintah dengan peran serta masyarakat*). This public participation mechanism was further elaborated in GR 69/1996 on the implementation of the public's right and obligation, form and mechanism to participate in spatial planning (*pelaksanaan hak dan kewajiban, serta bentuk dan tata cara peran serta masyarakat dalam penataan ruang*) and again in Ministry of Home Affairs Decree 9/1998.

as evidenced by cases such as Kedung Ombo³⁰⁵, public participation was to be understood in a very limited sense – involving only the requirement to announce (“*sosialisasi*”) in the Indonesian government lexicon) development plans and future land acquisition projects to individuals and communities living on the land.

West Java did prioritize growth poles, as can be seen from the amount of land in rural areas reserved for development. As will be explained below, reservation of rural land meant a policy of allowing conversion of rural and agricultural land for industrial or residential use. According to Articles 22 (c) and 28, growth poles covered 51 percent of West Java’s entire land surface, and included many fertile agricultural areas. This reservation was made in support of the national development policy to transform Indonesia from an agriculturally based economy into an industrial one. Agricultural land, irrigated rice fields in particular, adjacent to rapidly growing urban areas and future development sites became destined to accommodate the growth of industry and urban areas. The PR provided a legal basis for an anti-agricultural land policy.

In fact, this policy went against the national government’s own rules. Presidential Decrees 54/1980 and 33/1990 clearly prohibited the conversion of fertile agricultural or irrigated land (rice fields) for other uses and were followed up with a letter from the National Development Planning Agency (*Bappenas*) to its regional counterparts to put a halt to – or at least control – this trend.³⁰⁶ Similarly, the National Land Agency sent a letter to regional land offices – during the period when this office was still authorized to receive and process site permit (*izin lokasi*) applications³⁰⁷ – with a request to pay attention to the widespread conversion of irrigated rice fields for other purposes³⁰⁸. Their concern was that the massive conversion of fertile agricultural land would threaten the nation’s food security.³⁰⁹

However, the SPL also stipulates of the government’s obligation to “publish and distribute spatial planning made” and “inform and educate the public of its rights and obligation pertaining to spatial planning” (Art. 25).

³⁰⁵ See “Batalnya Kasasi Kasus Kedung Ombo: Apalagi yang Harus Diperbuat Warga Kedungpring?” (Republika, 9 November 1994); “Kalangan DPR: MA Bingungkan Rakyat” (Republika, 9 November 1994) and Stanley, *Seputar Kedung Ombo*, (Elsam: Jakarta, 1994)

³⁰⁶ Letter 5334/MU/9/1994 dated 19 September 1994.

³⁰⁷ See 4.5.1 below for a brief discussion on such permits. A more elaborate exposition on the permit-in-principle and site permit scheme will be provided in Chapter 7.

³⁰⁸ Letter 460-3346, dated 31 October 1994).

³⁰⁹ Massive conversion of fertile agriculture land caught the attention of the greater public in the late 1990s. See: “Perjuangan Merebut Tanah” (down to earth no. 40, February 1999 in <http://dte.gn.apc.org>) and has since been discussed extensively. See: “Revitalisasi Pertanian Baru Daftar Keinginan”, (Kompas online, 2 February 2005); Pantjar Simatupang & Bambang Irawan, “Pengendalian Konversi Lahan Pertanian: Tinjauan Ulang Kebijakan Lahan Pertanian Abadi” in Undang Kurnia F, Agus D. Setyorini & A. Setyanto (eds), *Prosiding Seminar*

At this point, we may draw three conclusions. The first is that, in deviation of the SPL 1992, the core of the Indonesian spatial planning system was at the provincial level, not at the national. While provincial spatial planning must be elaborated upon by the districts, the provincial government had a legal basis for the removal of considerable plots of land from the district's regulatory jurisdiction. The second point is that the PR 3/1994's concern for the protection of certain areas notwithstanding, provincial spatial planning was primarily geared towards supporting the establishment of a network of growth poles (consisting of primary and secondary cities) and the construction of the necessary infra-structure. The third is that the provincial spatial plan suffered from an anti-agriculture bias. It was predominantly directed to allow the urbanization of the countryside.

4.5. Planning at the District Level: Bandung Municipality

West Java's provincial spatial planning showed a profound urban bias. Considering how districts were bound to elaborate provincial spatial plans, the pertinent question is whether the same bias also affected district spatial plans. Would the districts be able or willing to maintain a proportional balance of forest and agriculture areas alongside cultivated areas? In the same context a number of other pertinent questions arose: Would district spatial planning be any different? Would a closer proximity between spatial planners and users make any difference? Would urban populations play a larger part in spatial planning at the local level? An analysis of the Bandung municipal spatial plan promulgated during this period provides a number of answers.

4.5.1. The District Spatial Plan and land use permits

To reiterate, in accordance with the SPL 1992, district governments had to formulate spatial plans on the basis of existing provincial spatial plans. District spatial plans determined the future usage of all areas: residential, forestry, agriculture, mining, industry, tourism and

Nasional: Multifungsi dan Konversi Lahan Pertanian Andi Irawan, Jakarta 2007); "Lahan Pertanian: Antara Negara dan Pasar" (Media Indonesia, 26 August 2008. However, only in 2004 did the government start perceiving land conversion as a threat to food security. It was mentioned in Law 25/2004 on the national development planning system (*sistem perencanaan pembangunan nasional*). Presidential Regulation 7/2005 on middle term development plan 2004-2009 (*rencana pembangunan jangka menengah 2004-2009*). Chapters 19 and 25 in particular mention the need to put a stop to continuing land use conversion in light of national food security.

others (Art. 22 para. 2(b) of Law 24/1992). They also indicated which areas were open for investment and other development projects (Art. 22 para.3(c)) and as such constituted the legal basis for evaluating all applications for development location permits (*perizinan lokasi pembangunan*) (Art. 22 para.4). Along with land use permits (*izin pemanfaatan ruang*), development location permits allowed government agencies and private investors to acquire land reserved by the government through spatial plans and utilize land acquired for “development” (Art. 26).

Were the government authorities in charge of providing these permits publicly accountable for this task? Both the development location and the land use permits were only to be provided in the public interest and were formulated for the benefit or at least protection of local people’s interests (especially for those living on and/or claiming ownership on land). However, it should be noted that although spatial plans provide general indications regarding which areas are available for development, they do not automatically grant the right to acquire the land and use it for any purpose whatsoever. There are different mechanisms for controlling the land acquisition process (development permits) and the control and monitoring of land use (land use permits). In both processes, individual permit applications shall be considered against existing spatial plans.

In order to facilitate accountability of this sort, all spatial plans, from the provincial to the district, should be sufficiently detailed to indicate what development plans can be realised in a particular place. In addition, the plan should be made known to a wide public.

4.5.2. Bandung Town Planning

It is important to keep in mind that there was already a town planning system before the SPL’s introduction of a hierarchical system of spatial development planning. Moreover, the SPL did not immediately abolish this system. As a result, the Ministry of Public Works and Ministry of Home Affairs remained involved in town planning. As will be seen in the case of Bandung, it is of the utmost important to understand the relationship between older and newer planning regulations in certain cases and how they were implemented.

As discussed in the previous chapter, the Bandung municipal government promulgated an urban master plan in 1971³¹⁰ to replace the one made by Thomas Karstens in 1930.³¹¹

³¹⁰ Bandung Municipal Parliament Decree (Surat Keputusan DPRD) 8939 of 1971. A report made by the Bandung Development Planning Board notes the existence of this Parliamentary Decree only in passing. See

Following this master plan, Bandung was to be developed into ‘a multi-function city serving the development of industry and trade-commerce’. This resulted in a policy which allowed industries and trade to flourish along major roads, connecting urban areas and opening up the city for rural-urban migration. In the legal parlance of the time, it is stated that the 1971 Bandung Master Plan:

“should be understood as an important tool to direct how urban land shall be allocated to secure the attainment of development goals as elaborated in the State Guidelines on National Development Policy, West Java’s Development Policy (*Pola Dasar Pembangunan Propinsi Daerah Tingkat I Jawa Barat*), Regional Development Plan for Greater Bandung (*Perencanaan Pengembangan Wilayah Bandung Raya*) and Bandung Development Policy (*Pola Dasar Pembangunan Daerah Kotamadya Daerah Tingkat II Bandung*)”.

Could the Master Plan of 1971 made in line with the basic ideas and purpose of SVO /SVV be adjusted to accomodate development goals articulated during the New Order government? There clearly was a mismatch between the goals intended by the SVO/ SVV and those envisioned by the central government in its top-down and hierarchical development plans. Urban planning, as envisaged by the SVO/ SVV, was to be formulated by local authorities and other stakeholders:

“to arrange the layout and buildings (...), so as to ensure town development is in line with the town’s social and geographical characteristics and possible growth, and

Bappeda Kota Bandung, Rencana Tata Ruang Wilayah Kota Bandung 2013: Buku Rencana, (Bandung: Bappeda, 2004), p. 2-4. For a brief analysis on master or town plans for Bandung from 1965 to 1990, see Sandi Aminuddin Siregar, Bandung-the Architecture of a City in Development: urban analysis of a regional capital as a contribution to the present debate on Indonesian urbanity and architectural identity (volume I & II) (doctoral thesis, Katholieke Universiteit te Leuven, June 1990), pp.118-129.

³¹¹ Ibid. The Karstens plan, the Bandung town planning document, was made by the famous Dutch architect-town planner Ir. Thomas Kartens. It contained a plan to extend town borders to accommodate urbanization for the next 25 years. For a brief elucidation on Thomas Karstens’ influence and work in colonial urban planning see Erica Bogaers and Peter de Ruijter, “Ir. Thomas Karstens and Indonesian Town Planning, 1915-1940”, in Peter J.M. Nas (ed), The Indonesian City: Studies in Urban Development and Planning, (Dordrecht-Holland/Cinnaminson-USA, 1986), pp.70-87. Cf. Pauline KM van Roosmalen, “Expanding Grounds. The Roots of Spatial Planning in Indonesia”, in Freek Colombijn, Martine Barwegen, Purnawan Basundoro and Johny Alfian Khusyairi (eds.) Kota Lama Kota Baru, Sejarah Kota-Kota di Indonesia, (Yogyakarta: Penerbit Ombak, 2005), pp. 75-117.

complies to the needs of the various races, and strives for a harmonious functioning of the town as a whole and in sympathy with its surroundings and general functions.”

As already mentioned, between 1970 and 1980, town planning became an element of national-regional *development* planning.³¹² Hence, the Ministry of Home Affairs promulgated Ministerial Regulation 9/1982 on the guidelines for development planning and management in the regions (*pedoman penyusunan perencanaan dan pengendalian pembangunan di daerah* or P5D). These guidelines intended to combine top-down with bottom-up planning by formulating master development plans in a hierarchically structured manner while channelling citizens’ aspirations from villages to the central government through a bureaucratic network of development planning meetings.³¹³

This linking of spatial and development policies was furthered by the inception of the permit-in-principle (*izin prinsip*) and the site permit (*izin lokasi*) scheme in the 1980s. The permit-in-principle, issued by the Investment Coordinating Board (BKPM), ensured that an investor may start acquiring land for investment, while the site permit, issued by the National Land Agency (BPN), allows him to acquire land from individual land owners with government support. Both instruments ensured that foreign and domestic investors would have access to abundant ‘under or un-developed’ land in the regions. They also ensured that development planning would be prioritized over spatial planning.³¹⁴

In the end, the 1971 Bandung Master Plan established to realize the objectives of the SVO/SVV was eclipsed by development planning. Central government policies regarding the issuance of permits-in-principle and site permits enabled investors and individual citizens alike to disregard the 1971 Bandung Master Plan. As a result, exclusively residential areas were turned into areas for mixed uses. A complete lack of interest in preserving the historical

³¹² See Djoko Sujarto, *Bunga Rampai: Penataan Ruang dan Pengembangan Kota Baru di Indonesia*, (Bandung: Departemen Teknik Planologi-ITB, 2004); Pidato Purnabakti, “Bagaimana Penataan Ruang Kota Sekarang”, (14 februari 2004).

³¹³ For a more detailed explanation on the development and spatial planning process before and after the enactment of the Law on Spatial Planning (24/1992) see Syahroni dan Tim GTZ-SfDM, “Selayang Pandang tentang Perencanaan Pembangunan di Daerah Tingkat II, (Proyek Pendukung Pemantapan Penataan Desentralisasi (P4D), Indonesian-German Governmental Cooperation, Oktober 1994). Cf. Ito Takeshi, “The Dynamics of Local Governance Reform in Decentralizing Indonesia: Participatory Planning and Village Empowerment in Bandung, West Java”, (*Asian-African Area Studies*, 5(2): 137-183, 2006. Ito, taking the district of Bandung as a case, compares development planning before and after 1999.

³¹⁴ A brief discussion on how both permits relate to land use planning shall be discussed below in section 4.6

value of Dutch colonial buildings and open green areas (e.g. public parks, artificial lakes) moreover led to their destruction on a large scale during this period.³¹⁵

In 1986, the Bandung municipality decided to amend the 1971 Bandung Master Plan.³¹⁶ The new Master Plan was made on the basis of new planning legislation by the Ministers of Home Affairs and Public Works³¹⁷ and had to be approved by both Ministers to become legally binding. This legal leverage effectively provided the Minister of Public Works with the power to control and determine the contents of city master plans, especially those regarding future infrastructure development projects.³¹⁸ As a result, it was no longer the autonomous municipality which controlled town land use planning.

In 1992, the Bandung Master Plan of 1986 was once more amended on the basis of the same procedure (Municipal Regulation 2/1992) and declared valid for the 1991-2001 period.³¹⁹ In this spatial plan, the linkage between 'spatial utilization' (land use) and development was made even more explicit. Not only did the consideration of the regulation explicitly refer to development planning in West Java and the municipality,³²⁰ it also supported the practice of issuing location development permits justifying land acquisition projects.

The above Master Plan was then further elaborated into a detailed plan (Municipal Regulation 2/1996). By this time, the SPL of 1992 had been in force for more than three

³¹⁵ Dibyo Hartono, "Arsitektur Bersejarah Kota Bandung dan Citra Kota Bandung" (Kompas, 16 April 2006), Dadan Nugraha, "Bangunan Kolonial di Kota Bandung (Pikiran Rakyat, 20 September 2005); "Mengembalikan Kejayaan Jalan Braga (Kompas, 6 Mei 2004); "Bandung Kembangkan Wisata Sejarah"(Bisnis Indonesia, 26 Maret 2004), "Bangunan Tua, Saksi Sejarah Kota Bandung (Kompas, 24 Maret 2002).

³¹⁶ Regional regulation issued by Kotamadya Daerah tingkat II Bandung 3/1986 on the Master Plan of Bandung 1985-2005, as authorized and certified by the Ministry of Home Affairs by virtue of a letter 650-1056 dated 11 July 1986.

³¹⁷ See Ministry of Home Affairs Regulation (*Permendagri*) 4/1980 on directives for urban planning (*Pedoman Penyusunan Rencana Induk Kota*) and Ministry of Home Affairs Instruction (*Instruksi Menteri Dalam Negeri*) 650-1223/1982 on the procedure for the formulation of urban planning (*Tata Kerja Penyusunan Rencana Kota*).

³¹⁸ As regulated in Law 13/1980 (public roads), Law 11/1974 and Government Regulation 23/1982 (on irrigation). By virtue of these laws and by laws, the Ministry of Public Works held attributed powers to formulate a comprehensive (land use) plan in regard to the need to establish new public road networks. See: Dinas Tata Kota Bandung, *Selayang Pandang Penataan Ruang Kota Bandung: Informasi Perizinan dan Tata Ruang*, (Bandung: Dinas Tata Kota Bandung, 2006):2-3.

³¹⁹ Kotamadya Daerah Tingkat II Bandung Regulation 2/1992 on the Master Plan of Bandung (*RUTRK Kotamadya Daerah Tingkat II Bandung 1991-2001*) as endorsed and legalized by the Ministry of Home Affairs by Decree 76/1994.

³²⁰ West Java Provincial Regulation 8/1988 on development planning of West Java Province: *pola dasar pembangunan daerah propinsi daerah tingkat I jawa barat*) and the Kotamadya Daerah Tingkat II Bandung Regulation 1/1989 (on development planning of Bandung municipality: *pola dasar pembangunan daerah tingkat II Kotamadya Bandung*).

years. However, the detailed plan did not refer to the SPL in its consideration, but to the Ministers of Home Affairs and Public Works' regulations, meaning that the plan was made in implementation of those regulations. As these were closely related to the SVO/SVV, they ought to have been revoked after the SPL replaced the SVO, but they remained in place.³²¹ This led to the awkward legal situation that the Master Plan of Bandung was made on the basis of a ministerial regulation that was no longer valid.

This deserves some explanation. The SVO, promulgated in 1948, was declared applicable after official Dutch recognition of Indonesian independence in 1949. The Ministry of Home Affairs reasserted the applicability of the SVO/SVV by issuing a circular letter (Pemda 18/3/6) dated 15-5-1973 on the formulation of city planning).³²² The letter which was addressed to heads of provincial regions stipulated, *inter alia*, that:

“(A)waiting the issuance of more specific regulations, the SVO should serve as the legal basis for drawing up urban development planning (regulations)”.

This long awaited regulation on spatial planning was the SPL 1992. With its passage, all other ministerial regulations made by both the Ministry of Public Works and Home Affairs on urban planning were to be considered legally invalid as well.

Its lack of validity notwithstanding, the detailed town plan of 1996 effectively functioned as the basis for spatial planning in Bandung until it was replaced in 2004. It divided the municipality into six planning regions (*wilayah perencanaan*, Art. 4), each of which encompassed several sub-districts (*kecamatan*). Each planning region was sub-divided into zones, with each zone serving a specific function: residential, educational, commercial, industrial, military and conservation. These zones were further broken down into blocks for which the municipal government must establish more detailed rules regarding their use. Such rules should determine the minimum amount of green-open areas within a block, the minimum percentage of building coverage within each individually owned parcel (*koefisien dasar bangunan*), the minimum percentage of floor coverage for buildings (*koefisien lantai*

³²¹ Art. 31 of the SPL: On the date of the promulgation of the SPL, the SVO 168/1948, Lieutenant Governor General of the Dutch-Indies, shall be declared inapplicable.

³²² Nicole Niessen, *op.cit*, pp.230-231; Cf. Budhy Tjahjati, *Pembangunan Perkotaan dengan Pendekatan Penataan Ruang: Implikasi dan Prospeknya*, sumbangan tulisan untuk sejarah tata ruang Indonesia 1950-2000, Jakarta, Agustus 2003. Cf. Ir. H. Sjarifuddin Akil (direktur jenderal penataan ruang, depkimpraswil), *Pengembangan Wilayah dan Penataan Ruang di Indonesia: Tinjauan Teoretis dan Praktis* (makalah dalam kuliah terbuka proram magister KAPET, Unhas, Makassar, 2007).

bangunan) and the technical and safety regulations pertaining to the construction of roads (Art. 5).

The detailed town plan also needed to be further elaborated by the municipality in building plans. This part of land use planning – known as the Building and Environment Plan (*Rencana Tata Bangunan dan Lingkungan/RTBL*) – would then provide a binding reference for the municipal government to restrict land owners’ freedom to make use of their land in the public interest. The *RTBL* were supposed to provide practical guidance for government agencies and individual land owners about how a piece of land could be used in the best interest of society as a whole. In this manner, it fleshed out Article 6 of the BAL, which states that: ‘every right on land (should be limited) by its social function’.³²³

Unfortunately, all of this remained up in the air, as the Bandung municipality never enacted any *RTBL*. That the municipality was not alone in this matter is indicated by a survey on regulations of other municipal governments, none of which possessed *RTBL* either.³²⁴ This raises the question how municipal governments regulated land use in the public interest in the absence of *RTBL*. To answer this question, the discussion will turn to how permits were either linked up to spatial plans in regard to land acquisition or in relation to land use.

4.5.3. Land Development and Land Use Restrictions Permits³²⁵

As indicated earlier, permits are the most important legal instrument by which in the end the government allocates land to be appropriated for development and/or restricts individual landowner freedom in land use. Accordingly, spatial management rests upon how these permits are used in practice. The scope of these permits and how permit holder actions are monitored determine spatial management success.

³²³ The General Elucidation Number II (4) of the BAL stipulates that no rights on land justify their use, or non-use, merely in the interest of the owner, in particular if this results in others suffering damage. Land must always be used in consideration to the extent of the right and with the purpose of increasing the welfare of both the rightful owner, society and state.

³²⁴ Only after 2000 did several district/municipalities and the Province of Central Java attempt to formulate *RTBL* for areas under their control. Semarang promulgated one in 2003 (MR 16/2003). See: “Butuh 20 tahun untuk menyulap Semarang (Suara Merdeka, 19 January 2005); “Realisasi Revitalisasi Kota Lama Dipertanyakan”, (Suara Merdeka, 09 Mei 2004), “Kota Lama Bukan “Little Netherlands” (Kompas 01 December 2003). In 2004, Bandung formulated *RTBL*, but only for the newly developed areas of Arca Manik, Ujung Berung and Gede Bage (personal communication: Mrs. Sumi from sub section of planning, city planning service (August 2005)

³²⁵ A more detailed elucidation on spatial management and permits will be given in Chapter VII.

As a rule, permits are defined as written decisions issued by government agencies which allow legal bodies to carry out particular activities that are prohibited in the absence of a permit.³²⁶ This requires a clear legal basis and the appointment of a specifically named government body. It is also important to mention that, in Indonesian administrative law, the authority of government officials providing permits is not limited to their issuance. They are also responsible for controlling applicants' actions after the permit is issued and may, if the permit holder violates the obligations or abuses the rights granted in the permit, decide to suspend or revoke the permit concerned.

Spatial planning permits fall into two categories. The first relates to land acquisition and the second to land use restrictions. The first is an instrument for allocating areas for investment (*penetapan lokasi investasi*) and land reserved for development projects (*pelaksanaan pembangunan dalam memanfaatkan ruang bagi kegiatan pembangunan*). The SPL 1992 specifically mentioned the development location permits (*perizinan lokasi pembangunan*; Art. 22 par.(3c) and par(4)) in this context. Spatial plans should be formulated to facilitate the realization of development projects initiated by the government as well as private commercial parties. The district spatial plan should become the basis for evaluating any application for development location permits, submitted either by government agencies or private parties. The second category relates to permits on land use. Permits to determine the use of land (*izin peruntukan penggunaan tanah/IPPT*) and permits to build or construct buildings (*izin mendirikan bangunan/IMB*) are the most important. When processing both permit applications, the Building and Environment Plan should be the main reference.

The district government should be able to determine at all times how a piece of land can be used in society's best interests when using these two categories of permits. At the same time, spatial plans should be able to inform government agencies, private corporations and individual land owners about the limitations on land acquisition and, more importantly, their use in promoting society's best interest.³²⁷ In other words, the district government should be able to assess the best use of land that will best meet the future needs of the people while safeguarding resources for the future.³²⁸

³²⁶ Cf. mr. N.M Spelt & J.B.J.M ten Berge, *Pengantar Hukum Perizinan*, as reworked by Philipus Hadjon (Surabaya, 1992). The authors of this book define permits or licenses as instruments used by the government to influence or induce citizens to behave in a certain way with the purpose of achieving a concrete goal (p.5).

³²⁷ Prajudi Atmosudirdjo, *Hukum Administrasi Negara*, Jakarta: Ghalia Indonesia, 1981), pp. 96-97.

³²⁸ Cf. FAO, *Guidelines for land-use planning*. (FAO Development Series no. 1, Rome 1993 reprinted 1996). The FAO defines land use planning as: "the systematic assessment of land and water potential, alternatives for land use and economic and social conditions in order to select and adopt the best land-use options. Its purpose is to

Looking at the processing of these permits provides good insight into how the government selected what kind of land use would be promoted and what discouraged. The following section will briefly discuss these two categories of permits.

4.5.4. Spatial Utilization Permits and Development Location Permits

As mentioned above the SPL 1982 provided two categories of permits, development location permits (*perizinan lokasi pembangunan*) and spatial utilization permits (*izin pemanfaatan ruang*). However it is unclear whether these permits were meant to be individual permits or a number of permits regulating access to land falling under that category. In practice, we can identify two of the best known permits regulating people's access to land, permits-in-principle (*persetujuan/izin prinsip*) and site/location permit (*izin lokasi*).

However one should be aware that both permits, however important, cannot be perceived to stand alone. They were, and even after 1999 are, related in a complex network to other kinds of permits as well. Quite a number of other permits to control access to land or regulate its use were related to both permits (permits-in-principle or site permit), either as a prerequisite to obtain them or as sequels. Adding to the complexity of the network of permits was binding 'recommendations' issued by various government agencies at the provincial or district level. Illustrations of such recommendations include: (1) approval issued by provincial/district development planning boards, evaluating conformity of a project proposal with existing spatial plans or (2) those granted by the Regional Environmental Impact Board on environmental impact assessment studies made by applicants. How this network of permits and recommendations in land use planning and controlling investment initiatives has functioned will be discussed in detail in chapter VII.

(a) Regulating access to land: the Permit-in-Principle and the Site-Permit

The permit-in-principle was not initially related to land acquisition or government approval on future use of land for investment. It was created during the early New Order to simultaneously stimulate and control foreign and domestic investment. The legal basis for the permit-in principle during the period discussed here was Presidential Decree 33/1992

select and put in practice those land uses that will best meet the needs of the people while safeguarding resources for the future. The driving force in planning is the need for change, the need for improved management or the need for a quite different pattern of land use dictated by changing circumstances”.

(revoking 54/1977) on investment (*tata cara penanaman modal*). Article 1-2 determined that any investor wishing to invest in Indonesia must first take into consideration the existing negative list.³²⁹ If the business proposal fell outside the negative list, the investor could proceed to request a confirmation letter from the governor on the future site of the project (*izin pencadangan tanah*). After having received such confirmation on the availability of land from the governor, the investor could then submit a request for a permit-in-principle from the president (foreign investment) or the Investment Coordinating Board (BPKM/*Badan Koordinasi Penanaman Modal*) (domestic investment). Upon approval of the request, the governor should issue the site permit enabling the applicant to start the land acquisition process on the site allocated.

Considering the above, we may conclude that hence much depended on the governor's approval. This was indicated clearly in a Presidential Instruction issued in 1976,³³⁰ which stated that investors could acquire land by using the land acquisition procedure reserved for government projects performed in the public interest,³³¹ but only after having obtained approval from the governor. When the NLA issued Regulation 3/1992, such permits to reserve land or permit-in-principle in the context of investment (*izin pencadangan tanah/izin prinsip dalam rangka penanaman modal*) were required before a site permit could be granted.³³² In this respect, the land reservation permit for investment was comparable to the approval to reserve land for development (*surat persetujuan penggunaan tanah untuk*

³²⁹ Law 1/1967 on foreign investment (as amended by Law 11/1970) and Law 6/1968 (as amended by Law 12/1970) on domestic investment. These laws should be read in conjunction with the introduction of the first Five Year Development Plan (or *repelita*) in 1969. This introduction places great emphasis upon rice and industrial production. Equally important are the enactments of the Basic Forestry Law (5/1967) and the Basic Mining Law (11/1967) through which the government enabled foreign investors to exploit Indonesian natural resources and finance the development process from the revenues thereof.

³³⁰ Presidential Instruction 1/1976 re. guidance to synchronize government tasks in managing land with those which falls under the scope of task of the forestry, mining, transmigration and public works (*pedoman tentang sinkronisasi pelaksanaan tugas keagrariaan dengan bidang tugas kehutanan, pertambangan, transmigrasi dan pekerjaan umum*).

³³¹ The legal basis was provided by the Ministry of Home Affairs Regulation 6/1972; 5/1973, 5/1974 (permit for land allocation for development purposes (*izin pencadangan tanah/prinsip dalam rangka penanaman modal*) and 2/1976 (allowing private enterprises to use procedure for land appropriation by the state). For real estate developers the Ministry of Home Affairs Regulation 3/1987 re. allocation and granting of land rights for housing construction companies (*penyediaan dan pemberian hak atas tanah untuk keperluan perusahaan perumahan*) was relevant.

³³² NLA Head Regulation 3/1992 (*tentang tata cara bagi perusahaan untuk memperoleh pencadangan tanah, izin lokasi, pemberian, perpanjangan dan pembaharuan hak atas tanah serta penerbitan sertifikatnya*) defines *pencadangan tanah* as permit-in-principle approving land reservation for investment purposes in accordance with provincial spatial planning.

pembangunan) issued by the governor in the framework of land acquisition in the name of development or the public interest. The underlying idea was that the governor was in the position to evaluate whether a government project or commercial endeavour was in line with the prevailing land use plans.

We will now turn to discuss the next permit regulating access to land, the site permit and how it related to the permit-in-principle. The site permit was created by Minister of Home Affairs Regulation 5/1974.³³³ Only much later in the 1980s, did it become the primary instrument to accommodate land acquisition by private commercial entities. It developed as part of the government policy to support industrial estate companies (*perusahaan kawasan industri*)³³⁴ and other particular business enterprises.³³⁵ In 1990 the NLA issued Regulation 3/1992. This regulation basically determined that the NLA held the power to control access to land through the use of the site permit. However, this development did not result in the abolishment of the permit to reserve land (*izin pencadangan tanah*), which at a latter stage was resurrected in the form of the permit-in-principle. In this regard the permit-in-principle was developed as a temporary permit to initiate business activities (*izin usaha sementara*), which included the initiation of preparatory measures required for the establishment of the business. The power to grant this permit was taken from the governor and transferred to the Investment Coordinating Board in Jakarta.

In any case, applicants for a site permit must first obtain a permit-in-principle. After having acquired a site permit, the investor held a monopoly on buying the land named in the permit. The permit-in-principle granted the permit holder the right to apply for a site permit allowing him/her to acquire land in the region named in the permit application.

As indicated above, the permit-in-principle became inexorably linked to the site permit issued by the NLA. Access to land for investment was thus controlled directly by the central

³³³ Ministry of Home Affairs Regulation 5/1974 on the reservation and granting of land for private companies (*ketentuan-ketentuan mengenai penyediaan dan pemberian tanah untuk keperluan perusahaan*). The central role of the governor as the government representative in controlling development permits was affirmed in Ministry of Home Affairs Regulation 6/1972 on the delegation of the authority to grant land rights (*pelimpahan wewenang pemberian hak atas tanah*).

³³⁴ See Presidential Decree 53/1989 (on *kawasan industri*) as amended by 41/1996. For a detailed regulation on how such companies may acquire *persetujuan prinsip* and *izin lokasi* see Ministry of Industry's Decree 291/M/SK/10/1989 as amended by 230/M/SK/10/1993 (*tata cara perizinan dan standar teknis kawasan industri*).

³³⁵ For example, hotels-tourist resorts, real-estate or housing construction companies. For companies specializing in the construction of residential areas pertinent is the GR 30/1999 on *Kawasan Siap Bangun* (area prepared for construction) and *Lingkungan Siap Bangun* (environment prepared for construction).

government through the Investment Coordinating Board and the NLA. In this way the role of the governor was curtailed.³³⁶ His power to control access to land suffered a second blow as after 1992, his power was reduced to giving recommendations indicating whether the site chosen for future investment projects accorded with existing spatial plans. While such recommendations, in practice submitted through the Provincial Development Planning Board (*Bappeda Propinsi*), were required to acquire site permit from the NLA, their binding power was considered dubious and negligible.³³⁷

From a legal viewpoint the above scheme raises a number of questions. Was the president or the Investment Coordinating Board under a legal obligation to look at the relevant district spatial plans before issuing a permit-in-principle? The same question can also be posed with regard to the NLA and the site permit. To what extent was the central government bound by district regulations? In practice, however, disregard of district spatial plans was commonplace and districts responded to deviations simply by adapting existing spatial plans (if they had one) to accommodate changes in land use patterns. Moreover, apparently the Investment Coordinating Board's perceived its task more in terms of having to induce rapid growth in investment rather than control land use. Permits-in-principle were granted without the board having to consult with districts. This may well have been influenced by the subordinated role spatial plans played with regard to development planning, whose primary goal was to boost economic growth by creating an investment friendly legal system. Another factor was that not all provinces or districts possessed such spatial plans or felt the need to formulate one before 1999. The absence did not necessarily hamper the Investment Coordination Board and/or the NLA in processing applications for investment. In the process, spatial plans became market or investment driven. From such a perspective, district regulations controlling access to land were easily perceived as an impediment to investment; something to be overruled. In the final analysis, the existing permit schemes, resulted in an uncoordinated and non-integrated effort at spatial management.³³⁸

³³⁶ For a discussion on the use of the site/location permit (*izin lokasi*) see Chapter VII of this book.

³³⁷ As argued by Ani Widayani from the West Java Provincial Development Planning Board, personal communication, November 2, 2004. This imbalanced power distribution between the governor (provincial Bappeda) and the NLA (and the Investment Coordinating Board) resulted in the Bappeda approving the proposed investment plan, even in the case that it violated existing spatial plans. They seemed to share the belief that in any case they were powerless to stop investment projects already enjoying support from the central government.

³³⁸ As earlier mentioned in Chapter II, Otto, (Note 42) mentions the lack of co-ordination, harmonisation and integration which threatens the internal unity and coherence of a legal system which is vital for achieving at least a degree of legal certainty and effective governance.

Another important issue was whether other government agencies at the same level (the NLA) or lower (provincial government or district services) would be willing to jeopardize any opportunity to promote regional or district economic growth if a permit-in-principle had already been granted? Once a permit-in-principle had been granted by the president himself (in the case of foreign investment), other government agencies would feel the obligation to further support the investment initiative by issuing all required documents. In this case, with both permits granted in violation of existing district spatial planning, would the district head – who was accountable to the Ministry of Home Affairs during the New Order government – be willing to revoke a Presidential or BKPM Decree and a NLA decree pursuant to the powers granted to him by virtue of Art. 26 of the SPL? There was little chance that district heads would risk doing so.

In sum, the freedom of district heads was severely limited by the existence of the centralized and top down development planning policy and the policy package (comprising of the creation of the permit-in-principle and site permit scheme discussed above) developed in the 1980s, to support industrialization and decrease the nation's dependency on income from natural oil and gas export. The idea of turning Indonesia into a modern industrialized nation went hand in hand with President Soeharto's strategy to consolidate political power and secure access to exploit natural resources (including land) for "development purposes".³³⁹ These two permits played a significant role in enabling large scale land acquisition and subsequent control of land by Sino-Indonesian business groups.³⁴⁰ It should be mentioned that it was also during this period that development became synonymous with huge infrastructure construction projects in support of industrialization and urban expansion. This also meant that existing spatial plans could be bypassed or adjusted to accommodate investment

³³⁹ For a discussion on forest exploitation and the growth of Indonesian economic empires, see "Kalimantan: the Rape of the Forests", a selection of articles from Down to Earth Newsletters (96-97), available at <http://forest.org/archive/indomalay/inrainsi.htm>. Cf. David W Brown, "Addicted to Rent: Corporate and Spatial Distribution of Forest Resources in Indonesia; Implications for Forest Sustainability and Government Policy (September 7 1999, available at http://www.geocities.com/davidbrown_id/. See also Richard Robison, *Indonesia: The Rise of Capital* (Sydney: Allen & Unwin, 1986) who provides a detailed analysis of the movement of military and political leaders into business.

³⁴⁰ Likewise, the same permits and the way they had been wielded to support industrialization and the urbanization of the countryside was a contributing factor in the widespread occurrence of land conflicts and legal disputes, marginalizing rural agricultural communities. See Noer Fauz (ed.), *Tanah dan Pembangunan: Risalah dari Konferensi INFID* (Jakarta: Pustaka Sinar Harapan, 1997) Cf. Restu Mahyuni & A Patra M. Zen, "Pemberdayaan Hukum Bagi Masyarakat Miskin: Andai Para Pembuat Kebijakan Mau Melakukan" (Hasil-hasil konsultasi Nasional Komisi Pemberdayaan Hukum Bagi Masyarakat Miskin (Jakarta: YLBHI, CLEP, UNDP, 2007). See especially chapter IV.

needs. To illustrate this point, Tommy Firman³⁴¹ suggested a direct causal relationship between the numbers of site permit granted and the increased rate of agricultural land conversion for other uses. Quoting the National Agency for Statistics (*Badan Pusat Statistik*), in the period of 1991-1993, agricultural land conversion reached 106,424.3 hectares or 53,000 hectares per year: 54% for residential areas, 16% for industry, 4.9% for offices and the rest for other non-agricultural uses. 51% of land use change occurred in Java. Firman also noted that most land conversion occurred in regions which were declared protected by existing spatial plans, such as the Puncak region or the North Bandung region where construction of buildings was completely prohibited or at the very least strictly controlled. Moreover, as revealed by Mahyuni³⁴², as of 1998, the NLA issued a site permit covering 74.735 hectares for housing construction companies in the Jakarta-Bogor-Tangerang-Bekasi region and 17.470 hectares for major industrial estates. In the same regions, as of 1995, there were 32 golf courses covering an area of 11.200 hectare were established. Within the same period (1981-1999), the conversion of agricultural land was recorded to be 88.500 hectares per year.

Next we will see how both permits also influenced the extent to which the second category of permits became dysfunctional. We now first turn to discussing the second category of permits, those that relate to land use control.

(b) District Spatial Planning and Land Use Restrictions

The Bandung town plan contained only very general restrictions on land use. The municipality had to elaborate these into more specific and technical rules regarding the way land could be used, which should have guided the issuance of the two main tools of the government to control and monitor urban land use: the permit to plan or determine the use of land (*izin perencanaan-peruntukan penggunaan tanah/IPPT*) and the permit to build or construct buildings (*izin mendirikan bangunan/IMB*).³⁴³

The rules on the land use planning permit were laid down in DR Bandung 10/PD/1977, and have been amended three times since.³⁴⁴ The first revision was made by DR 4/1996 in light of

³⁴¹ Tommy Firman, "Pola Spasial dan Restrukturisasi Perkotaan di Jawa (Kompas, 31 Mei 1996).

³⁴² Mahyuni et al. op. cit, pp. 95-98.

³⁴³ The latter is also meant to guarantee that buildings are constructed in fulfilment of sanitary and safety regulations.

³⁴⁴ Bandung District Regulation 4/1996 on land use planning permit (*izin perencanaan penggunaan lahan*). It was revised in 1998 by virtue of DR 25/1998 on land use determination permit (*izin peruntukan penggunaan*

the revision to the Bandung Master Plan of 1971 and was applicable until the end of the New Government period in 1998. This regulation did not provide a clear definition of the land use planning permit (*IPPT*), but a circular definition which did not explain what the permit is and how it should function. Art. 1(f) DR 4/1996 stipulates that:

“The land use planning permit is a planning permit for land use based on RUTRK/RDTRK as a binding plan in light of public service (*Ijin perencanaan penggunaan lahan adalah ijin perencanaan bagi penggunaan lahan yang didasarkan pada RUTRK/RDTRK sebagai rencana yang mengikat dalam pelayanan umum*)”.

Further reading reveals that the IPPT was needed before the submission of an application for a building permit (Art. 6) and that it was a government instrument to control land use by individuals or corporations so that such plans would fall in line with existing development and land use plans, especially the Master Plan and/or the Detailed Spatial Plan (*RUTRK/RDTRK*; Art. 16). The mayor also held the authority to reject permit applications which did not conform to the Master Plan or Detailed Spatial Planning, and to rescind permits found to be in violation of those plans.

As its predecessor, DR 25/1998 did not provide a definition of this permit, but stipulates that:

“Each person planning to construct buildings on land for industry, housing-real estate, trade/industry or for other purposes must first (*wajib terlebih dahulu*) obtain a land use determination permit (Art. 1 par.(1))”.

Paragraph 2 of the same article further declared that holding a land use determination permit was mandatory if one wished to apply for a building permit, while Article 5 stated that the permit could be refused if the land use proposed was not in conformity with the Master Plan and/or the Detailed Spatial Plan. The permit could also be rescinded if actual land use did not conform to these Plans.

We may draw two conclusions from the above. First, the land use determination permit is a legal instrument available to the municipality to evaluate land use plans against district plans and detailed spatial plans. The use of the word “or” signifies that in the absence of the RTBL,

tanah) and lastly in 2004 by DR 4/2002. The term for a pertinent permit was also changed from a “land use planning permit” into a “land use determination permit”.

the RUTRK would be applicable. This further indicates that an RTBL was not actually necessary. Second is that the land use determination is mandatory before a building permit could be applied for. We will now take a look at the latter.

The building regulation applicable under the New Order was the “*Bouwverordening van Bandoeng*” (building regulation of Bandung). It was promulgated by the autonomous “*stadsgemeente*” of Bandung on 2 October 1929.³⁴⁵ After 1945, this building regulation was adopted by the successor to the *Bandung gemeente*. However, a changing structure and system of government after 1945 necessitated a number of amendments to the building regulation.³⁴⁶ In 1953, the regulation was translated into Indonesian but only the Dutch original version was declared binding.³⁴⁷ As with a number of other transplanted Dutch colonial regulations, the unofficial translation, not the Dutch version, was used in daily practice by officials processing individual building permit applications.³⁴⁸ It was replaced completely in 1998 by DR 14/1998.³⁴⁹

The building regulation of 1929 covered not only technical aspects of all buildings with regard to safety measures, sanitary and health concerns³⁵⁰), but also included rules restraining the use of land by different ‘races’. Art. 24 stipulated that areas for western modelled buildings, eastern modelled buildings and housing for the indigenous population (*perumahan kampong perdusunan*) would be determined in the urban development plan (*uitbreidingsplan*). Different rules in regard to building and floor-land use coverage ratio and other technical rules regarding the use of land and building materials would be applied within these areas. Nevertheless, the regulation is very clear regarding the demand that

³⁴⁵ As promulgated in the Provinciaal Blad van West Java (provincial gazette) on 29 February 1932 no. 2.

³⁴⁶ Taking into consideration the government structure established by RGL 5/1974. The adoption of this law resulted in the amendment of the regulation by virtue of District Regulation 11/PD/1974 dated 7 October 1974 as endorsed by the Governor by Decree 290/AV/18/Perund/SK/1975. However, amendments were made also in light of this to regulate some important issues differently. For instance, DR 18/PD/1977 (the eleventh amendment to the *Bouwverordening van Bandoeng*) was made simply in order to change the wording of one particular article.

³⁴⁷ In the letter preceding, dated 28 July 1953, concerning the legality of the translated version of the “*Bouwverordening*,” it was declared that the Dutch version should be held to be legally binding.

³⁴⁸ A similar situation existed in regard to the application of the *Burgerlijke Wetboek* (civil code), *Wetboek van Strafrecht* (criminal code) and the *Herziene Inlandsche Regeling* (civil and criminal procedural law). In 1981, by virtue of Law 8/1981 (Code of Criminal Procedural Law), the HIR was rescinded, but only in regard to criminal procedural law. Until now, no official translation of these laws exists.

³⁴⁹ Bandung DR 14/1998 on the construction of buildings in Bandung (*Bangunan di Wilayah Kotamadya Bandung*).

³⁵⁰ See especially Chapter V (on different classes of buildings, urban development plans and parcels of land) and Chapter VI (on the construction of buildings).

everyone, regardless of distinctions based on race³⁵¹, would be under the obligation to acquire a building permit before starting construction work (Art. 7). Accordingly, this rule would even apply to ‘indigenous people’ living in kampongs wishing to construct and live in ‘traditional bamboo houses’ in the municipality,³⁵² unless they would be considered non-permanent houses which according to Art. 22 classified as class (c), less strict requirements prevail (Art. 11 par.(10)).

In this respect, the 1929 building regulation seemed to apply the principle of equality before the law, but with the option of treating various races differently. This conforms to the goal of urban planning according to the SVO. The building regulation of 1929 should be considered inseparable from the 1930 Bandung Master Plan. It can be argued that changes made to the existing master plan would not directly result in a mismatch with other land use regulations in principle. However, as indicated earlier, urban planning developed during the 1970s-1980s and later under the SPL 1992 was based on ideas very different from those of the colonial period. Moreover, after the promulgation of the RGL 1974, the whole municipal government structure was radically altered. Translating the Dutch terms for municipal organs into correct Indonesian did not solve the problem. Similar terms were often used to denote different concepts³⁵³. Additionally, the institutions of municipal government upon which the implementation of the regulation depended were assigned different task and functions under the New Order government.³⁵⁴

In addition, Bandung *gemeente*’s successors were unwilling or unable to implement the 1929 building regulation consistently from the beginning. A number of external factors prevented them from doing so. There were revolutionary wars (1945-1949), the political upheavals and

³⁵¹ Article 131 jo. 163 *Indische Staatsregeling* divides the population living in the Netherlands Indies on the basis of race: Europeans or those declared equal to Europeans, Eastern (Chinese, Arabs) and indigenous peoples.

³⁵² This obligation would certainly be applied to kampongs found wholly or partly within the borders of Bandung. As noted by Otto, in 1920 there were 14 autonomous villages situated within the administrative borders of Bandung, and 7 villages in part. Due to sanitary and health concerns, a proposal was submitted to abolish the autonomy of such villages and include them within the jurisdiction of the municipality. However, having the possibility to do so, the *gemeente* of Bandung, fearing budgetary consequences, decided not to issue an *opheffingsordonnantie* (regulation to abolish desa autonomy). See JM Otto, “Een Minahasser in Bandoeng: Indonesische oppositie in de koloniale gemeente” in Harry A. Poeze and Pim Schoorl (eds), *Excursies in Celebes* (Leiden: KITLV Uitgeverij, 1991), pp. 185-215.

³⁵³ An issue discussed extensively by Marjanne Termorshuizen-Arts in her dissertation, *Juridische Semantiek: een bijdrage tot de methodologie van de rechtsvergelijking, de rechtsvinding en het juridisch vertalen* (Nijmegen: Willem-Jan van der Wolf, 2003).

³⁵⁴ It consisted of only two organs: the mayor and the local parliament (DPRD). Both were to work together in the formulation and enactment of local regulations (peraturan daerah). The Indonesian version of a local parliament was not authorized to issue parliament decisions in contrast with the authorities it had previously.

rebellions against the central government of the Soekarno Old Order period, including in West Java initiated by the DI/TII in 1958-1960, and other factors. Government officials working in the municipal building service believed that indigenous populations living in kampongs were exempted from the obligation to obtain building permits, a sentiment shared by the kampong people.³⁵⁵ These officials wrongly assumed that the building regulation of 1929 did not apply to urban kampongs. The discretion to exempt kampong people from the obligation to apply for building permits may also have been the result of an unwillingness of the indigenized municipal government to apply the 1929 regulation to kampong dwellers which flocked to the city and occupied available land, legally or illegally.

In order to answer the question to what extent these municipal agencies were able to control land use (by using the land use permit and building permit discussed above) according to plans available during the 1980s and 1990s, one may simply check maps of the area.³⁵⁶ One must look at the growth and spread of formal and informal settlements within municipal borders and at the urban fringe – the latter having caused the conurbation of Bandung city with adjacent satellite cities (Cimahi-Padalarang in the west; Cibiru-Sumedang in the east-north east, Lembang in the north and Soreang-Ciwidey in the south) – and look at it in light of the Town Plan and the Detailed Plans. This shows how the city expanded at a tremendous pace, mainly through illegal development (or informal settlements) in new city quarters in ways quite different from those indicated in the plans mentioned above.³⁵⁷ In short, the land use permit/licensing scheme, putatively a government instrument to control land use, failed to control land use in accordance with town planning.

Several authors have pointed out that this was the inevitable outcome of the NUDS policy which promoted cities as the primary engines of economic growth. Not only did this policy generate an urban bias in terms of land use, but it also resulted in a flood of migrants from

³⁵⁵ Personal communication with Mrs. Sumi from the sub-division of planning, city planning service and Mr. Rosiman K (from the sub-division permits from the building service) of the Bandung municipality (august 2005)

³⁵⁶ The urbanization process, the result of this industrialization, has been described by Tommy Firman, "Urban Development in Indonesia, 1990-2001: from the boom to the early reform era through the crisis" (*Habitat International* 26 (2002) 229-249.

³⁵⁷ McGee introduced the term 'desa-kota' to describe this pattern of development. See T.G.McGee, "Labour force change and mobility in the extended metropolitan regions of Asia" in Roland J. Fuchs et al (eds), *Mega-city growth and the future* (Tokyo: United Nations University Press, 1994): 62-102. He defines regions labelled as *desakota* as regions of an intense mixture of agricultural and non-agricultural activities that often stretch along linear corridors between the cores of large cities (p. 74). See also T.G.McGee, "The emergence of *Desakota* regions in Asia: expanding a hypothesis", in N. Ginsburg, B. Koppell, T.G.McGee (eds) *The Extended Metropolis: Settlement Transition in Asia* (Honolulu: University of Hawaii Press, 1991), pp. 3-25.

rural areas to the cities, leading to an inevitable disregard for zoning regulations.³⁵⁸ Likewise, the so called ‘floating policy’ – introduced in the early 1980s – which presented economic dynamics as a justification for land use led to a complete disregard for existing town planning. Worse than the NUDS policy, the ‘floating policy’ had no legal basis and justified extra-legal measures with a claim to local economic/social interest.³⁵⁹

4.6. Conclusion

This chapter has demonstrated that the main objective of the SPL 1992 during the New Order, the establishment of a comprehensive and integrated system of natural resource management, was not realised. The SPL miscalculated the extent to which the embedded fragmented approach to natural resource management could be corrected and underestimated the difficulty of transforming town planning into spatial-development planning. Especially problematic for the establishment of an integrated and comprehensive spatial planning regulatory system was the unwillingness of the Ministry of Forestry to relinquish its monopolistic power to regulate and manage land use for the extended areas under its jurisdiction. Moreover, the architects of the SPL 1992 also miscalculated the extent to which both the ministries in charge of urban planning (the Ministry of Home Affairs and the Ministry of Public Work) would be willing to force municipalities to adjust their spatial plans or even make one.

Another problem was the fact that district spatial plans were put at the centre of land use planning, while the SPL 1992 authorized central and provincial governments to carve out considerable areas from the territorial jurisdiction of district governments. By design, the SPL 1992 engendered the formulation of overlapping and sometimes conflicting spatial plans by allowing the central and provincial government to determine and provide spatial

³⁵⁸ Cf. Arief Daryanto, “Disparitas Pembangunan Perkotaan-Perdesaan di Indonesia” (Agrimedia Volume 8 no. 2). See also H.M. Nad Darga Talkurputra, Penataan Ruang Perkotaan, (www.bktrn.org). Cf. Budhy Tjahjati Sugijanto Soegijoko, Gita Chandrika Napitupulu, Wahyu Mulyana (eds.) Bunga Rampai Pembangunan Kota Indonesia dalam Abad 21: pengalaman pembangunan perkotaan di Indonesia (buku 2), (Jakarta: Lembaga Penerbit Fakultas Ekonomi-UI, 2005).

³⁵⁹ The mayor of Bandung in the early and late 1980s during which this floating policy was initiated pointed out that the transfer of use of land (*alih fungsi pemanfaatan lahan*) in violation of existing zoning regulations should be tolerated and even encouraged as business enterprises sprouting in predominantly previous residential areas proved to be beneficial to reduce unemployment and beneficial for the economy in general. Personal communication (Asep Warlan Yusuf, expert of spatial planning and environmental law; October 2005). He was the first with whom I spoke to mention the existence and its influence of floating policy on the implementation of town spatial planning and land use policy in general.

planning for specific areas or protected areas. These areas, while located within the administrative borders of the districts, were placed beyond their responsibility. Land use in these areas was controlled directly by the central/provincial government. As a result, the SPL 1992 contained the seeds for preserving a fragmented approach to spatial planning. It is likely that the main reason for this was the unwillingness of the central government to let development matters be regulated and controlled at the district level.

As the Bandung municipality town plans suggest, the town planning concept, first introduced and developed during the colonial period, survived the promulgation of the SPL in 1992. This resulted in two different concepts of spatial planning influencing land use policy made at the district level. The colonial concept presupposed the existence of an autonomous town government, while the SPL concept, heavily influenced by land use planning for development thinking, relied on the hierarchical top-down government structure of the time. More important is the extent to which this blending of two different approaches resulted in the inception of two different permits system. One set of permits was purposively geared towards enabling government agencies and commercial corporations to acquire land and use it in the name of national development. Here, spatial planning is made in support of development planning primarily geared toward economic growth and urban infrastructure development. The downside was the equation of public interest with economic growth and infrastructure development. The other permit system was inherited from the Dutch and built on the view that land use in the urban context should be controlled and restrained in a public interest that was more than economic growth only.

The fall of the New Order government in 1997/1998 made possible a total makeover of state and government systems. The spatial planning system was made dependent on the existing state and government structure. What changed, and how these changes influenced and moulded a different approach to spatial planning will be discussed in the next chapter.

CHAPTER V

REGIONAL AUTONOMY AND SPATIAL PLANNING IN INDONESIA: IMPLEMENTATION IN WEST JAVA AND BANDUNG DURING “REFORMASI” (1999-2004)

5.1. Introduction:

The previous chapter discussed the extent to which the Spatial Planning Law of 1992 (SPL 1992) was transformed into land use planning at the district level. During the New Order period, the two most striking features of provincial and district³⁶⁰ spatial planning were their subservience to development planning and their being used by the central government as a legal instrument to control and direct land use for economic development in the regions.

This planning system was completely overhauled by the decentralization process which started in 1999. The New Order’s top down, hierarchical government structure was replaced by a completely new one which stressed district autonomy and accountability at the local level. Potentially this meant that district governments could now start to enact locally attuned spatial and development plans, while being held accountable for their implementation. Whether this was the case in practice will be explored in this chapter. The main question addressed is how powers were divided between different levels of government regarding development and land use planning during the 1999-2004 period and what its effects were on spatial planning in West Java and Bandung. Lessons learned from this analysis may be applicable to similar situations occurring in other parts of Indonesia.

This chapter is structured as follows: the first section describes the attempt to decentralize and the effect it had on regional autonomy, and more specifically on the distribution of powers between the central and district government. How Regional Government Law 22/1999 (RGL 1999) and its implementing regulation (GR 25/2000) allowed for a re-interpretation of the SPL 1992 is discussed in the second section. The last section describes how the West Java provincial government and Bandung municipality selectively read and interpreted certain legislative provisions to advance their interests. To highlight this issue, the difficulties and compromises made to jointly manage the North Bandung Area will be

³⁶⁰ Unless otherwise indicated the term districts as used here shall cover *kabupaten*, commonly referred as districts too and *kota* (municipalities). The use of the term district thus may refer to districts in the broad sense as covering both districts in the strict sense (*kabupaten*) and municipalities (*kota*).

discussed. This will expose the ways spatial plans served/obstructed the goals of the decentralization effort. To begin, I will make a general outline of relevant changes in state and government structure which influenced the district's autonomy in spatial planning.

5.2. Decentralization in Indonesia after 1998

Following the downfall of the New Order regime, the People's Consultative Assembly issued a decree (15/MPR/1998) addressing the issue of how to preserve the central government's legitimacy without relinquishing the ideal of Indonesia as a unitary state.³⁶¹ In this decree, the Assembly instructed the government to establish a form of regional autonomy that is wide-reaching and responsible, as well as a more just system of natural resource management. These two issues were perceived as inseparable. Subsequently, the People's Consultative Assembly issued another decree in 2001 (9/2001)³⁶² focusing on agrarian reform and natural resource management.³⁶³

As a follow up to the above 1998 People Consultative Assembly Decree, the Habibie administration promulgated the RGL 1999 (Law 22/1999) and Law 25/1999 (on fiscal balance: *perimbangan keuangan antara pemerintah pusat dan pemerintahan daerah*). As argued by Aspinall, the 1999 regional government laws advancing decentralization were promulgated on the basis of two basic arguments:³⁶⁴

“(...) that shifting authority to the sub-provincial level would promote democratization, because communities had a far greater awareness of and sense of engagement with local policies than they did with either provincial or national affairs. District-based autonomy would thus bring decision-making to a level where

³⁶¹ The decree is officially titled “*tentang penyelenggaraan Otonomi Daerah; Pengaturan, Pembagian, dan Pemanfaatan Sumberdaya Nasional yang Berkeadilan; serta Perimbangan Keuangan Pusat dan Daerah dalam Kerangka Negara Kesatuan Republik Indonesia*”.

³⁶² *Pembaruan Agraria dan Pengelolaan Sumber Daya Alam* (agrarian reform and natural resource management). For a brief comment on how this decree is expected to bring change to the existing land law, see Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Nasional dalam hubungannya dengan TAP MPR RI IX/MPR/2001* (Jakarta: Univ. Trisakti, 2003).

³⁶³ Regrettably, agrarian reform has been treated as a distinct issue from regional autonomy and spatial management issues. It has been transformed into a land distribution and titling program as evidenced by the agrarian reform program launched in 2007 by the incumbent president “Agrarian Reform: is it really pro-poor?” (Down to Earth no. 72/March 2007).

³⁶⁴ Edward Aspinall & Greg Fealy, in their introduction (Decentralization and the Rise of the Local) to Edward Aspinall & Greg Fealy (eds), *Local Power and Politics in Indonesia: Decentralization & Democratization* (Singapore: Institute of Southeast Asian Studies, 2003), p. 4.

communities were more inclined to participate and where they could hold politicians accountable for their actions. Second, district level autonomy was seen as the best way to ensure that decentralization did not encourage separatism and the break up of the country”.

These arguments are widely supported by Indonesian scholars. According to Amri the reason for the promulgation of RGL 1999 was a fear that Indonesia would disintegrate if the regions’ demands for a greater voice in managing their own affairs and a greater/more balanced distribution of natural resource exploitation benefits were not appropriately addressed.³⁶⁵ She further points out that 90% of revenues went to the central government in the 1995/1996 fiscal year, leaving only 10% for the regions. Ryaas Rashid gives a more legally reasoned motive on why the Indonesian government decided to promulgate RGL 22/1999: the Habibie government would have been of the opinion that the New Order regime had misinterpreted the 1945 Constitution and that upon a normative reading the elucidation of the 1945 Constitution requires that regions be granted autonomy³⁶⁶

As a follow up to the transformation in government structure brought by RGL 1999 and its central implementing regulation GR 25/2000, the People’s Consultative Assembly decided to amend article 18 of the 1945 Constitution. In contrast with the old version, the new Article 8 explicitly stipulates that provincial, municipal and district governments should enjoy autonomy to the widest extent possible (*otonomi seluas-luasnya*), only excepting duties reserved for the central government (par. 5); that the people shall elect governors, heads of the district/municipal governments and parliament members on a periodical basis (par. 3-4); and that regional governments (provincial and district) possess the authority to enact regional regulations (*peraturan daerah*) in realization of their autonomy and with regard to de-concentrated tasks (par.6). With district parliaments’ increased importance in lawmaking, district regulations became much more important as a source of law at the district level.

The wish to create more accountable regional governments, which were better attuned to local people’s needs and demands at the same time, required the overhaul of the central

³⁶⁵ Puspa Delima Amri, “Dampak Ekonomi dan Politik UU no. 22 dan 25 tahun 1999 tentang Otonomi Daerah CSIS Economic Working Paper Series, June 2000) available at <http://www.csis.or.id/papers/wpe054>.

³⁶⁶ Ryaas Rasyid, “Otonomi Daerah: latar belakang dan masalahnya” in Syamsudin Haris (ed). *Desentralisasi & Otonomi Daerah: Desentralisasi, Demokratisasi dan Akuntabilitas Pemerintah Daerah* (Jakarta: Lipi Press, 2004): pp. 3-25.

government which had mainly exercised its powers through deconcentrated offices.³⁶⁷ Indeed, the central government decided to abolish ministerial representative offices at both the provincial (*kantor wilayah*) and district levels (*kantor departemen*).³⁶⁸ Influential central government boards, such as the National Development Planning Board (*Bappenas*), also lost control over their representative offices, which were incorporated into the district/provincial organizational structure. Other central government instruments such as the Environmental Impact Board (*Bapedal*), established by the Ministry of the Environment, lost its official connection with similar boards in the regions. This policy move marked a lessening of the central government's grip on the regions/provinces and the opening of room for provincial and district governments to take over the tasks delegated to them by the RGL 1999. Each district was to establish at least 11 services or boards and would have the freedom to establish more in light of local needs and demands.³⁶⁹

Thus, a main result of decentralization was bureaucratic expansion at the district level. In order to contain this development the central government enacted GR 84/2000 (later amended by GR 8/2003).³⁷⁰ Apparently, district and provincial governments were not really trusted to be able to design individual organizational systems in tune with local needs and were not given much freedom to experiment with local government structure and systems.³⁷¹

³⁶⁷ See e.g. Rainer Rohdewohld, "Decentralization and the Indonesian Bureaucracy: Major Changes, Minor Impact?" in E. Aspinall & G. Feals (eds), *Local Power and Politics in Indonesia, Decentralization and Democratisation*, (Singapore: Institute of Southeast Asian Studies, 2003), pp. 259-274.

³⁶⁸ Syaikhul Usman, "Regional Autonomy in Indonesia: Field Experiences and Emerging Challenges" paper prepared for the 7th PRSCO Summer Institute/the 4th IRSA International Conference: "Decentralization, Natural Resources, and Regional Development in the Pacific Rim (Bali 20-21 June 2002). Quoting GTZ, Syaikhul Usman revealed that as of 2001, in total 239 provincial-level offices of the central government (*Kanwil*), 3,933 district-level offices of the central government (*kandep*), and 16,180 technical units (UPT) of the central government have been handed over to provinces, district and municipalities (p.6).

³⁶⁹ Rakaka Mahi, "Proses Desentralisasi di Indonesia" in Hadi Soesastro et al (eds), *Pemikiran dan Permasalahan Ekonomi di Indonesia* (Jakarta: Kanisius, 2005), pp. 582-586.

³⁷⁰ GR 84/2000 on the directives on the establishment of regional government services and offices (*pedoman organisasi perangkat daerah*). This GR allows the district governments to establish at least 16 services (*dinas*) to take care of government duties transferred. It also opens the possibility that these regions established additional services to take care of optional duties transferred on request in accordance with their needs and capabilities. It was amended in 2003 by GR 8/2003. See Miftah Thoha, "Tinjauan dan Implementasi Birokrasi di Indonesia" (Journal Wacana Kinerja, Vol. 10 no. 3-2007), pp. 75-85. Cf. See Roy V. Salomo, *Pokok-Pokok Pikiran Penyempurnaan UU no. 32/2004 tentang Pemerintahan Daerah: Perangkat Daerah (Departemen Dalam Negeri-GTZ)*.

³⁷¹ Taufik Effendi, (incumbent Minister of Pendayagunaan Aparatur Negara), "Arah dan Strategi Pendayagunaan Aparatur Negara dalam Rangka Efektivitas Pembangunan dan Terwujudnya Good Governance", (Journal Wacana Kinerja, Vol. 10 no. 2-2007), pp. 1-5. He mentions legislative engineering attempts addressing bureaucratic reform. Veilhzal Rifai, "Reformasi Birokrasi Pemerintahan: Perwujudan Good Governance dan Pemerintahan yang Efisien, Efektif dan Produktif" (Wacana Kinerja, Vol. 10, no.4-2007), pp. 27-34.

Decentralization also impacted upon the hierarchy of legislation. As this issue was already discussed in Chapter 2, I will limit myself to pointing out only the most important changes relevant to spatial management post 1999. First that district governments now possess power to promulgate district regulations (*peraturan daerah*) on certain issues expressly attributed to it by the central government. Secondly, these local regulations should be approved by a democratically elected district parliament. Accordingly, the districts are bound to implement and enforce such local regulations exclusively binding within the district administrative borders. Provincial and districts governments possess the power to promulgate spatial plans which are approved and legitimised by the provincial viz. district parliament. All of this raises a question posed by Asshiddiqie, the former Chief Justice of the Indonesian Constitutional Court: how far should the Indonesian legal system be decentralized?³⁷² The amended Article 18 of the 1945 Constitution expressly acknowledges legal pluralism within the unitary state of Indonesia. This would mean that regional regulations can sometimes override rules made by the central government. The main question for this book is the following: to what extent can provinces and districts develop individual spatial plans uninhibited by central state legislation?

5.3. The RGL 1999 and Spatial Management

A particular challenge for the newly autonomous districts was how to deal with the SPL 1992. How should the hierarchal spatial planning system be reinterpreted? The SPL 1992, as discussed in previous chapters, was made in conformity with the centralized and top down government structure as embodied by Law 5/1974 and was an integrated part of the New Order's centralized development planning system. There seemed to be an unavoidable mismatch between a more decentralized government structure and the top-down spatial management system of the SPL 1992. We will explore this issue in the next sections.

5.3.1. Centralized development planning

In the light of the radical changes in the state/government structure, one would expect the whole – development – spatial planning system to have changed completely after the enactment of the RGL 1999. However, this did not apply to development planning. The RGL 1999 stipulated that the national government retained the authority to make policies on national development planning and exercise general oversight (Art. 7(2)). GR 25/2000

³⁷² Jimly Asshiddiqie, "Hukum Islam dan Reformasi Hukum Nasional" paper presented before a seminar "Eksistensi Hukum Islam dalam Reformasi Sistem Hukum Nasional" organized by the BPHN Dept. Kehakiman & Ham, Jakarta, 27 september 2000.

further entrusted these duties to the central and provincial governments (Art. 2- 3). This allowed them to produce directives, and establish criteria and standards, also for district development planning. The New Order's centralised, top-down development planning system thus remained more or less in place.

One difference resulted from a reduction in the People's Consultative Assembly's power to formulate binding Broad Guidelines of State Policies (*garis-garis besar haluan pembangunan*). The last People Consultative Assembly's Decree on national development policy was promulgated in 1999.³⁷³ It provided the legal basis for the promulgation of Law 25/2000 on the national development program (*program pembangunan nasional/propenas*) 2000-2004. Henceforth, the government held the power to establish these programs.

This included annual development program, including the annual budget plan. A similar system was to be developed at the provincial and district levels, where regional development programs (*program pembangunan daerah/propeda*) would be used to formulate regional annual development programs.³⁷⁴ The established view is that the *propenas* was to be translated and elaborated upon in the *propeda* at the provincial and district levels. In this way the arrangement remained similar to the previous one under the New Order regime. The question is to what extent this top down system was compatible with a new government structure that emphasized district autonomy and accountability. As we will now see, a top-down, centralized approach to development planning certainly did not make a good fit with the district based approach to spatial planning developed by the districts in the 1999-2004 period.

5.3.2 Decentralized Spatial Planning: Re-interpretation of the SPL 24/1992

In contrast to development planning, spatial planning did become decentralized after 1999. GR 25/2000 stipulated that the national spatial plan should be made on the basis of (*berdasarkan*) district and provincial spatial plans (Art. 2(3) point 13)). The Article's wording referred to a bottom-up approach: the national spatial plan would be a compilation of all

³⁷³ PCA Decree 4/1999 (Broad Guidelines of State Policies 1999-2004).

³⁷⁴ At a later stage, the temporary arrangement provided by Law 25/2000 was replaced completely by a more permanent development planning system. In 2004, Law 25/2004 concerning the national development planning system (*sistem perencanaan pembangunan nasional*) was promulgated. How this system has worked to re-centralize power and limit self autonomy for the districts enjoyed for a brief period (1999-2004) shall be discussed in more detail in Chapter VI.

provincial and district spatial plans (*perda rencana tata ruang*). This suggests that the national spatial plan could only be formulated after the central government had collected all provincial and district spatial plans, which were no longer to be formulated on the basis of Ministerial regulations providing guidance and directives. The binding nature of such central government guidance and directives had moreover become questionable considering particularly the autonomy of districts in lawmaking, -implementation and enforcement.

The relation between provincial and district spatial plans also changed. Art. 3(5) point 12 of the GR 25/2000 stipulated that provincial spatial plans had to be developed on the basis of agreements with district governments. The elucidation to this article provided no clarification as to how the provincial spatial plan had to be formulated or how such agreements should be put into law. The reliance on agreement put provincial governments in an ambiguous situation, as they could not force autonomous districts to enter into negotiations. Under the RGL 1999, the provincial government lost its hierarchical position vis-à-vis the districts. Provincial regulations and other decrees/written instructions issued by the governor largely lost their binding force on the districts,³⁷⁵ which were quick to conclude that they held the power to determine land use within their borders. We shall return to this issue in our discussion of the spatial management of the North Bandung Area in Chapter 8.

The RGL 1999 and GR 25/2000 thus promoted a radically different approach from the one contained in the SPL 1992. In a sense, they completely replaced it.³⁷⁶ The spatial management powers attributed to the districts made it possible for them to re-interpret the hierarchal spatial management system. For a short period GR 25/2000 enabled districts to make spatial plans free from central government interference. District spatial planning increased in significance as a tool for inducing development and controlling land use within

³⁷⁵ Such as the decrees the West Java Provincial governor issued in regard to the North Bandung Area. The involvement of the governor of West Java on the issue of protecting the area dates from the early 1970s and continued well after reformation in 1997. In 1982 the Governor of West Java issued a decree (no 181.1 / SK.1624-Bapp / 1982 date 5 November 1982 regulating land use of KBU, designating Punclut as a protected area closed for development); and the last being a circular letter of the governor of 2004 addressed to head of districts sharing responsibility for the management of the North Bandung Area to put development on hold. See further: Erwin Kustiman, "Quo Vadis" Pengendalian KBU" (Pikiran Rakyat, 25 January 2007).

³⁷⁶ The question to be asked is whether an implementing regulation may do so legally speaking. It should be evaluated against the existing hierarchy of law and the theory underlying this hierarchical system. Then such implementing regulations (produced by the executive) should be declared null and void as they cannot change what has been stipulated by law and duly approved and ratified by the parliament. To the best of my knowledge, no substantial criticism has been raised or directed against this *extra* or even *contra legem* legislation.

urban areas.³⁷⁷ This provided an incentive for district governments to formulate good and workable spatial plans. Besides it might at the same time promote more or less healthy competition between districts in developing better land use planning, with the possibility that cities in resource-rich regions could develop at a faster pace.³⁷⁸

The RGL 1999 and GR 25/2000 also made clear that henceforth not only municipalities but also 'normal' districts ought to have spatial plans. Indeed, after 1999, most districts which did not previously have spatial plans began producing them. Formulating spatial plans became part of a legal strategy to mark regions' relative autonomy in self-regulation, in particular in land management. But spatial plans also became what they were intended for: the district governments' tool to regulate and control land use within their respective jurisdiction. Unfortunately, as will later be discussed, this did not automatically mean that district governments had an increased ability to manage land in the service of the local population.

The increasing number of spatial plans was also the result of a proliferation of new provinces and districts after 1999.³⁷⁹ One unexpected by-product of the RGL 1999 was an accelerated splitting or fragmentation of regions.³⁸⁰ This establishment of new regions was often prompted by long simmering disputes regarding the distribution of the spoils of natural resources or other political-economic considerations. The establishment of new autonomous regions moreover creates new government posts and jobs for civil servants, while districts also obtain the benefit of receiving block grants from the central government.³⁸¹ The

³⁷⁷ See Tommy Firman, "Indonesian Cities in the Early Reform Era", in Peter J.M. Nas (ed), *The Indonesian Town Revisited* (Singapore: Institute of Southeast Asian Studies, 2002), pp.100-112.

³⁷⁸ See Tommy Firman, "Indonesian Cities in the Early Reform Era", in Peter J.M. Nas (ed), *The Indonesian Town Revisited* (Singapore: Institute of Southeast Asian Studies, 2002), pp.100-112.

³⁷⁹ A list of spatial plans at the provincial and district level (West, Central and East part of Indonesia) is provided by the Ministry of Public Works (the Ministry for Settlement and Regional Infrastructure; updated 24 September 2003). The list was made in light of the need to evaluate existing regulations against the KepMenKimpraswil 327/Kpts/M/2002.

³⁸⁰ See also Chapter II on the administrative fragmentation or involution of Indonesia after 1999. The legal basis of and procedure for the splitting of regions is provided by GR 129/2000 on the establishment, division, dissolution and joining of autonomous regions (*pembentukan, pemekaran, penghapusan dan penggabungan daerah*). For a brief critical remark regarding the process and procedure for regional splitting see: "Banyak Pintu Menuju Pemekaran"; "Usulan Pemekaran-Pemekaran Bermasalah, Mengapa?" (suaradaerah online, 14 June 2007) and "Lobi-lobi Politik Warnai Penilaian Daerah Otonom: Sebanyak 76 dari 98 Daerah Otonom Gagal" (Kompas, 27 October 2007). "Stop Pemekaran Daerah Baru: Kepentingan Politik Lebih Mengemuka" (Kompas 6 February 2009: 1). Data compiled by Kompas reveals that 95% of these new autonomous regions were established in the outer regions (Sumatera: 77; Kalimantan: 25; Sulawesi: 35; Papua: 31; Nusa Tenggara: 11 and Maluku: 13). 10 new autonomous regions were established in Java. This trend seems to have continued unabated, excepting a short period between 2005 and 2006.

³⁸¹ See: Eko Prasjojo, "Evaluasi 2007 dan Perspektif 2008" (Indopos, 27 December 2007).

splitting of regions also led to an increase in local corruption through an expansion of the number of independent veto points and government agencies across the country.³⁸² However, what is more relevant here is the fact that regional fragmentation also put pressure on all government level to formulate or adjust existing spatial plans.³⁸³

In short, the spatial planning system established under RGL 1999 and GR 25/2000 granted a wide level of discretion to districts and little controlling power to the central and provincial government(s). The response of provincial and district governments to the opportunities thus provided eventually led to the central government's decision to revise Law 22/1999 and GR 25/2000. The following section demonstrates how this process of making spatial plans evolved in West Java province and Bandung municipality.

5.4. Spatial Management Post 1999 in West Java, Central Java and Bandung

5.4.1. Fragmentation of West Java province and Jakarta's ambitions

The background to West Java's spatial planning during the 1999-2004 period was formed by the administrative fragmentation referred to earlier. For West Java by far the most important event was the secession of Banten province. The RGL 1999 brought about an opportunity for Banten's local elite to assert cultural and historic differences from Sundanese West Java³⁸⁴ and Banten was established as a new province in 2003. It includes such former West Java districts (*kabupaten*) as Serang, Pandeglang, Lebak and Tangerang in addition to the municipalities (*kota*) of Tangerang and Cilegon. The result was a considerable reduction in West Java's geographical coverage. Previously, West Java province covered an area of 44,354,61 Km². After 2003, this was reduced to 35,746,26 Km² and comprised of (2005) 16

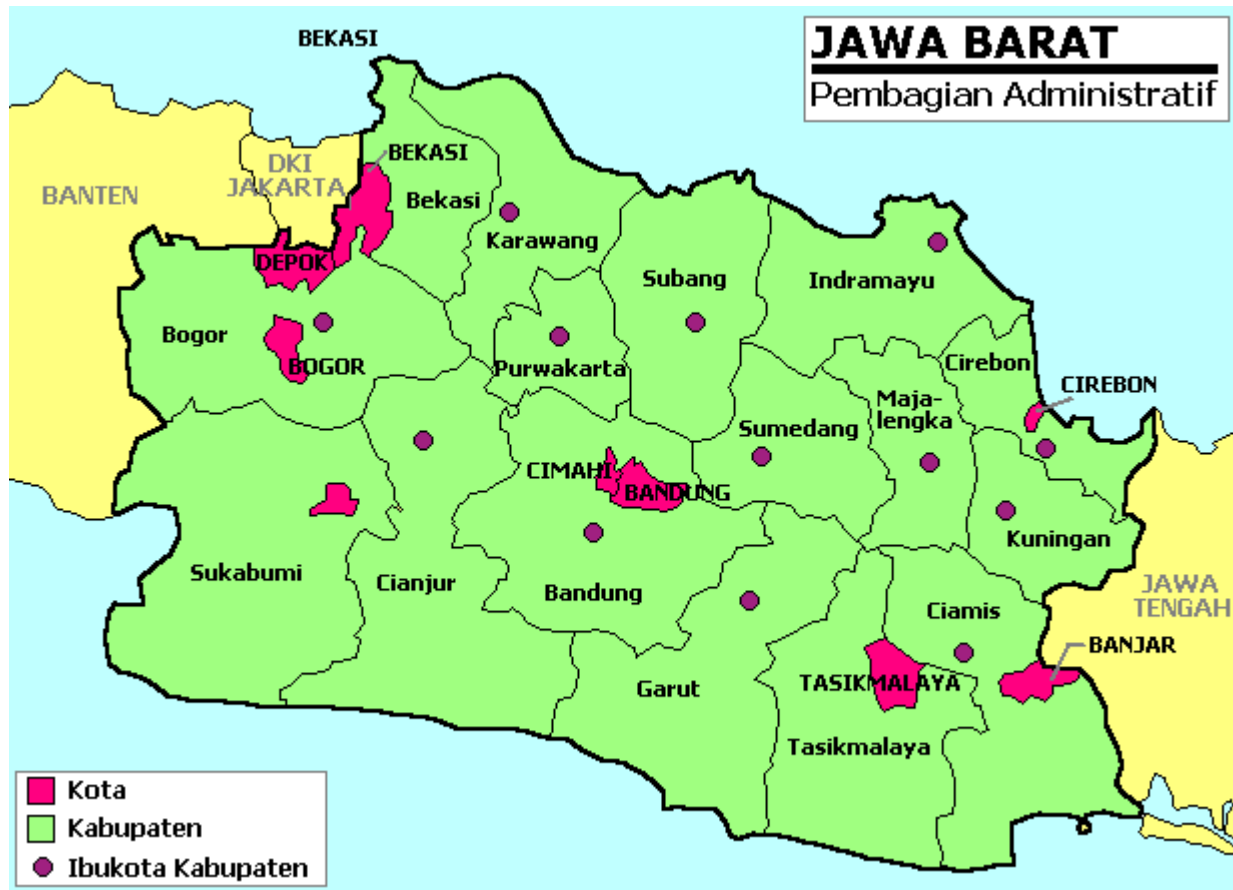
³⁸² Rachmat Herutomo, "Fiscal Decentralization: An elusive goal? (Globe Asia, Vol. 2, no. 2 February 2008): 22-24.

³⁸³ To highlight the problem I provide the following examples: the establishment of Cimahi as an autonomous city and the splitting up of the District Bandung into two separate districts: District of Bandung and District of West Bandung forced the amendment of the District of Bandung Regulation 1/2001 (RTRW Kabupaten Bandung). In reaction to the separation of Cimahi, the District of Bandung Regulation 1/2001 was amended by DR 12/2001 (district spatial planning regulation). Cimahi promulgated its own spatial planning regulation (Cimahi DR 23/2003). The District of Bandung spatial planning regulation of 2001 should be adjusted in light of the establishment of *Kabupaten Bandung Barat* by virtue of Law 12/2007. In 2008, the district government of Bandung promulgated a new spatial planning regulation (DR 3/2008).

³⁸⁴ See also, "Banten Jadi Propinsi, Tinggal Rakyat Menagih Janji" (Kompas, 7 October 2000). Ethnic sentiments and pride of their distinctive history from the rest of West Java may equally influence the separation. See: "Kesultanan Banten, Wallahuallam ..." (Kompas, 26 April 2003), Irman N/Fajar Banten, "Perlukah Rekonstruksi Kesultanan Banten? (Pikiran Rakyat, 8 February 2003).

districts, 9 municipalities, divided into 584 quarters (*kecamatan*), 5,201 villages (*Desa*) and 609 sub-quarters (*Kelurahan*).³⁸⁵ See figure-1 below.

Figure-5-3: West Java Province: administrative division 2005



The above picture indicates the coverage of all West Java provincial regulations issued after 2003. It also provides insight into the number of spatial plans to be made or adjusted.

Another important circumstance was Jakarta province's wish to incorporate adjoining regions into its spatial planning scheme and establish an all encompassing and integrated spatial plan for neighbouring regions, formally falling under the administration of West Java province. The intention was to provide an integrated and comprehensive spatial plan to

³⁸⁵ See Profil Daerah Jawa Barat available at <http://www.indonesia.go.id/id/index.php?option>, last visited 15 August 2009.

support the development of a megapolitan area covering the district and municipality of Bogor, Depok municipality, the district of Tangerang, the district of Bekasi, the municipality of Bekasi and the district of Cianjur (combined, known-as *Jabodetabekjur*). As asserted by the previous Governor of Jakarta, Sutiyoso, “the megapolitan concept would make Jakarta the centre of economic growth and adjacent districts such as Bogor, Depok, Tangerang, Bekasi and Cianjur would benefit from this close connection to Jakarta.”³⁸⁶ This was argued to promote maintaining green zones in the greater Jakarta area and effective management of water and flood control³⁸⁷. Similarly, but less threatening for the province’s authority, were other urban centres’ plans. Bandung for instance advanced the idea of establishing Bandung Metropolitan Area which would cover the Bandung municipality, the Bandung district, Cimahi and Sumedang. However, it was clear that West Java had to act in order to guard its jurisdiction in spatial management.

5.4.2. West Java Spatial Planning after 1999

In 2003, West Java enacted a new Spatial Plan by Provincial Regulation (Perda) 2/2003 (*RTRW Propinsi Jawa Barat*), replacing Perda 3/1994. The consideration of the Perda explicitly linked the amendment to the promulgation of RGL 1999. The new plan did take into account that the position of provincial government vis-à-vis the districts had changed, but also still referred to the SPL 1992. We will now see how the province tried to reconcile these diametrically opposed approaches to spatial planning.

As already mentioned, GR 25/2000 stipulated that the national spatial plan should be made on the basis of (*berdasarkan*) district and provincial spatial plans (Art. 2(3) point 13). Regarding provincial spatial planning, the GR stipulated that the provincial government should develop spatial planning on the basis of agreements with district governments (Art.3(5) point 12). This led the provincial government of West Java to regard Perda 2/2003 as a bridge connecting national and district spatial planning (Art.4(1) of Perda 2/2003). The problem was that initially only a few districts possessed spatial plans or were interested in

³⁸⁶In 2008 the President signed Presidential Regulation 54/2008 on the spatial management of the region covering Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak, and Cianjur. See further: “Sutiyoso senang Presiden respons Megapolitan”(Tempo Interaktif, 8 september 2008); “Megapolitan Perlu Kementerian Khusus Tata Ruang” (Tempo Interaktif, 9 September 2008); “Jawa Barat Minta Pusat Awasi Megapolitan”(Tempo Interaktif, 25 September 2008).

³⁸⁷ Tifa Asrianti, “Megapolitan decree allows integrated flood management” (the Jakarta Post, 9 september 2008).

making them. This changed after 2000, when both old and new districts began to formulate new spatial plans, but West Java province could not wait for all of them because Banten seceded in 2003.

The second paragraph of Art. 4 Perda 2/2003 stipulated that the provincial spatial plan was to become the basis for the formulation of the National Spatial Plan (RTRW *Nasional*). This was still fully in line with GR 25/2000. However, the same paragraph also stipulated that the Provincial Spatial Plan was to become the main point of reference for formulating district spatial plans; and the main directive for planning, utilization and supervision of land use in the districts. The districts would need to adjust (*perlu menyesuaikan*) their respective spatial plans with the provincial level on the basis of agreement (*kesepakatan*), in order to secure integration and harmony (*untuk menjamin keterpaduan dan keserasian*) (Art.10). The article's use of two conflicting terms, *the need to adjust*, indicating a one-sided obligation to secure consistency and *on the basis of agreement* is rather confusing. Apparently, the West Java provincial government still believed itself empowered to force district governments into following directives and reach a consensus on what spatial plans should be formulated and adopted as law. This is clearly the result of a selective reading and interpretation of GR 25/2000 on behalf of the provincial government. Not surprisingly, as we will see later, district governments preferred a quite different interpretation.

The belief in the provincial capability to control spatial planning was also reflected in its view on issuing land use permits. Perda 2/2003 provided that the districts when issuing permits (part of the oversight mechanism) should take into account (*agar memperhatikan dan mempertimbangkan*) the province's spatial planning (Article 19). This provision should be understood in the context of the provincial government's authority to issue directives regarding land use for cultivation and protected areas (as based on the same *Perda*). Thus, with regard to cultivation areas, the provincial regulation stipulated the need to preserve rice fields (art. 19 & 73) and referred to a number of future and on-going development projects in the districts: (1) the development of cities as growth poles (Arts.47-51); (2) infrastructure development projects (Arts. 52-60) and (3) development prioritized growth poles (*kawasan andalan*; Arts. 62-65). A list of such development projects, subject to a negotiated agreement, should be incorporated by targeted districts (where the projects are to be situated) into their respective spatial plans. A provincial spatial planning coordination team (*tim koordinasi penataan ruang daerah propinsi*) would supervise and monitor land use and the issuance of

spatial utilization permits (*izin pemanfaatan ruang*) in realizing these development projects.³⁸⁸

Regarding designated protected areas, an ambitious target was incorporated in Art. 31. It is stipulated that at least 45% of West Java's surface encompassing forested and non-forested areas shall be maintained as protected areas.³⁸⁹ This was to counter the rapidly increasing rate of deforestation post-1999 caused by illegal logging and land clearing by local farmers.³⁹⁰ Regarding non-forested areas, the Perda went on to specify the districts where protected areas would be situated in (Arts. 32-41). South and North Bandung were mentioned specifically as areas providing protection to adjoining areas (Art. 34). However, as will be discussed later, the districts were not at all willing to give up their jurisdiction on spatial planning in these areas, producing a serious dispute with the central and provincial government.

Finally, the West Java provincial government attempted to force an adjustment of various spatial plans made by the district government, especially those within the Bandung Metropolitan Area. To this end it prepared a memorandum of understanding between four districts and the provincial government in 2004³⁹¹. As a corollary, the four districts concerned signed a joint decree determining responsibility in managing the metropolitan

³⁸⁸ This is of importance for the later discussion of land acquisition in the public interest and the role of permits in legitimizing acquisition and subsequent utilization.

³⁸⁹ For a definition of cultivation and protected area see Chapter IV.

³⁹⁰ During the 2000-2008 period, protected forest (*hutan lindung*) coverage decreased to 106.851 hectare (24%) and production forest (*hutan produksi*) decreased to 130.589 hectare (31%). In addition, primary forest coverage decreased by 24% and secondary forest coverage by 17%. In total, forested areas previously covering a land mass of 791.519,33 hectares saw a drastic reduction. BPLHD, *Kajian Kriteria Kerusakan lahan di Jawa Barat, Laporan Akhir Proyek Pengendalian kerusakan dan Pengelolaan Keanekaragaman hayati dan habitatnya di Jawa Barat secara Terpadu dan Berkelanjutan*. Kerjasama antara Badan Pengendalian Lingkungan Hidup Daerah Propinsi Jawa Barat dengan Pusat Studi Kewilayahan dan Lingkungan – Bogor, Jawa Barat, 2002. "90% Hutan di Jawa Barat Rusak" (Galamedia. 4 Agustus 2009); Cf. "590.000 ha hutan di Jawa Rusak" (Bisnis.com. 23 January 2003); "Kerusakan Hutan Jabar Mencapai 30 Ribu Hektar (Gatra.com, 1 Maret 2002).

³⁹¹ "Disetujui, MoU Pengelolaan Bandung Metropolita: RTRW Kota/Kab. Di Cekungan Bandung Harus Mengacu ke Provinsi" (Pikiran Rakyat 14 September 2005); "Bandung Metropolitan Harus Segera Diwujudkan (Pikiran Rakyat 2 February 2006); RTRW Kawasan Metropolitan Bandung Harus Akomodatif (Kompas, 27 September 2004). The Memorandum of Understanding was signed on 26 July 2004 by the Governor and the Mayor and District Head of respectively the municipalities of Bandung and Cimahi and the districts Bandung and Sumedang.

area.³⁹² This legal document would form the basis of a joint effort to produce a more environmentally focused spatial planning policy.³⁹³

In summary, the provincial government envisioned itself to function as bridge and in-between connecting the National Spatial Plan with those made by the districts. Whether they could do so successfully is questionable. Not only did it seem likely that the national government would object to a national spatial plan formulated as a compilation of provincial spatial plans, but also were the districts probably inclined to challenge provincial attempts to curb their authority regarding spatial planning. Before looking into this matter, we will first consider how a comparable provincial government responded to similar situations. For this purpose I have selected Central Java.

5.4.3. A Comparison: Central Java's New Spatial Plan

Central Java amended its Provincial Spatial Plan (Perda 8/1992) with Perda 21/2003, which was declared valid for 15 years. Just as the new West Java Plan, this one referred to both the RGL 1999 and the SPL 1992 (and their implementing regulations). However, it also referred to the newly-minted development planning program (Law 25/2000; *Propenas 2000-2004*), which was overlooked by West Java's provincial spatial plan.

Article 6 of the new Plan followed the view of its West Java equivalent: it explicitly stipulated that the provincial spatial plan should be considered as a directive (*pedoman*) and reference (*acuan*) for district spatial plans and their implementation. No reference was made to the rule in GR 25/2000 which made it possible for districts to assert independence in spatial planning. The Plan further indicated how it should function as a directive and reference: by designating which cities were to function as primary, secondary and tertiary growth poles (Art. 15), by designating conservation areas within the districts (Arts. 16-19) and protected areas (Arts. 20-22), by specifying future infrastructure projects (Art. 23-26) and by designating strategic areas (*kawasan strategis*) and priority areas (*kawasan prioritas*) either for development of industries or for reasons of conservation (Arts. 27-28).

³⁹² Joint declaration (Surat Kesepakatan Bersama) 31/2004; 23/2004, 21/2004; 650/Kep.521-Bappeda/2004; 23 of 2004) re. cooperation with regard to infrastructure management and development of the Bandung Metropolitan Area.

³⁹³ For an attempt of such effort see Ari Djatmiko, "Arahan Pengembangan Ruang Wilayah Metropolitan Bandung", (Infomatek vol. 6 no. 3 September 2004): 155-160.

Art. 7(a) underlined the status of provincial spatial planning as an elaboration of the national spatial planning strategy (*RTR Nasional*/GR 47/1997) and Art. 7(b) stipulated that the provincial spatial plan should function as a binding reference (*acuan yang mengikat*), synchronizing (*penyelaras*) provincial and district spatial plans. The term ‘binding reference’ seems to have been used to counter the argument that directives were not legally binding. As it stood, provincial governments did not rank higher than districts and districts possessed the power to pass “democratically legitimised” district regulations, but a ‘binding reference’ was apparently thought to redress that point.

In short, the Central Java Provincial government, while paying lip service to the regional government law and GR 25/2000, proceeded as if nothing had changed regarding its position vis-à-vis the districts. It simply applied the hierarchical system of spatial planning established in the SPL 1992. West Java and Central Java thus demonstrate that the RGL 1999 did not immediately change embedded perceptions regarding the provinces’ higher status and the extent to which districts could enjoy their autonomy as granted by the Constitution and the law. However, there was a slight difference. The West Java provincial government emphasized its co-ordinating position, acting as a bridge between the districts and the central government. Central Java had shopped the SPL 1992 and the RGL 1999 even more selectively in favour of continued central rule.

We now will turn how the municipality of Bandung responded to the opportunity to formulate its spatial plan as a reflection of its autonomy.

5.4.4 District Spatial Management: Bandung Municipality’s Spatial Plan

Bandung Municipality’s spatial plan of 1992 (Perda 2/1992; RUTRK Bandung 1991-2001) expired in 2001, but three years passed before a successor was enacted. Government officials interviewed about the reason why this took so long indicated a kind of indifference. The municipality did promulgate Perda 5/2000 on the basic patterns of regional development of Bandung (*pola dasar pembangunan daerah kota Bandung tahun 2000-2004*) elaborated in Perda 9/2001 on regional development programs (*program pembangunan daerah/propeda tahun 2000-2004*), one year before the spatial plan expired, but apparently the Bandung municipal government decided to prioritize other issues over spatial planning.

In any case, in 2004 Bandung Municipality enacted a new spatial plan (Perda 2/2004).³⁹⁴ Its consideration states that (c):

“Perda 2/1992 on the Master Plan of Bandung (1991-2001) has expired and does not conform to existing regulations, and therefore the need has arisen to formulate a new spatial plan in conformity with Government Regulation 47/1997 on the national spatial plan;”

Like its predecessor, this 2004 plan was closely linked to existing regulations pertaining to municipal development policy and programs.³⁹⁵ Spatial planning was still perceived as a corollary to (centralized) development planning, to translate development programs into future land use plans. A reference to a general obligation to break the general spatial plan down into more detailed rules controlling land use also remained in place. On this basis the municipal government would elaborate the general spatial plan into detailed town spatial planning and/or a design plan (*rencana rancangan*), complete with zoning regulations, architectural and environmental design, building plans (blue prints) and other technical requirements (arts. 6(2 c); 30 & 101(3)).

What *is* remarkable is that the new regulation was only formulated with reference to national laws and their implementing regulations, notably the RGL 1999 and GR 25/2000.³⁹⁶ No reference was made to ministerial regulations issued by Home Affairs or Public Works determining the scope of competence and content for spatial planning at the district/municipal level. This may indicate that the municipal government did not regard these as binding anymore and conforms to the fact that spatial planning authority was attributed to the districts by law as part of their autonomy. The West Java Spatial Plan (Perda 2/2003) was only ‘taken into account’. The general elucidation explicitly states that:

³⁹⁴ Bandung Municipality Regulation (DR) 2/2004 on spatial planning of the city of Bandung (*rencana tata ruang wilayah kota Bandung*) dated 10 February 2004). In 2005, an effort to amend this DR had already begun. In 2006, the municipal government issued DR 3/2006 on the amendment of DR 2/2004. This amended only a few articles related to certain rules on the development of north Bandung. Basically thus, DR 2/2004 with slight modifications (DR 3/2006) is still valid. More about this in the next chapter.

³⁹⁵ DR 5/2000 *tentang Pola Dasar Pembangunan Daerah Kota Bandung 2000-2004*, and DR 9/2001 *tentang Program Pembangunan Daerah (Propeda) Kota Bandung 2000-2004*.

³⁹⁶ But also Law 28/2002 on the Construction of Buildings; GR 26/1985 on (the construction of) public roads; GR 8/1990 (construction and management of toll roads); GR 41/1993 (public transportation); GR 43/1993 (traffic infrastructure); GR 35/1991 (management of rivers); GR 68/1998 (management of nature conservation areas).

”spatial planning cannot be considered a top-down process, but should be based on an agreement made by and between the province and the district concerned (...). that the Bandung Spatial Plan shall function as the basis to harmonize and guide the formulation of spatial planning policy at the provincial level.

In other words, Bandung Municipality chose to interpret GR 25/2000 to the letter and thus went against the SPL 1992 with its top-down approach. However, Bandung Municipality’s understanding of spatial management authority also seems to indicate that each district could regard itself as completely free to formulate individual spatial plans without regard for adjoining regions. This would result in provincial spatial plans being reduced to a mosaic of diverse and potentially conflicting district spatial plans.

The obvious downside to such a scenario is its probably negative effects for ecologically sustainable development and the problem to develop a synchronized regional or trans-district based land use policy.³⁹⁷ As worded by Head of the Directorate General of Spatial Planning (Ministry of Public Work)³⁹⁸ Hermanto Dardak, spatial planning made only on the basis of district interests may end up in a “tragedy of the commons”. This rings particularly true for the management of forest areas and river basins extending beyond the administrative borders of more than one district. It supports the argument for the need of formulating umbrella spatial plans for megapolitan areas, whose management would necessarily require co-operation between adjoining districts. Moreover, Art. 9 par.(1 & 2) of the RGL 1999 provides for provincial or even central government management in the case of trans-border issues or other governmental issue which go beyond districts capacity to handle. Whether such approach will and can resolve tension between the provincial and districts remain to be seen.

We will return to this issue in our discussion of the North Bandung Area’s spatial planning. First I will explain shortly how Bandung developed its permits in controlling land use.

³⁹⁷ I am grateful to Asep Warlan Yusuf for pointing this out to me.

³⁹⁸ Direktur Jenderal Penataan Ruang, Depkimpraswil, “Perencanaan Tata Ruang Wilayah dalam Era Otonomi dan Desentralisasi”, (paper presented before Program Pascasarjana Magister Perencanaan Kota dan Daerah, UGM-Yogyakarta, 5 May 2003).

5.4.5 Bandung permits for controlling land use

In contrast to what had been common in the past, the 2004 Bandung Spatial Plan (BSP 2004) has been elaborated into more detailed and technical rules by *peraturan walikota* (general regulation issued by the mayor)³⁹⁹ instead of by *peraturan daerah* (district regulation) which requires approval from the local parliament. The reason given was that detailed planning does not need parliamentary approval, as it is simply an elaboration of the BSP 2004. This has given the mayor wide discretionary powers in interpreting the district spatial plan and put him into a very advantageous position regarding the issuance of permits for land acquisition and use. The power of the district parliament has been reduced accordingly.⁴⁰⁰

The importance of the elaboration of general regulations into detailed and technical rules is apparent in how the BSP 2004 regulates the issuance of development permits (*perizinan pembangunan*), and spatial utilization permits (*perizinan pemanfaatan ruang*). Both function as tools for overseeing actual spatial utilization (*pengendalian pemanfaatan ruang*). A whole chapter (Chapter VII) has been devoted to regulating permits related to spatial planning and their functions. In this chapter, permits are perceived, first, as a tool for controlling actual land use for development purposes and, second, for providing a legal basis for oversight and enforcement action.

The BSP 2004 underscores the municipality's authority to determine what permits/licenses one needs (art. 102(4)). Additional requirements for applicants to be made in the public interest may be appended to the discretion of the municipal government (art. 102(5)). The latter has used this opportunity to the full, by incorporating specific requirements for carrying out public duties – which are normally fulfilled by the government – into permits. This has serious implications for public accountability within the framework of public-private cooperation or partnership arrangements, as will be further discussed in Chapter 8 when we will discuss the practice of land acquisition by private commercial company.

The BSP 2004 does not specify the number and names of the permits required, although such information is important for investors and individuals looking to acquire and use land. Only the Elucidation to Art. 102(2) stipulate that spatial-land use permits include the land use permit (*Izin Peruntukan Penggunaan Tanah* or IPPT) and the building or construction

³⁹⁹ See Mayoral Regulation (*Peraturan Walikota 981/2006* on the detailed spatial planning of the development area of Cibeunying (*Rencana Detail Tata Ruang Kota (RDTRK) Wilayah Pengembangan Cibeunying*) and 685/2006 on the detailed planning for the development area of Gedebage (*RDTRK Wilayah Pengembangan Gedebage*).

⁴⁰⁰ Personal communication (Asep Warlan), 27 August 2005.

permit (*Izin Mendirikan Bangunan* or IMB). These permits may be granted only if the applicant has already obtained recommendations from the relevant municipal services.⁴⁰¹ Earlier, in 1999, the Bandung municipality already acquired the authority to process application of permits-in-principle (*izin prinsip*) and site permits (*izin lokasi*).⁴⁰² Both permits have been important in controlling investment initiatives and in the allocation of land to support district economic growth. The emphasis in permitting has thus clearly shifted from the central government to the district level. By having control over the land use permits, the district governments may autonomously manage land use according to their own district spatial plans, while local citizens may hold them directly accountable for spatial mismanagement.

Under the new spatial planning system, each district is thus free to determine which permits it prefers to use in regulating and controlling land use. A freedom which, as discussed in the preceding chapter, did not exist during the New Order government with its emphasis on centralized command and control. In other words, each district after 1999 possesses the power to develop its own system of permits and licenses to control land use.⁴⁰³ At the same time, such freedom opens up the possibility of each district developing different systems to control access to land and its use.

These differences between districts, especially after the promulgation of RGL 1999 and the devolution of a number of land authorities to the districts are potentially significant as they may introduce competition between districts in attracting investors. While neoliberals may be in favour of this, the downside is that it works against districts with stricter permit regimes. In the worst case such a pluriform system may result in a race to the bottom in which each district decides to lower its standards controlling peoples' access to land. In developing its particular land use policy, districts may be tempted to consider only short term economic gains rather than sustainability of land use.

⁴⁰¹ i.e. city planning service: *dinas tata kota*), land service: *dinas pertanahan*, environmental impact assessment commission of the BPLHD {environmental board} and the public transportation service, which must conduct and approve traffic impact analyses {*analisis dampak lalu lintas*}.

⁴⁰² Mayoral Decree (*Keputusan Walikota Kepala Daerah Tingkat II Bandung*) 170/1999 on the process of issuing site permits to implement Ministry of Agraria/Head of BPN regulation 2/1999 on the procedure to obtain a site permit (*tatacara pemberian izin lokasi dalam rangka pelaksanaan PerMenAg/kepala BPN no.2/1999*).

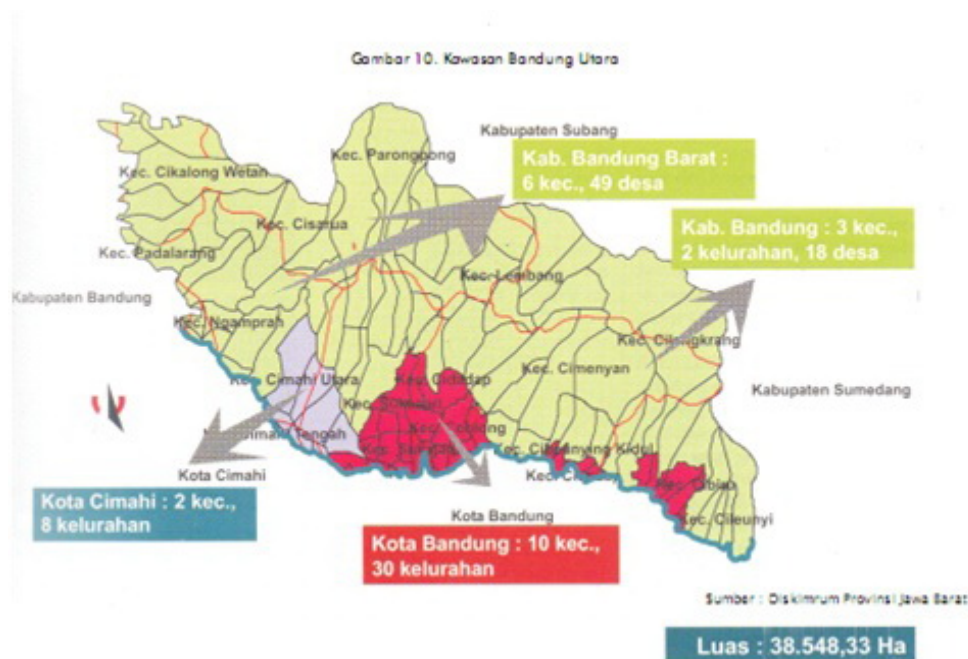
⁴⁰³ How such permits issued by the district government relates to other permits controlling access to land issued by central government agencies will be discussed extensively in Chapter VII.

The next section shows how such different permitting regimes played a role in the disputes about land use control in the North Bandung area between the provincial government of West Java and three autonomous districts.

5.4.6 Conflict and competition in controlling land use of protected areas: North Bandung

As discussed above, the West Java provincial government held the position that its spatial plan should be used by districts governments as a point of reference, but district governments – at least Bandung municipality – held a different view, referring to GR 25/2000. This is illustrated by the case of North Bandung. The West Java Spatial Plan of 2003 and its predecessor designated the North Bandung Area as a conservation area, but the newly established municipality of Cimahi (autonomous since 2001), the district of Bandung and the Bandung municipality, simply disregarded directives and limitations on land use issued by the provincial government on this basis. The joint border of the districts sharing this Area is depicted below.

Figure 5-4: Map of North Bandung Area



Instead, each district (and municipality) sharing the authority of managing the area decided to regulate land use planning for the conservation area of North Bandung according to its

individual needs. Bandung district (*Kabupaten Bandung*), pursuant to Perda Kabupaten Bandung 12/2001, declared the part of North Bandung within its territory to be a special zone (*kawasan tertentu*)⁴⁰⁴, not particularly an area designated as protected area, and accordingly allowed for the development of that area as a cultivation area. The Bandung district government in fact supported the urbanization of agricultural areas such as Lembang, Cisarua, Parongpong (after 2009 falling under the jurisdiction of the newly established West Bandung district (*Kabupaten Bandung Barat*) by allowing investors to construct hotels-restaurants within the area, and even converting fertile agricultural land (tea plantations) into luxurious residential areas. Bandung municipality's BSP 2004 determined that the part of north Bandung within its domain was a conservation area, but put aside a maximum of 20% of the area for construction and other infrastructure. Just as the Bandung district government, the Bandung municipal government seemed to be powerless to stop the proliferation of kampungs and residential areas within the North Bandung Area under its jurisdiction. In contrast, Cimahi, completely disregarded the designation of North Bandung Area as protected area by declaring the whole area under its jurisdiction, by Perda 23/2003 as cultivation area.⁴⁰⁵ To stress its point, the Cimahi government built its municipal office at the Cimahi river basin lying within the North Bandung Area, and converted much of the surrounding fertile rice fields.

This fragmentary approach to the North Bandung Area's spatial management continued well into the coming years with the splitting of the District of Bandung and the establishment of the West Bandung District in 2009. The last named did not yet promulgate a spatial plan but may well sustain the previous land use policy developed by the Bandung district.

Provincial officials were uncomfortable with the districts governments' reading of the intent of the RGL 1999 and GR 25/2000. Those interviewed considered the districts at fault for carrying newfound freedoms too far. They would speak of "autonomy spinning out of control" (*otonomi kebablasan*). The case of North Bandung, which will be discussed in detail later, indicates the uncertainty of the post-1999 situation, if there is no willingness to co-operate on the part of the various levels of government. This involves district

⁴⁰⁴ However, the District Government of Bandung contested the allegation that it did not care about the need to preserve the North Bandung Area. The Head of Development Planning Board of the District of Bandung, H.R. Wahyu G.P., pointed out that out of the 85 developers in possession of *izin lokasi* (renamed *izin pemanfaatan tanah*/land use permit) only 15 had been granted the permit by the District government. The other 70 acquired the permit during 1991-1996 from the provincial government. "90% Izin di KBU dari Pemprov" (Pikiran Rakyat, 14/08/2004).

⁴⁰⁵ "Di Era Otonomi Daerah Kawasan Bandung Utara Tercabik-cabik" (Kompas, 19 June 2004); "Konsep KBU yang Tumpang Tindih Akan Diseragamkan" (Kompas, 30 April 2005).

governments developing spatial plans in response not only to local needs but also to other concerns such as the impact of land use to neighbouring districts. Such a fragmentary approach to spatial planning of shared areas (in this case the North Bandung Area) indicates also the difficulties the central and provincial government has faced in controlling land use at the district level before and after 2004 (when the provincial and central government attempted to recentralize spatial planning authorities). Illustrative is the failure of the West Java Provincial Government in controlling land use conversion in the North Bandung Area, despite the promulgation of the (provincial) Regional Regulation 1/2008 on the Control and Utilization of the North Bandung Area (*pengendalian dan pemanfaatan ruang kawasan Bandung Utara*). Particularly worrisome is the rate of land use conversion around the Boscha Observatory (the only observatory in the southern hemisphere) which threatens its sustainable use.⁴⁰⁶

5.5. Conclusion

How the West Java provincial government and Bandung municipality responded to changes in the state and legal system reflects not only a conscious division of labour between the central, provincial and regional governments but also struggles over political and economic resources. At the core is the extent to which districts may enjoy autonomy in spatial management and development planning. The use of regional regulations to assert territorial claims and authority within administrative borders has been an important part of this struggle. The power to formulate spatial planning was delegated to the districts, which sooner or later started using the legal opportunities opened up by the RGL 22/1999 and GR 25/2000.

For a while the linkage between development permits (*perizinan pembangunan*), or spatial utilization permits (*perizinan pemanfaatan ruang*), and district spatial plans became more direct. Previously, districts only enjoyed a delegated responsibility to formulate spatial plans. In this respect, they were strictly controlled by the Ministry of Home Affairs and the

⁴⁰⁶ Bosscha observatory has been declared as national cultural heritage (by the Ministry of Culture and Tourism Decree No, KM.51/2004 and Ministry of Culture and Tourism Regulation PM.34/2008 on the protection of important national cultural objects or heritage (*pengamanan objek vital nasional di bidang kebudayaan dan pariwisata*). See further, inter alia, “KBU dan Bosscha Jadi Perhatian Pansus RUU” (Republika Online, 1 September 2006); and “Alih Fungsi Lahan, Mengganggu Keberadaan Boscha” www.bplhdjabar.go.id, 28 July 2010, last accessed 14/01/2011). Cf. “700 ha di KBU Beralih Fungsi” (galamedia online, 24 March 2009). It has been reported that in the period between 2009-2004, approximately 700 hectare of green open areas within the North Bandung Area (from the total of 38.000 hectares) had been occupied and converted to other uses.

Ministry of Public Works. As a result, district government agencies responsible for receiving and processing permit applications could avoid accountability by pointing out that it was not their decision that mattered; they simply implemented orders from higher authorities. During the brief period of 1999-2004, it was momentarily possible to hold the district government directly accountable for the process of spatial management. In other words, district governments would be directly accountable in the formulation of land use planning and the implementation thereof to the local population.

The negative side is that both the provincial and national spatial plans were completely ignored by the districts. This has been illustrated by the North Bandung Area case. Each district jointly sharing responsibility of the area may more or less with impunity disregard the provincial designation of that area as protected zone. To offset negative effects, a strengthening of the provincial position -deeply impaired by both the RGL of 1999 and GR 25/2000- should be initiated. The provincial government should have the power to intervene or to install a system whereby districts sharing the responsibility of managing a protected area may reach a consensus on how to establish a more synchronized effort at controlling land use for development purposes. Unfortunately, the way the central government has responded to such incidents has scuttled this experiment in delegating real power and authorities.

For a brief period (1999-2004), the central and provincial government seemed powerless to control the way district government realize their new found freedom in directly controlling access to land through spatial planning and the related permit system. In addition as pointed out by Hofman and Kaiser:⁴⁰⁷

“Omission of a general clause in the law to state that the local government is bound by national law (omitted because the drafting team felt it was obvious) further obscured the exact extent and nature of decentralization. This confusion was further increased by the People’s Consultative Assembly’s decree of 2000 which determined the hierarchy of laws, but omitted the ministerial decree as a legal instrument.”

⁴⁰⁷ Bert Hofman and Kai Kaiser (World Bank), “ The Making of the Big Bang and its Aftermath: A Political Economy Perspective” (paper presented at the conference: Can Decentralization Help to Rebuild Indonesia?), sponsored by the International Studies Program, Andrew Young School of Policy Studies, Georgia State University, May 1-3 2002

Unsurprisingly, the opportunity opened up by the shortcoming of the RGL 1999, has been successfully seized by districts wishing to assert their autonomy, especially in spatial management. Subsequently, the central government made a conscious effort to take back delegated powers. It not only amended the RGL 1999 by RGL 32/2004,⁴⁰⁸ but went as far as superimposing a centralized, top-down planning system on top of the newly decentralized government structure. This has caused general confusion regarding which level of government is authorized to do what and the extent to which it may be held accountable for its actions.⁴⁰⁹ The confusion stems from a tug of war between competing interests that have a concrete, material basis rather than a technical governance issue. How regional governments produce and implement spatial and development planning takes place in this context, between efforts to push decentralization forward and efforts to roll it back.

⁴⁰⁸ The reasons prompting the amendment of RGL 22/1999 and 25/1999 (fiscal balance) have been discussed by Indra J. Pilliang, Dendi Ramdani, Agung Pribadi (eds.), *Otonomi Daerah: Evaluasi dan Proyeksi*, cetakan 1, (Jakarta: CV Trio Rimba Perkasa, 2003). He argues that there is a compelling need to seek a new political and legally supported compromise between the central government, who accused the regions of carrying their new found freedom too far, and the regional government who were fighting to maintain their autonomy. Other political consideration may prompted the central government to do so. See further Fitriani, Bert Hofman and Kai Kaiser, "Unity in Diversity? The Creation of New Local Governments in A Decentralizing Indonesia," (Bulletin of Indonesian Economic Studies, Vol. 41, no. 1, 2005) p. 60-61

⁴⁰⁹ Cf. Vedi R. Hadiz, "Decentralization and Democracy in Indonesia: A Critique of Neo-Institutionalist Perspectives", (The Southeast-Asia Research Centre: Working Paper Series no. 47 May 2003) p. 705., which made a similar point in regard to decentralization.

CHAPTER VI

THE RE-ESTABLISHMENT OF THE CENTRALIZED SPATIAL PLANNING SYSTEM (2004-2010)

6.1. Introduction

The previous chapter looked at the ways in which the tumultuous years following 1999 changed the whole set-up of the spatial management system. With regional autonomy came the realization that spatial management could be used to establish borders of jurisdiction important in asserting control over natural resources and limiting the central government's interference in local affairs. At the same time, the central government tried to prevent national and provincial spatial planning from resulting in a mosaic of disparate district spatial plans. Such a district based approach would surely be inadequate in managing trans-border eco-regions, as it brought about the possibility of districts exploiting their areas without concern for negative spill-over into adjacent districts.⁴¹⁰ The central question here is how to strike a proper balance between allowing districts' self rule to prevail and the urgent need to prevent unsustainable spatial management. What kind of balance must be maintained? To what extent may the central and provincial governments restrain district self-autonomy?

In 2004, the central government decided to amend the RGL 1999 with Law 32/2004. This brought about an opportunity to revoke GR 25/2000 which had been instrumental in allowing districts to assert full autonomy in spatial planning by GR 38/2007. The Spatial Planning Law of 1992 was replaced with Law 26/2007 to the same end. A re-assertion of the hierarchical structure of spatial planning should force the readjustment of district regulations on spatial planning. In addition, it would re-establish the supremacy of national spatial planning. This attempt was justified as necessary in the interest of maintaining the viability of Indonesia as a unitary state. A parallel but related attempt was the establishment of a concomitant development planning system. This too was aimed at re-affirming the national government's power to control and influence law and policy making at the district level.

⁴¹⁰ Cf. Richard Seymour & Sarah Turner, "Otonomi Daerah: Indonesia's Decentralization Experiment" (New Zealand Journal of Asian Studies 4, 2 (December, 2002): 33-51. They argue that regional autonomy presented Indonesian development with at least six related challenges: (1) inappropriate autonomy level; (2) no improvement in fiscal autonomy; (3) lack of finance; (4) resource rich provinces favored; (5) grey areas of law; and (6) human resource capabilities and inappropriate time scale.

This chapter will discuss the central government's effort to regain lost power in spatial management and its impact on district autonomy. First, the Regional Government Law of 2004 (RGL 2004) and its implementing regulation GR 38/2007 will be analyzed. These regulations provided the framework on how authorities are distributed between the central government, the provinces and districts. This is necessary in order to assess which government level should formally be responsible for what and to what extent they can be held legally accountable. The purpose is to evaluate good governance at the local level.⁴¹¹ Following this I will discuss the new Spatial Planning Law 26/2007 (SPL 2007). An attempt will be made at identifying core problems resulting from the imposition of a new regulatory framework on the distribution of government authority in spatial planning as it had developed.

6.2. A brief experiment with autonomous district planning

Below I will briefly reiterate the legal conditions under which it was possible to develop a district based spatial planning system. In contrast with the previous chapter's discussion, only the basic contours will be highlighted. This is necessary in order to provide a proper understanding of the potential negative impact of such an approach and the strategies used by the central government to restrain the district government power in spatial management. The discussion will then turn to an explanation as to why the central government decided to roll back the decentralization of spatial management powers.

6.2.1. District's Autonomy in Spatial Planning

GR 25/2000 created an opportunity for districts to draft and promulgate individual regulations on spatial planning. In doing so, they were legally able to deliberately ignore existing provincial plans for a short time. This stemmed from the belief that district regulations should be understood as evidence of a regional autonomy. Consequently, provincial governments and the Ministry of Home Affairs lost their hierarchal position vis-à-vis the districts as based on Law 5/1974. Under this law, a district regulation would become legally binding only after having been approved by the provincial government and endorsed by the Ministry of Home Affairs.

⁴¹¹ See further H. Syaekani H.R. *Akses dan Indikator Tata Kelola Pemerintahan Daerah yang Baik* (access and indicators to good local governance), (Jakarta: Lembaga Kajian Hukum dan Kebijakan Otonomi Daerah, 2003).

This system was abandoned by Law 22/1999 and GR 25/2000. Regarding district spatial planning, the *bupati* (district head) and the *walikota* (major) would be directly responsible for planning and implementation of the approved plan and be held accountable by the district parliaments (*Dewan Perwakilan Rakyat Daerah*). The district parliament had the authority to demand accountability from the district government on how to implement the approved plan.

As a result, the provincial government lost its higher ranking position *vis-à-vis* districts. The RGL 1999 determined that provinces would retain dual status as autonomous regions and as regional representatives for the central government. As autonomous regions, the provinces would have the authority to manage certain cross-border matters beyond district authority (Art. 9 par. 1 & 2)). As representatives for the central government, the provinces would carry out certain administrative tasks delegated by the President to the governors (Art. 9 par. 3), but it is obvious that the provincial government could not override district regulations, unless it was a cross-district matter.

District autonomy was further reinforced by Law No 10/2004 which abandoned the idea that regional/local regulations should be framed in a hierarchical fashion.⁴¹² This resulted in provincial, district and village regulations having the same standing. In contrast with the Bandung Master Plan of 1986, which should be read as an elaboration of higher ranking regulations, the Bandung Spatial Plan of 2004, as amended in 2006, constitutes the realization of authentic municipality-wide responsible autonomy (*otonomi yang luas, nyata dan bertanggungjawab*). Whether this meant that local people had real voice in influencing local policy decision-making will be addressed later.

These changes may explain the rising number of provincial and spatial plans promulgated from 1999 onwards and renewed efforts at drawing up spatial plans. To illustrate this point, one may look at the list provided by the Directorate General of Spatial Planning, Ministry of Public Works.⁴¹³ It provides data – however incomplete – on the status of regional spatial plans, the year they were made, finished, and other particulars. For example, the province of West Java, encompassing 26 districts, promulgated its spatial plan in 2003 (*Perda RTRWP 2/2003*). Out of 26 districts, a few, such as Bandung municipality, promulgated their spatial

⁴¹² Law 10/2004 on the process of law making (*pembentukan undang-undang*). For a brief discussion of the hierarchy of written (formal) law see Chapter II (2.4.4.)

⁴¹³ Available at http://www.penataanruang.net/perda/daftar_perda.asp, last visited 16/06/2009.

plans before 1999. A rising number of autonomous regions (the districts of Bandung and Cimahi in addition to regions established after 1999) promulgated spatial plans after 1999. This means that these districts promulgated spatial plans without having had to go through the mechanisms established to secure conformity with higher ranking spatial plans.⁴¹⁴

Thus, for a while districts enjoyed full freedom in formulating, implementing and monitoring spatial plans. However, this power would have been meaningless unless the districts had also acquired the power to manage land affairs, specifically powers controlling access to land.

6.2.2. Districts' Autonomy in Land Affairs

From 1988 until 1999, the NLA held all authority over land and land use management.⁴¹⁵ Its authority extended beyond land administration. It also covered the formulation of land policy and the control of land acquisition for public/private interests.⁴¹⁶ To this end, the NLA created the site permit as the central government's instrument to monitor foreign/domestic investment and control investors' access to land. The process of land acquisition was to occur only if future land use conformed to existing spatial plans. This will be dealt with in later chapters.

PCA Decree 9/2001 on Agrarian Reform and Natural Resource Management and RGL 22/1999 with its implementing regulation (GR 25/2000) devolved responsibility and authority in land affairs to the districts. Consequently, a number of districts, established land

⁴¹⁴ The District of Cianjur (DR 7/1997); the District of Cirebon (DR 13/1996); the District of Kuningan (DR 6/1994); the District of Indramayu (DR 1/1997); the District of Majalengka (DR 6/1994); the District of Subang (DR 28/1996); the District of Purwakarta (DR 47/1996); the District of Karawang (DR 17/1991); municipality of Cirebon (DR 3/1985). A number of districts promulgated their spatial plans in 1999: the districts of Sukabumi (DR 10/1999) and Tasikmalaya (DR 8/1999). The rest promulgated spatial plans after the entry of RGL 22/1999 and the relevant implementing regulation (GR 25/2000).

⁴¹⁵ The NLA as established by Presidential Decree 26/1988 (on the National Land Agency) is directly answerable to the president through the state secretary. This presidential decree was amended after 1999 by Presidential Regulation 10/2006 on the NLA (BPN).

⁴¹⁶ Art. 2 & 3 of PD 26/1988 authorized the NLA to formulate policies regarding land use, land possession and ownership, land titles, mapping and registration and all other tasks delegated by the President.

administration services in an attempt to take over regional land registry offices and incorporate them into the structure of the district government.⁴¹⁷

The NLA contested the district government's move to apportion their previous authority in land affairs and succeeded in moving the central government to halting the districts' efforts at claiming land affair's authority. As a result, the President issued a decree (10/2001) on the implementation of regional autonomy in land affairs, which effectively stopped the move to devolve land affairs to the regions.⁴¹⁸ The rationale for this decision, as succinctly argued by Thorburn, was that:⁴¹⁹

“The National Land Agency (BPN), still reeling from “losing” 74% of the country's territory as a result of the Forestry Law more than three decades earlier adopted a siege mentality, refusing to entertain any discussion of revisions of the BAL or relinquish any of its remaining authority. BPN officials regard the BAL as the “holy grail” of land reform in Indonesia, and themselves as the law's guardian and champion.”

This points out how the devolution of powers to the districts was not a simple a matter of legally stating how governmental powers must be distributed. More seems to have been at play. The districts could not automatically claim the attribution of certain powers. In 2001, President Wahid issued a decree instructing the Minister of Home Affairs and Regional Autonomy to establish which powers were to be devolved to the districts.⁴²⁰ In other words, powers claimed by the districts will only be recognized on the condition that the Ministry of Home Affairs approved of the claim. This means that districts will issue regulations claiming

⁴¹⁷ The municipality of Bandung in 2000 simply determined that the NLA West Java Regional Office (*Kantor BPN Jawa Barat*) should be transformed into a municipal land service (*dinas pertanahan kotamadya*). Personal communication, Eric from the Legal Service of the Bandung Municipal government, 12 August 2003).

⁴¹⁸ Betty Akmal, “Polemik Kewenangan Pertanahan pada Era Otonomi Daerah” (Pelita, May 2003). After 1999, the central government issued 3 Presidential Decrees (10/2001; 62/2001 and 103/2001) stipulating that the central government (NLA) shall temporarily hold all authority in land affairs until 31 May 2003 pending the promulgation of a regulation on land affairs. At that time, the President promulgated another decree distributing land authorities between the NLA and the districts, i.e. Presidential Decree 34/2003. Cf. Susie Berindra, “Pertanahan: kewenangan yang diperebutkan” (Kompas 16 Juni 2006) & “Penyerahan Kewenangan Bidang Pertanahan dari Pusat ke Daerah Masih Setengah Hati” (Pelita, 6 April 2008).

⁴¹⁹ Craig C. Thorburn, The plot thickens: Land administration and policy in post-New Order Indonesia, (Asia Pacific Viewpoint, Vol. 45, no.1, April 2004), pp. 33-49.

⁴²⁰ Presidential Decree 5/2001 on implementing the recognition of municipal/district attributed or delegated authorities (*tentang Pelaksanaan Pengakuan Kewenangan Kabupaten/Kota*).

which powers it shall apportion and subsequently request the Ministry of Home Affairs to endorse. Article 2 of *Perda Kota Bandung 2/2001*⁴²¹ provides that the municipality of Bandung's authority comprises of 11 obligatory and 13 additional powers as adjusted to its capability. Part of this regulation is a mayoral decree which lists and describes all authorities it has claimed under the RGL.⁴²²

Although in violation of RGL 1999, this suggests that the delegation of attributed authorities to the districts may be put on hold or even rescinded by the central government, as was the case with power in land affairs. By virtue of Presidential Regulation 34/2003 authorities regarding the land sector were to be distributed between the NLA and the districts.⁴²³ However, the district freedom in the determination of land use through spatial planning did not last long. The central government became worried about districts disregarding national interests. Government officials at the provincial and district level spoke out about *otonomi yang kebablasan* (autonomy spinning out of control).⁴²⁴ This was the main message of a statement made by governors all over Indonesia in July 2003 arguing that:⁴²⁵

“Current conflicts in land use (spatial utilizations) may escalate into a full scale conflict of interest between the national interest and the interest of the districts”

⁴²¹ Bandung municipal regulation (*Peraturan Daerah Kota Bandung*) 2/2001 on the authorities the Bandung municipality possesses as an autonomous region (*tentang Kewenangan Daerah Kota Bandung sebagai Daerah Otonom* (7 March 2001).

⁴²² Bandung Mayoral decree (*Surat keputusan Walikota Kepala Daerah Tingkat II Bandung*) 2/2001. In the land service section, the municipality claimed authority to regulate, manage, control, reserve and allocate land for development programs in the interests of society, individuals and corporations; issuance of site permits, extensions and permits for land conversion, including all other tasks and responsibilities previously held by the NLA, such as land administration and the granting and cancellation of land rights.

⁴²³ Presidential Regulation 34/2003 on national policy in the land sector (*kebijakan nasional di bidang pertanahan*), which prompted the issuance of the Decree of the Head of the NLA 2/2003 on the norms and standard mechanisms for the implementation of the central government's authority in land affairs as performed by (*yang dilaksanakan oleh*) the regional governments. For comments, see Arie Sukanti Hutagalung & Markus Gunawan, *Kewenangan Pemerintah di Bidang Pertanahan*, (Jakarta: Radjawali Press, 2008).

⁴²⁴ As conveyed by a number of government officials at the provincial level interviewed. Rudy Gandakusumah, head of the legal division of the West Java provincial government, complained about the difficulty of asking district heads to meet with the Governor to discuss governmental affairs (10 August 2005). Likewise, Tita Pathi, from the Directorate of Public Works for the West Java Province, complained about the districts deliberate disregard for directives on land use restrictions issued by her office (personal communication, 16 May 2005).

⁴²⁵ Agreement made by governors in Indonesia at a national workshop organized by the National Spatial Planning Coordinating Board (*kesepakatan Gubernur seluruh Indonesia pada Rapat Kerja Nasional Badan Koordinasi Tata Ruang Nasional*), (Surabaya 14 July 2003).

Implicitly, they referred to the mis-management of the buffer zone surrounding the capital city of Jakarta by surrounding districts. The deforestation and urbanization of the Puncak highlands were pointed out as the primary cause of periodical flooding in Jakarta and the surround region.⁴²⁶

The continued and increasing rate of deforestation and environmental degradation on Java and outer regions also gave weight to this argument. This was attributed to the districts' inability to a control massive land grabbing on the part of both local people and outsiders and, moreover, the exploitation of natural resources previously under tight control of the central government.

In an effort to strengthen the central government's position and implement the above Presidential Decree 34/2003, the NLA issued a binding directive addressed to district government officials. The directives contained guidance on how the districts should interpret and implement rules and regulations issued by the NLA, such as ministerial regulations or decrees.⁴²⁷ Nevertheless, even this was not considered enough. The President issued Presidential Regulation 10/2006 on the NLA, stipulating that land affairs would once more be managed directly by the NLA as a central government body.⁴²⁸ Among the powers attributed to the NLA was the authority over land management, agrarian reform and management for special areas (*pelaksanaan penatagunaan tanah, reformasi agrarian dan penataan wilayah-wilayah khusus*, art. 3 (h)). No further information is available on what exactly *penatagunaan tanah* means and to what extent it relates to spatial planning.⁴²⁹ Regarding the control of the

⁴²⁶ This strengthened the perception that central government intervention was necessary, also in light of overlapping spatial plans. See "Kawasan Puncak, Kab Bogor Masih Sarat Masalah". (Harian Umum Pelita, 12 September 2007). The district of Bogor allegedly promulgated Perda 17/2000 (RTRW Kabupaten Bogor) as implementing regulation of a Government Regulation 47/1997 which declared the area encompassing Bogor-Puncak-Cianjur as providing protection to adjacent regions (West Java and Jakarta). Cf. "Penataan Kawasan Puncak Harus Terkoordinasi" (Pelita, 16 January 2009). One member of the Parliament of the District of Bogor, Taufik Masduki, points out that the legal basis for the spatial management of Puncak is currently provided by President Regulation 54/2008 on the management of Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak and Cianjur (*penataan kawasan Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak and Cianjur*).

⁴²⁷ Head of the NLA's decision 2/2003 on norms and standard mechanisms for the performance of delegated land authorities to the districts (*tentang Norma dan Standar Mekanisme Ketatalaksanaan Kewenangan Pemerintah di Bidang Pertanahan yang Dilaksanakan oleh Pemerintah Kabupaten/Kota*).

⁴²⁸ Presidential Regulation (10/2006) has been criticized as being in violation of Law 32/2004 on regional government. See "Perpres BPN Bertentangan dengan UU Pemda" (Suara Karya, 20 Mei 2006); Cf. Usep Setiawan, "Krisis Kelembagaan Pertanahan? (Catatan atas Kontroversi Perpres No. 10 tahun 2006 tentang BPN)" (hukumonline.com, 28/7/06).

⁴²⁹ According to Soemardjito, working at the NLA Office in Jakarta, *tata guna tanah* or *penatagunaan tanah* simply refers to *tata ruang* or *penataan ruang* (spatial management). (personal communication, 17 February 2009) A special body has been established to take care of this authority. See: the NLA official website;

acquisition of land by private entities, it meant that the NLA was once more a member of the team evaluating and approving site permit applications as it once was before 1999.

Below, I will discuss how the central government also successfully re-distributed power in an attempt to restrain the districts' tendency to assert their autonomy in spatial management by amending the regional government law and subsequently drawing up a new implementing regulation.

6.3. Re-establishing provincial governments' status

From the central government's point of view, the main problem was how to monitor what district regulations were promulgated and their consistency with national laws and policies. The existing mechanism of judicial review by the Supreme Court⁴³⁰ or executive review by the Ministry of Home Affairs⁴³¹ were considered insufficient. Those mechanisms, furthermore, may only be utilized after the promulgation of such regulations. It cannot prevent the adoption and implementation of district regulation inconsistent with national policies and regulations. Instead, the central government decided to embark upon a strategy to recentralize devolved powers through legislative engineering, namely by amending the RGL 1999 and any related (and existing) implementing regulations.

<http://www.bpn.go.id/tentangbpn.aspx>. On reading Presidential Decree 34/2003, he also proposes that this particular authority in land affairs (*tata guna tanah*) be held by the provinces and districts. See Soemardjito, "Kewenangan Bidang Pertanahan di Era Otonomi Daerah" (Suara Merdeka, 21 May 2005).

⁴³⁰ See Law 14/1970 as amended by Law 4/2004 on Judicial Powers. Cf. Law 14/1985 on the Supreme Court as amended by Law 5/2004. Art. 26(1) of Law 14/1970 (Art. 11(2) of Law 4/2004) confers the power to invalidate all regulations ranked below the law (*undang-undang*) to the Supreme Court on the finding that such regulation contradicts higher ranking regulations. Regarding the question of how to invoke judicial review see: Supreme Court Regulation (*peraturan MA*) 1/1993 jo. 1/1999. A different form of judicial review is conferred to the Constitutional Court established by virtue of Law 24/2003. The Constitutional Court may review any law against the 1945 Constitution.

⁴³¹ Executive review refers to the power of the central government (the president and/or ministry of home affairs) to invalidate regional regulations (at the provincial, district or village level) which have been found to conflict with higher ranking regulations or endanger the public interest. See Art. 136 par.(3) and (4) Law 32/2004. The same article also lays down the principle that any regional regulation should be understood as an elucidation (*penjabaran lebih lanjut*) of higher ranking laws. For comments and the practice of executive review see: "738 Perda dan S Quanon Batal" (Kompas 27 June 2008); "Problem Hukum Pengujian Perda: Berangkat dari Pembatalan Perda Privatisasi Rumah Sakit (www.hukumonline.com, 22/06/2006); Perda Dibatalkan Lewat Perpres atau Kepmendagri (www.hukumonline.com, 23/06/2006).

6.3.1. The Law on Regional Government

The primary tool to achieve this was the Regional Government Law 32/2004 (RGL 2004). GR 25/2000, which brought about the mosaic of diverse and conflicting district spatial plans, was also revoked.

Officially, the new version of the RGL (32/2004) was promulgated to keep up with changing laws.⁴³² A number of things happened in the period between 1999 and 2003. The 1945 Constitution was amended four times. The People's Consultative Assembly issued a number of decrees related to regional government and autonomy. The central government promulgated laws regulating general elections. All of these legislative changes influenced the decision to amend the RGL 1999.⁴³³

However, the RGL 2004 also served as a legal instrument for re-arranging the balance of power through its redistribution of authorities between the central, provincial and district governments. It was arguably made as an attempt to remedy problems related to the lost standing of central and provincial governments. While the RGL 1999 was in force, the provinces in particular suffered in their loss of power to the districts, which previously ranked lower in the government hierarchy.⁴³⁴ Part of the problem was due to the fact that the RGL 1999 envisaged provinces merely as a sort of government in reserve whose task was to handle trans-district issues and other affairs the districts could not perform (*kewenangan yang tidak atau belum dapat dilaksanakan oleh daerah kabupaten dan kota*). Additionally,

⁴³² Law 32/2004 was again amended in 2005 by Law 8/2005.

⁴³³ See the General Elucidation to the Regional Government Law (32/2004). Curiously, it was the RGL 1999 which forced the amendment to article 18 of the old version of the 1945 Constitution in the first place. However, the new article 18 seems to have been made on the basis of a different conception of regional autonomy, which necessitated an amendment to the existing regional government law. Cf. Bagir Manan, *Perkembangan UUD 1945* (Yogyakarta: FHUII Press, 2004), pp. 35-38. The People Consultative Assembly's decrees referred in the elucidation are, Nos.4/2000 (recommendation on the implementation of regional autonomy); 6/2002 and 5/2003 (both containing recommendations to report made by the president and other state bodies). In regard to what laws were influential, the elucidation named: Law 12/2003 (general election for parliament members and regional representatives); Law 22/2003 (on the status and position of the People's Consultative Assembly, Parliament, Regional Representative Body (*dewan perwakilan daerah*) and regional parliaments); and Law 23/2003 (general election to choose president and vice president).

⁴³⁴ A complaint often heard and voiced by government officials in the West Java province. Personal communication with: Rudy Gandakusuma, Legal Officer at the West Java Provincial Government (10 August 2005); Suharsono, head of the West Java Bapedalda (Environmental Impact Monitoring Board) (15 August 2005) and Wisandana (officer at the environmental service of the West Java Province) (2 September 2005). Even officials from the districts (at the legal service of Cimahi Municipality) have admitted that regional autonomy has failed to clarify the status and position of provincial governments (May 2004). Cf. Pheni Chalid, *Otonomi Daerah: Masalah, Pemberdayaan dan Konflik* (Jakarta: Partnership, 2005), p. 12; 114-150.

the law was unclear as to when and how to decide that certain matters are beyond a district's authorities or capabilities.

The remedy offered by RGL 2004 is a re-affirmation of the provincial governments' position as a solution. This was accomplished by devolving governmental duties (*urusan wajib*) similar to those assigned to the districts to the provinces. As listed by Article 13 par. 1 of RGL 2004, the province now possesses authorities in development planning and spatial management, similar to those attributed to the districts. Article 14 uses the same formulae to determine the scope of district authorities. This raises the question as to how to avoid overlapping and competing duties and how to synchronize law making at the various government levels.

6.3.2. Maintaining and Securing Synchronized Law-Making

The drafters of the RGL 2004 seem to have been primarily concerned with how to control and monitor districts, actions and performance. The RGL 2004 posits that district and provincial regulations are to be understood as elaborations of higher ranking laws. They should take local uniqueness into consideration (Art. 136 par. 3) as long as this is not contrary to the public interest and/or higher ranking laws and regulations (Art. 136 par.4). Violation of this rule shall empower the president to revoke errant regional regulations (Art. 145). The law also establishes that any objections to the presidential regulation (*peraturan presiden*) revoking regional regulations (*peraturan daerah*) shall be addressed to the Supreme Court, which holds ultimate authority in this matter (Art. 145).

Accordingly, the central government may directly revoke a district or provincial regulation it deems contrary to higher ranking laws or to the public interest (in addition to the authority it has in utilizing the executive review procedure). This is not without problems. As Ashiddiqie correctly points out, the central government should not have the power to invalidate regional regulations, considering that they have been formed as a consensus between the government concerned and its partner, the regional parliament. Such power is best performed by the Supreme Court on the basis of his of reading Art. 24(a) of the 1945 Constitution.⁴³⁵

Furthermore, RGL 2004 restored the mechanism of prior approval as a condition for provincial and district governments promulgating regional regulations. This control mechanism is applied to regulations concerning the provincial and district annual budget

⁴³⁵ Jimly Asshiddiqie, *Hukum Acara Pengujian UU* (Jakarta: SekJend MK, 2006), pp. 37-39.

plan (Art. 185-186). These articles authorize the governor to evaluate draft regulations against higher ranking laws (the provincial regulation and/or the Minister of Home Affairs' decrees or decisions) or the public interest. If the governor or Minister of Home Affairs' consideration is ignored and the province/district proceeds to promulgate the draft into a binding regulation, such regional regulations may be revoked by issuing a governor or ministerial decree. The above rule is declared, *mutatis mutandis*, applicable in regard to local taxes/revenues and spatial planning drafts (Art. 189). The same article also establishes a prior consultation mechanism applicable to law making at the district level. In case of draft *perda* pertaining to local taxes and revenues, the district should consult with the Minister of Finance. In regard to law making in spatial planning the provincial/district government must first consult with the Minister having competence in spatial planning. This prior consultation process did not exist during the 1999-2004 period and indicates an attempt at re-strengthening the central government's control over districts. The move to re-assert the higher ranking of central and provincial governments was further refined in the RGL 2004 implementing regulation GR 38/2007.

6.4. Re-introducing Top-Down Development Planning

The deeper significance of the attempt to re-assert the government's hierarchal legal system cannot be fully determined without relating it to how the implementing regulation of the RGL 2004 distributed powers between the central, provincial and district governments. The focus will be on how powers in development, spatial planning and land affairs were to be regulated. This will reveal that GR 38/2007 went even further in subverting the spirit of regional autonomy.

6.4.1. No change in development thinking and strategy

The abolition of the People's Consultative Assembly's status as the highest state organ seems to have had little consequence on the importance of top-down centralized planning. The Assembly lost its authority to produce national development guidelines which the government was to translate into development policies to be elaborated upon by provincial and district/municipal spatial plans. This was made clear in the last People Consultative Assembly' Decree on national development policy promulgated in 1999.⁴³⁶ The responsibility

⁴³⁶ PCA Decree 4/1999 on the Broad Guidelines of State Policies (GBHN) of 1999-2004.

to make development planning became decentralized as well and was devolved to the autonomous regions. Regardless of this change, the central government interpreted the above decree as a legal basis to promulgate Law 25/2000 on the National Development Program (*Program Pembangunan Nasional/Propenas*) 2000-2004 which the autonomous regions must implement.

The development system, as envisaged in Law 25/2000, provides the basis upon which the central government formulates its annual development planning, including the annual budget plan. A similar system has been developed at the provincial and district level, where a Regional Development Program (*Program Pembangunan Daerah*) shall be used as a reference in formulating the regional annual development planning. Law 25/2000 has been replaced by Law 25/2004 on the National Development Planning System (*sistem perencanaan pembangunan nasional*) which provides a more durable legal basis for a top down and centralized development planning system.

The consideration of Law 25/2004, echoing previous MPR decrees on state guidelines for national development policy (*garis-garis besar haluan pembangunan/GBHN*), emphasizes the importance of economic development. It goes further in asserting that the president's duty is to formulate both development and spatial planning policy and turn them into binding law (Art. 32) which must be elaborated by regional governments into planning documents.

The most important development planning documents in Law 25/2004 are:⁴³⁷

- (1) The long term development planning (*rencana pembangunan jangka panjang/RPJPP*), valid for 20 years; which must be translated into:
- (2) Mid-term development planning for a period of 5 years (*rencana pembangunan jangka menengah/RPJMM*). The five year plan must be transformed into more detail by:
- (3) Mid-term development planning formulated by each ministry or government institution (*RPJM Kementrian/Lembaga*); this document shall be valid for 5 year and comprise the institution's strategic planning (*Rencana Strategis/Renstra*); and by:
- (4) Mid-term development planning formulated by regional government agencies or services (*RPJM Satuan Kerja Perangkat Daerah/Renstra SKPD*; strategic planning valid for 5 years).

⁴³⁷ For a short discussion on the development planning system established under Law 25/2004 see: Rommy Sautma Hotma Bako, "Sistem Perencanaan Pembangunan Nasional Indonesia", (Law Review, Fakultas Hukum Universitas Pelita Harapan, Vol. VIII, no. 3 March 2009): 490-504.

In turn, these mid-term development planning documents must be elaborated into short term planning documents:

- (1) The annual national development plan or the central government work plan (*Rencana Pembangunan Tahunan/RPT*) or *Rencana Kerja Pemerintah (RKP)*, which form the basis for the annual work plan for ministries and other governmental bodies.
- (2) The annual regional development plan (*RPT Daerah*), which forms the basis for an annual work plan for each regional government service or body.

The Long Term Development Plan 2005-2025 made on the basis of Art. 13 par(1) of Law 25/2004 was promulgated by Law 17/2007 (*Rencana Pembangunan Jangka Panjang Nasional*). The President, elaborating upon the Long Term National Development Planning (*rencana pembangunan jangka panjang*/20 years) and pursuant to article 32, promulgated the Middle Term National Development Planning (*Rencana Jangka Menengah Nasional tahun 2004-2009*) (Presidential Regulation 7/2005).

The Presidential Regulation of 2005 also regulates how national and regional development planning ought to be synchronized. A central role is to be played by the governor. Art. 33 (4) of this regulation stipulates that the governor's task, in his dual position as head of the province and representative of the central government, is to coordinate, integrate, synchronize and synergize development planning made by provincial and district governments. Likewise, Art. 150 of the 2004 Regional Government Law insist that regional development planning should be integrated into the national development plan. One additional legal instrument to force such integration is the Minister of Home Affairs' executive review power.

Law 25/2004 established a national development planning system (*sistem perencanaan pembangunan nasional*) which made previous People's Consultative Assembly decrees on state policy and national development redundant. The law purports to establish a procedure for the formulation of long, middle and short term development planning resembling the previous system of top-down development planning. The Minister of Home Affairs reinforced this approach with a circular letter addressed to Governors, Heads of the Provincial Parliaments, Mayors and District Heads and local parliaments.⁴³⁸ It reminded the provincial and district governments of their obligation to make medium and short term development planning documents in order to integrate, synchronize and harmonize such documents with

⁴³⁸ Letter 050/2020/SJ dated August 11, 2005

national development planning. Additionally, every draft of provincial and district regulations pertaining to said medium and short term development planning must be reviewed by the Ministry of Home Affairs (Directorate General of Regional Development Supervision (*Dirjen Bina Pembangunan Daerah*) or the governor. It also provided a detailed directive on how to formulate such documents and a list of items to be regulated by them. Notwithstanding its status as a circular letter, one should not easily dismiss its legal implications as the minister holds the authority to monitor, evaluate and revoke provincial or district regulations (*Perda*) found inconsistent with higher ranking laws and regulations.

In order to provide provincial and district governments with guidance on how to draft and implement development plans, the government promulgated GR 39/2006 and GR 40/2006. These were followed by a circular letter from the Minister of Home Affairs (050/2020/SJ dated 11 August 2005) regarding directives in the making of Regional RPJP and RPJMs (*petunjuk penyusunan dokumen RPJP Daerah dan RPJM Daerah*).

Clearly, development planning is to be tightly monitored by the central government. It seems that nothing has been left to chance. How has this centralized system been further transformed by GR 38/2007 which is based on the Regional Government Law?

6.4.2. The District's authority in Development Planning

GR 38/2007, the implementing regulation of the RGL 2004, re-affirms the need to secure synchronization in development planning at different levels of government. In section F of the above GR, the central government retains the power to formulate general planning policies, which translates into the authority to issue authoritative guidance on:

- (a) Formulation and standards for planning,
- (b) Implementation and supervision mechanisms addressed to the regions;
- (c) Consultation and supervision
- (d) The monitoring and evaluation of development programs the implementation.

All the authoritative guidance pertaining on this matter issued by the central government are officially non-binding, but that is not how government officials at the district and provincial levels perceive them.

In effect, regional development planning has returned to its former position of elaborating national development planning. It is no longer the result of democratic deliberation between the executive branch of the government and local parliaments. It contains no district vision on how to develop its potential. The participation of local people is not considered necessary and should not hinder the formulation and realization of development planning and programs. Development planning thus marginalizes public participation and ignores democracy at the local level.

This being said, I have to mention the existence of the development planning consensus (*musyawarah rencana pembangunan (musrenbang)*), a forum initiated by the government to promote public participation and involvement in development planning.⁴³⁹ However, this *musrenbang* was reduced to a forum where community representatives were invited to submit a list of local development initiatives in daily practice. There was no guarantee that their wish would be adopted into formal development planning.⁴⁴⁰

Considering the interconnectedness of development and spatial planning, important is also to note how GR 38/2007 regulates the distribution of spatial planning authorities between central and regional governments.

⁴³⁹ This process involved an annual forum at different levels to seek a consensus on what programs to include in their annual development planning. This was a part of the system developed under the Law 25/2004 on national development planning. Guidance and directives on how to conduct such *musyawarah* at all levels, from village to the district and provincial, was provided by the National Development Planning Board and the Ministry of Home Affairs. See Ministry of Home Affairs Decree 050-187/Kep/Bangda/2007 concerning the guidance to evaluate the implementation of the development planning consensus (*pedoman penilaian dan evaluasi pelaksanaan penyelenggaraan musyawarah perencanaan pembangunan*). How such consensus in planning should be achieved was regulated by the Ministry of Home Affairs jointly with the Head of the Bappenas/State Ministry of National Development Planning.

⁴⁴⁰ In practice, the process seems not to have succeeded. “The consensus building has been a failure, “Hanya pro-forma”, as argued by Koerniatmanto, a professor in law at Unpar (personal communication, August 20, 2006). A similar view is held by Asep Warlan Yusuf, (personal communication, August 20, 2006). But it seems that the failure of the *musrenbang* is also noted by Bappenas. See: Wicaksono Sarosa, Misbahul Hasan and Ari Norman, Making People’s Voice Matter: An Analytical Study on District Planning and Budgetting, Final Report, (Jakarta: Badan Perencanaan Pembangunan Nasional (Bappenas) & Decentralization Support Facility (DSF), 2008. The report stated that “(...) the quality, coverage and level of participation of the Musrenbang are generally still limited. This has resulted in the overall process being unable to collect and channel the actual aspirations of the people. The participation of non-government stakeholders also tends to be low and limited to the ‘local elites’ or those who happen to have access to the processes” (2.11, p. 17).

6.5. GR 38/2007 and the distribution of (spatial) planning powers

GR 38/2007 replaced GR 25/2000 because the latter put too much emphasis on district autonomy in spatial management. As an implementing regulation of the RGL 2004, it has established an elaborate scheme regarding the distribution of powers to the central, provincial and district levels. There are 26 government affairs which have to be managed (*urusan wajib*) by the provinces and districts⁴⁴¹ and 8 government affairs which are optional (*urusan pilihan*).⁴⁴² Here, I will only discuss two important issues related to spatial management and land affairs.

6.5.1. The Provincial and District government's authority in spatial management

Section E of the attachment to GR 38/2007 (on the distribution of powers in spatial management) makes it clear that the provincial and district governments possess similar powers in spatial management.⁴⁴³ An excerpt from this list regarding the distribution of spatial management power (planning, implementation and oversight) between the central government, the province and district is provided below

⁴⁴¹ Comprising of (Art.2 par(2): (1) education; (2) health; (3) environment; (4) public works; (5) spatial planning; (6) development planning; (7) housing; (8) youth and sports; (9) investment; (10) co-operation and small-medium scale economic enterprises; (11) civil registrar; (12) labour; (13) food security; (14) women empowerment and child protection; (15) population control; (16) transportation; (17) communication and information management; (18) land administration; (19) national unity and internal politic; (20) regional autonomy, general government affairs; regional finance administration, regional government bodies, civil service; (21) community and village empowerment; (22) social affairs; (23) culture; (24) statistics; (25) archives; and (26) library.

⁴⁴² Comprising of (Art. 7 par.(4)): fishery; agriculture; forestry; energy and mineral extraction; tourism; industry; trade and transmigration.

⁴⁴³ A complete version of the GR 38/2007 (with attachment elaborating the distribution of powers between the central government and the provinces/districts) has been made available by Tim Redaksi FokusMedia, Pembagian Urusan Pemerintah Antara Pemerintah, Pemerintah Daerah Provinsi dan Pemerintah Daerah Kabupaten/Kota (Peraturan Pemerintah RI no. 38/2007), (Jakarta: FokusMedia, 2007).

Table 6-6: Distribution of spatial management powers

Central Government	Provincial	District
Formulation of: 1. National Spatial Plans (RTRWN); 2. Spatial Plan of National Strategic Areas; 3. detailed spatial plan for the RTRWN	Ibid, for: 1. Provincial Spatial Plans (RTRWP); 2. Spatial Plan for Provincial Strategic Area; 3. Detailed Spatial Plan for the RTRWP	Ibid, for: 1. District Spatial Plan (RTRWK). 2. Spatial Plan for District Strategic Area; 3. Detailed Spatial Plan for the RTRWL
Control and Monitoring of spatial utilization (land use) at the national level including cross provincial affairs (and national strategic areas) Formulation of zoning regulations as directives in controlling land use at the national level	Ibid, within the provincial borders including district cross border affairs (and strategic areas) Ibid, in controlling land use at the provincial level.	Ibid, within the district borders including those within the district strategic areas. Ibid, in controlling land use at the district level.
Granting of spatial utilization permits (<i>izin pemanfaatan ruang</i>) in accordance with RTRWN Revocation of permits not in accordance with RTRWN	Ibid, in accordance with RTRWP Ibid, not in accordance with the RTRWP	Ibid, in accordance with RTRWK. Ibid, not in accordance with RTRWK
In the event a province fails to properly promulgate a spatial plan, the central government is authorized to over-ride the provincial government and take over.	Ibid, in the case districts fail in spatial management.	-

While this scheme avoids creating the impression that district spatial planning is merely an elaboration (*penjabaran*) of similar documents, a thorough reading clearly suggests the existence of a strict spatial planning hierarchy. The formulation and implementation of district spatial planning is monitored by the provincial government and those of the province by the central government. Part of the monitoring process involves the power to take over planning authorities (*pengambilalihan kewenangan*) in the event that the central (or provincial) government regards the lower government units as incapable of meeting the minimum service provisions in spatial planning (*standard pelayanan minimal di bidang penataan ruang*) determined by the central government. In this way, the central or provincial government may decide to side line the district spatial planning.

Another way to do this is by imposing limits to the planning area of the districts. Just as in the old SPL (24/1992), the central government has reserved the power to determine national strategic areas within the administrative jurisdiction of provinces and districts. A very important possibility opened up by the GR 38/2007 is that the central and provincial governments can “over-rule” the districts by designating certain areas as strategic or prioritized. Such areas are thus literally taken out of the districts’ jurisdiction and directly managed by the provincial or central government. It also means that the districts must wait until the provincial and central governments have finished promulgating their spatial plans, which include the spatial plan for strategic/prioritized areas, before drawing up their own. The districts may only provide spatial planning for areas within their administrative borders not claimed by the provincial or central government.

Regarding the power to revoke permits, particularly the site permit, GR 38/2007 in its Attachment Land Affair Section, no. 1; sub-sector site permit, [h]), stipulates that the revocation of site permit shall be done at the initiative of the provincial government with the consideration of the head of the NLA’s regional office at the provincial level. GR 2007 only focuses on this particular permit. It does not provide further information regarding which government agency has the power to revoke other spatial utilization permits.

Apparently the GR’s scheme on the structure of spatial planning refers to a different notion of government structure than envisaged in the Regional Government Laws of 1999 and 2004. In this GR, each government unit is perceived as possessing overlapping authorities in spatial management. The central or provincial government may even decide to take over those authorities from autonomous districts. Each government unit also holds similar powers in regulating access to land through the use of spatial utilization permits. As mentioned earlier, influential in this context is how the power in land management is further re-distributed.

6.5.2. Redistribution of powers in land affairs

The Regional Government Laws of 1999 and 2004 are both very clear on the point that districts possess the authority to manage land affairs. Art. 14 par.(1) of the 2004 Law clearly stipulates that districts shall have the authority (*urusan wajib*) in:

- (a) Development planning;
- (b) Spatial management: planning and implementation of oversight
- (c) Land affairs or services (*pelayanan pertanahan*).

However, in legal practice, it does not automatically translate into the districts being empowered fully to manage land affairs within its administrative borders. The central government, hesitant to release its hold on land affairs, decided to promulgate an implementing regulation, elaborating on how land use management powers should be delegated. Pursuant to Art. 2 of Presidential Regulation 34/2003, districts possess the authority to:

- (1) Issue site permits (*izin lokasi*);
- (2) Conduct land acquisition in the public interest (*kepentingan pembangunan*);
- (3) Settle disputes related to cultivated land (*tanah garapan*);
- (4) Settle compensation issues in regard to land acquisition for development;
- (5) Determine land to be re-distributed and who may benefit from it, and decide the amount of compensation in cases of land redistribution (for absentee land holders and those possessing land above the allotted maximum amount);
- (6) Award recognition and settle disputes in regard to indigenous communities claims on land;
- (7) Settle disputes and conflicts arising out of the use of empty land;
- (8) Process and grant licenses to open up land
- (9) Draw up district land use planning (*penatagunaan tanah*).⁴⁴⁴

Accordingly, not all powers in land affairs are devolved, notably the power in land administration related to land titling still falls under the central government's exclusive

⁴⁴⁴ See Government Regulation 16/2004 on land use (*penatagunaan tanah*). This GR should be read as implementing the directive contained in art, 16 par.(2) of Law 24/1992 (spatial planning law). The purpose of land use policy is to regulate land possession (*penguasaan*), use (*penggunaan*) and utilization in the interest of development as determined by existing spatial plans (Art. 3). For a more elaborate explanation on how spatial plans should be translated into land use policy by the NLA or district governments, see: H. Muchsin & Iman Koeswahyono, *Aspek Kebijaksanaan Hukum Penatagunaan Tanah dan Penataan Ruang*, (Jakarta; Sinar Grafika, 2008).

jurisdiction. Such a strategy seems to serve the central government's decision in maintaining the NLA's central position in land administration⁴⁴⁵.

Confusingly, GR 38/2007 as implementing regulation of the RGL 2004 begins with the assumption that these nine authorities should also be attributed to the central and provincial governments.⁴⁴⁶ It might be that this ruling relates to the fact that each government level (central, provincial and districts) possesses similar authorities in spatial management, but with the central and provincial government having power to override district spatial management powers. What is also means is that each government level holds authority to issue spatial utilization permits. Each unit within their respective "jurisdiction" may allow private entities to acquire land through this permit. In other words, the power to determine who gets access to land is shared by the central, provincial and district government.⁴⁴⁷

Given the districts' authority in land affairs mentioned above, it seems strange that they do not have the power to develop individual development schemes or issue land use permits, but have to adopt the scheme developed by the NLA. Bandung municipality did not make any changes to a Mayoral Decree (170/1999) declaring the applicability of the procedure for the site permit application as established in the Ministry of Agraria/Head of NLA regulation on site permit (2/1999). In contrast, the DKI Jakarta's site permit scheme is different.⁴⁴⁸ The governor of DKI Jakarta has promulgated his own regulation, Governor of DKI Jakarta Decree 540/1990 and 138/1998, to allow investors to acquire land and thus control the process of land acquisition within its borders.

A similar scheme underlies the way the other eight powers listed above have been distributed between the central, provincial and district governments. In this system, the central government holds the authority to determine the national policies and norms to be applied by the provinces and districts.

⁴⁴⁵ This may explain the promulgation of Presidential Regulation 10/2006 on the NLA which affirms its previous authority in land management and administration.

⁴⁴⁶ The attachment to GR 38/2007, sub section I "distribution or division of government authorities in managing land (*pembagian urusan pemerintahan di bidang pertanahan*). pp. 215-226.

⁴⁴⁷ A similar trend of recentralizing power in land affairs and spatial management is observable also in the forestry sector. See further: Ribot, J.C.; Agrawal, A.; Larson, A.M., "Recentralizing while decentralizing: How the national government reappropriates forest resources", *World Development* Vol. 34(11), 2006.

⁴⁴⁸ See B.F. Sihombing, *Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia* (Jakarta: Gunung Agung, 2005). This book discusses how the special district of Jakarta regulates and controls land acquisition within its administrative borders.

The ways in which powers concerning land acquisition in the public interest have been distributed is important in relation to the implementation of spatial planning. The districts and provinces hold the authority to determine which areas are to be allocated for development in the public interest, establish committees for land acquisition and land appraisal, determine and supervise the implementation of compensation, settle disputes and oversee the dispossession of land owners. However, the central government, as indicated above, retains the power to guide (*pembinaan*), control (*pengendalian*) and supervise the land acquisition process as conducted by provincial and district governments.

The attribution of all nine powers in land affairs depends on the condition that each government level has formulated and implemented a spatial plan. This should be an incentive for the districts, provincial and central government to promulgate their own. Districts need one to be able to determine people's access to land and control land acquisition. The interests of the central and provincial governments may be similar to the districts, with the added incentive that their own can be used to limit districts' power in land use. This brings us to the last part of this chapter regarding how Spatial Planning Law 26/2007 distributes powers in spatial management between the central, provincial and district governments.

6.6. The Spatial Planning Regulatory Framework Law 26/2007

With the promulgation of the regional government laws of 1999 and 2004 and related by-laws, the need arose to amend SPL 1992. The central government promulgated a new spatial planning regulatory framework law (26/2007; SPL 2007) on 26 April 2007. What kind of system would be established by the SPL 2007? And, most importantly, would it reflect a different approach to development issues?

A complete break with the past did not occur.⁴⁴⁹ Government thinking about the development regime, except in regard of the insertion of the *musrenbang* system, did not seem to change much after the New Order. As discussed above, centralized, top down development planning in general was preserved in a slightly different form. A paper by the Directorate General of Spatial Planning discusses the extent to which the Indonesian spatial planning and regional development planning systems still follow development theories from

⁴⁴⁹ See, for instance, Haryo Winarso, Pradono, Denny Zulkaidi & Miming Miharja (eds). *Pemikiran dan Praktek Perencanaan dalam Era Transformasi di Indonesia* (Bandung: Departemen Teknik Planologi, ITB, 2002).

the 1950s and still perceive cities as engines of national growth and development.⁴⁵⁰ Such ideas are still reflected by the SPL 2007 as well.

Unfortunately, this also meant that the central government continued its sectoral and fragmented approach to natural resource management. The new Forestry Law 41/1999 and GR 38/2007 reaffirmed this by stating that the Ministry of Forestry shall retain its monopolistic authority over state forest, which means that the power to develop forest planning remains with the forest planning agency within the Ministry.⁴⁵¹ Consequently, the newly promulgated SPL 26/2007 would only be applicable to non-forested areas. The previously discussed system of synchronization (*padu serasi*) of provincial spatial and forest planning remained in place⁴⁵² This separation should be kept in mind when discussing spatial management and analysing SPL 26/2007.

6.6.1. Basic features of the SPL 26/2007

SPL 2007 set out to distribute similar spatial management powers to different levels of government than the SPL 1992. It re-affirmed the power of the central and provincial governments to out/over-rule district spatial plans. In both cases, local communities were marginalized from the spatial management process. Just as GR 38/2007 the SPL 2007 develops a combination of a parallel and a hierarchal spatial management system. A parallel system refers to the fact that each government unit possesses more or less similar authorities in spatial management, which creates the impression that districts have autonomy in spatial management. In contrast the hierarchical system indicates that district spatial planning is

⁴⁵⁰ Dirjen Penataan Ruang, Dept. Permukiman dan Prasarana Wilayah, “Pengembangan Wilayah dan Penataan Ruang Indonesia: Tinjauan Teoretis dan Praktis”, paper presented at studium generale Sekolah Tinggi Teknologi Nasional (STTNAS), Yogyakarta 1 September 2003. The paper refers to development theories such as developed by Hirschmann (polarization and the trickle-down effect) and by Myrdal (the backwash and spread effect).

⁴⁵¹ In accordance with Forestry Ministerial Regulation P.13/Menhut-2/2005, concerning the Organization and Management of the Ministry of Forestry, the Forestry Planning Agency’ tasks are: preparing macro planning in the forestry sector and promoting sustainable forest management. The agency undertook a number of activities including the preparation of long-term, medium-term and annual planning, annual statistics in forestry, forest spatial plan, periodical forest inventory, establishing forest management areas, the establishment of forest management units and the development of periodical national and regional maps on forest. For a complete list of this agency’s activities see further: <http://www.dephut.go.id/informasi/statistik/2005/Planologi.htm> (last visited 14 September 2009).

⁴⁵² A *padu serasi* for West Java was made in 1996. Nonetheless, the current Perhutani Unit III (a state owner company established by the Ministry of Forestry) controls around 792, 467 hectares of state forest land (production forest and protected forest). See: www.dephut.go.id/informasi_luas_perum.htm

considered an elaboration of higher ranking spatial planning (of the provincial which in turn elaborates upon the national spatial plan). From a strict legal perspective, the relevant question is in event of conflict between both regulations which one will prevail. The SPL ranks higher in the legal hierarchy. Therefore, the SPL should prevail in case of a conflict.

6.6.2. A dual system of planning (parallel and hierarchical)

As GR 38/2007, SPL 2007 provides that each government level or unit may enact the same package of regulations in spatial planning: general/detailed spatial planning and spatial planning for strategic zones (growth poles). The law attributes spatial management powers (comprising of planning, implementation and oversight) to the central and regional governments (art. 7(2)). Each general spatial plan will be valid for 20 years. The implementation and oversight of strategic area plans, made by the central or provincial government, may be transferred to the districts (on the basis of *deconcentration* or by transfer of central government functions to the districts by the “*mede-bewind*” principle; arts 8 par.(4) and 10 par(4)).

As a result, each unit of government (central, provincial and district) holds the power to make zoning regulations on the basis of existing detailed spatial plans (art. 36) and process permit applications (in regard to land acquisition and use). Art. 26 par.(3) determines that:

“District spatial plans (applicable also for municipalities) shall be the basis on which to process applications for development location permits (*perizinan lokasi pembangunan*) and land affairs (*administrasi pertanahan*)”

Permits that are not acquired in accordance with the proper procedure are to be declared null and void. Permits acquired using the proper procedure but which fails to conform to existing rules may be revoked with the permit holder holding the right to demand indemnity (Art. 37). This suggests that the districts are also authorized to determine the proper procedure and rules regulating development location permits. Strangely similar powers in regard to issuing such permits are not attributed to the provinces and central government. This creates the impression that at the ground level, it is the districts which in the final analysis holds the power to determine access to land through the use of development location permits. However, given the distribution of authorities in regard to land affairs

discussed earlier above, this cannot be the case. It also does not conform with the fact that the central and provincial governments hold the power to manage strategic areas either directly or transfer their power to do so to the districts.

In a similar fashion as GR 38/2007, the SPL 2007 elaborates the system into a hierarchal spatial planning system by re-affirming the previous system developed under the SPL 24/1992. It develops an elaborate system of prior approval and endorsement to guard consistency in different layers of spatial plans. This system has again been reaffirmed by GR 5/2010 on establishment of the spatial planning system (*penyelenggaraan penataan ruang*).

First, Art. 6 par.(2) and Art. 14 par.(2) of SPL 2007 confirms the hierarchical system which the districts attempted to abolish during the 1999-2004 period. Art. 6 par.(2) stipulates that:

“National, Provincial and District spatial management shall be performed in a hierarchal and complementary manner (*dilakukan secara berjenjang dan komplementer*).”

Second, in order to maintain an integrated national development-spatial planning system, SPL 2007 reaffirms the central and provincial governments’ authority to issue general guidance (Art. 8(5)) and binding directives (Art. 10 (6.a.3) pertaining to spatial plans and their implementation at the regional level. It was explicitly determined that, districts when formulating their spatial plans, must refer to (*mengacu pada*):

- (1) National and Provincial Spatial Plan (RTRWN & RTRWP);
- (2) Directives (*pedoman*) and Instructions (*petunjuk*) in spatial management
- (3) District long-term development planning (*rencana pembangunan jangka panjang daerah*)

This attempt to re-establish centralized spatial management conforms to the top-down development planning approach of Law 25/2004 on national development planning. In order to guarantee conformity between development and spatial planning, Art. 18 provides that every draft pertaining to spatial planning at the regional level must be approved by the State Minister of National Development Planning before being promulgated. The minister shall evaluate the substance of a draft’s regulations on general and detailed spatial planning proposed by the province and districts (art. 18(1)). The Minister shall also determine what subject and issues are to be addressed in spatial plans, issue authoritative directives and

regulate the spatial planning formulation process for the provinces and districts (24(2) & 27(2)).

In addition, district draft regulations must be scrutinized by the governor before being submitted to the Minister with a recommendation (Art. 18(2)). The procedure for the endorsement of city planning⁴⁵³ used by the New Order has thus been taken over and declared to be applicable to all spatial plans made by provincial and district governments. Such a system of prior scrutiny and endorsement for draft regulations provides the central and provincial governments with the authority to evaluate whether districts and municipalities conforms to SPL requirements. These include that each district should maintain a public open-green area amounting to 30% of the total urban area and by restricting land owner's freedom to use land by obligating them to maintain at least 20% of land under their control as private green areas (art.28-29 and art. 42(2)).

This system has been further elaborated upon in GR 15/2010 mentioned earlier above and by the Ministry of Public Works. Pursuant to Art. 8(5) and Art. 18 of SPL 26/2007, the central government holds the power to issue binding directives. It can issue directives for spatial management (*pedoman bidang penataan ruang*), while provincial governments can promulgate guiding principles for implementation (*petunjuk pelaksanaan*) addressed at districts (art.10).⁴⁵⁴ The central government, in this case acting through the Ministry of Public Works, has issued a regulation containing directives addressed to provincial and district governments on the procedure to formulate general and detailed spatial plans.⁴⁵⁵ Art. 18 point (c) of this Ministerial Regulation points out the necessity of harmonizing district development planning with similar spatial plans at the provincial and national level in successive order.

⁴⁵³ As regulated in the Ministry of Home Affair Regulation 2/1987 on directives for city planning (*pedoman penyusunan rencana kota*)

⁴⁵⁴ This legal avenue was subsequently utilized by the West Java provincial government to address the problem of conflicting/competing claims of districts sharing responsibility to manage the conservation area of Bandung. See further Chapter 7 of this book.

⁴⁵⁵ Ministry of Public Works Regulation 11/prt/m/2009 pertaining to directives addressed to provinces and districts on how to formulate their respective general and detailed spatial plans (*tentang pedoman persetujuan substansi dalam penetapan rancangan peraturan daerah tentang rencana tata ruang provinsi dan rencana tata ruang kabupaten/kota beserta rencana rincinya*). This decree was complemented when the Ministry of Public Works issued Decree 327/Kpts/M/2002 on six principles on spatial planning (*enam pedoman bidang penataan ruang*). This decree comprises of directives addressed at planning agencies at the provincial and district level specifying how to formulate spatial plans. This attempt at uniformity may well have been made with the objective of facilitating evaluation.

The Ministry of Public Works' central position in spatial management is reflected in the way it develops spatial planning for Indonesia's major islands (Sumatera, Java, Kalimantan/Borneo, Sulawesi/Celebes; and others).⁴⁵⁶ Spatial planning included in a presidential regulation as an elaboration of the national spatial planning is binding upon the provincial government. In turn, the provincial government is to elaborate island spatial planning into provincial spatial plans. Unfortunately, the promulgation of these island based spatial plans by presidential regulations was postponed due to the amendment of SPL 24/1992.⁴⁵⁷

Likewise, a sub-division of this ministry, the Directorate General on Spatial Planning of the Ministry of Public Works, provides comprehensive spatial planning for urban areas through the National Urban Development Strategy (*strategi nasional pembangunan perkotaan/SNPP*) which is to be incorporated into the National Spatial Plan (*RTRWNasional*).⁴⁵⁸ This plan is made by the central government and the district governments must refer to it.

This raises a number of issues. Which central government agency aside from the Public Works actually holds the power to maintain a synchronized effort at top-down spatial planning? A few other government agencies (the provincial government, Bappenas and the Ministry of Home Affairs) have been mentioned in attribution to this responsibility. How is overlap and competition between those various agencies to be avoided?

6.6.3. Inter-Department Rivalry

In implementing the SPL 26/2007 it is clear that the National Development Planning Board, the Ministry of Public Works and the provincial governments assume the power to control law making at the district level. This applies in particular to district regulations in spatial planning. To make matters more complicated, the Ministry of Home Affairs has assumed similar powers. Based on their understanding of the distribution of spatial management

⁴⁵⁶ It was understood that such drafts were made to implement the directive contained in Art. 65 of GR 47/1997 on the National Spatial Plan (RTRWN).

⁴⁵⁷ For drafts on the island spatial plans (Sumatera; Java-Bali; Kalimantan and Sulawesi), see: <http://penataanruang.pu.go.id/rtrpulau.asp>. last visited 15 June 2009 Complete with maps (1: 500.000) and detailed indications of which areas shall be designated *kawasan andalan*, *kawasan tertentu* and *kawasan lindung*.

⁴⁵⁸ For information on the Directorate General of Spatial Planning activities regarding urban-town development-spatial planning, see: Direktur Jenderal Penataan Ruang, "Penyelenggaraan Penataan Ruang: Permasalahan, Tantangan, Kebijakan, Strategi, dan Program Strategis", paper presented before training "penyelenggaraan penataan ruang dalam pembangunan daerah, (Jakarta, 29 November 2005).

authorities, the Ministry of Home Affairs issued Ministerial Regulation 28/2008 regulating the evaluation procedure of (provincial and district) spatial planning draft documents.⁴⁵⁹ However, it also assumed the authority to issue technical and detailed directives on how districts should make urban spatial planning.⁴⁶⁰

Moreover, the central government has also established the National Spatial Planning Coordination Board (*Badan Koordinasi Tata Ruang Nasional/BKTRN*; *KepPres* 62 of 2000). This body has the Coordination Minister of Economy (*Menteri Koordinator Perekonomian*) as its chairperson and the Minister of National Development Planning/Head of *Bappenas* as its secretary. Its members include the Ministers of Home Affairs, Defence, Agriculture, Public Work, the State Environment Minister, and the head of the NLA. A similar board at the provincial and municipal/district levels is to be established to complement this national board's work. This should be done pursuant to the Ministry of Home Affairs Decree 147 of 2004 (*pedoman koordinasi penataan ruang daerah*).

As a result, the SPL inadvertently made it possible for different government agencies to share and duplicate spatial management authorities. In this way, it has been instrumental in strengthening the inter-department rivalry, which Niessen notes had already been prevalent under the New Order government.⁴⁶¹ However, at present, the Ministries of Home Affairs Public Works are not the only ones who have a stake in regulating spatial management. Other government agencies such as Bappenas, the Ministry of Home Affairs, and the provincial governments possess similar powers. At stake may be the issue which government agency in the end determines people's access to land and controls land acquisition for development. Spatial management could become an arena where various government agencies at different levels compete with each other. Additionally, a tangled network of conflicting and competing rules and regulations could make it extremely difficult for end users (land owners or citizens) to know exactly what the law ought to be. While it is already difficult for them to know how the existing land law determines their access to land and restricts their freedom to use it, the existing spatial planning law makes it more complicated.

⁴⁵⁹ Ministry of Home Affairs Regulation (Peraturan Menteri Dalam Negeri) 28/2008 procedure to evaluate draft regulations on provincial and district spatial planning (*tentang tata cara evaluasi rancangan peraturan daerah tentang rencana tata ruang daerah*)

⁴⁶⁰ Ministry of Home Affairs Regulation 1/2007 on urban-open green area planning and management (*penataan ruang terbuka hijau kawasan perkotaan*) and 1/2008 on directives for urban planning (*pedoman perencanaan kawasan perkotaan*).

⁴⁶¹ Nicole Niessen, *Municipal Government in Indonesia: Policy, Law and Practice of Decentralization and Urban Spatial Planning*, (dissertation, Leiden University, 1999), pp. 228-236.

Securing society's compliance to the law, then, becomes difficult if not impossible, resulting in widespread informality not only in land ownership but also in its use.

Arising from this new system is the need to revise the national spatial plan as well as provincial and district spatial plans. All existing provincial and district spatial plans promulgated before 2007, and especially those made during 1999-2007, should be readjusted as to conform to the top-down and centralized spatial planning system envisaged by the SPL 2007 as well as by both the Ministry of Home Affairs and Public Works. The revised GR on national spatial planning, promulgated in 2008, puts pressure on provincial and district governments to re-adjust their spatial plans. The relevant question here is to what extent this top-down planning system is in sync with the more bottom up and district-based government system established by the regional government law? What effect has such a top-down spatial planning system on district autonomy?

6.6.4. The Impact to District's Autonomy

The re-establishment of a hierarchical system of planning purposefully resulted in the upgrading of provincial regulations (on spatial planning). However, Law 10/2004 on the hierarchy of legal sources does not differentiate between provincial and district regulations. According to Art.18 of the SPL 2007, provincial regulations (provincial spatial plans) are to be considered of higher status than similar spatial plans promulgated by district governments. District spatial planning, being of lower rank, should be an elaboration of and thus made in line with the provincial spatial plans. Accordingly, the SPL 26/2007 can be said to re-introduces the hierarchy in law by determining that spatial planning is to be hierarchal and complementary (6(2) & art. 14(2)). This differs from what is provided by Law 10/2004 which does not recognize such difference between regulation made by the province and the districts. As a result, one must distinguish between two kinds of district regulations. The first are democratically made district regulations, reflecting district autonomy, and the second, relating to spatial management, are district regulations which should be considered not as reflecting self rule and autonomy. The latter are better perceived as reflecting district's compliance in meeting its governmental duties under the SPL 2007 and as imposed by other binding directives issued by a number of central government agencies having certain authorities in spatial management.

Consequently, district governments and their officials can no longer be regarded as autonomous policy makers. Instead, they now carry out duties as instructed by officials

higher up. District spatial plans in this framework should be read as elaborations of similar plans made at higher levels. This procedure marginalizes district parliaments and sidelines the function of district regulation as an expression of district autonomy. The whole spatial management set up runs counter to the objective of regional autonomy, i.e. that local communities can participate in a meaningful way or hold politicians accountable for their actions.⁴⁶²

It must be noted, as the previous chapter has shown that district-based spatial management does not automatically translate into a better and more sustainable land use policy. Certainly we cannot assume that district spatial plans will as a rule take into account cross border impact of land use plans. Real danger exist that districts tend to put into place spatial plans more attuned to their own needs and interests, rather than taking into account the need of adjacent and neighbouring districts. There is more than enough justification for putting a more eco-regional spatial management approach in place, such as that is proposed by the Ministry of Public Works. The Minister proposed to treat a number of Indonesian main islands (Java, Sumatera, Kalimantan and Sulawesi) as one eco-region and accordingly proposed a master plan for each island which must be elaborated further by the provinces and districts. Regardless, one cannot stop wondering whether statutory limitations imposed on district autonomy did not overreach in seeking a proper balance between district autonomy and the need to maintain an integrated and comprehensive effort in spatial management. It is doubtful, considering the system established by the SPL 2007, whether the central, provincial and district, all together in cooperation, can put into place a workable and more environmentally sustainable spatial management system.

One core issue, however, remains unanswered. How would local communities and individual citizens be able to determine which government level or government agency, considering the fragmentary nature of spatial management, can be held accountable in the case of disasters resulting from spatial mis-management? Another issue relates to the difficulty in determining which spatial plan has been used as a justification to dispossess them from their land? Looking at the highest plan to see what it determines may not be enough, especially if we take into account not only existing data on existing spatial plans at the national, provincial and district level but also the complementarity of spatial plans with

⁴⁶² Edward Aspinall & Greg Fealy, in their introduction (Decentralization and the Rise of the Local) to Edward Aspinall & Greg Fealy (eds), *Local Power and Politics in Indonesia: Decentralization & Democratization* (Singapore: Institute of Southeast Asian Studies, 2003), p. 4.

development planning. Art 60 of SPL 2007 provides the following list of rights granted to citizens:⁴⁶³

1. To be informed of existing spatial plans;
2. To receive benefits from land use changes,
3. To obtain compensation in the event of land use for development not complying with existing spatial plans;
4. To object against land use decisions not in compliance with spatial plans;
5. To file a motion to revoke permits and stop development projects in violation of spatial plans
6. To file compensation claims to the government or permit holder.

The enforcement of these rights greatly depends on clarity regarding which government agency at which level holds responsibility. It is difficult for citizens to find which spatial (or development) plan matters while making their way through an array of spatial utilization permits.

6.7. Conclusion

The system envisaged by the new regional government law and its implementing regulation is not in line with the general reason for granting districts autonomy regarding spatial management and development planning. Here, districts have very limited autonomy in spatial-development planning. It is doubtful whether the establishment of a hierarchical and parallel system of spatial management has been an adequate response to the problems at hand. Apparently legislative efforts culminating in the amendment of the SPL 1992 were guided mostly by the need of the central government to strengthen its position vis-à-vis the districts and establishing ways to curb and limit district's power in spatial management.

The obligation of prior consultation and making the entering into force of provincial and district regulations dependent on subsequent endorsement by the central government may well lead to spatial utilization for investment purposes. The focus therefore shifts to promoting economic growth rather than the needs of the local population. Likewise, the central and provincial governments' authority to take large areas away from the jurisdiction of districts is disturbing. Government units may compete with each other in delineating

⁴⁶³ Imam S. Ernawi, (Director General of Spatial Planning, Ministry of Public Works), "Implikasi Penerapan Undang-undang No. 26 tahun 2007 terhadap Peran Perencana dan Asosiasi Profesi Perencana" (paper presented before a congress organized by the Association of Planners, Jakarta, 30-10-2007).

which areas fall under their direct control. It also violates the principle intention of the SPL 1992 and 2007 which require that districts have control over the main important permits in spatial management. Both the central and provincial governments have the power to determine if and when district spatial plans can be approved and declared ready for use.

It seems as if the top-down spatial-development planning regulatory scheme has been made to promote central government control over local aspirations, not to encourage local accountability. One important issue here is where to place the concerns of local people. One could argue that in the end the decentralization movement has failed to give more exit and voice options to local people. They have little power in deciding or even influencing the course of development planning. Public participation is thus mostly rhetorical.

In addition, the central government's attempt to amending the spatial planning system has been actually an attempt at re-centralization and went against the idea of granting districts autonomy. This brings to mind Turner et al.'s argument that Indonesia's interpretation of decentralization is not equivalent to a Western one. In the Indonesian context, decentralization focuses on the delegation of responsibility rather than the transfer of power and authority.⁴⁶⁴ This may well have brought about district governments that are expected to be accountable not to communities, their political constituents, but to central and provincial governments.

The system also weakens the extent to which government officials, especially at the district level, can be held accountable. Accountability is meant to serve three purposes: to control the abuse of public authority; provide assurance in respect to the management of public resources and the adherence to the law and public service values; and to promote learning in pursuit of continuous improvement in governance and public management.⁴⁶⁵ Spatial planning does not encourage local public officials to take responsibility for their decisions. Instead, it allows them to hide behind the argument that their actions were based on instructions from above and beyond.

The New Order perceived spatial management as a legal instrument for securing investor/government access to land for "development" rather than controlling land in the public interest. Spatial management as it further determines when and how land is to be acquired

⁴⁶⁴ Mark Turner & Owen Podger (with Maria Sumardjono & Wayan K. Tirthayasa), *Decentralization in Indonesia: Redesigning the state* (Canberra: Asia Pacific Press, 2003), p. 2.

⁴⁶⁵ Aucoin and Heintzman, "The Dialectics of Accountability for Performance in Public Management Reform" (*International Review of Administrative Science*, 2000: 66), pp. 45-55.

by the state in the public interest or for investment purposes, not only poses a threat to the tenurial security of individual land owners and communities, but also endangers environmental sustainability. The next chapters will deal with the use of spatial plans to justify land acquisition and dispossession of land owners in the public interest during 2004-2010 and highlight how the attempt by the central and provincial government at recapturing lost powers in spatial management influenced land use policy at the district level.

CHAPTER VII

SPATIAL PLANNING AND PERMITS REGULATING ACCESS TO LAND

7.1. Introduction

This chapter will look at permits regulating access to land. These permits comprise an important but much neglected part of spatial management in Indonesia. First, I will explore what kinds of permits are normatively and practically related to the system of hierarchical and complementary spatial plans as constructed by the SPL 1992 and SPL 2007. Attention will be paid to both their legal normative aspects and how they are perceived by users and third parties. Next, I will focus on permitting practice, and what adaptations/deviations from the normative framework occur. When examining how permits regulate land acquisition and land use, my focus is on how they determine access and how they influence perceptions regarding tenure security.

The issue of land acquisition in the public interest is particularly important.⁴⁶⁶ It may only take place in accordance with existing (district) spatial plans. Therefore spatial utilization permits (*perizinan pemanfaatan ruang*) and development location permits (*perizinan lokasi pembangunan*) are the most important legal tools in controlling and monitoring such land acquisition. The SPL 2007 highlights these functions and points at the importance of having accurate district spatial plans to this end (Art. 26 par.(3)).

The literature on spatial planning and land acquisition in Indonesia seldom addresses this issue. If the topic is raised at all, the ways in which the permits concerned relate to spatial management, access to land and land acquisition are generally ignored.⁴⁶⁷ The same applies to the spatial management literature and how permitting influences people's perception of

⁴⁶⁶ See Ministry of Home Affairs Regulation (MHAR) 15/1975 on land acquisition procedure, MHAR 2/1976 on the applicability of land acquisition procedure for private enterprises, Presidential Decree 55/1993 on land acquisition for development in the public interest, Ministry of Agraria/Head of NLA Regulation 1/1994, Presidential Regulation 36/2005 (amended by PR 65/2006) on land acquisition for development in the public interest. See also Chapter IX on the evolution of the land acquisition procedure.

⁴⁶⁷ See Irene Eka Sihombing, *Segi-Segi Hukum Tanah Nasional dalam Pengadaan Tanah untuk Pembangunan*, (Jakarta: Universitas Trisakti, 2005); Adrian Sutedi, *Implementasi Prinsip Kepentingan Umum dalam Pengadaan Tanah Untuk Pembangunan* (Jakarta: Sinar Grafika, 2007); Mudakir Iskandar, "Dasar-Dasar Pembebasan Tanah untuk Kepentingan Umum (dilengkapi peraturan perundang-undangan & Peraturan Presiden no. 65 tahun 2006) (Jakarta: Jala Permata, 2007).

their tenurial security.⁴⁶⁸ Here, secure tenure is understood not only as the right of all individuals and groups to effective protection by the state against forced eviction, but also to possess secure access to land.⁴⁶⁹

As indicated in the previous chapters, spatial plans regulate land use only at the abstract and general level and should function, according to the Indonesian Coordinating Board for National Spatial Planning (BKTRN), as a guiding tool in the implementation of national development planning (*pedoman pelaksanaan pembangunan nasional*).⁴⁷⁰ Effective implementation occurs through detailed planning, zoning regulations and permits regulating land access and use. The ways in which the government/bureaucracy wields permits to a large extent determines formality and informality in land use and the costs of maintaining property rights on land.⁴⁷¹

The first section of this chapter will discuss general issues, such as how spatial management relates to certain permits and how those permits relate to land access. The rising importance of spatial utilization and development location permits as oversight measures under the SPL 2007 will be highlighted. The second section will look into the question regarding what spatial utilization and development location permits comprise of and how this relates to rules allowing investors to access land. Central to the discussion will be how the permit-in-principle (*izin prinsip*) and location/site permit (*izin lokasi*) have evolved and how they relate to other permits regulating land use. This will necessitate a look at land use permits issued at the district level and how these permits have been perceived by users, which has greatly changed after the introduction of the RGL 1999 and 2004. Special attention will be

⁴⁶⁸ Cf. H. Muchsin & Imam Koeswahyono, *Aspek Kebijakan Hukum Penatagunaan Tanah dan Penataan Ruang* (Jakarta: Sinar Grafika, 2008).

⁴⁶⁹ Clarissa Augustinus & Marjolein Benschop, *Security of Tenure: Best Practices* (UN Habitat, 2009) downloaded from www.unhabitat.org/downloads/docs/ last accessed 1 August 2009. Cf. Lynn Ellsworth, *A Place in the World: A Review of the Global Debate on Tenure Security*, (New York: Ford Foundation, 2009). For a discussion on the meaning of tenure security, especially in the context of urban land tenure and competing claims on the best use of land, see Reerink, G. (forthcoming), *Tenure Security for Indonesia's Low Income Kampong-dwellers: A Socio-Legal Study on Land, Decentralization and the Rule of Law in Bandung*, (Leiden University, Phd Dissertation, Leiden University Press. But see also Alain Durand-Lasserve and Harris Selod, "The Formalization of urban land tenure in developing countries", paper for the World Bank's 2007 Urban Research Symposium, May 14-16, Washington DC.

⁴⁷⁰ Ministry of Public Work in his opening speech for National Working Group Meeting of the Coordinating Board of National Planning (Badan Koordinasi Tata Ruang Nasional) Surabaya, 14 Juli 2003.

⁴⁷¹ Hernando de Soto, *The Other Path: An Economic Answer to Terrorism* (New York: Harper & Row Publishers, 1989), pp.132-187.

paid to how site permits have been used to control access to land and influence tenurial security for land occupants at the district level. The chapter will conclude by evaluating the weaknesses revealed in the implementation of spatial plans through spatial utilization permits.

7.2. Permits in Spatial Management

In general terms, a permit, or “license” (*toestemming*), is a special kind of legal action. It allows a natural person or legal body to do something which is normally prohibited, but is distinct from a dispensation (*vrijstelling*), which allows someone not to meet certain obligations under certain conditions.⁴⁷² Both are exemptions to a general rule, comprising of prohibitions (*verbod*) or obligations (*gebod*). Both must meet certain principles: they must be issued for a legitimate purpose, they must be ‘performable’, contain an appropriate subject matter, be issued by an authorized body and be known to the public.⁴⁷³

From the point of view of administrative law, permits are important government tools for directing and monitoring people’s behaviour, in order to achieve certain goals and/or implement specific laws.⁴⁷⁴ Public authorities must hold adequate powers for this. If not, their actions will be *ultra vires*. The power to formulate and issue/reject permit applications may thus be considered part of the attributed or delegated power granted to public authorities. Moreover, this power must be exercised in service of the purpose for which it was created.⁴⁷⁵ This requirement is in accordance with a well-established rule in administrative law, i.e. that all government decisions must be lawful in terms of being based

⁴⁷² Laboratorium Hukum FH-Unpar, *Ketrampilan Perancangan Hukum*, (Bandung: Citra Aditya Bakti, 1997), pp. 6-10.

⁴⁷³ CST Kansil et.al. *Kemahiran Membuat Perundang-undangan* (Jakarta, 2003): pp. 70.

⁴⁷⁴ See: Paulus Effendi Lotulung, *Beberapa Sistem Kontrol Segi Hukum terhadap Pemerintah*, (Bandung: Citra Aditya Bakti, 1993). Cf. Diana Halim Koentjoro, *Arti, Cara dan Fungsi Pengawasan Penyelenggaraan Pemerintahan ditinjau dari Optik Hukum Administrasi Negara dalam dimensi-dimensi Hukum Administrasi Negara* (Yogyakarta: UII Press)

⁴⁷⁵ See Carol Harlow, “Global Administrative Law: the quest for principles and values” (the *European Journal of International Law* Vol. 17 no. 1, 2007): 187-214. This principle applies not only to the European states Harlow refers to, but also to Indonesia. Cf. Adriaan Bedner, “Administrative Courts in Indonesia: a socio-legal study” (dissertation, Univ. Leiden, 2000) and Safri Nugraha (et al), *Hukum Administrasi Negara* (Jakarta: Badan Penerbit Fakultas Hukum UI, 2005).

on written-formal law (*wetmatig*) as well as *rechtmatig* (which refers to not only being grounded in written-formal law but also of being just).⁴⁷⁶

Permits may be issued orally or in written form. Only written permits, formally issued by government organs in the form of decrees will be dealt with here. In Indonesian administrative law, such written decrees or permits are known as “*beschikking*” or administrative decrees (*Keputusan Tata Usaha Negara*). The Administrative Court Law (5/1986, Art. 1(1) gives the following definition:

“A government body or organ’s legal action conferring certain rights and obligations to a natural or legal corporation, which is concrete, individual and final.”

Accordingly, permits related to spatial management refer to a government decree (concrete, individual and final) which allows the permit holder to do things generally prohibited in the spatial planning law, any spatial plan or any land use plan.

Neither the SPL 1992 nor the SPL 2007 are clear about “spatial utilization” or “development location permits”. They do not provide any guidance on what kinds of general prohibitions exist. The SPL 1992 only provides that all spatial utilization permits (*izin pemanfaatan ruang*) not granted in conformity (*yang tidak sesuai dengan*) with district spatial plans will be declared void (*batal*) by the district head (article 26). Art. 22 par.(4) further states that the district spatial plan (which is an elaboration of the provincial spatial plan) shall be the basis upon which development location permits (*perizinan or izin lokasi pembangunan*) are issued. The formal elucidation of this article stipulates that district spatial plans shall function as a reference for the district government:

- (1) to decide on the allocation of land for development projects (*lokasi kegiatan pembangunan dalam memanfaatkan ruang*);
- (2) to design appropriate development planning to the extent it relates to land use;
- (3) to issue recommendations on spatial use (*pengarahan pemanfaatan ruang*).

Unfortunately, no further explanation is provided on what development location permits, spatial utilization permits and recommendations on spatial use consist of or the ways in which they relate or how they differ. The same applies to the SPL 2007, in spite of the fact

⁴⁷⁶ Ibid.

that the SPL 2007 views permits as a government oversight instrument of similar importance as zoning, incentives/disincentives and (administrative-criminal) sanctions (Art. 35).

The SPL 2007 only provides that the authority to issue permits shall be regulated by the appropriate government level according to the existing law (Art. 37 par.(1)). This suggests that each government level holds the authority to provide spatial utilization and development location permits in controlling land use according to the appropriate spatial plan implemented for a certain area. This obviously refers to the distribution of spatial management powers by and between the central, provincial and district governments as regulated in GR 38/2007 and the SPL 2007. It renders the system more complex than it was under the SPL 1992, when permits could only be issued on the basis of district spatial plans, not on those formulated by the central and provincial governments.

However, the SPL 2007 is not consistent on this matter. Art. 26 par.(3) provides that:

“The district spatial plan shall be the basis on which to process development location permit applications and develop land administration policies”.

This suggests that, contrary to what has been described above, only district governments have the power to regulate land use and develop land administration policies. As a consequence, the provincial and central government have no control at all on how land will be utilized by districts. The importance of this becomes apparent in the spatial management of protected or conservation zones shared by two or more adjacent districts. As mentioned earlier, it also does not fit with the distribution of spatial management power between central, provincial and districts envisaged by the SPL 2007 and the existing spatial management practice. Such inconsistencies flow over into the permitting system as will be discussed below. Another problem with this power is the authority of the NLA and other government bodies to issue permits related to land use and control access to land.⁴⁷⁷ As we will see later, these competing and overlapping authorities in practice create serious problems of legal certainty and tenure security.

⁴⁷⁷ Government Regulation 16/2004 on land use planning (*penatagunaan tanah*); Presidential Regulation 10/2006 on the NLA and Presidential Decree 34/2003 on the Land National Policy. The last named regulation specifies which powers, 9 particular powers, are delegated to the districts.

7.3. Administrative Sanction and Penalization of Non-Compliance

The SPL 2007 contains more rules than the SPL 1992 regarding the situation that a spatial utilization permit is issued in violation of spatial plans. The main rule of Art. 37 par. (2) provides that permits violating spatial plans are to be revoked (*dibatalkan*) by the central or regional government that issued the permit. Art. 37 par. (3) moreover stipulates that a permit obtained without following the proper procedure shall be declared null and void (*batal demi hukum*), which means that it is assumed to have never existed. In that case all the actions based on the permit are in fact illegal. If permits are obtained following the official procedure but still violate existing spatial plans, they must be cancelled (Art. 37 par. 4) or, in the case they are not in compliance with spatial plans promulgated after the date of the permit, the relevant government (central or regional) may cancel the permit (Art. 37 par. 6). In both cases, a permit holder whose permit is cancelled may demand compensation, the procedure of which shall be provided in a government regulation (par.8).

Strikingly, no similar provision exists with regard to location permits. The consideration of Art. 60 provides society (*masyarakat*) with the right to submit an objection or file a cancellation petition for the cessation of development performed not in accordance with the spatial plan (par. e). Society also has the right to receive adequate compensation for damages suffered from development activities performed in accordance with spatial plans or file a compensation claim addressed to the government and/or permit holder in the case that development activities violating spatial plans result in damages (par. c and f).

Art. 37(7) reconfirms the importance of spatial plans by prohibiting government officials to grant permits in violation of such plans. Art. 73 even penalises such action. Remarkably, once again no comparable rule exists with regard to location permits. However, it would make no sense if the same principle regulating the issuance of spatial utilization permits would not apply *mutatis mutandis* to development location permits, so we must assume that this was the objective of the legislator.⁴⁷⁸

⁴⁷⁸ Unfortunately, as earlier mentioned, existing Indonesian literature on spatial management does not pay much attention to the permitting system and issues related to the utilization of this system in the implementation of spatial plans. Even A. Hermanto Dardak, the former directorate general of spatial planning at the Ministry of Public Works pays scant attention to the role of permits in the implementation and enforcement of spatial plans. See: A. Hermanto Dardak, *Menata Ruang Nusantara: Geostrategi Abad 21, Menuju Masyarakat Sejahtera*. (Jakarta: LKSPI Press, 2008). In comparison, the *Dewan Perwakilan Daerah* (regional representative board) of the Indonesian Parliament, paid more attention to the general failure of the SPL 2007 to be implemented. See their report as summarized in: “Disimpulkan, UU Penataan Ruang Tidak Implementatif”, 22 June 2010, (www://dpd.go.id/2010/06/, last accessed 27/04/2011).

The central role of permits as a government oversight mechanism for securing compliance with spatial plans is also underscored by Art. 61 which determines that every person is under the legal obligation to:

- a. Comply with spatial plans duly enacted by all government levels;
- b. Utilize land in accordance with spatial utilization permits (*izin pemanfaatan ruang*) as granted by appropriate government agencies;
- c. Comply with all requirements set out in the above permit;
- d. Allow public access to areas declared as public property (*milik umum*) by law.

Violation of these rules constitutes a criminal offence (Arts. 69-72). Perhaps for this reason the legislator has provided an exhaustive list, whereas one can think of other forms of violation as well, such as violation of existing building codes or zoning. The Elucidation provides a brief explanation regarding the meaning of these particular legal obligations. Here, the term “compliance” means that every person is under the legal obligation to acquire spatial utilization permits issued by the appropriate government agency before using land in accordance with its allocated function and the conditions established by the permit. “Access” is meant to guarantee the public’s free access to public areas. A brief explanation on the criteria of public areas is also provided: they must be allocated for general public use and enjoyment (e.g. beaches, water springs) or serve as connecting roads to public areas.

Violations may also be followed by administrative sanctions comprising of (Art. 62-63):

1. Written reprimands;
2. Temporary termination of activities;
3. Temporary termination of public services;
4. Closure of (business or development) site;
5. Revocation and cancellation of license;
6. Demolition of constructions;
7. Rehabilitation of land;
8. Fines.

The next article (Art. 64) makes the use of these sanctions dependent on the promulgation of government regulations providing the procedure for imposing such sanctions. Additionally, individuals suffering damages from the implementation of spatial plans have the right to sue the perpetrators before the civil court to obtain compensation (Art. 66). The same right to

sue has been mentioned earlier in Art. 60 but specifically in the context that damages result from violation of the spatial plan.

In fact, criminalization of non-compliance with spatial plans at the district level had been introduced earlier by Bandung district. The Bandung Spatial Plan (PD 4/2004) determines, rather vaguely, that every violation to the rules in this district regulation could be penalized with a maximum imprisonment (*pidana kurungan*) of 3 months or a fine of up to five million rupiahs. The next paragraph determines that violations of spatial plans causing environmental pollution/damage or threatening the public interest (*mengancam kepentingan umum*) shall be punished in accordance with the prevailing law, in this case the Environmental Management Act (EMA) 32/2009, earlier 23/1997 or any other law on environmental protection.

While in principle it should be valued that non-compliance with spatial plans, violations of the spatial planning permit and its conditions, and the hindering of access to certain public areas are considered criminal offences, one may wonder whether the wordings of these are sufficiently clear to meet the legality principle.⁴⁷⁹ The main problem is that the criminal court has to evaluate the legality of a permit awarded by a public administrative body or whether certain conditions attached to the permit have been fulfilled, as well as whether the crime committed has resulted in a serious threat to the environment or public interest. As this is not the expertise of a criminal court it may lead to problems of interpretation.⁴⁸⁰

A related question is whether criminal law is a suitable mechanism to address the complex social and economic concerns inherent in land use or acquisition. As suggested by Nawawi, criminal law should rather be used sparingly, as it cannot take into account the wider government concerns in such complex fields as land management.⁴⁸¹ Most land owners or occupants in urban kampongs or slum areas cannot afford to build their houses in compliance with spatial plans, zoning regulations and building codes, all of which consist moreover of

⁴⁷⁹ On the legality principle see J. Remmelink. *Hukum Pidana: Komentar atas Pasal-Pasal Terpenting dari Kitab Undang-Undang Hukum Pidana Belanda dan Padanannya dalam Kitab Undang-Undang Hukum Pidana Indonesia* (Jakarta: PT Gramedia Pustaka Utama), pp. 355-358. See also Fajrime A Gofar, "Asas Legalitas dalam Rancangan KUHP" (position paper advokasi RUU KUHP Seri #1) (Jakarta: Elsam, 2005).

⁴⁸⁰ Cf. M.G. Faure, J.C. Oudijk & D. Schaffmeister (eds), *Kekhawatiran Masa Kini: Pemikiran Mengenai Hukum Pidana Lingkungan Dalam Teori dan Praktek*, (Bandung: Citra Aditya Bakti, 1994). Particularly, Chapter 1 on the enforcement of environmental law through civil law, administrative law and criminal law and Chapter 2 on the impact of environmental criminal law to administrative law, pp. 1-130.

⁴⁸¹ Barda Nawawi Arief, *Kapita Selekta Hukum Pidana* (Bandung: Citra Aditya Bakti, 2003) especially Chapter II (the use of penal sanctions in administrative law).

technical norms alien to them.⁴⁸² To automatically regard them as criminals fit to suffer punishment would result in gross injustice. Criminal law certainly cannot remedy social-economic or politic structural deficits which make such crimes possible in the first place.⁴⁸³

We will now return to the question as to what constitutes a spatial utilization permit or a location permit as mentioned in the SPL 1992 and 2007. Is it just one or a collection of permits related to land acquisition and land use? And what permits related to land acquisition and land use are issued in legal practice?

7.4. Spatial Utilization Permit(s) and Development Location Permit(s) in the SPL

Neither the SPL 1992 nor the SPL 2007 provides a clear answer to the above questions. The SPL 2007 attributes the power to determine which permits are created as part of the spatial planning oversight mechanism to the central, provincial and district governments within their individual jurisdictions (Art. 37). This has resulted in a complex network of permits and binding recommendations⁴⁸⁴ controlling access to land and regulating land use. This situation is exacerbated by the fact that these jurisdictions are seldom clear. For instance, the Bandung Spatial Plan (PD 4/2004) determines that spatial utilization permits refer to government efforts at regulating activities which have the potential to violate spatial and development plans, and, consequently, may go against the public interest (Art. 1 par.(42)). They include permits related to location, quality of space, land use, intensity of land use, technical rules regarding construction and the satisfaction of all other infra-structure related requirements (*kelengkapan prasarana*), in accordance with the prevailing law, *adat* law and custom (Art. 1 par.(43)). Development location permits are not mentioned at all. I therefore suggest that we now take a closer look at which permits, even those officially unrelated to existing spatial plans, are used in legal practice to regulate and monitor access to and use of land.

⁴⁸² One of the causes of this problem seems that many developing countries have adopted rules suited for developed/industrialized countries with different physical, climatological and social environments. Such codes have often been inappropriate and have increased development costs substantially, making it difficult in particular low income groups to afford housing built to legal building standards. See further: Unescap, "Urban land policies for the uninitiated" (http://www.unescap.org/huset/land_policies/index.htm) last visited 11/14/05.

⁴⁸³ Barda Nawawi, *Beberapa Aspek Kebijakan Penegakan dan Pengembangan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1998), pp.41-47.

⁴⁸⁴ Such as the environmental impact assessment and the traffic impact assessment .

7.5. Permits in Spatial Management

7.5.1. Controlling Access to Land and Restrictions to Land Use

As indicated earlier in Chapter 4, two permits are related to control and monitor access to land: the permit-in-principle (*persetujuan or izin prinsip*) and the site/location permit (*izin lokasi*). Both permits were introduced and gained in importance as part of the open-door policy initiated in the early 1980s to promote industrialization and reduce Indonesia's dependency on natural resource exploitation. They were outcomes of the policy to make it easier to obtain land for private commercial enterprises, for which a separate procedure was established.⁴⁸⁵

These two permits were also central to the New Order's housing and settlement development program, and to the large scale 'housing industry', including the establishment of new towns (self-contained or dependent) around and adjacent to major cities such as Jakarta, Bandung, Semarang, Surabaya, Makassar and Medan.⁴⁸⁶ Adrian, working for an estate management of a new self-contained town (Kota Baru Parahyangan) on the outskirts of Bandung, concedes that:⁴⁸⁷

“The most important permits to be acquired from the government are the permit-in-principle and the site permit. With that in hand, access to land is secured. The same permits indicate a guarantee that proposed land use had been approved and declared to be in conformity of existing laws”

Other permits related to land use only become important after land has been acquired on the basis of these two permits.

⁴⁸⁵ Ifdhal Kasim and Endang Suhendar, “Kebijakan Pertanahan Orde Baru: Mengabaikan Keadilan Demi Pertumbuhan Ekonomi” in Noer Fauzi (ed), *Tanah dan Pembangunan: Risalah dari Konferensi INFID ke-10* (Jakarta: Pustaka Sinar Harapan, 1997), pp. 97-170.

⁴⁸⁶ Cosmas Batubara, *Kebijaksanaan dan Strategi Pembangunan Perumahan Rakyat* (Jakarta: Kantor Menpera, 1986) & from the same author, *Kebijaksanaan Pembangunan Perumahan Nasional: Sebuah Sumbang Saran* (Jakarta: Kantor Menpera, 1987); Djoko Sujarto, *Kinerja dan Dampak Tata Ruang dalam Pembangunan Kota Baru: Studi Kasus Kota Terpadu Bumi Bekasi Baru*, unpublished doctoral dissertation, ITB-Bandung, 1993.

⁴⁸⁷ Personal communication, Bandung (Kota Baru Parahyangan) 20 April 2005. Similar views were voiced by Tigor Sinaga, the vice head of West Java branch of Real-Estate Indonesia during an interview, 25 May 2005 and by an ex-Bupati of Bekasi. Lieut.Col of the Army (ret.), Djamhari (1995-1997) and other government officials at the district and provincial levels interviewed separately during this study.

7.5.2. 'Permits-in-principle'

During the New Order, investors had to obtain an 'investment-approval-in-principle' (*persetujuan prinsip penanaman modal*) from the President. Approval meant that the proposed business activity was in conformity with the "Negative Investment List" (*Daftar Investasi Negatif*)⁴⁸⁸ and that the investors were eligible for preferential treatment. This included tax breaks and government support in controlling and facilitating access to natural (and agrarian) resources.⁴⁸⁹

In 1976, the Ministry of Home Affairs promulgated a regulation allowing investors to use land acquisition procedures hitherto reserved for government development projects.⁴⁹⁰ Art. 1 of this 1976 ministerial regulation stated that:

"Land release (*pembebasan tanah*) by private corporations in the interest of development projects in support of public interest and social facilities may be performed using the procedure established in Chapter I, II and IV of the Ministry of Home Affairs Regulation 15/1975."

Linking the idea of development with economic growth and investment blurred the distinction between the public and private realms. Purely commercial concerns could easily be "in the public interest" by arguing that they promoted national development (*pembangunan nasional*) and economic growth (*pertumbuhan ekonomi*).⁴⁹¹ Thus already in the late 1970s, the investment-approval-in-principle signified government support for investors to acquire land and even clear land in the public interest.

⁴⁸⁸ One important factor influencing the investment climate has been the List of Negative Investment. This list is regularly evaluated and updated. See Presidential Decree 96/2000 and 118 (2000).

⁴⁸⁹ The most recent is Presidential Decree 127/2001 on economic activities reserved for small-middle scale businesses (*bidang-bidang yang dicadangkan untuk UKM*) and business activities declared open for middle large-scale business with the obligation to form partnerships with small scale businesses (*bidang yang terbuka untuk usaha menengah dan besar dengan kewajiban bermitra*).

⁴⁹⁰ MHAR 2/1976 on the use of land acquisition procedure for government interest by private corporations (*penggunaan acara pembebasan tanah untuk kepentingan pemerintah bagi pembebasan tanah oleh pihak swasta*).

⁴⁹¹ See also People's Consultative Assembly (PCA) Decree 2/1988 (Broad Guidelines of State Policies).

However, only in the late 1980s did the ‘investment–approval-in-principle’ become a preliminary permit, pending the issuance of a business permit (*izin usaha industri*). The permit allowed companies to begin preparatory work (i.e. acquiring land to establish factories, offices and other amenities)⁴⁹². Thus, it became linked to the site permit (*izin lokasi*) created by the National Land Agency in 1992. In other words, any company applying for a location permit had to first obtain an ‘investment–approval-in-principle’. The procedure now looked as follows. If the business proposal fell outside the negative list, the investor could proceed by requesting a confirmation letter to be issued by the governor on the future site of the project. After receiving confirmation on the availability of land from the governor, he could request a permit-in-principle (*izin or persetujuan prinsip*). The governor should then issue the site permit enabling the applicant to start the land acquisition process on the site allocated.

Another permit referred to as permit-in-principle (*izin prinsip*) is the one issued by separate ministries or their branch offices at the provincial (*kantor wilyayah*) and district levels (*kantor departemen*) (or after 1999 by the office (*dinas*) of the district government). For instance, if one wanted to establish a hotel to accommodate tourism, the Ministry of Tourism or its branch office had to issue a permit-in-principle. Such business proposals must comply with the relevant sector’s short or long term work plan, in this case a tourism development master plan (*rencana induk pengembangan pariwisata*),⁴⁹³ made at the national or regional level. This step was required before a permanent business permit (*izin usaha tetap*) could be issued by the Ministry of Trade and Industry (or after 1999), by the district office for trade or industry. Just as the investment–approval-in-principle issued in case of foreign/domestic investment, this permit was also required for land acquisition.

It is not clear whether foreign and domestic investment companies had to apply for both preliminary permits. The fact that these permits operated under totally different regimes

⁴⁹² See Presidential Decree 33/1992 (revoking 54/1977) on investment (*tata cara penanaman modal*). It served at the same time as a temporary permit to initiate business activities (*izin usaha sementara*)

⁴⁹³ Thus PT. Dam Utama Sakti Prima, a real-estate/housing construction company, acquired a *persetujuan prinsip* and subsequently two *izin lokasi* before and after 1999 based on the government’s consideration that their plan to develop the north Bandung area concurred with existing *rencana induk pengembangan pariwisata Propinsi Jawa Barat*. Another company, wishing to develop an abandoned dairy farm in Lembang (a sub-district of the Bandung District) acquired a similar approval before deciding on the development of an integrated tourism area or tourist resort near and around the Bosscha observatory. See Joan Hardjono, “Local Government and Environmental Conservation in West Java”, in Budy P. Resosudarmo (eds.), *The Politics and Economics of Indonesia’s Natural Resources*, (Singapore: Institute of Southeast Asian Studies, 2006), pp. 217-227. It should be noted that this article does not mention the *persetujuan prinsip*.

suggests that this was indeed the case. Those I interviewed for this study could not clarify the matter, but only referred generally to the need of a 'permit-in-principle' for obtaining site permits, without further specifying. The fact is that both permits served similar purposes: approval of the kind of commercial activity to be conducted or the investment to be made. Such duplicity, which for investors only means red-tape bureaucracy and additional transaction costs, should be avoided. Moreover, for the sake of clarity, one permit must be clear on what action is actually sanctioned. The permit holder should not hold a multi-functional permit which allows the establishment of a particular business enterprise and at the same time enables the private-commercial enterprise to conduct land acquisition. For that purpose, another permit using a similar name has been invented.

The permit-in-principle (*persetujuan prinsip*) should not be confused with a third preliminary permit, which was directly related to the approval to reserve land for investment by the Governor and thus to the implementation of the provincial spatial plan. Pursuant to NLA Regulation 3/1992, a so-called land reservation (*pencadangan tanah*) was a preliminary permit to later acquire land for investment purposes in accordance with the existing provincial spatial plan (art.1). Together with a recommendation issued by the district head/mayor approving the proposed land reservation, this reservation was required before an investor could apply for a site permit to the NLA.

In summary, it is extremely difficult to keep track of the various forms of preliminary permits, in particular because all of them are referred to colloquially as permits-in-principle. A number of initiatives have been taken at the national and district level to overcome this problem. In 1992, for instance, the Bandung district government decided to fuse all of these permits, including the mayor's recommendation, into one permit for land utilization (*izin pemanfaatan tanah*)⁴⁹⁴ in order to simplify the land acquisition process and thus create a more favourable investment climate at the district level. However, this did not really work out well. The NLA did not regard itself as subordinate to the jurisdiction of the districts and continued to issue land reservations. Moreover, in 1998 the central government overruled the district government, exempting foreign/domestic investment companies from the

⁴⁹⁴ Perda (PD) Kabupaten Bandung 5/1992 as amended by 2/2001 (*izin pemanfaatan tanah di kabupaten Bandung*). Article 1(7) explains that this *izin pemanfaatan tanah* should be considered as *izin peruntukan penggunaan tanah* as mentioned in GR 20/1997 and accordingly replaced and fused with the *persetujuan prinsip*, *izin lokasi* and *fatwa rencana pengarahannya lokasi* (advies planning) issued by the Urban Planning Service (*dinas tata kota*).

obligation to acquire an approval-in-principle (*persetujuan prinsip*) from provincial and district governments.⁴⁹⁵ This removed the legal basis from the Bandung district policy.

After 1999, each region seemed to be at liberty to rename the preliminary permits or create similar permits to meet specific development needs on the basis of their newly acquired autonomy.⁴⁹⁶ The Bandung municipal government decided to return to the old system of different preliminary permits. To obtain a site permit, the applicant needed first: an investment permit-in-principle (*persetujuan prinsip penanaman modal*) signed by the President in case of foreign investment or signed by the Head of the BKPM in case of domestic investment, an approval-in-principle signed by the head of the sectoral office concerned (now always at the level of the municipality), a letter of approval for spatial utilization (*surat persetujuan pemanfaatan ruang*) as issued by the TKPRD (regional spatial planning coordinating team; headed by the municipal Bappeda); and another approval -in principle (*surat persetujuan prinsip*) signed by the mayor.⁴⁹⁷

The bewildering variety of preliminary permits should not obscure that in the end their result remained the same: They indicate government approval for the type of business or investment activity to be established and for acquiring land for this purpose.

7.5.3. The Legal Basis of the Site Permit

The site permit was first introduced in 1974 as a permit allowing investors or private companies to acquire land by virtue of the Ministry of Home Affairs Regulation 5/1974. The development of this permit has been closely related to changing regulations regarding land acquisition in the public interest. Presidential Decree 55/1993 (on land acquisition for development projects in the public interest) revoked Regulations of the Minister of Home

⁴⁹⁵ See Presidential Instruction 22/1998 (*tentang penghapusan kewajiban memiliki rekomendasi instansi teknis dalam permohonan persetujuan penanaman modal*) and 23/1998 (*tentang penghapusan ketentuan kewajiban memiliki surat persetujuan prinsip dalam pelaksanaan realisasi penanaman modal di daerah*).

⁴⁹⁶ For example, the Mayor of Semarang allowed for the reclamation of wetlands within its administrative territory on the basis of a *persetujuan pemanfaatan lahan perairan dan pelaksanaan reklamasi di kawasan perairan marina* (approval for land reclamation of wetlands and marshes) for the construction of a new residential area. See Dwi P. Sasongko, "Marina dalam regulasi Amdal" (Suara Merdeka, 9 June 2005).

⁴⁹⁷ Particulars on this letter have been obtained from field research to the Bappeda-Kota Bandung (May 2005). The official working there (Neneng) was willing to provide me with two specimens of this *Persetujuan Pemanfaatan Ruang* (one granted in regard to a request to build houses on private land within the North Bandung Area; and Letter dated 16 June 2008 signed by the mayor of Bandung, Dada Rosada; and a draft letter in regard to a request to construct Hotel Grand Asirila in South Bandung).

Affairs 15/1975 and 2/1976. This created two distinctly different procedures for land acquisition for private-commercial purposes viz. land acquisition in the public interest. Both procedures, however, advance the same principles: that land may be acquired only on the basis of direct negotiation with land owners and that land occupants shall be offered compensation.⁴⁹⁸

New rules for private companies were laid down in Ministry of Agraria/Head of NLA Regulation 3/1992 and concerned the procedure for them to reserve land, site permits and the issuance, extension and renewal of land titles. (*tata cara bagi perusahaan untuk memperoleh pencadangan tanah, izin lokasi, pemberian, perpanjangan dan pembaharuan hak atas tanah serta penerbitan sertifikatnya*). It was mainly an outcome of the central government's continued economic policy to attract foreign and domestic investment, although sustained critique on the old regulations' use for commercial purposes was also important. The central government could use the new procedure to boost the growth of industrial estates companies (*perusahaan kawasan industri*)⁴⁹⁹ and other investment initiatives.⁵⁰⁰ Central to the new policy was the site permit, provided by the central government. This strongly suggests that the site permit was specifically created as a tool for the central government to control and regulate investor access to land.

⁴⁹⁸ Art. 8 par.(5) of Presidential Decree 55/1993 stipulated that the land assembly committee (*panitia pengadaan tanah*) shall negotiate (*mengadakan musyawarah*) with land owners and the government agency needing land in determining the form and/or amount of compensation. Ministry of Agraria/Head of NLA Regulation 2/1999 on site permits stipulates in Art. 8 par.(1) that its holder may free land (*membebaskan tanah*) within the location indicated in the permit on the basis of consent (*berdasarkan kesepakatan*) with land occupants either through a sell-purchase act, by offering a compensation, land consolidation or other legal options available.

⁴⁹⁹ The importance of the site permit for the government development policy in the industry sector was underscored the Presidential Decree 53/1989 (*on kawasan industri*) as amended by 41/1996. For a detailed regulation on how companies may acquire *persetujuan prinsip* and *izin lokasi* see Ministry of Industry's Decree 291/M/SK/10/1989 as amended by 230/M/SK/10/1993 (*tata cara perizinan dan standar teknis kawasan industri*). Other relevant regulations in this context were the Ministry of Home Affair Regulation 3/1984 on the procedure to reserve land and the granting of land rights, building permits and nuisance permits for foreign and domestic investment companies (*tata cara penyediaan tanah dan pemberian hak atas tanah, pemberian izin bangunan serta izin gangguan bagi perusahaan-perusahaan yang mengadakan penanaman modal menurut undang-undang no. 1/1967 dan undang-undang no. 6/1968*).

⁵⁰⁰ For example, hotels-tourist resorts, real-estate or housing construction companies. Important for companies specializing in the construction of residential areas pertinent is GR 30 of 1999 on *Kawasan Siap Bangun* (area prepared for construction) and *Lingkungan Siap Bangun* (environment prepared for construction).

On the basis of NLA Regulation 3/1992,⁵⁰¹ a firm required a reservation permit to reserve land for investment (*izin pencadangan tanah*) before it could submit any site permit application.⁵⁰² As discussed in the previous section, this permit was provided by the governor and may be compared to the approval to reserve land for development (*surat persetujuan penggunaan tanah untuk pembangunan*) or a reservation permit (*surat konfirmasi pencadangan tanah*) (a confirmation letter to reserve land for specific commercial-investment purposes). This power to grant or withhold prior consent indicated that it was the Governor who thus held the authority to evaluate whether a project was in accordance with the provincial plan. This moreover indicated that the governor was allowed to override district spatial plans.

However, in 1993 the government adopted the Policy Package of 23 October 1993 and the NLA decided to get rid of this authority of the governor. The NLA central office instructed its provincial and district branch offices that investors no longer needed prior approval (the reservation permit above) from the governor before requesting a site and a business permit.⁵⁰³ In other words, since 1993, even provincial governments lost their power to control land use within their jurisdiction. Apparently, the NLA, which answers directly to the President, held enough power to curtail the governor's authority in this way. Legally speaking this was incorrect, since the governor received his power in an NLA regulation and saw it removed in a letter of instruction.

In summary, since 1993 companies wishing to acquire land could directly submit applications to obtain preliminary permits and site permits from the central government (in practice meaning BKPM, NLA and sometimes sectoral agencies. This centralized system assured that provincial and district governments could be forced to support development

⁵⁰¹ This NLA regulation was amended a number of times. The first by Ministry of Agraria/Head of NLA Regulation 2/1993 on the procedure for acquiring site permits and land rights for foreign/domestic investment companies (*tentang tata cara memperoleh izin lokasi dan hak atas tanah bagi perusahaan dalam rangka penanaman modal*) and its implementing regulation: Ministry of Agraria/Head of NLA Decision 22/1993 on the directives for the implementation of the Ministry of Agraria/Head of NLA Regulation 2/1993 (*tentang Petunjuk Pelaksanaan Pemberian izin Lokasi dalam Rangka Pelaksanaan Peraturan Menteri Agraria/ Kepala Pertanahan Nasional Nomor 2 Tahun 1993*). It was again amended in 1999 by the Ministry of Agraria/Head of NLA Regulation 2/1999 (*tentang Izin Lokasi*).

⁵⁰² The Ministry of Agraria/Head of NLA regulation 3/1992 defines *pencadangan tanah* as a permit-in-principle approving land reservation for investment purposes in accordance with provincial spatial planning.

⁵⁰³ Letter no. 5000-3302.A. dated 1 November 1993 (concerning government policy package of 23 October 1993. By virtue of this letter, companies would be required only to obtain a permit-in-principle (*izin/persetujuan penanaman modal*) from the BKPM or another government agency and then apply for a site permit.

programs initiated by private commercial enterprises, especially those that enjoy the central government's full support. Ultimately, the central government could now control spatial utilization for investment purposes through the NLA.

7.5.4. The Site Permit

Minister of Agraria/Head of NLA Regulation 2/1999 defines the site permit (*izin lokasi*) as a permit allowing private investors to acquire land (*izin pengadaan tanah demi kepentingan investasi*). This means that the investor has the exclusive right to negotiate with the owners about a transfer of their title. Thus, its functions are to transfer title (*izin pemindahan hak*) and allow land use for the investment purpose (*izin menggunakan tanah guna keperluan penanaman modal*). The site permit -which actually comprises three different permits- is hence primarily an instrument to control investor access to land and allow its acquisition and utilization. Unsurprisingly, the site permit, deviating from the basic principle that a permit should serve one clear objective, is generally considered to serve five or six direct objectives: (1) guiding the location of private investment and development projects; (2) co-ordinating government and private sector development activities; (3) facilitating land acquisition for development projects; (4) facilitating land acquisition for large-scale development projects, including new towns and industrial estate projects; and (5) attaching appropriate project development conditions to permits for land acquisition;⁵⁰⁴ (6) encouraging contact between developers and government officials at an early stage and enabling officials to monitor and shape development.⁵⁰⁵

This means that the site permit has not been designed primarily to enable government agencies at the district level to control and monitor land use in a sustainable manner. In fact the central government, i.e. the NLA, could and has been known to override district spatial plans. Accordingly, districts habitually were forced to strike compromises and accommodate the needs of investors enjoying a site permit. By controlling who gets a site permit, the NLA – not the districts – effectively decides who gets access to land. Initially, only a few districts

⁵⁰⁴ Tommy Firman, "Major issues in Indonesia's urban land development", (Land Use Policy 21 (2004) 347-355. Archers seems to disregard or downplay the permit-in-principle's connection to the site permit.

⁵⁰⁵ Bruce W. Ferguson and Michael L. Hoffman, "Land Markets and the Effect of Regulation on Formal-Sector Development in Urban Indonesia"(Review of Urban and Regional Development Studies 5, (1993)).

held spatial plans and even those were not always interested in implementing them.⁵⁰⁶ But this has changed, as will be discussed in the next section.

The site permit is also an important tool in preventing abusive practices of large-scale landholding by determining the maximum amount of land per site permit (Art. 4).⁵⁰⁷ It also prevents land speculation, by setting a time limit: ⁵⁰⁸ a site permit for land amounting to twenty-five to fifty hectares is valid for a maximum of two years and three years for land larger than fifty hectares (extendable for one year if the land acquired already amounts to 50% of the land appointed in the permit).

In fact this rule has not been strictly applied, on the contrary. Parent companies have simply ordered their subsidiary companies to request a number of site permits within one area or in different regions. This was the legal loophole through which quite a number of conglomerates (including the family of the late president Soeharto) acquired land throughout Indonesia.⁵⁰⁹ Moreover, while Indonesian land law has recognized a number of restrictions on land ownership and conveyance,⁵¹⁰ the necessary implementing regulations have never been made.⁵¹¹ In other words, no effective statutory limitation exists on land ownership. This

⁵⁰⁶ As discussed in the previous chapters, practice shows that during the 1970-1999, only a few municipalities (cities proper) developed town plans. Most district governments assumed wrongly that they did not have any obligation to do so. This changed after the 1999 regional government law (RGL) determined that spatial management becomes attributed power of districts.

⁵⁰⁷ This point was also made by Professor Maria W. Soemardjono when discussing the possibility of altogether abolishing the *izin lokasi-izin prinsip* scheme in controlling land acquisition (4 July 2007). See also Maria W. Soemardjono, "Tanah, dari rakyat, oleh rakyat dan untuk rakyat" (Media Transparansi Edisi 2/November 1998).

⁵⁰⁸ Personal communication of Prof. Maria W. Soemardjono, UGM-Yogyakarta, June 7, 2007.

⁵⁰⁹ Allegedly, the Soeharto family owned or otherwise controlled more than a hundred or more parcels of land spread in more than 15 districts, totaling 50 thousand hectares, in West Java alone. See: Soeharto, Sang Maharaja Tanah, (xpos, no. 44/I/31 Oktober-November 98); "Tuan Tanah Meneer Soeharto (Xpos, No 43/I/24. 30 October 1998). Cf. George J. Aditjondro, "Yayasan-Yayasan Soeharto" (<http://www.tempointeraktif.com>, 14/05/2004. Sihombing reports that Hutomo Mandala Putra owned, controlled or had access to 22 parcels of land amounting to 57.532 meter² (or 5.75 hectares) (according to NLA Jakarta Office Letter dated 15 November 2000). BF. Sihombing, *Evolusi Kebijakan Pertanahan dalam Hukum Tanah Indonesia*, (Jakarta: Toko Buku Agung), p. 21. Another example is land holding under control of a luxurious housing construction company, Pantai Indah Kapuk, amounting to 800 hectares in North Jakarta (Properti Indonesia no. 2/1994).

⁵¹⁰ Art. 7, 10 and 17 of the BAL mention the need to limit land ownership in regard to agriculture. This land-reform principle was further elaborated in Law 56/Prp/1960 on the Limit to Agricultural Land (*penetapan luas tanah pertanian*). Article 12 of this Law stipulates that: "the maximum amount one may own for residence or other development purpose shall be further regulated in a government regulation". Until now, no such Government Regulation has been promulgated

⁵¹¹ Maria S.W. Sumardjono, *Tanah dalam Perspektif Hak Ekonomi, Sosial dan Budaya*, (Jakarta: Kompas, 2008), pp.4-5; pp. 13-18.

weakness in the land law and in the practice of issuing site permits has created wide opportunities for massive land hoarding and rampant land speculation.

Strikingly, most authors pay little or no attention to how site permits should relate to spatial management, even if in the words of the Director General of Spatial Planning of the National Planning Board the site permit is to be understood as “(...) an implementing tool in spatial management and part of the investment policy (...)”⁵¹² A central issue here is who issues the site permit. If such power is held at another level than the one responsible for drawing up and implementing spatial planning, the chance that the site permit will effectively be used for this purpose is very small indeed. Until 1999 such convergence was absent, since the site permit was provided by the NLA. However, in that year this power was delegated to the district level.

7.5.5. Transfer of the power to issue site permits from the NLA to the Districts

The Regional Government Law (RGL) of 1999 and its implementing regulation determined that land affairs should be fully devolved to the districts.⁵¹³ However, strong opposition from the NLA, which considered the districts as unfit for this task,⁵¹⁴ resulted in a reduction of the transfer of authority to nine specific powers only – and thus to a violation of the RGL 1999. However, among the powers transferred was the authority to receive and process site permit applications (Presidential Decree 34/2003).⁵¹⁵

The districts could either directly implement Ministry of Agraria/Head of NLA Regulation 2/93 jo. 2/1999 and related implementing directives (Minister of Agraria Decree 22/1993) or adapt it according to local conditions by promulgating a district implementing regulation.

⁵¹² Direktorat Tata Ruang dan Pertanahan Bappenas, “Pemberian Ijin Lokasi dan Hak atas Tanah Berbasis Tata Ruang” paper in www.bktrn.org, last accessed August 25, 2003.

⁵¹³ For a general discussion on the advantages and disadvantages of the policy of devolving land affairs authority to the district see: Thomas Rieger, Faisal Djalal, Edwar St. Pamuncak, Rusdi Ramon, Bedjo Soewardi, Decentralizing Indonesia’s Land Administration System: Are Local Government and Land Offices Ready? Evidence from 27 Districts, Final Report-Commissioned by World Bank Jakarta Office-BPN, Jakarta June 2001.

⁵¹⁴ For further discussion on this topic see : Craig C. Thorburn, “The plot thickens: Land administration and policy in post-New Order Indonesia”(Asia Pacific Viewpoint, Vol. 45, no. 1, April 2004): pp. 39-49.

⁵¹⁵ It concerns the following authorities/tasks: 1. processing site permits applications; 2. land acquisition performed in the public interest; 3. settlements of conflicts related to ‘*tanah garapan*’; 4. settlement of disputes in relation to compensation; 5. deciding on the location and recipients of land redistribution programs; 6. settlement of issues regarding customary communal land claims; 7. deciding on issues related to empty/vacant land; 8. granting rights to clear open access land; and 9. land use planning (*perencanaan penggunaan tanah wilayah kabupaten/kota*), which refers to various permits controlling land use.

The Bandung municipality opted for the latter solution, promulgating Mayoral Decree 170/1999 on the procedure to obtain site permits. Still, in this manner the authority to process site permit applications became a delegated authority rather than one attributed by law to the districts, while the NLA held on to its monopoly on land administration.⁵¹⁶

None the less, whether they directly implemented the NLA regulation on site permits or transformed these rules into district regulation, the districts now determine when and how investors may access land and they have directly controlled land use through other permits since 2003. The question is whether the districts have been capable to perform these tasks in a proper manner, and whether they have been willing to account for their decisions related to land use.

7.5.6. The Site Permit and District Spatial Planning

The benefits accruing from the authority to provide site permits could only be fully realized if districts possessed spatial plans made according the SPL 1992 or 2007, since the request for a site permit may only be approved if the proposed land use concurs with existing spatial plans.⁵¹⁷ Both the SPL 1992 (Art. 26) and the SPL 2007 (Art. 26 jo. 37) hold that:

1. Spatial utilization permits should not be granted if their application violates existing district spatial plan;
2. The district government is authorized to process, approve and reject spatial utilization permit applications;
3. In the absence of a district spatial plan, no spatial utilization permit should be issued at all.

This indicates that district government at all times held the power to control access to land and monitor its use through the use of spatial utilization permits or development location permits. Nonetheless, this has not been the case. First, the invention of various permits-in-principle and lastly the site permit indicates that it had been the central government not the districts which determine access to land. Secondly, in practice deviation from this rule has been common.

⁵¹⁶ See Presidential Regulation 10/2006 on the NLA.

⁵¹⁷ Art. 1 NLA Regulation 3/1992 & Art. 3 NLA Regulation 2/1999.

This can at least partly be explained by the fact that the permit-in-principle and site permits mechanism were primarily invented to induce investment (and accommodate private initiatives in the housing and industry sectors) rather than controlling land use in general. Since development planning -general and sectoral- and spatial plans are mutually constitutive in legal practice, quite a number of site permits applications have been approved that are consistent with sectoral development planning (industry, tourism, etc), but not with spatial plans. Granting permits in disregard of spatial plans has become accepted legal practice and has undercut the authority of spatial plans to regulate access and monitor land utilization in the public interest.⁵¹⁸

Even until 2003, the district of Bandung had a number of spatial plans for small towns within the district (*rencana umum tata ruang kota*)⁵¹⁹ but no comprehensive district spatial plan. This did not deter the NLA or the Bandung district government from processing site permit applications in violation of existing spatial plans⁵²⁰ or even allowing land acquisition for the construction of new towns (satellites).⁵²¹ Likewise, districts did not consider the legal obligation to adjust existing district spatial plans to the SPL 2007 as a reason to stop granting permits-in-principle or site permits before such adjustments had been made.

The situation has been aggravated by the fact that by 2002 only 8.1% of existing district actually had a spatial plan, a situation which has continued to exist.⁵²² It consequently means

⁵¹⁸ The site permit granted on the basis of a sectoral plan to develop tourism industry in the North Bandung Area discussed in Chapter 8 provides one example of such practice.

⁵¹⁹ Perda Kabupaten Bandung 12/1990 (RUTRK Soreang; 1989-2009); Perda Kabupaten Bandung 13/1990 (RUTRK Soreang; 1989 -2009); Perda Kabupaten Bandung 19/1990 (RUTRK Soreang); Perda Kabupaten Bandung 47/1990 (RUTRK Padalarang; 1995-2004); Perda Kabupaten Bandung 48/1995 (RUTK administrasi Cimahi; 1995-2004); & Perda Kabupaten II Bandung 49/1995 (RUTRK Lembang; 1995-2004). In 2001, these were replaced by Perda 1/2001 Bandung district spatial planning (RTRW; 2001-2010).

⁵²⁰ In the 1980s, the NLA issued numerous site permits allowing corporations to appropriate land in the supposed “conservation area” of North Bandung and subsequently convert land reserved to function as a water catchment area for residential purposes. In the 1986-1996 period there were 105 developers controlling an area amounting to 3,611 hectares. Between 1996 and 2001, the NLA issued 7 other site permits for 7 developers covering 228 hectares of land. The district of Bandung issued permits covering 128 ha for 5 developers in 2001-2004. See. “KBU Dinyatakan Status Quo” (Pikiran Rakyat, 5 August 2006).

⁵²¹ Interview: Andrian Budi Kusumah (from PT. Bella Putera Intiland. At the time, he was employed in the town management of Kota Baru Bumi Parahyangan); August 2004. The absence of the Bandung district plan as a required reference in considering the company’s application to acquire land was solved through the adoption of an architectural and environmental development plan (*rencana tata bangunan dan lingkungan*) signed by the company and the district government of Bandung.

⁵²² Status Raperda RTRW, Dirjen Penataan Ruang Kementerian PU (www.pu.go.id, last accessed 12/12/ 2005). Cf. “500 Pemda Langgar UU Penataan Ruang”, <http://fpks.or.id/2010/12>, last accessed 27/04/2011. Commission V of the Indonesian parliament reported that in 2011, out of 33 provinces, only 6 provinces had updated their

that site permits had been and continued to be issued, in the absence of a district spatial plan, in reference to sectoral development planning instead. Huge tourism development projects initiated by investors may then be justified by referring to the official development planning. Conversion of agricultural land in Bali and Lombok since the late 1980s to accommodate the tourism industry may well have been made possible by such a system.⁵²³

By emphasising the importance of a top-down synchronized spatial planning system, the SPL 2007 may have further slowed down the adoption of district spatial plans. Provincial governments had to wait to make or adjust their spatial plans until the central government had promulgated a national spatial plan and determined which areas were to be assigned as national special zones. The districts in their turn had to wait for the provincial general and detailed spatial plans. Subsequently, provincial and district spatial plans had to be synchronized with the central government's forest planning, at the risk of annulment of provincial and district spatial plans by the Minister of Home Affairs.⁵²⁴

Hence, quite a number of years will pass before the ideal system as envisaged by the SPL 2007 will have been established.⁵²⁵ As a result, site permits will continue to be issued without any district spatial plan in place and provincial spatial plans or even existing development planning will continue to be used as guidance for regulating access to land instead.

spatial plan, i.e. South Sulawesi, Bali, NTB, Lampung, Yogyakarta and Central Java. Out of 398 districts (*kabupaten*) only 12 (including Bandung district) had revised and promulgated their spatial plans and from 93 municipalities (*kota*) only 3 possess perda RTRW. See also: "Masih Sedikit Daerah yang Punya Perda Tata Ruang" (hukumonline, 9/11/2010).

⁵²³ At the time I worked as a junior associate lawyer at Makarim & Taira Law Office at Jakarta (1989) my first assignment was to assist an Indonesian corporation (allegedly owned by Bambang Triatmodjo, one of the late President Soeharto's sons) in acquiring land in Lombok to be developed into an integrated tourism area. A similar situation could be observed in Bali too, where corporations based in Jakarta acquired land in Bali for tourism development. See also note no. 44.

⁵²⁴ See: "Banyak Perda Bermasalah Demi Genjot PAD" (17 July 2008) available at www.hukum.jogja.go.id/?pilih+lihat&id=44. This article reports that 53% of provincial/district regulations on spatial planning were made in violation of the Forestry Law (41/1999). Especially problematic is the practice by which district governments appropriate forest land through spatial planning and deem themselves authorized to convert forest land for other uses (*alih fungsi lahan hutan*) on this basis. The same article suggests that since 2002, quite a number of regional regulations (*783 perda and one qunanun*) have been invalidated by the Ministry of Home Affairs on account of being found in violation of higher ranking laws related to tax and spatial planning laws. Cf. Hetifah Siswanda, "Menata Ruang untuk Semua (Kompas, 19 November 2008) which describes a similar disarray regarding spatial planning in an urban context.

⁵²⁵ Art. 14 of Law 32/2004 (regional government law) stipulates that spatial planning, utilization and oversight is a government duty attributed to the districts. However, GR 38/2007 (Art. 7) stipulates that spatial planning is a basic service (*pelayanan dasar*) which must be performed by both provincial and district governments.

7.5.7. The Site Permit as a Tool to Control Access to Land and Tenure Security

The site permit is of particular importance for the tenure security of investors and land owners. Tenure security has been defined as protection of landholders against involuntary removal from the land on which they reside, unless through due process of law, including payment of adequate compensation.⁵²⁶ As mentioned earlier, the site permit awards the permit holder with the exclusive right to negotiate with land owners, buy them out and prevent others from doing the same. On account of this “policy,” the permit holder enjoys a monopolistic right to clear the land within the site permit area from competing land claims (*membebaskan tanah dalam areal izin lokasi*) on the basis of agreement (*kesepakatan*) with land owners.⁵²⁷ The site permit is thus supposed to provide tenure security for both investors and land occupants. For investors it comes in the sense of an exclusive right to negotiate, and for land occupants in the form of a guarantee that they will receive fair treatment and adequate compensation. The influence of the site permit on the tenure security of those holding the land that will be the subject of negotiation between individual and communal land owners – disregarding the formality of ownership – will now be considered.

The NLA or the municipal/district land service (*dinas pertanahan*) considers that the location of the land named in a site permit is under ‘status quo’ (*ditempatkan di bawah status quo*). This means that land owners are not allowed to engage in any legal transactions transferring rights or titles to persons or legal bodies other than the site permit holder. This interpretation has been contested by legal scholars and government officials, who argue that a site permit, which is valid for two to three years and can be extended for another year, should not diminish a land owner’s right to request a land title certificate or sell and transfer legal ownership to a third party.⁵²⁸

Such a status quo has a serious impact on the tenure security of those holding the land concerned. This applies in particular to those who only hold an unregistered land title, because the NLA has informally instructed the public officials concerned⁵²⁹ not to accept and

⁵²⁶ Supra, note no. 4.

⁵²⁷ Art. 8 par.(1). Ministry of Agraria/Head of NLA Regulation 2/1999.

⁵²⁸ See Maria S.W Sumardjono (2008), op.cit, p. 40-41. She argues that such a function of the site permit is based on a misperception but is commonplace and apparently accepted as law. A site permit in practice will result in the “*lonceng kematian*” (death) of any land rights as owner or land holder since they cannot transfer ownership to a third party, obtain land titling or request a renewal of land titling. See also, Arie S. Hutagalung, Tebaran Pemikiran Seputar Masalah Hukum Tanah, (Jakarta: LPHI 2005:25-27).

⁵²⁹ There are two kinds of *Pejabat Pembuat Akta Tanah* (public officials holding monopoly on the drawing of land certificates). One is the *camat* (head of the sub-district) by virtue of his official capacity. The other is a notary public who has been appointed as PPAT. Both are closely supervised by the NLA.

process any request for land certificates.⁵³⁰ There is no official support for such a practice. Art. 8 (2) of Ministry of Agraria/Head of NLA Regulation 2/1999 expressly states that:

“A land owner’s right to submit an application for land registration shall not be diminished by the existence of any site permit”.

None the less, this practice is generally condoned in order to speed up the land acquisition process. The NLA in such cases does not recognise unregistered legal claims to land ownership and declares the land concerned under direct control of the state. The NLA will then award a long lease to the site permit holder.⁵³¹ The extra bonus from the NLA’s perspective is that any site permit that is successfully implemented increases the area of land formally titled by the NLA. Such land becomes fully taxable.⁵³²

The above unofficial policy has created the wrong impression that those holding unregistered land only have the right to negotiate the type and amount of compensation. They are not in a position at all to refuse the offer by the site permit holder. This is also evident from the ‘socialization process’ by which the site permit holder informs land owners of the development project as endorsed by the government.

⁵³⁰ Cf. the attached letter of the Minister of Agraria/head of the NLA dated 10 February 1999 to Regulation 2/1999. In this letter, he writes that this understanding of the site permit is based on a misperception. He further argues that the refusal of NLA officers to process land certification applications reflects no official policy but is the decision of an individual officer (see also Art. 8 of the said Regulation). Using this strategy, the NLA (and later the district government) have publicly denied that any site permit they issued violates the right of land owners to freely dispose of their land (personal communication: Reny SH, notary public, working in Bandung, 1 August 2005).

⁵³¹ This part of ‘site permit’ role was specifically mentioned during an interview with two government officials working at the BPN Regional Office of West Java, sub-section of planning and supervision (Budi Karyo & Wijoyo; 1 September 2004). In any case, the NLA possesses the exclusive authority to upgrade or downgrade land title claims. The legal term is “*perubahan hak*”. Corporations, in contrast with individuals, may not enjoy *hak milik* (ownership) on land. They may be granted a master HGB (*HGB Induk*), HGU or Hak Pengelolaan. In 1999, the State Ministry of Agraria/Head of the BPN issued Regulation 9/1999 on the procedure for the granting and cancellation of rights on state land and the right to manage (*tata cara pemberian dan pembatalan hak atas tanah Negara dan Hak Pengelolaan*).

⁵³² Property taxes (including land and building tax: *pajak bumi bangunan*) are the most important source of revenue for the districts. The distribution of revenue collected by the districts follows well-established rules found in Law 12/1994 (property tax law): 90% of collected payment will be redistributed to the regions: it will be shared by the district government (64.8%) and the provincial government (16.2%). Only 10% will be retained by the central government. The district government allocates 9% for collecting cost, including 0.75% for costs incurred in organizing meetings with officials from the sub-districts or villages tasked with the responsibility to distribute the SPPT (*surat pemberitahuan pajak terutang*: tax invoice) to individual taxpayers.

The seriousness of this issue is underscored by the number of unregistered landholdings. Less than 40% of all land in Indonesia, excluding forest area, has been registered,⁵³³ despite efforts to legalize land assets through systematic land titling schemes, sponsored by the World Bank and AusAid.⁵³⁴ Another problem is that registers tend to lose their accuracy. As explained by Wallace:⁵³⁵

“(t)he preference for informality in land transactions runs into land registration, so that derivative, or post-registration, transactions are not always formalized or registered, especially in the case of land that is not of high commercial value. (...) the sustainability of the registration system is also substantially prejudiced by official transaction taxes and other fees collected through BPN. These are officially about 20% of the value of each sale”.

This is reinforced by Indonesia’s adhering to a ‘negative’ system of registration, meaning that legal ownership can be challenged by a third party without time limits at any point in

⁵³³ The legal basis for systematic land titling was the Minister of Agraria/Head of NLA Regulation 1/1995. This regulation was revoked and replaced by Ministry of Agraria/Head of NLA Regulation 3/1995 on Systematic Land Titling. The current process and procedures for systematic land titling is to be found in GR 24/1997 on land registration. In 2004, only 32% of land was titled in Indonesia (tanahkoe.tripod.com 2004). A different source indicates that only 20% was titled, most of it in urban areas (Kompas 5 Oktober 2004). Soemardjito, a government official working at NLA Jakarta, has revealed that less than 40% of land throughout Indonesia was titled in 2009, mostly on Java and in urban areas (personal communication, March 25, 2009). Cf. Noer Fauzi, “Land Titles do not equal agrarian reform”, <http://insideindonesia.org/content/view/1247/47/> last accessed 20 October 2009. He asserts that: “Under the leadership of Dr. Joyo Winoto, BPN has pursued a process of ‘legalising’ land assets through accelerating the certification of land titles at an astonishing rate. The volume of government sponsored land ‘legalisation’ has risen sharply. In 2004, before Joyo was appointed, the BPN issued full legal titles for only 269,902 land holdings. By 2008, the total had reached 2,172,507 – an increase of over 800 per cent. Adding cases for which individuals, groups, and businesses paid their own processing fees brings the total to 4,627,039 property titles certified.

⁵³⁴ See: Smeru, 2002, An Impact Evaluation of Systematic Land Titling under the Land Administration Project (LAP). Research Report, June. In the report that was written that as a result, the LAP, as performed by the NLA during the 1994-2001 period, successfully registered formal land ownership claims of 1.2 million parcels on Java alone. Moreover, according to a press release, AusAid (2001), the NLA successfully registered 1.8 million parcels during that period and provided tenurial security to more than 10 million people in doing so.

⁵³⁵ Wallace, Jude, Indonesia Land Law in Timothy Lindsey (ed.) Indonesia’s Law & Society, 2nd ed. (Sydney: Federal Press, 2006) p. 214. Informality is also likely to be caused by the costly and complex procedures regulating transfer of title. The cost for registering property transfer is fixed. However, parties to a sell and purchase agreement must pay a fixed transfer charge of Rp. 25,000.00 + 4% charge. Buyers must pay 5% (BPHTB and valued added tax). For first time registration, the cost may be more than 3% (of the land market price) as the buyer (new owner) must pay additional taxes (2-5%, excluding property tax). Transfer cost does not reach 1% excluding property tax. The established charge in registering land mortgage (and having the encumbrance registered in the land certificate) is also less than 1%.

Indonesia.⁵³⁶ Anecdotal evidence suggests that even people who have held a land certificate for more than 10 years may lose their claim on this land because a third party has successfully proven before a court to have a legal claim based on informal transactions.⁵³⁷

Informality and legal uncertainty of land ownership will thus be the rule rather than the exception for many years to come. Any analysis regarding people's tenurial security should take this into consideration.⁵³⁸ Furthermore, the site permit itself operates along such a formal-informal continuum. It certainly works to the advantage of the government and private investors. Those holding unregistered land titles have not even a formal right to compensation. None the less, The NLA regulation on the site permit expressly puts the site permit holder under the legal obligation to indemnify both formal and informal title holders.⁵³⁹

In summary, individual land owners or communities (in urban areas as well as remote areas including indigenous people), without legal title, generally possess very weak legal bargaining position. Their claim on land is not taken seriously as a state recognized right to be accorded legal protection⁵⁴⁰. In cases where local communities are more knowledgeable about state law and have access to legal and political support to advance their interests this stance has sometimes been successfully contested, but altogether these are exceptions. Compensation is usually marked as a voluntary gift or charity (*uang kerohiman, uang*

⁵³⁶ Art. 32 GR 24/1997 (on land registration) stipulates that the time limit is 5 years after the issuance of the land certificate. However, this statutory time limit may be extended ad infinitum in legal practice.

⁵³⁷ See "Kontroversi Sengketa Tanah Meruya: Kasus Puluhan Tahun Yang Belum Menemui Titik Terang Penyelesaian" (Analisis Mingguan Perhimpunan Pendidikan Demokrasi, Vol. 1 no. 9 May, 2007).

⁵³⁸ UN-Habitat, Handbook on Best Practices: Security of Tenure and Access to Land, Implementation of the Habitat Agenda (Nairobi: UN Habitat, 2003), p. 2. The UN Habitat suggests that "any analysis of security of tenure and rights to lands needs to take account that firstly, there are a range of land rights in most countries which occupy a continuum, with a number of such rights occurring on the same site or plot. Secondly, it is not possible to separate the different type of land rights into those that are legal and those that are illegal. Rather there is a range of informal-formal (illegal-legal) types along a continuum, with some settlements being more illegal by comparison than others".

⁵³⁹ Art. 6(9) (transfer of rights on land) Ministry of Agraria/Head of the NLA 2/1993.

⁵⁴⁰ As argued by Gunanegara, this power to annul or otherwise award land rights (ownership, the right to building etc.) to persons or corporations is based on the state's right to control as embodied in Art. 33(3) of the 1945 Constitution. This award or annulment is performed by issuing a government decision (*beschikking*) as legal evidence of legal title and the recognition that such claims will be accorded protection. In this context, one should read the constitutional guarantee (Article 18H par. 4 of the 1945 Constitution) which stipulates that everyone is entitled to possession and must be accorded protection from arbitrary dispossession (*setiap orang berhak mempunyai hak milik pribadi dan hak milik tersebut tidak boleh diambilalih secara sewenang-wenang oleh siapapun*). See Gunanegara, op. cit. p. 14-15.

pengusiran)⁵⁴¹ and in some cases, informal title holders are simply evicted without compensation at all.⁵⁴²

7.5.8. The Socialization Process: Investors' Tendency to (Mis) Represent the Public Interest

Site permit holders always portray themselves as representing the public interest and enjoying full government support for this reason. Particularly relevant for housing construction companies or real estate developers is GR 80/1999 on making land ready for residential development.⁵⁴³ The introduction to this regulation suggests that having a site permit indicates that a housing construction company is performing a public duty: providing the government with new residential areas or houses for the general population. Moreover, all site permits include a list of public duties transferred to the permit holder, such as a promise to finance or construct mosques, public schools or other public facilities.⁵⁴⁴ The site permit thus serves as a public-private arrangement or partnership for development, and as a government tool to coordinate land development programs.

Unsurprisingly, private investment initiatives are often presented as part of the government's official development program (or at least as being beneficial to the local economy and population) during the so-called "socialization process". This is especially the case with housing and construction projects. Government support for the land acquisition process is often expressed as well during the public consultations prior to the issuance of a site permit. These consultations are obligatory (Art. 6(5) NLA Regulation 2/1999) and serve to disseminate information about the investment project, including its land acquisition plan. They also enable the developer to collect relevant data from the community and to discuss alternative forms of compensation with local land owners.

⁵⁴¹ Ariadi Suryo Ringoringo from the Poor People's Association/Serikat Rakyat Miskin Indonesia points out that site permit holders in Jakarta mostly paid compensation out of charity rather than legal obligation to land occupants (personal communication, 28 January 2009).

⁵⁴² Bede Sheppard, Leonard H. Sandler Fellow, "Condemned Communities" a Human Right Watch Report available at <http://www.hrg.org> (last accessed 1/27/2010)

⁵⁴³ Government Regulation 80/1999 on ready to use residential areas or environment (*Kawasan Siap Bangun dan Lingkungan Siap Bangun yang Berdiri Sendiri*).

⁵⁴⁴ They are seldom enumerated and included explicitly in the site permit, but nevertheless form some of the terms and conditions of the site permit. Djamhari, a former bupati of Bekasi, has justified this practice by arguing that the district government seldom has the financial capability to fulfil its duty of bringing development to the local population. Similar arguments have been made by Tigor Sinaga from REI and other legal officers employed by housing construction companies interviewed for this study. The same system has been found underlying the *persetujuan pemanfaatan ruang* discussed earlier in note 36.

While the socialization process seems intended to give the local population a voice, it only allows for discussions regarding the amount or form of compensation. It cannot prevent the government from providing a site permit.⁵⁴⁵ The same applies to the letter of approval for spatial utilization (*surat persetujuan pemanfaatan ruang*), which in Bandung precedes the site permit procedure.⁵⁴⁶ Here, the applicant is likewise under the obligation to inform land occupants in the neighbourhood about the development plan, but they are not allowed much space to contest the plan. As one government official in Cimahi working at the city planning service confided:⁵⁴⁷

“In case of an individual raising an objection, the government has the obligation to check and if need be mediate (...) in most cases objections shall be considered as merely a technical matter and dealt with accordingly”

The choice of words in both the site permit and spatial utilization approval indicates that this socialization process does not involve a genuine effort to encourage public participation in investment plans that may radically alter land use patterns. Rather on the contrary, it tends to reduce the negotiation process into a one-way discussion to which land owners and inhabitants of the area concerned are invited by sub-district heads (or heads of the village government) to be informed of the future project. This also indicates the government’s tendency to view investment initiatives as automatically being in the public interest or at least to see them as part of its strategy to bring development to the people. This has resulted in a misreading of the principle embodied in Article 6 of the BAL: that every plot of land has a social function now means that land owners must be willing at all times to surrender their rights for the sake of development.⁵⁴⁸

⁵⁴⁵ Cf. Rosie Campbell, Keith Dowding and Peter John, “Modelling the exit—voice trade-off: social capital and responses to public service” (paper for the ‘Workshop on structural equation modelling: applications in the social sciences’, Centre for Democracy and Elections, University of Manchester, February 28 2007).

⁵⁴⁶ See Note. 36.

⁵⁴⁷ Nandang from the Dinas Tata Kota Pemkot Cimahi, personal communication 25 February 2004.

⁵⁴⁸ See Gunanegara, op.cit, p. 27-28. See also Maria S.W. Soemardjono, “Dalih untuk umum masih dipakai untuk menggusur rakyat” (Kompas on line 27 March 1996); and Dedi Sinaga, UU Pengambilalihan tanah perlu dicabut (Tempointeraktif 6 Februari 2001).

7.6. After land acquisition: land use for development

The situation described above works to the advantage of site permits holders when negotiating compensation. As a result, small rural or urban kampong landowners partially subsidize the cost of urban development initiated by private commercial companies,⁵⁴⁹ while the government can increase the amount of formally titled land with the support of site permit holders.

The next part discusses how the site permit functions in practice, starting with the terms and conditions that are a part of all permits regulating land use at the district level.

7.6.1. Terms and Conditions of the Site Permit

After 2003, the district governments, rather than the NLA, have begun to determine what requirements are to be appended to all applications for site permits. This has been a very important shift in terms of granting districts concrete responsibilities regarding the control of access to land and the monitoring of its use. It also signifies the rising importance of district development and spatial planning. Districts, not the central or provincial government as in the past, now possess full authority to direct, control and monitor land use for development. Whether that means greater government accountability and tenurial security for land occupants remains to be seen.

In Bandung all site permit applicants now need to include:

- (1) A permit-in-principle issued by the president, BKPM or an organ/service at the district level;
- (2) A rough map/sketch of the land to be acquired;
- (3) A description of the project;
- (4) Spatial Utilization Approval (*persetujuan pemanfaatan ruang*) from the District TKPRD (which includes the district head, and heads of all government service or boards).⁵⁵⁰
- (5) A letter guaranteeing applicants' willingness to compensate or resettle land owners;

⁵⁴⁹ Cf. Raymond J. Struyk, Michael L. Hoffman and Harold M. Katsura, *The Market for Shelter in Indonesian Cities*, (Washington: Urban Institute Press, 1990). Esp. Chapter V (land acquisition and titling for BTN-financed housing), pp. 121-156.

⁵⁵⁰ A team (committee) to be established by the provincial and district governments on the basis of a ministerial instruction (Home Affairs 19/1996 *tentang pedoman koordinasi penataan ruang daerah tingkat I dan tingkat II* as amended by Ministerial Decree 147/2004 (*pedoman koordinasi penataan ruang daerah*)).

- (6) A letter from land owners whose land has been acquired affirming their willingness to release any claims on land or transfer such claims to the site permit applicant.

This list shows that all district services or boards, as well as the TKPRD must have approved of the proposed investment plan and its location, but also that the applicant must guarantee that the land acquisition will be performed on a voluntary basis and that land holders will be adequately compensated. For land already acquired, the district government demands written evidence from land owners affirming their willingness to transfer title to the site permit holder. Such letters may be presented in the form of a notarial sale and purchase deed, or an agreement to release title in the event that the land was not titled.

The applicant's promise to acquire land on a voluntary basis also functions as a guarantee that it will be free of competing property right claims. Only after having acquired all of the land may an applicant proceed to request the NLA for a title. This protects the NLA against any third party claims contesting the legality of the land acquisition on the basis of a site permit. The site permit also contains a special clause for this purpose. The government may protect itself likewise from future legal claims filed by a third party for environmental damage caused by project development, putting all accountability on the holder of the site permit.

Other requirements may be appended from time to time and adjusted to specific conditions. For instance, a site permit awarded by the Mayor of Bandung in 2000 indicates that the applicant must also submit:

- (7) A description of the integrated tourism project development (*uraian rencana proyek pembangunan kawasan wisata terpadu*) ;
- (8) A statement signed by the applicant that he will abide by the law.

A different site permit issued by the Mayor of Bandung in 2003⁵⁵¹ states that the applicant must also submit:

- (1) a description of the project proposal (*uraian rencana proyek pembangunan perumahan*);

⁵⁵¹ Mayor of Bandung Decree No. 595.82/Jep.1132-Huk/2003 on the site permit granted to PT. Bumi Antapani Mas (pemberian izin lokasi untuk keperluan pembangunan perumahan atas nama Pt. Bumi Antapani Mas beralamat di Jl. Cicalengka Raya no. 27 Bandung seluas $\pm 55/000 \text{ m}^2$ (± 5.5 . ha) terletak di Kelurahan Antapani, Kecamatan Cicadas Kota Bandung).

- (2) a spatial utilization approval from the District Development Planning Board (Bappeda) (*persetujuan pemanfaatan ruang*);
- (3) a consideration concerning proposed land use (*pertimbangan aspek tata guna tanah*) issued by the NLA regional office or the land service of the municipality.

The above list indicates that the municipality is now in full control of the procedure. More importantly it signifies that any site permit approved should be in line with the district spatial plan or any other land use plan. On the other hand, confusingly, the above list mentions two kinds of spatial utilization approval, one to be granted by the TKPRD and another by the Bappeda, suggesting that applicants must request the same letter from two different institutions. This might not be case as the TKPRD is actually an ad hoc committee working under the auspices of the Bappeda. The request in practice is addressed to the Bappeda but discussed within the TKPRD.

Ironically, the site permits I obtained in this case ⁵⁵² carry no reference to any district detailed spatial plan or zoning regulations. Nonetheless, eventually the spatial utilization approval was issued by the TKPRD and Bappeda, after its constituent services found that the project met the requirements for land use in general (city planning service: *dinas tata kota*), specific technical requirements for the construction of buildings and detailed land use (building service: *dinas bangunan*), the allocation of open green areas and public parks (public parks services: *dinas pertamanan*), and others.

It is noteworthy that the NLA -which lost its power to issue site permits in 2003- was brought back into the procedure to submit its considerations regarding aspects of land use. To what extent its role differs from the spatial utilization approval as issued by the both the TKPRD and Bappeda is rather vague. Apparently, the NLA uses its own land use plan (*rencana tata guna tanah*) for this purpose.⁵⁵³ In sum, investors requiring land must seek

⁵⁵² Cf. note 36.

⁵⁵³ One of the NLA's competencies concerns the determination of land use planning (*penatagunaan tanah*), i.e. the implementation of the Government Regulation on land use (No. 16/2004; *penatagunaan tanah*). A comparable permit is necessary before a government institution can acquire land, but carries a different name, "approval on the land acquisition of the land requested" (*persetujuan penetapan lokasi pengadaan tanah*) (see Mayor of Bandung decree No. 593.82/Kep.158-Huk/2006 (*persetujuan penetapan lokasi pengadaan tanah untuk kepentingan pengembangan sarana olahraga terbuka di lingkungan kampus politeknik manufaktur Bandung Kelurahan Cigadung Kota Bandung seluas 6.093 m2*)).

Soemardjito from NLA Jakarta explained that *penatagunaan tanah* is actually the same as spatial planning (personal communication, March 25, 2009). An earlier visit (July 2004) to the Bandung land office also revealed that *tata guna tanah* is similar to spatial management (*tata ruang*: planning, implementation and oversight). Unfortunately, existing literature on the subject pays no attention to this difference between spatial

approval from the NLA, which has competencies regarding land use planning (*penatagunaan tanah*), the mayor, who approves applications for permits-in-principle and site permit, and the Bappeda or TKPRD, which comprises of various district government agencies that have competencies regarding the control and monitoring of actual land use. All of these actors hold similar responsibilities in controlling land use, which tend to overlap. Regardless, the permit seeker must still seek the endorsement of these three different government bodies.

Both the permit-in-principle and the site permit thus refer to terms and conditions related to how land should be acquired and used. These references concern obligations to the earlier promises, that permit holders should compensate land owners pursuant to the prevailing law. Another important obligation in the site permit is that the permit holder is to adapt his or her site/land use plan (the project's blueprint) to the district's detailed spatial plan. Such adjustments are to be made by the permit holder after the NLA has measured the land acquired and provided the permit holder a long lease for building purposes (*hak guna bangunan*) or one for cultivation (*hak guna usaha*). On this point specific conditions are enclosed in the site permit to ensure this obligation's fulfilment. They demand that the future land holder obtains other permits or binding recommendations from other services, particularly the public works, city planning and building services. In the process, other specific conditions may be required by these services. In other words, a number of additional permits and recommendations play a role controlling actual land use by the site permit holder. This suggests that how land shall be used by the permit holder is fully controlled and monitored by the district government.

However, the Bandung municipality has inserted a number of exoneration clauses into such permits. In the case that man-made disaster occurs – the direct or indirect result of actions taken by the permit holder - the government agency issuing the permit or recommendation shall be exonerated from any legal responsibility. It is the permit holder who will be liable and fully responsible to pay compensation for damages caused to third parties or to rehabilitate the environment damaged or polluted by its actions. In fact, the government thus renounces its “public” duty to plan, implement and control land use, which violates the SPL 1992 and SPL 2007. The result is that these permits grant dispensation to the permit holder to stray from spatial plans or zoning regulations and thus legalize illegal land use. Moreover, the municipality may even provide specific permits for the same purpose.

management (*tata ruang*) and land use planning (*penatagunaan tanah*). See H. Muchsin & Imam Koeswahyono, op.cit.

7.6.2. Land Use Permits at the District Level⁵⁵⁴

Once the land for a project has been acquired, the site permit ceases to play a direct role in determining land use. Other government agencies regulating specific aspect of land use take over. The most important permits at this stage are:

- (1) The land clearance permit (*izin pematangan lahan*), allowing land owners to clear land in preparation for its intended use; issued by the *Bina Marga* section of the Public Work Service (*Dinas Pekerjaan Umum*);
- (2) A recommendation regarding flood containment (*Peil Banjir*) issued by the Water Management Service (*Dinas Pengairan*);
- (3) The land use allocation permit (*izin peruntukan penggunaan tanah/IPPT*), issued by the City Planning Service (*Dinas Tata Kota*), which allows land owners to use land for its intended purpose in compliance with existing detailed planning and zoning regulations;
- (4) The construction permit (*izin mendirikan bangunan/IMB*), which ensures that buildings shall be constructed according to the prevailing building codes, issued by the Building Service (*Dinas Bangunan*).

In order to obtain the IPPT and IMB in particular, applicants must first acquire a number of other recommendations related to land use and zoning regulations, such as a directive on land use (*fatwa tata guna tanah*) issued by the District Branch Office of the NLA (*Kantor Pertanahan*) and site plan approval (*advies planning*) issued by the City Planning Service. Given their non-binding nature, these two are typical “recommendations on spatial use” (*pengarahan pemanfaatan ruang*) or investment location (*arahan lokasi investasi*) as mentioned in the SPL 1992 (Art. 22 par(3c)). The SPL 2007, on the other hand, only mentions zoning, licensing, incentives and disincentives, and the use of legal sanctions as instruments available to the government to control spatial use (Art. 35). However, the use of “recommendations on spatial use or investment location” has been used none the less. In this manner each step in the process of gaining permission for land use seems to be closely monitored by the district government by means of permits and recommendations.

⁵⁵⁴ This section describes the situation as it is in Bandung Municipality. The Bandung Municipal Government uses 28 permits to control business or investment initiatives. Only a few relate to land acquisition and land use. Other municipals or districts may have a different number and perhaps kind of permits. Certainly after 1999, districts enjoyed greater freedom in regulating access to natural resources and determining the region’s investment climate by the creation of a number of permits. Cf. P. Agung Pambudi & Neil McCulloch et al, op.cit.

7.6.3. Permits as Exemptions to the General Rule

A first example of a specific permit providing an exemption from restrictions on land use is the permit for the adjustment of the course, form, dimension and slope of waterways or rivers (*izin perubahan alur, bentuk, dimensi dan kemiringan dasar saluran/sungai*), better known as “the permit to correct the course of rivers” (*izin normalisasi sungai*). It allows the land owners to disregard the obligation to preserve and protect river basins and watersheds.⁵⁵⁵ They may even be allowed to close down natural springs. Both areas are explicitly mentioned in the SPL 1992 and 2007 as conservation zones where use is restricted. As stated by an official working at the Bandung Public Works Service, the basic consideration underlying the granting of this particular permit is to allow land owners to maximize land use by correcting the natural meandering flow of rivers and avoid having to manage the 200 m² encircling natural springs.⁵⁵⁶

Another example is the land clearance permit (IPPT). The IPPT has been interpreted as allowing land owners to close down bothersome springs and lakes established for flood control or level off slopes not fit for development although they should be protected according to the SPL 2007. The permit is used to justify violations of other land use restrictions as well.⁵⁵⁷ The same government official quoted above explained that such a practice was prompted by district government agencies’ desire to avoid burdensome legal obligations in managing protected areas. He argued that most government agencies, particularly the Public Works Services (which includes the Water Management Service), do not have the technical capacity or financial means for this.

⁵⁵⁵ Ministry of Public Work Regulation 63/PRT/1993 (on the Management of Watersheds and River basins: *garis sempadan sungai, daerah manfaat sungai, penguasaan sungai dan bekas sungai*). Art. 4 stipulates that the power to determine watershed lines (*garis sempadan sungai*) shall be divided by and between the Minister of Public Works, districts and a special legal body (*badan hukum tertentu*). For rivers running through districts, the line will be determined minimally at 10 meter from the riverside of rivers with a depth of 3 meters; 15 meters for rivers with 3-20 meter depth; and 30 meters for rivers with a depth of more than 20 meters (Art. 8). Implementing the above, the Bandung municipal government issued Regulation 6/2002 which stipulates that the watershed line shall be determined at 4 meters in case of buildings and 2 meter in case of a fence constructed along the watershed in very dense urban residential areas. A quick look at the Cikapundung watershed and other small rivers in Bandung reveals that this rule had been mostly ignored by society in general.

⁵⁵⁶ Rosiman Karmono, personal communication, Bandung, August 10, 2004.

⁵⁵⁷ As pointed out by Abrar Prasadjo, a kampung resident living adjacent a real-estate company. (21 August 2004). This company closed down a natural spring found within its area. Similar examples are found in abundance in and around Bandung. Taufan from DPKLTS relates similar examples in which companies have disregarded general rules prohibiting use of protected areas (30 July 2004).

Similarly, the Nuisance Ordinance Permit (*Izin Undang-Undang Gangguan*)⁵⁵⁸, although originally intended to control land use by industries or other business enterprises, in practice has been used in such a way as granting a permit holder the right to convert the use of residential buildings into business premises in deviation of existing zoning regulation. In the case that one residential building within a residential zone had been successfully converted, others quickly follow. This trend had been behind the rapid conversion of residential areas around the city center of Bandung into a busy commercial and business area.⁵⁵⁹ Likewise, the prohibition against the conversion of rice fields⁵⁶⁰ has been bypassed by the issuance of a permit allowing the holder to do just that (*izin perubahan penggunaan tanah pertanian ke non-pertanian*). This permit is provided by the Agricultural Service (*dinas pertanian*) on behalf of the Mayor or District Head.

District governments may also use these means to liberate themselves from spatial plan restrictions. Perhaps the most extreme example is the Cimahi Municipality's 2001 decision to build a municipal office in the middle of an irrigated valley along the basin of the Cimahi River. This went completely against the spatial plan, which in other respects, however, was quite problematic itself: it labeled the conservation zone in North Bandung "under-developed land" and allocated it for housing and business.

Violations and digressions thus occur at different levels. At the lowest level we have seen that what should be considered illegal is justified by the introduction of a permit granting the holder dispensation from complying with a general rule. This has led to a situation where real estate developers, and governments themselves, are allowed to continuously disregard

⁵⁵⁸ The Nuisance Ordinance Permit (*UU Izin Gangguan*) S.1926: 226 as amended by S 1940: 14 as further elaborated in Perda Kota Bandung 27/2002 on the Nuisance Permit and Business Permit (*izin gangguan dan izin tempat usaha*).

⁵⁵⁹ In previous spatial plans of Bandung, notably those made by T. Karstens, the area along and around Jl. Dipati Ukur, Ir. H. Juanda (Dago), Cihampelas and Sukajadi (major transportation roads in Bandung) had been preserved for residential purposes, schools and hospitals. Since the late 1980s and continuing today, a great number of residential houses has been converted into business offices, shopping centres, and restaurants. Investors apparently have not been inhibited by zoning regulations as they can use or misuse the nuisance ordinance permit, which requires a prior neighbour approval (*persetujuan tetangga*) before being approved, to exempt themselves from the obligation to establish commercial or business enterprises within a residential area. In practice, the neighbour approval has been assumed to be acquired by conducting a socialization process or sending a circular notification on the plan to the closest neighbours. Apart from that investors may also be exempted from zoning regulations by the use of IPPT, allowing them to use land in accordance with their investment plan. See note 93.

⁵⁶⁰ Presidential Decree 53/1989 on Industrial Estates (amended by Decree 98/1993 and 41/1996) explicitly prohibits conversion of fertile and productive irrigated rice fields. A similar rule is found in the Circular Letter of Ministry of Agraria/Head of NLA 410-1851 & 460-3346 of 1994.

restrictions on land use. Making matters worse, most district governments do not allocate sufficient funds for monitoring whether land use is in accordance with spatial plans or even zoning and building regulations.⁵⁶¹ As a result, even if a clearly illegal situation exists chances are slim that something will be done about it.

7.6.4. Investors, not District Spatial Plans determine land use

This situation reinforces the wrongful, but deeply embedded, perception that he who acquires and physically controls land enjoys the freedom as to decide how best to use it. As Agus Setiawan, an in-house lawyer of a big real estate developing company in Bandung (PT. Setra Duta), argues:⁵⁶²

“After you acquire and control the land, it is practically up to the company (or owner) how to use it. As a company your first priority must be to acquire and control the land (take physical possession). How you will actually use the land depends on how you deal with the appropriate governments controlling various permits and binding recommendations.”

Tonison Ginting, representing a Tangerang based real-estate company, put it far more bluntly:⁵⁶³

“According to the prevailing law this land is formally-legally ours. So we are free to decide how to best use our land. On what basis do they (the government and the people) demand that we cease to perform certain activities? This is our land”.

⁵⁶¹ E.g. Sri Dewi Sartika, “Perubahan Fungsi Lahan di Dago dikaitkan dengan pemberian Ijin Peruntukan Penggunaan Lahan dan Ijin Mendirikan Bangunan” (unpublished paper, Bandung December 2007). This study was performed under my supervision. Cf. Rumiati Rosalina Tobing, “Evaluasi Penerapan Peraturan Daerah tentang Bangunan di Kota Bandung” (Bandung: Lembaga Penelitian Unpar, 2004/2005).

⁵⁶² Personal communication, Bandung 2 September 2005. Setiawan refused to let me review PT. Setra Duta’s permits or other relevant legal documentation. Two other real estate companies repeatedly declined requests for interviews (Batununggal and Dago Pakar). Instead, I gathered information during field visits to these sites.

⁵⁶³ Ginting made this statement in defence of his company’s decision to close down a manmade lake, established by the local government as part of a water management system. See “Pengembang Terus Menguruk Situ Antap” (Kompas 2 November 2009).

While the argument made in the second quote is clearly incorrect, it is true that spatial plans and zoning regulations have become malleable to the concrete needs of land owners by the use or misuse of permits, a perception shared by officials of Bandung Municipality.⁵⁶⁴

Equally worrisome is the perception commonly found among government officials and high and middle ranking employees working in the housing industry that land use permits are merely a sort of procedural afterthought without any real legal consequence. Permits and recommendations related to land acquisition and land use are perceived merely as revenue collection mechanisms. The complexity of obtaining permits and related recommendations reinforces this view. Teguh Satria, head of the central council (*dewan pusat*) of Real Estate Indonesia (the association of housing construction companies), unsurprisingly complained that:⁵⁶⁵

“Heads of Districts or Mayors apparently perceive that housing construction companies must share their earnings with the government (*membagi keuntungan*). Developers even have to beg to obtain permits (*mengemis minta izin*).”

This suggests that the complexity of the permit and recommendation system mainly serves to fill the coffers of the municipal government, but it also alludes to the opportunities it opens for members of the bureaucracy and individual government officials to enrich themselves. Instead, the complexity and opaqueness of the permit system in spatial management is a breeding ground for corrupt practice and hinders the establishment of good governance in spatial management.

⁵⁶⁴ As concluded by Sri Dewi Sartika, op.cit, on the basis of interviews with Aa Sutarna from the Building Service (19 September 2007) and Rosiman Karmono from the Urban Planning Service (28 September 2007). The same perception emerged from interviews I conducted with government officials (Bandung municipality and district and Cimahi) during the course of this study (2004-2010). Behind this lack of interest in using the IPPT (and nuisance ordinance permit) as instrument to prohibit land use not in accordance with spatial plans (and zoning regulations) has been the floating policy mentioned earlier in Chapter IV.

⁵⁶⁵ “Pemda belum peduli perumahan: pengembang seharusnya dapat kemudahan (Kompas, 9 november 2009: 23).

7.7. Conclusion

There is no doubt that it is important for the general public to be aware of when permits pertaining to land acquisition and land use are issued and what their contents are. It is equally important to have clarity about the laws underlying such permits and what they allow the government to regulate by means of them. Only in this way can permits be an efficient tool to regulate spatial planning in the public interest.

In practice, however, we have seen that the licensing scheme relating to the spatial utilization permit is best understood as the embodiment of a negotiated agreement with conditions appended to the permits. A permit reflects the relative bargaining power of government officials on the one hand and private investors on the other – with generally little influence of other stakeholders or the general public. It seems as if the role of government officials in issuing permits is not so much to articulate the public interest as to arbitrate between the interests of different groups and legitimate certain interests and policy proposals.

This situation is partly caused by unclarity about the functions of the spatial utilization and development location permits. In fact, these two permits as mentioned in the SPL 1992 and SPL 2007 do not exist in that sense in legal practice. Instead, various government agencies from different levels have created their own permits and binding regulations that control access to land and restrict its use. Legal practice, especially in the housing and construction industry, shows that access to land is controlled by the government through the permit-in-principle and the site permit. Both permits are more related to investment policy than to spatial management. My research has demonstrated this for Bandung, but it is likely the case in most other cities in Indonesia as well. Many other permits have furthermore been created to control specific aspects of land use, but often for purposes going against the whole idea of spatial planning.

The sheer number and variety of permits and related binding recommendations makes it extremely difficult to trace which government agency should be held accountable in the event actual land use by investors violates spatial plans. The habitual use of certain permits to waive government responsibility, especially with regard to how a permit holder uses his land, adds to the confusion. Moreover, a complex network of permits and binding recommendations obscures the underlying public-private partnership to bring “development” to the people.

This situation shows an uncanny similarity with production sharing contracts in the oil and natural gas industry, work contracts in the mining industry and forest production permits in the forestry industry. A prominent feature of all of these negotiated agreements is the delegation of the authority to exploit natural resources to the permit holder *together* with the transfer of a number of government responsibilities. In Indonesia this kind of public-private partnership in the management of natural resources has an ideological underpinning in the idea of share-cropping or share tenancy.⁵⁶⁶ Rondinelli argues that the reason for the government's dependency on the public-private partnership stems from the general observation that:⁵⁶⁷

“Neither national nor local governments in most countries have sufficient budgetary resources to extend services and infrastructure or to subsidize inefficient state enterprises or agencies. (...) The current and projected revenue base of most municipalities is inadequate to finance capital improvements and associated operating cost ... (and) many municipalities has large debt obligations, leaving little room for major new loans”

It is in the context of how permits and binding recommendations control access to land and regulate its use that spatial management influences people's tenurial security. In theory, land owners should look at spatial plans in order to know exactly which “development” plans might potentially impinge on their tenurial security. This implies that citizens must be aware of which spatial plans are applicable for a specific location at all times and which government agency holds the authority to regulate land use by issuing permits and binding recommendations regulating access to land or restricting its use. The difficulties related to how spatial plans ‘protect the public interest’ and preserve people's tenurial security in actual practice will be discussed more deeply in the next chapters. Part of this discussion will relate to how public accountability has been compromised in the public-private partnership underlying actual land use.

⁵⁶⁶ Cf. Moeliono, Tristram (2008) “The Right to Avail and Share-Cropping: Natural Resource Management in Indonesia”, paper presented at the seminar, *Ten Years along Decentralization in Indonesia*, which was organized by the Faculty of Law Unika Atmadjaya-Jakarta, HuMa, Leiden University and Radboud (Nijmegen) University, 15-16 July 2008, Jakarta.

⁵⁶⁷ Dennis A. Rondinelli, “Partnering for Development: Government-Private Sector Cooperation in Service Provision”, paper presented before the Fourth Global Forum on Reinventing Government-Citizen, Business and Governments: Partnership for Development and Democracy, 11-23 September 2002, available at http://www.unpan.org/conf_globalforum02.asp, last accessed August 2, 2003.

CHAPTER VIII

LAND ACQUISITION AND UTILIZATION FOR DEVELOPMENT: INTEGRATED TOURISM DEVELOPMENT IN THE NORTH BANDUNG AREA

8.1. Introduction

As the previous chapters of this book have indicated, the existing spatial-development plans do not seem to be concerned with actual land use management. They are principally related to the authorization of all levels of government and associated agencies to determine land allocation in order to boost investment initiatives and thus sustain economic growth. Waddell has argued that spatial-development plans “are [largely] dominated by provisions that could be interpreted as permission granting conferrals of legislative or administrative authority”. In her view, their main purpose is to provide “guidance in decision making and guarantee legal accountability in government action.”⁵⁶⁸ The issue surrounding the sharing or distribution of government power in spatial planning as discussed in the preceding chapters should be seen in this context. The basic idea is that districts, albeit under strict control of the central government, should be empowered in managing land within their administrative borders. Whether this is also true in practice must be tested against how the network of permits and binding recommendation are actually utilized and how this affects transparency, public participation in government decisions related to future land use, and government accountability. This approach may also serve to show the extent to which the central and provincial government have been able to seize back spatial management powers, which we discussed earlier in Chapter 6.

Furthermore, it is important to evaluate how permits and binding recommendations regulate access to land and restrain people’s freedom to use it. Niessen mentions how the central and regional governments have made spatial plans the basis for granting permits for development.⁵⁶⁹ She characterizes the site permit as a spatial management instrument, but does not explain how other permits and binding recommendations that regulate land access

⁵⁶⁸ See further S.K. Waddell, *The Role of the Legal Rule in Indonesian Law: Environmental Law & Reformasi of Water Quality Management*, dissertation, University of Sydney, 2004). pp. 128-139.

⁵⁶⁹ Niessen notes that it is far from obvious what kinds of permits fall within the category of “permit for development sites (*perizinan lokasi pembangunan*)”. Nicole Niessen, *Municipal Government in Indonesia: Policy, Law and Practice of Decentralization and Urban Spatial Planning*, dissertation, Leiden University, 1999 p. 245. In any event, the relevant permits are not enumerated in Article 26(1) SPL 1992 and SPL 2007.

influence its actual use. As detailed in the previous chapter, it is important to observe how different government agencies maintain a complex network of permits and binding recommendations intended to control access to land and regulate its use. In other words, it is the network of licenses and binding recommendations which actualize spatial/development plans.

De Soto's work on the relationship between the informal sector and the state/formal law in Peru pays similar attention to the influence of permits.⁵⁷⁰ He essentially argues that permits greatly influence the access cost of partaking in certain economic activities in addition to the cost of remaining legally engaged in them. Important as this may be, I shall not pursue this thought further. The question of how the network of licenses and binding recommendations influences the relationship between the government and investors needing permits to gain access to land is more relevant to this study.⁵⁷¹

To gain insight into the workings of the licensing system and how it influences tenure security and people's access to justice, I present a case study on land acquisition performed by a private commercial company - allegedly in the public interest. An important part of the discussion will regard how society generally reacted against this "development plan" once it became public and what legal avenues exist to contest its legitimacy. The case will shed light on how the complex network of permits and binding recommendations as part of a "negotiated agreement" determined people's access to land and influenced the balance of power between the government, the license holder and local society.

Considering that similar legal rules regulating access to land are generally enforced throughout Indonesia, the case is fairly likely to represent many others. Nevertheless, West Java and Bandung are special in the sense that they represent a densely populated area and

⁵⁷⁰ Hernando de Soto, *The Other Path: The Economic Answer to Terrorism*, (New York: Basic Books, 2002). Especially important is his analysis (Chapter 5) of the cost and importance of the law (permits or licenses) in determining the legality of any economic activity and the informality of claiming and using land. Also compare to, J.M. Lusugga Kironde, "The regulatory framework, unplanned development and urban poverty: Findings from Dar es Salaam, Tanzania", *Land Use Policy* 23 (2006) 460-472.

⁵⁷¹ Roger Wettenhall and Ian Thynne in their article, "Emerging Patterns of Governance: Synergy, Partnership and the Public-Private Mix" (*Asian Journal of Public Administration* Vol. 21, No. 2 (December 1999): 157-178), sums up the emerging trend towards privatization and the emerging forms of partnership between the government and private sector. They conclude that a new discourse is emerging about the desirability of moving to a style of "governance" uniting the state, the market and civil society in the service of the nation from the late 20th century ideological division between those who advocate for a shrinking state and those who argue that privatization abolishes vitally important public interest values and demand for the state's reintroduction. One such new form of governance involves the creation of a public-private partnership.

therefore pressure on land is second only to Jakarta in Indonesia. Manmade disasters resulting from unsustainable land patterns are a pervasive threat in West Java. Lessons learned from this case may thus be relevant to other regions, but the physical conditions need not always be as problematic there.

This chapter is structured as follows. In the first section I present a very brief account on the basic legal principles regulating land acquisition by private actors. It will serve as background information for the Puncut case which will be discussed in the next section. The focus will be on how permits (and binding recommendations) influence the bargaining position of both parties and the extent to which the process is participatory. In the last section I present some general conclusions.

8.2. Transfer of Land on the Basis of Negotiation

As a basic principle, private commercial entities are only permitted to acquire land on the basis of direct negotiation with land owners. Freedom of contract is applicable. On the same basis, any land owner or occupant has the freedom to transfer his right or claim to another party with or without monetary compensation. In practice, however, much depends on the parties' bargaining positions which in turn are influenced by legal and non-legal factors.

In principle spatial plans are not to diminish private actors' freedom to conduct transactions concerning land. The SPL 2007 clearly stipulates that spatial plans shall not impair existing rights and claims on land, whether registered or unregistered, in any way.⁵⁷² On the other hand, general and detailed spatial plans (including zoning regulations, building codes and site permits) undoubtedly influence future land use. They can restrict the new owner's freedom with regard to land use or the conducting of land transactions in the public interest. Simply stated, any land owner or occupant must take into consideration the public interest as articulated in spatial plans and other rules restricting land use. Government control and oversight on individual or community land use is justified on the ideological basis that

⁵⁷² Article 9 GR 16/ 2004 on land use management (*penatagunaan tanah*). Cf. art. 4 SPL 1992 provides that everyone has the right to compensation in case development performed in accordance with existing spatial planning results in damage or injury. No similar provision is found in SPL 2007. However, a more general statement is provided by Art. 7(3) of the SPL 2007 which stipulates that spatial planning implementation shall be done taking into account the existing rights of the people.

Indonesia does not recognize unrestrained individual freedom in land use⁵⁷³. A similar principle is found in the SPLs of 1992 and 2007.⁵⁷⁴

Development permits (*izin-izin pembangunan*) therefore influence the government's ability to oversee the process of land acquisition initiated by commercial enterprises and other entities. The government ought to be able to control land use in the public interest through the utilization of a wide array of related permits and binding recommendations. We will now see how permits (including recommendations without which permits shall not be issued in the first place) influence the understanding of law as an instrument of government. The *Punclut* case provides insight into how private developers acquire land in the name of development and the ways in which permits and their accompanying recommendations are used by both the government and private developers in order to secure their interests.

8.3. Integrated Tourism Area Development in a Conservation Area: the Punclut case

8.3.1. Geographical location and importance of Punclut as Conservation Area

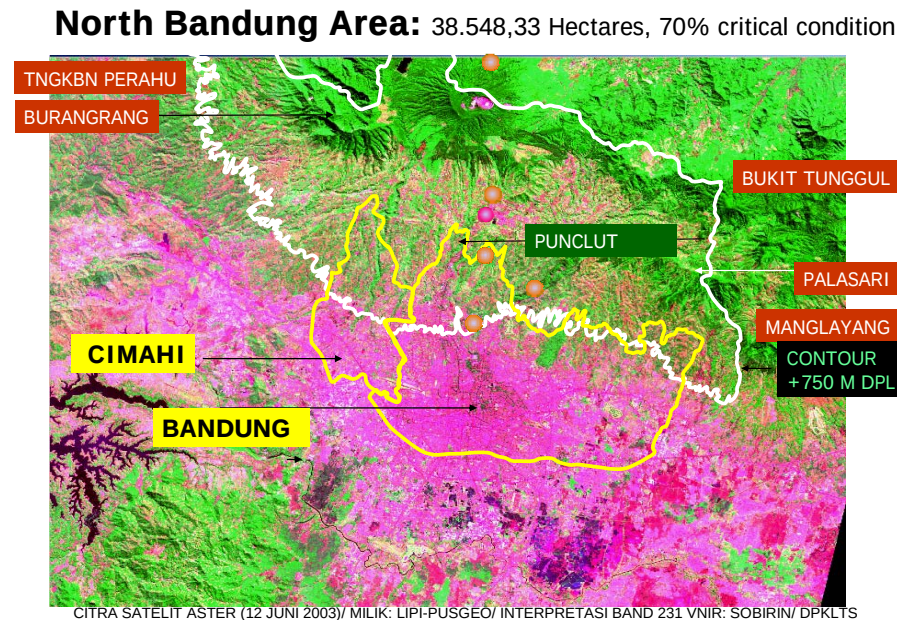
Punclut is the name of a small hill in the conservation zone (*kawasan lindung*) of the North Bandung Area (*Kawasan Bandung Utara/KBU*) (see the sketch below). This conservation area, situated within the administrative borders of the West Java province, is deemed important in maintaining and preserving the sustainability of the greater urban area of Bandung, the borders of which are drawn as a line following the contours of 750 meter above sea level. It lies at the northern end of Bandung municipality and fully falls within its administrative jurisdiction. The same area also denotes the dividing line between the jurisdictions of Bandung district with Bandung municipality. At the northwest lies West Bandung District (*Kabupaten Bandung Barat*) which shares responsibility in managing the part of the North Bandung Area falling within its administrative jurisdiction.

⁵⁷³ Article 6 of the BAL stipulates that every piece of land claimed by individuals and public/private entities must take into consideration the land's social function. The general elucidation of BAL (*dasar-dasar dari hukum agrarian nasional* sub section (4)) further states that land shall be used (or not used) taking society and the state's interests into consideration in addition to those of the individual. However, this does not mean that an individual's interests will be ignored to advance the public interest. Ideally, they should be complementary and balanced (*akan saling mengimbangi*).

⁵⁷⁴ As stipulated in art.3 SPL 1992. A stronger statement is provided by Law 26/2007. Art. 2 of SPL 2007 provides that spatial planning shall be implemented partially on the basis of public interest protection.

A sketch of the North Bandung Area's borders and the administrative borders of Bandung and Cimahi is given below.

Figure 8-5: Map of North Bandung Area-Punclut



The yellow line above marks the administrative borders of the Bandung and Cimahi municipal governments. The white line indicates the borders of the North Bandung Area following the 750 meters above sea level contour line and the tops of mountains encircling Bandung (Manglayang, Palasari, Bukit Tunggul, Tangkuban Perahu and Burangrang). The area colored pink indicates cultivated area, used by both the growing urban and rural populations. It spreads evenly along the low lands of the Bandung basin and the watershed of rivers running from the north (highlands) to the south (Cipaganti, Cikapundung, Cisarua) and from the east to the west (Citarum). The green colored area indicates the remaining forest and protected areas. Part of the protected area is the Taman Hutan Raya Djuanda (Tahura) which only partially covers the Cikapundung watershed. The Bosscha observatory and the now defunct Baru Adjag dairy farm's land lie at the northern side of the Bandung municipality at the foot of Mt. Tangkuban Perahu (Lembang; presently part of the West Bandung District). The black spot at the lower left side of the above picture indicates the Saguling artificial lake (the hydro electrical power plant and dam).

The spatial management of the North Bandung Area (Punclut included) involves not only the districts which share jurisdiction over the area (Bandung municipality, Cimahi, Bandung District and the newly established West Bandung District, founded in 2007) but also the West Java provincial government. Presently, approximately 70% of the North Bandung Area is in critical condition as these district governments seem to be unwilling or unable to stop unsustainable land use patterns.⁵⁷⁵ Punclut and the North Bandung Area are important as the location of a number of natural springs which form an important source of clean drinking water for the increasingly large population of the Bandung municipality and district. These springs and small rivers feed two important rivers in West Java, the Cikapundung and Citarum. The Citarum is dammed in three locations, Saguling, Cirata and Jatiluhur, and provides hydroelectrical power for Jakarta, West Java and Banten. A concerted effort at managing these river basins (including control and oversight through permits) is thus urgently needed.

8.3.2. A brief account of the history of Punclut and the North Bandung Area

During colonial times the area known as Punclut today, was part of a tea plantation owned by a Dutch private company holding a long lease land certificate (*erfpacht verponding no. 12/Ciumbuleuit*)⁵⁷⁶. The Ciumbuleuit plantation ceased to operate in the late 1930s, although the *erfpacht verponding* (long lease) was valid until 1952.⁵⁷⁷ Apparently, the colonial government decided to reforest and preserve the area as a green belt after 1930, taking into consideration the area's vicinity to the Bosscha Observatory situated in Lembang, at the foot of the Mt. Tangkuban Perahu, north of Punclut.

During the early 1950s, former plantation workers decided to settle in the area after losing their jobs. They started to clear the surrounding forest and claimed ownership on the basis of the right to open and cultivate land (*hak membuka ladang*) and the right to till the land (*hak*

⁵⁷⁵ See Chapter 5 of this book, section 5.4.2.3 (conflict and competition in controlling land use of protected areas). Sobirin from DPKLTS argued that approximately 350 hectares within the municipality and district of Bandung (the North Bandung Area) are in critical condition. In Punclut (Ciumbuleuit), this amounts to 150 hectares, Dago Pakar, 80 hectares, and Cimenyan, 70 hectares (Kompas, 8 November 2002). The Bandung Spatial Plan of 2004 also indicates Punclut as being in critical condition.

⁵⁷⁶ R.P.G.A Voskuil e.a. Bandoeng, Beeld van een stad, (Asia Maior: Purmerend, 1996). p. 8.

⁵⁷⁷ "TKPRKP Rumuskan 4 Tahap Penyelamatan: Cabut Mencabut SK Picu Kasus Punclut" (Pikiran Rakyat, 24 January 2005).

garap). These small families established the first kampongs in the area (Cipicung and Pagerwangi).⁵⁷⁸ However, their informal ownership claims did not last long.

First, the government claimed direct control over the land on the basis of the BAL (5/1960).⁵⁷⁹ In effect, the area as referred to by the ex *erfpacht verponding* 12/Ciumbuleuit became state land (*tanah yang dikuasai Negara*). Second, the government, through a decree issued by the *Kepala Inspeksi Agraria* (head of the agrarian inspectorate under the Ministry of Home Affairs) dated 24 February 1961⁵⁸⁰, granted titles of ownership to 943 individuals, notably former army officers from the Territorial Military Command of Siliwangi. Consequently, the kampong people's claims of ownership on the basis of occupation and cultivation were dismissed. The government argued that they only possessed the right to till (agricultural land), which a person may enjoy as long as the new land owner agrees. In practice the kampong people concerned were therefore allowed to remain and moreover retained ownership title over their houses. Furthermore, rural settlers continued to cultivate the land and establish new settlements within the area.

The decree subjected the grant to the condition that the recipients, the military, must use the land (build a house and settle) within 5 years as of the date of decree. Failure to do so would result in the government revoking the grant and the recipients losing their right to demand reimbursement of all the costs incurred in obtaining a land certificate. As a result, land use was not construed as a right derived from ownership but was considered a requirement to be met before the right of full ownership could be enjoyed. The reasoning behind this decision was a policy to populate the area as fast as possible in order to prevent surviving members of the Darul Islam insurgency from using it as hideout.

However, the government provided no infrastructure for the creation of residential area and in 1975 the provincial government officially declared that they were unwilling to finance the construction of roads within the area⁵⁸¹. Unsurprisingly, none of the 943 recipients actually took physical possession of the land, although many of them did obtain a land certificate. From a legal viewpoint this violates the condition under which the grant was issued.

⁵⁷⁸ Personal communication with Ibu Roros, long-time Kampong Cipicung resident. She claimed that it was her grandfather who was the first inhabitant of the kampong established by the tea plantation. After the dissolution of the company, he decided to stay and claim land cultivated as his property. He subsequently became rich selling land to urban people (personal communication, 20-21 June 2004).

⁵⁷⁹ See the rules on the conversion of land rights, article III (*erfpacht* for plantations will automatically be converted into *hak guna usaha*, valid for the remaining lease period but not exceeding 20 years).

⁵⁸⁰ Inspector of Agrarian Affairs Letter (Surat Keputusan Kepala Inspeksi Agraria) 17/Insp.P/1961.

⁵⁸¹ Letter dated 21 April 1975 (6156/75 no. 11).

Consequently all recipients should automatically be considered to have lost their claim of ownership. Regardless, those who successfully applied for a land certificate held on to the belief that their claim of ownership title remained valid, as non-fulfilment was caused primarily by the government failure in developing infrastructure. In addition, the recipients of the grant also argued that the provincial government declared the area north of Bandung as a conservation area where any development initiative must be tightly monitored. As a result, they could not enter the area in the period between 1980 and 1990.⁵⁸²

Later, West Java Spatial Planning *PD 3/1994* and other related decrees⁵⁸³ marked the land as an open-green area, due to its function as a water catchment area. Likewise, the Provincial Environmental Management Board (BPLHD) argued that the provincial government should control the existing development plans and spatial utilization of the area in the interest of the entire population living in the Bandung basin.⁵⁸⁴ Others argued that the area should be left preserved as an open area so as not to disturb its hydro-geological function⁵⁸⁵ and role in controlling the basin's micro climate.⁵⁸⁶ Confusingly the same environmentalist who made

⁵⁸² Solihin GP, "Punclut, "Meneer" Fandam dan 'Nasib' Pejoang" (Pikiran Rakyat, 22 January 2005). Solihin, former commandant of the Siliwangi Division and governor of West Java province in the 1970s, was a recipient of this grant. He cited, among other letters issued by the West Java Governor, No. 181./SK.1624-Bapp/1982 dated 5 November 1982. Others, such as the Head of the Forum Bandung Baru (a forum comprising of recipients of the grant), Teddy Kardin, cited other reasons as well, namely an inability to finance the development of the Punclut area alone (personal communication, 22 June 2005).

⁵⁸³ In 2003, the West Java Provincial Government (by virtue of Provincial Regulation No. 2 of 2003 on Regional Spatial Planning) reasserted the designation of North Bandung as a conservation area. Cf. Badan Perencanaan Pembangunan Daerah Tingkat I Propinsi Jawa Barat, "Rencana Umum Tata Ruang Kawasan Bandung Utara", (Bandung, February 1998). The latest effort at protecting the area is a circular letter issued by the Governor of West Java addressing the Mayors of Bandung and Cimahi and the Regent of Kabupaten Bandung regarding the need to control spatial use for the North Bandung Region in 2004. It was followed by a meeting between these government officials. The final result was a memorandum of understanding to put regional development on hold. See: West Java Annual Report, State of the Environmental, published by the West Java Environmental Protection Agency, for the years 2003 and 2004. However, this MoU was criticized for being an ineffective legal measure. See: "MoU Bandung Utara tak Berguna" (Pikiran Rakyat, 2 June 2004). However, in 2008, the West Java Provincial Government issued PD 1/2008 on the Monitoring of Land Use in the North Bandung region (*Pengendalian Pemanfaatan Ruang Kawasan Bandung Utara* no. 1/2008) which was followed by Governor's Regulation 21/2009 on the technical guidance on the implementation of PD 1/2008.

⁵⁸⁴ This is the standpoint taken by the provincial government, expressed by the BPLHD (badan pengendalian lingkungan hidup daerah/regional environmental management board). See: BPLHD, *Upaya Pengendalian Pembangunan Kawasan Bandung Utara*, (policy paper, 2006)

⁵⁸⁵ Sobirin, working for DPKLTS (a local environmental NGO) based in Bandung. His views have been quoted in national newspapers, see, i.e.: "Rusak Parah, Kawasan Lindung Cekungan Bandung: Permukaan Tanah Terus Menurun" (Kompas, 15 February 2007): a. Cf. I Gde Pantja Astawa from the faculty of law Unpad, Bandung and Chay Asdak from ITB, as quoted in "KBU Dinyatakan Status Quo", (pikiran rakyat, 5 August 2004);

⁵⁸⁶ Punclut, Generator Utama Iklim Kota Bandung, www.pikiran-rakyat.com, 13 Juli 2004.

this remark also took the view that Punclut needs to be revitalized and that development should be controlled rather than prohibited. His contradictory remarks may well relate to the fact that during the same period (1980-1990), the provincial government had been powerless to curb land occupation by the local population living in the kampungs within the area. They used the opportunity created by the legal impasse to take physical possession of available 'no-man' land and claimed legal ownership on the basis of it. The side effect of the whole process described above is that informality of land possession creeps back in despite the best intentions of the government above to populate the area and formalize ownership claims.

Differences of opinion regarding the spatial use of Punclut within the North Bandung Region as sketched above (and implicitly on the issue who would benefit from it) has continued. As mentioned earlier, environmentalists have held the opinion that Punclut must be preserved as an open space in the interest of maintaining its hydro-geological function. However, they have never specified what role local people living in scattered settlements should play in such a scheme. On the other hand, the municipality and district perceived Punclut as underdeveloped and in need of revitalization.⁵⁸⁷ The Bandung municipality's tourism service once came up with a plan to develop Punclut into a modern integrated tourism area,⁵⁸⁸ and decreed that market driven development would decide what kind of tourism activities would be established in the Punclut area for the next ten years. This approach was taken based on the assumption that the area's potential had not been realized to its fullest. These arguments were joined together in an effort to 'save and revitalize' the area. To implement these policy change, private enterprises were invited by the government to jointly develop the area.

In fact, the view that infrastructure development in the North Bandung Area, Punclut in particular, should not be hindered prevailed. There was no absolute prohibition on development as indicated by a decree issued by the state minister of environment which bypassed all other regulations stipulating otherwise.⁵⁸⁹ As mentioned earlier, villagers continued cultivating the land during these years, and the transfer of "informal ownership"

⁵⁸⁷ Cf. "Penataan Kawasan Punclut" (Pemerintah Kota Bandung, 2004). In this document, the municipality lays out a policy plan to develop (revitalize or penataan kembali) the Punclut area.

⁵⁸⁸ Tourism Development Master Plan (Rencana Induk Pengembangan Pariwisata/RIPP) of Bandung of 1997, issued by the Bandung municipal government 1997.

⁵⁸⁹ Keputusan Menteri Negara Lingkungan Hidup/Kepala Badan Pengendalian Dampak Lingkungan, Kep-35/MenLH/12/1998: approval of the Environmental Impact Assessment, Regional Environment Management Development Plans (Persetujuan Analisis Dampak Lingkungan, Rencana Pengelolaan Lingkungan Regional Pembangunan Kawasan Bandung utara Kabupaten Bandung dan Kotamadya Bandung. Propinsi Jawa Barat oleh Gubernur/Kepala Daerah Tingkat I selaku Koordinator Pemrakarsa).

continued unabated. Existing kampongs continued to grow (from only one kampung into several kampongs scattered all over the North Bandung Area)⁵⁹⁰ and many outsiders bought land from either kampung dwellers or grant recipients who sold their land without the government acknowledging their rights.⁵⁹¹

This disregard for the label of “protected land” may well have been influenced by the drive to support private investment initiatives. The central government held the opinion that there was no legitimate reason to prevent this area’s cultivation for non-agricultural purposes. The area was well-known to a number of private companies looking to invest in the tourism industry. In order to facilitate development, access to land was made easier. Especially after 1993, companies could obtain permits-in-principle (issued by the Investment Coordinating Board-BKPM) and site permits (issued by the National Land Agency-BPN) directly from the central government without in practice having to bother with existing provincial and district spatial plans.⁵⁹² The point of view taken was that investment controlled by the central government, especially through the BKPM (investment coordinating board) and the NLA, should be supported by lower ranking regulations as promulgated by regional governments.

By issuing site permits, the NLA allowed for continuous development of the northern part of Bandung, including the conservation areas of Mt. Tangkuban Perahu. As recorded by the Provincial Regional Development Planning Board (*Bappeda Propinsi Jabar*), the NLA regional office had awarded site permits to 72 developers in the northern part of Bandung up until 1996, amounting to 3.307, 72 hectares. During the 1996-2001 period the NLA in West Java continue to award site permits to another five developers amounting to 228 hectares.⁵⁹³

⁵⁹⁰ Cipicung expanded from originally a cluster of small houses in the early 1960s into a village with over 350 families (2010). In the 1970s, people from this village opened up other areas in the vicinity and established other kampongs (Cipicung Hilir, Sekejulung, Sariwangi).

⁵⁹¹ It is legally required that any sell and purchase deed be signed and/or made before a public notary/PPAT. See article 19-23 GR 10/1961 as amended by GR 24/1997 (land registration). The pejabat pembuat akta tanah (official appointed to draw land deeds) is an appointed notary public or ex officio head of sub-districts (kecamatan). Every legal transaction involving land is thus placed under the close supervision of the state and legally recognized only if performed by the PPAT. However, it does not prevent people from performing land transactions under hand or informally.

⁵⁹² One important factor behind the opening of the area for development is that the West Java Governor lost the power to restrain development of said area in 1993. The central government, by virtue of the October 23, 1993 policy package (*Pakto* 1993), effectively transferred the governor’s power with regard to site permits to the National Land Agency. See the Head of NLA’s Regulation 3/1992 as added and amended by 2/1993 (procedure to obtain site permit and right on land for companies established in relation to (foreign/domestic) investment). It was again amended in 1999 by virtue of Head of the NLA Regulation 2/1999 (on site permit). Due to these changes data available showed that since 1993, 10 real estate developers had access to develop this area. In 1995 and again in 2004-05, this number increased to more than one hundred companies.

⁵⁹³ See Chapter 6, especially regarding district’s autonomy in land affairs after 1997/1999 and Chapter 7 on the transfer of the power to issue site permits to the districts following the regional autonomy laws of 1999/2004.

Even after the Regional Government Law's promulgation in 1999 and the transfer of site permit authority to the districts, all districts sharing jurisdiction over the North Bandung Area continued to issue site permits allowing for continued development of the conservation area.⁵⁹⁴ It seems as though they too, in agreement with the central government, believed that investment should not be hampered by land use regulations. In the process, existing circular letters issued by the governor were blatantly ignored. However, it should be noted that given the now equal status of the districts and municipalities with the provincial government, these circulars and decrees had lost much of their persuasive power.⁵⁹⁵ Briefly stated, the practice of granting of site permits highlights the fact that the northern area of Bandung was now being treated more like a cultivation area (*kawasan budidaya*) than a conservation area. This may partly explain the Bandung municipal government's attitude in dealing with environmental concerns over the development of the Punclut area.

8.3.3. Investment initiatives in Tourism Development Planning

To reiterate, undoubtedly the municipality of Bandung considers Punclut to be both mismanaged and underdeveloped. This may well be the reason behind the municipal decision to issue site permits allowing private actors to acquire and develop land within this area.⁵⁹⁶ However, at present, only one private actor (PT. Dam Utama Sakti Prima (PT./PT. DUSP) has been able to commence development. This company, specializing in housing construction, established in 1993, sought to develop that part of the North Bandung Area falling within the Bandung municipal administrative jurisdiction. PT. DUSP argued that the northern part of the Bandung was ideal for an integrated tourism area. The company envisioned a number of residential enclaves for luxurious town houses with a limited building coverage area, a shopping mall, discotheques and an international golf course. Later on, it was added that the development plan was also meant to reinvigorate the area by bringing development to local people who suffered from a lack of access to the town as well as facilitating a municipal policy to reforest the area.

⁵⁹⁴ Adang Jukardi, "Izin Belum Keluar, Pembangunan Sudah Dilakukan" (Pikiran Rakyat, 25 May 2004).

⁵⁹⁵ Joan Hardjono, "Local Government and Environmental Conservation in West Java"(pp. 216-228) in Budy P. Resosudarmo (eds.), *The Politics and Economics of Indonesia's Natural Resources* (Singapore, Institute of Southeast Asian Studies, 2005).

⁵⁹⁶ Four private actors (real-estate developers) obtained site permits allowing for the acquisition of land in the area: PT. DUSP (±248 hectares); PT. Asura International Commerce (116 hectares); PT. Mulya Sejati (30 hectares) and PT. Inaka Mulya (14 hectares). See also DPRD Kota Bandung Ancam Interpelasi Walikota (suara pembaruan daily, 19 January 2005). Dondy, a technical consultant (planner) for PT. Inaka Mulya related to me that the reason that these actors had yet to develop was due to the difficulty in obtaining a recommendation from the Governor, without which the Mayor would not issue other permits and recommendations allowing for development. Personal communication, 12 January 2010.

PT DUSP had already obtained a site permit from the NLA in 1994.⁵⁹⁷ This indicated that the company had secured an investment approval letter (*persetujuan penanaman modal*), better known as a permit-in-principle (*izin or persetujuan prinsip*)⁵⁹⁸, containing the central government's approval of the planned activity.⁵⁹⁹ As may be remembered from Chapter 7 the permit-in-principle empowers its holder to start all necessary preparation to establish his/her business enterprise, including acquisition of land. Hence this permit, albeit indirectly, serves as some sort of official approval that the land acquisition involved is in accordance with existing development or spatial planning.⁶⁰⁰ With the 1994 site permit, PT. DUSP started acquiring land. Later, it submitted a request for master construction rights (*hak guna bangunan induk*) which formalized its claims on land.

The site permit meant that PT. DUSP enjoyed a monopolistic right to purchase land and thus prevented land speculation from its present occupants. In this respect, the site permit shows a close similarity with the land for development letter (*surat penetapan lahan untuk pembangunan*) and the approval on site development letter (*surat persetujuan penetapan lokasi*) used in the Jatigede and Majalengka airport cases. In both cases, the existence of such permits placed the whole area under a status quo where no legal transaction or development activity would be allowed that could hamper the land acquisition process in any way. In fact, officials from the NLA's West Java office refused local people's requests to certify their claims on land in the area.⁶⁰¹ Without a proper land certificate, owners and occupants of said land could not officially sell or transfer their land to third parties or even apply for permits to

⁵⁹⁷ No. 460.02-809-94 (29 April 1994) for the development of "kawasan wisata terpadu bukit dago raya", valid for 2 year and extendable for one year only.

⁵⁹⁸ See Law 5/1984 (industry), GR 13/1995 (industrial permits), and Ministerial Regulation (of industry) 150/1995 (procedure). For foreign and domestic investment companies see: Law 1/1967 as amended by 11/1970 and Law 6/1968 as amended by 12/1970, Presidential Decree 98-118 of 2000 (amended list for investment) and other implementing regulations as elaborated by the Investment Coordinating Board at the central and regional levels.

⁵⁹⁹ Art. 2 of MAR 2/1999 stipulates that every company acquiring *persetujuan penanaman modal* is under the hold obligation to an *izin lokasi* in order to acquire land needed for investment. An *izin lokasi* (Art. 1 par.(1)) is a license granted to companies already in possession of a *persetujuan penanaman modal* to acquire land, transfer land title or ownership and use the land (in accordance with existing spatial planning).

⁶⁰⁰ See Art. 3 of MAR 2/1999.

⁶⁰¹ "Punclut, Nasibmu 'Puncak Ciumbuleuit'", (Kompas, 23 June 2003). This seems also a belief shared by public notaries. In one case, a notary public advised a client that since certain members of the *Panitia Pembebasan Tanah* (or in the case of land acquisition by private enterprises: TKPRD) are also state officials in charge of approving and processing land certificate applications it would be in the client's interest not to proceed with certification of his/her land, Shohibun, "Tanya Jawab Perkara: Besarnya Ganti Rugi Tidak Diatur oleh Undang-undang Maupun Peraturan Pemerintah", (Majalah Berita Bulanan Notaris/PPAT, Renvoi, no. 3.27.III, 2005):26-27.

build or even renovate buildings. Individual claims on land or private property thus were put aside as the company's development plan was decided as being in the best interest of the public.

Accordingly, PT. DUSP's site permit greatly increased the company's bargaining power when dealing with individual land owners, mostly kampong dwellers living within the site permit area or claiming land as land tillers (*penggarap*). One land owner in Punclut allegedly claimed that:⁶⁰²

“Actually, I do not want to sell my land, but the decision was forced upon me by the local government and religious leaders in my village. Presently, I'm again forced to sell a piece of land in front of my house”

However, even with a site permit in hand, PT. DUSP failed to persuade all of the land owners to sell their land. Especially troublesome for the company was the refusal of most of the 943 absentee (ex-military) land owners holding land certificates mentioned earlier. It is also highly possible, considering the incompleteness and low accessibility of land data as maintained by the NLA, that the company encountered difficulty in tracking the whereabouts of those land owners. The prospect of conducting individual negotiation with all of these people, seen from the company's perspective, may also be considered not cost effective. In contrast, it is more efficient to conduct negotiation with the kampong people (holding formal or informal land title) en masse during the socialization process and offer them a fixed compensation price. It might be that such considerations enticed the company to try a different approach. It attempted to put pressure on the NLA, to revoke existing individual land titles⁶⁰³ and convince the Bandung municipal government to support the development plan. This scheme seems to have been quite successful.

First, the Bandung municipal government's land service organized a field visit in July-August 1994 and afterward send a report to the NLA, confirming that there were no houses built in the area known as *ex erfpacht verponding 12/Ciumbuleuit* – part of which the first

⁶⁰² As told by Ki Endang to a reporter. See: “Suara dari Sudut Punclut” a special report in *Pikiran Rakyat* 25 January 2005.

⁶⁰³ This point was made by Solihin GP, one of the absentee “owners” whose land was forcibly taken away. See Solihin GP, “Punclut, Meener Fandam, dan Nasib Pejoang”, (*Pikiran Rakyat*, 22 January 2005)

PT. DUSP site permit referred to. Second, the NLA at Jakarta issued a decree (4 September 1997)⁶⁰⁴ revoking the earlier land grant made in 1961 on the basis of this report. It then declared all existing land ownership certificates to be null and void and instructed the cancellation of all registrations of ownership. Strikingly, it also declared PT.DUSP responsible for compensating for any loss suffered by the land owners resulting from the revocation of land certificates within six month in the same letter. The letter provides no further clarification regarding the decision to transfer this duty (to satisfy compensation claims). However, it does indicate the NLA's intention to shift this burden to PT. DUSP and thus exonerate itself from the legal consequences stemming from its decision.

Such a move might not have completely shielded the NLA from lawsuits from these land owners. However, it did provide them with a guarantee that funding would be provided by PT. DUSP if a court decided that the NLA must pay monetary compensation. The same move also allowed the NLA to decide on the future ownership of state-owned land, while PT. DUSP could secure its claims. Pursuant to the prevailing law, the land known as *ex erfpacht verponding no. 12/Ciumbuleuit* became state land upon which the NLA could award ownership to PT. DUSP (a master right to build or *hak guna bangunan induk*), subject to compliance with the earlier stated requirements regarding the compensation of any loss suffered by the 934 previous owners.

Only a small number of these 934 people whose land certificate had been revoked, decided to bring this matter before the administrative court.⁶⁰⁵ Two of these cases were decided by the Supreme Court. In 2000, the Supreme Court decided to uphold the administrative court's decision in favor of the defendants (the NLA, the Bandung municipal land service and PT. DUSP as an intervening party) in the first case.⁶⁰⁶ In the second, it declared that the NLA's decision to cancel was in violation of the law.⁶⁰⁷

⁶⁰⁴ The Minister of Agraria/Head of BPN, by virtue of Decree 19-VIII-1997 dated 4 September 1997, revoked the letter issued by the Head of the Agrarian Inspectorate of West Java Decree of 1961 regarding the granting of land under an ownership title covering an area of 84.21 hectares (the total area awarded to those ex-soldiers). Several owners accepted the decision and returned their certificate to the Land Office. Others decided to take this matter to the administrative court.

⁶⁰⁵ In legal practice, information on any court judgment is not open to the public. Only the parties themselves have full access. On the other hand, visitors may be granted access to the court registrar after obtaining permit from the President of the administrative court. However, data has to be "handpicked". I was able to look into the particulars of only two of these cases.

⁶⁰⁶ Supreme Court Decision 512 K/TUN/2000 upheld the decision of the administrative court in the first instance (05/G/1998/P.TUN. Bdg (13 August 1998) thereby overruling the High Court's decision in favour of the

Undoubtedly, the decisive factor in those cases brought before the Supreme Court was the existence of the site permit awarded to PT. DUSP by the Bandung municipality (*Kota Bandung*) in 2000⁶⁰⁸ (see the next section). In contrast the district of Bandung (*Kabupaten Bandung*) apparently had not awarded PT. DUSP a site permit allowing it to acquire parcels of land previously part of the *ex erfpacht verponding no. 12/Ciumbuleuit* found within the administrative borders of the district of Bandung.⁶⁰⁹ On that reason alone, the Administrative Court in Judgement 92 K/TUN/2000 determined that the NLA's decision to revoke land titles on land found within the district of Bandung was considered in breach of the law.

Both decisions thus demonstrated how the Administrative Court (and the Supreme Court) considered site permits as binding and used their existence to uphold a government decision made in 1997 (even if the permit was issued in 2000). However, no further clarification was found in both Supreme Court's decisions about why the existence or non-existence of a site permit should be considered decisive in the determination of the legality of the NLA's letter to revoke land certificates en masse. Both are arguably decisions which are not well argued (*kurang cukup dipertimbangkan* or *onvoldoende gemotiveerd*), both decisions even argued that applicants were absentee land owners (and as such violated the condition under which land ownership was granted). The inconsistent manner in which the Supreme Court argued and justified its decisions creates the impression of unfair and discriminatory treatment, but they do underscore the importance of site permits and the court's support to development initiatives.

plaintiff (No. 22/B/1999/PT.TUN-Jakarta, 17 December 1999) (with judges: Paulus E. Lotulung; Widayatno Sastroharjono and Titi Nurmala Siagian).

⁶⁰⁷ Supreme Court Decision 92 K/TUN/2000 (with judges: Hj. Asma Samik Ibrahim; Benjamin Mangkoedilaga and Laica Marzuki).

⁶⁰⁸ This transfer of authority in regulating land/spatial-use was realized by virtue of Presidential Decree 10/2001 (implementation of regional autonomy in the field of land policy/law) and Presidential Decree 34/2003 (national policy on land policy/law). Article 2 expressly delegates former parts of the Central Government's authority (as performed by the National Land Office) to autonomous regional governments (municipalities and regencies), to wit processing requests for *izin lokasi* and *izin membuka tanah* (open/clear empty or under-used land). In the Bandung municipality, this authority was further elaborated upon in Mayor's Decree 170/1999 on the procedure to process site permit applications.

⁶⁰⁹ "Bupati tidak mengizinkan bangun kawasan wisata terpadu bukit dago raya", (Pikiran Rakyat, 2 December 1997).

It is important to realize that aside from a few individuals protesting against cancellation of their land certificates and a few NGOs who had already contested the plan in 1997,⁶¹⁰ others holding a stake in the preservation of North Bandung as protected land (the majority of the people living in the Bandung basin) were not aware of PT. DUSP's plan and the way in which they had been able to acquire land. The Regional Government Laws of 1999 and 2004 had apparently failed to create a more transparent process for the spatial management of the area.

8.3.4. The Regional Autonomy laws of 1999 and 2004

After 1999, the authority to issue permits, notably the permit-in-principle and the site permit, was delegated to the district governments. The Regional Coordinating Investment Board (*Badan Koordinasi Penanaman Modal Daerah/BKPM*) at the district/municipal level was entrusted to process all applications for permits-in-principle, while the authority to process site permit applications came under the jurisdiction of the mayor or the district head working through the Regional Development Planning Board (*Bappeda*). It seems that the previous legal basis for site permits made by the NLA in 1999 was not deemed applicable at the district level. To be able to use the site permit as an instrument for controlling access to land, Bandung municipality issued a decree regulating the process of granting such permits.⁶¹¹ By doing so, the site permit's scope of reach became bound to the administrative borders of Bandung. Accordingly, the municipality itself could now, by the use of site permits, control access to land in implementation of spatial plans or development planning. However, whether the municipality was really willing and able to restrict access to Punclut and control land use within the area was another issue, as the municipal government chose to continue their partnership with PT. DUSP rather than take action to preserve Punclut as a conservation zone.

How should we understand this decision in light of the district's autonomy in spatial management? PT. DUSP acquired legal ownership of much of the land mentioned in the first

⁶¹⁰ "Batalkan, Rencana Membangun Dago Raya"(Pikiran Rakyat, 25 November 1997); "Walhi Tidak Setuju Pembangunan Punclut", (29 November 1997); "Stop Pengembangan Punclut, LSM Desak Pemkot Batalkan Izin untuk PT. DUSP" (Pikiran Rakyat, 7 June 2001).

⁶¹¹ Keputusan Walikota Kepala Daerah Tingkat II Bandung No. 170 tahun 1999 tentang tata cara pemberian izin lokasi dalam rangka pelaksanaan Peraturan Menteri Agraria/Kepala BPN No. 2 tahun 1999 tentang izin lokasi. All other municipalities and district governments currently regulate the process of obtaining site permits independently.

site permit. It then obtained a second site permit from the Bandung municipality under which it acquired an additional 80 hectares. One should note that, in practice, actual control (possession) of the land overrides the district government's enforcement of spatial plans.⁶¹² Thus, the owner of much of Puncut, PT. DUSP was in a strong position to negotiate future land use. Predictably, the Bandung municipality government then decided to allow the realization of the company's so-called integrated tourism development plan,⁶¹³ and awarded them a second site permit in 2000.⁶¹⁴ The municipal government justified such a move by arguing that this particular area was underdeveloped and had been mismanaged by the local population and thus was in dire need of rehabilitation. PT. DUSP, previously the central government's partner in bringing development to remote areas, now became the district government's agent of development.

As mentioned earlier, the 2000 site permit awarded to PT. DUSP was considered a decisive factor by the Administrative Court of Bandung in determining the legality of the NLA's decision to cancel land certificates. The site permit thus provided a necessary legal justification for the "belated" revocation of land certificates by the NLA. At the same time, it also signified the NLA's loss of power in controlling access to land and the districts' new strong position in establishing partnerships for using available land. It was now the municipality rather than the central government which controlled access to land and could monitor its use according to more participatory and locally attuned spatial plans.⁶¹⁵ Likewise, this change provided the municipal government with an option to establish a private-public partnership for developing infrastructure perceived to be automatically in the public interest. The legal framework of this partnership was established through the network of binding recommendations and permits, with the site permit at its centre. Whether this allows locals to have a greater voice in determining their land's best use remains to be seen.

⁶¹² Land owners (holding formal or informal titles) generally disregard land use restrictions found in spatial plans, zoning regulations or building codes. See previous chapter.

⁶¹³ Puncut and the whole land ex erfpacht verponding 12/Ciumbuleuit by virtue of GR.16/1987 (adjustment to the administrative borders of the municipality of Bandung and the Bandung district) fall under the administrative jurisdiction of the municipal government.

⁶¹⁴ Bandung Mayor's Decree 593.82/SK.225-Yantap/2000 regarding the award of *izin lokasi* for the development of an integrated tourism area "Bukit Dago Raya" to PT. DUSP, dated 18 March 2000.

⁶¹⁵ See Chapter 5 for the impact of the decentralization laws to spatial management. For a brief time, the municipality of Bandung was able to draw spatial plan independent of the provincial and national plans.

8.3.5. Bringing development to the people through Public-Private Partnership

PT. DUSP had to acquire approval from various agencies or boards for the proposed land use before it could apply for a second site permit from (1) the Regional Environmental Impact Monitoring Board of Bandung (granted 8 February 2000) and (2) the Regional Development Board (granted 4 March 2000).⁶¹⁶ Both letters of recommendation referred to an earlier decree issued by the State Minister of Environment/Head of the National Environmental Impact Monitoring Board.⁶¹⁷ The decree basically stipulated that the North Bandung area will be open for development albeit subject to strict conditions. This enabled the districts sharing jurisdiction over the area to declare it open for investment initiatives. Said decree thus functioned as some sort of “general approval” under which all individual applications for environmental impact assessment recommendation to be conducted by the districts could be evaluated. It is highly probable that this situation eased the path for PT. DUSP to obtain a separate environmental impact assessment (as later demanded) and to renew its previous environmental impact analysis for the land it had acquired.

With both recommendations in hand, PT. DUSP then had to seek a (3) letter of approval from the Coordinating Team of Regional Spatial Planning (*Tim Koordinasi Penataan Ruang Daerah/TKPRD*), comprising of representatives from various services and boards of the municipality, and chaired by the Head of the Regional Planning Board (*Bappeda*). Approval was to be given after a meeting or a series of closed meetings between TKPRD and PT. DUSP.⁶¹⁸ As they were not open to the public, it was unclear what was discussed and what decisions were reached. Only the end result (permits and binding recommendations) would be made available to the public or other interested parties. In practice even this is not a general rule. The common reason for this given by government officials is that such documents are privy only to the parties concerned and accordingly protected as secret documents. From a legal viewpoint, such conduct violates basic principles of good

⁶¹⁶ Recommendation Letter 643/317.4-Bappeda (dated 4 March 2000) and Letter 660.1/13A-Bapedalda (dated 8 February 2000).

⁶¹⁷ In accordance with the Ministry of Environment Decree/Head of the Environment Impact Monitoring Board Kep-35/MenLH/12/1998 on the approval of the environment impact analysis, regional environment management and monitoring plan for the development of the North Bandung Area. Art. 7 of this decree actually contain an instruction to prohibit the issuing of new location permits within the conservation area of Tangkuban Perahu. However, it does not prohibit the same for the Lembang basin.

⁶¹⁸ In the consideration of PT. DUSP's site permit, reference is made to a meeting conducted on 7 March 2000. However, no reference is made to the venue itself.

government which, inter alia, comprises of transparency and public accountability.⁶¹⁹ Such an attitude also runs counter to the general obligation of government officials to honor people's right to information which relates to their right to participate in the making of public policy and control government conduct.⁶²⁰

Nonetheless a glimpse of what happened behind closed doors has been provided by an in-house lawyer for a Bandung real estate and housing construction company (*Istana Group*) who was present during these meetings. Agus Setiawan has led me to believe that the meetings were commonly preceded by a number of informal meetings. Their purpose was to establish trust and build a working relationship in an effort to avoid an application's potential rejection. Both formal and informal meetings generally occurred behind closed doors, conducted at the *Bappeda* or other venues decided by both parties. All costs incurred were borne by the company seeking approval. Apparently, the company must also pay for transportation and give extra money to each government official invited.⁶²¹ Such practices undoubtedly put a serious strain on government officials wishing to remain independent or at least neutral. Setiawan also added that with the stronger position of local parliaments after 1999, companies looking to invest (or acquire land) also had to build good relationships with members of parliaments.

Regarding transparency, *Bappeda* officials I spoke with argued that it was common practice to also invite the heads of subquarters, villages and even city-quarters to attend the final

⁶¹⁹ Principles of good government (*asas-asas umum pemerintahan yang baik*) though considered part of unwritten rules in the Indonesian administrative law can be found elucidated in Law 9/2004 (amending Law 5/1986) on the Administrative Court (Art. 53(2)), Law 28/1999 (on the clean management of state affairs free from corruption, collusion and nepotism (*penyelenggaraan negara yang bersih dari Korupsi, Kolusi dan Nepotisme*)) and Law 32/2004 (Regional Government). On the role and development of these principles in the Indonesian administrative law see further: Irfan Fachruddin, *Pengawasan Peradilan Administrasi Terhadap Tindakan Pemerintah*, (Bandung: Alumni, 2004); A. Muin Fahmal, *Peran Asas-asas Umum Pemerintahan yang Layak dalam Mewujudkan Pemerintahan yang Bersih*, Cet. I, (Yogyakarta: UII Press, 2006), Philipus M. Hadjon et al, *Pengantar Hukum Administrasi*, (Yogyakarta: GadjahMada University Press, 2008) and H.R. Ridwan, *Hukum Administrasi Negara* (Jakarta: Radjawali Press, 2010).

⁶²⁰ This basic right to access information is elucidated in Law 28/1999, Law 14/2008 on transparency of public information (*keterbukaan informasi publik*) and Law 25/2009 on public service (*pelayanan publik*). Art. 9 of Law 28/1999 guarantees people's right to seek, obtain and render information on state management (*mencari, memperoleh dan memberikan informasi tentang penyelenggaraan negara*). For discussion on this right of participation and public access to information see FH UNIBRAW-Malang, *Laporan Akhir: Akses Publik Terhadap Informasi Hukum* (KHN KK B.2, 2003) and FH UNPAR-Bandung, *Laporan Akhir: Hukum Prosedur Keluhan Publik* (KHN KK B.3.2003).

⁶²¹ Personal communication, 2 September 2005.

meeting or preceding meetings.⁶²² The underlying idea was that these officials would give voice to local people's concerns. Unfortunately, these officials seldom had the time or interest to attend the meetings.⁶²³ As a result, PT. DUSP was later under the obligation to publicly inform land owners on their plan to acquire land. This is habitually performed at a much latter stage, with the help of the village head or head of the sub-district (*kecamatan*) by organizing a public meeting with local people during which they are informed about the "development plan".

Every government official attending the meetings preceding the granting of the site permit is expected to voice their office's concerns and interests and offer recommendations on this basis. In the case of PT. DUSP, references to such recommendations can only be inferred from a letter of approval denoting support to the proposed use of land (*surat persetujuan pemanfaatan lahan*). This letter is decisive in the consideration to issue a second site permit and the determination of what "public duties" or "social corporate responsibilities" will be imposed on the company. One such public duty imposed as a trade-off was the financing and the construction of public schools in or outside the site permit area. Within the site permit area, the company also had to allocate land for the construction of the Singaporean International School and give financial aid to public schools in the vicinity of its development area.⁶²⁴

Although we do not know for sure, it is not likely that the government officials involved voiced specific concerns about the public interest or even raised any objections regarding the possibility that the proposed land use plan would potentially threaten the region's social and environmental sustainability. The terms and conditions for the site permits only refer to general obligations, such as requiring the license holder to directly negotiate with land owners, decide the amount and form of compensation on the basis of negotiation, preserve the area's function as a watershed, and build roads and other kinds of infrastructure in line with certain technical specifications. PT. DUSP's site permit did contain specific technical limitations for land use: a building coverage ratio, the prohibition to build on slopes of more than 30°, to reserve slopes more than 40° for open-green belts. In order to secure compliance

⁶²² Neneng, working at the Bappeda Bandung, personal communication 20 July 2004. The same information was also relayed to me by Rosiman Karmono from the city planning service (August 10, 2004).

⁶²³ The low attendance of head of sub-quarters and village heads in such meetings was also confirmed by Agus Setiawan (see above) and Tigor Sinaga (vice chairman of REI Jabar), interview 25 March 2005

⁶²⁴ As told by Taufan Suratno from DPKLTS, personal communication, 20 August 2004. As regard the Singaporean International School, it is difficult to appreciate that as PT. DUSP contribution to the public interest. It might be better considered as part of PT. DUSP marketing strategy to attract potential buyers.

with these technical terms and conditions, the permit holder has to seek approval for the site plan with a kind of blue-print or detailed master plan on land use in the site permit. The site plan shall be prepared by the city planning service (*dinas tata kota*), evaluated and commented upon by other local government agencies and subsequently be approved by the Mayor.

As a general rule, and also applicable in PT. DUSP's case as a condition attached to its site permit, the applicant also has to sign and submit a statement agreeing to provide monetary compensation to land owners or make another trade-off. It is also customary to demand from the site holder a guarantee that he will voluntarily and free of charge release to the municipality any infrastructure he has constructed or will construct within the site permit area. After the transfer, the municipal government is responsible for all maintenance. In practice, quite a number of real estate developers neglect this duty and simply leave developed areas without satisfying this condition. In their defense, it should be noted that the process of transferring responsibility is somewhat complex. The municipal government must first evaluate the quality of the infrastructure being handed over. Only if the infrastructure satisfies established construction standards will the transfer be realized by signing a process verbal on the transfer (*berita acara penyerahan asset*). Even if this is the case, the municipal government may still recoil from accepting responsibility if maintenance has proven to be beyond its technical or financial capabilities.⁶²⁵ Here may be added that this process seldom happens according to the rules. Most of the time, the municipal government rather chooses to avoid transfer in order not to increase municipal spending. This has been the primary reason why most roads within numerous small and medium 'gated communities' within the Bandung municipality and Bandung District or other places are in bad condition. Maintenance of roads and other infrastructure is mostly left to the inhabitants or if they are lucky, particularly in elite gated communities, by an estate or town management company established to provide "public services" to the inhabitants⁶²⁶

In the case of PT. DUSP, it is doubtful that the Bandung municipality will be capable or willing to maintain an international golf course, which the permit holder argues was to be

⁶²⁵Adrian, working at the estate/town management of Kota Baru Bumi Parahyangan, at Padalang. Personal communication, 20 April 2005.

⁶²⁶ Personal communication with a number of officials at Bappeda Bandung and Cimahi and people working at Real-Estate/Housing Constuction companies (Agus Setiawan/Adrian) (August-September 2004). In comparison, a quite similar situation can be observed in rural and urban kampongs where mostly the maintenance of roads and other infrastructure are left to the inhabitants themselves. This again contrasts with the quality and condition of infrastructure in elite gated communities where such matters are managed by an estate or town management.

constructed in fulfillment of its duty to reserve 60% green open area for water-catchment. It may be expected that in the future PT. DUSP or other investors, as in other elite gated communities, will establish a separate company specifically to manage the golf course and provide basic public services to residential areas surrounding it.⁶²⁷ This may be an additional incentive for district governments to “develop land” through public-private partnerships. Another added bonus is that through such partnerships, the government will in the end have under its administrative control a huge area of developed land fully titled and thus taxable

The long process described above suggests that the municipal government thoroughly evaluated PT. DUSP’s business proposal and approved of its land acquisition project. Apparently the business proposal was found in line with existing spatial and development plans.⁶²⁸ Obviously, as elucidated above, there were numerous factors influencing the municipal decision to enter into a partnership with PT. DUSP to bring development to Puncut. Curiously, however, the municipality also demanded that PT. DUSP must abide by the law and take full legal responsibility. This suggests that if the municipality or any of its agencies and boards made bad decisions during the long evaluation process, it is the company that would bear full legal responsibility for them. The reason for this may well be that government officials feel the need to protect themselves from future lawsuits stemming from the implementation of permits and binding recommendations. However, this also creates the impression that oversight is unnecessary since public duties can be legally transferred to private commercial enterprises.

As indicated above, the company is also under the obligation to inform the public of its intent to acquire land and utilize it according to the development plan approved by the government. During the so called “socialization process”, typically organized by the village or sub-district government, but initiated and fully financed by the permit seeker, the company in question must convey its land-use plan (and land acquisition project) to the general public, especially to those whose land falls under the site permit. This process is also conducted in order to fulfill one of the requirements for obtaining the land use allocation permit (IPPT) and construction or building permit (IMB) Unfortunately, there is no information available

⁶²⁷ In comparison, the management of an international golf course and residential clusters around it in Rancamaya, Cimacan-Bogor, are left in the hand of a professional estate management. In such areas, the estate/town management provides most of the public service which in other places should be borne by the government. Personal communication: Joshua Wahyudi, one of the inhabitants of Rancamaya, 30 July 2005).

⁶²⁸ The *izin lokasi* awarded to PT. DUSP explicitly refers to Perda Kotamadya Daerah tingkat II Bandung 2/1992 (general city plan of Bandung) and Perda Kotamadya Daerah Tingkat II Bandung 2/1996 (detailed spatial plan of Bandung).

on how PT. DUSP conducted the socialization process and what the results were. Usually local people have limited options to negotiate the amount or form of compensation.⁶²⁹ However, in PT. DUSP's case, the Bandung municipality initiated a land consolidation scheme as part of a strategy to appease local people to hasten the implementation of PT. DUSP's development plan.⁶³⁰ In any case, the socialization process was only relevant for a small area, bordering existing kampongs within the Puncut area, which PT. DUSP needed for the completion of its plan. Most of the land had been secured with the help of the NLA in cancelling individual land certificated previously, held by a number of people who received a land grant from the NLA in the 1960's. We have already discussed this issue earlier.

In the end, PT. DUSP successfully completed the land acquisition project and proceeded to request a *HGB Induk* to secure land ownership. In order to begin the development process, it had to acquire other permits related to land use, the most important ones being the land clearance permit (*izin pematangan lahan*) allowing it to cut and fill preparing the land for development, and the land use allocation permit, allowing land owners to use land in accordance with its designation and ensuring compliance with existing detailed planning and zoning regulations.

8.3.6. Land use after acquisition

The land use allocation permit⁶³¹ awarded to PT. DUSP allowed it to acquire other permits (such as the *izin pematangan lahan*: land clearing permit)⁶³² and all other permits for road construction and other infrastructure (*izin pembuatan jalan masuk pekarangan*)⁶³³ from the public works service. The public work service (in this case the *Dinas Bina Marga*) could not

⁶²⁹ See Chapter VII (on the duty of a site permit holder to conduct a socialization process).

⁶³⁰ See: Mayor of Bandung Decree 593/Kep. 434-BagHuk/2001 (determination of the area designated for land consolidation at the sub-district of Cidadap, Ciumbuleuit) dated 6 August 2001). He also appointed a team to consolidate the land (Decree 593/Kep.1068-Huk/2002). The task of this team is to provide socialization for the plan with the local people.

⁶³¹ The legal basis regulating the process of obtaining a land use allocation permit (IPPT) is Perda Kotamadya Daerah Tingkat II Bandung 25/1998 as amended by PD Bandung 4/2002 (*izin peruntukan penggunaan tanah*). PT. DUSP obtained an SIPPT (*surat IPPT*) from the City Planning Service (*Dinas Tata Kota*) in 2005 (503.640/3095/DTK/XII/2005 dated 8 December 2005).

⁶³² Surat Izin Walikota Bandung 593/01-DBM/2005 tentang Izin Pematangan Tanah/Lahan a.n. Fandam Darmawan (13 January 2005). Perda Kota Bandung 5/2002 amending Perda Kotamadya Daerah Tingkat II Bandung 31/1998 (retribusi pemakaian kekayaan daerah dan pematangan tanah) provides the legal basis for the award of other permits following the issuance of IPPT.

⁶³³ Surat Izin Walikota Bandung 620/06-DBM/2005 dated 13 January 2005.

refuse the permit to PT. DUSP, which formally possessed the right to demand full support in realizing its development plan. Full support was also due, as pointed out by the Administrative Court of Bandung, because PT. DUSP's 1995 environmental impact assessment study had been approved by the Governor.⁶³⁴ Although not mentioned by the administrative court, influencing the decision to award the land use permit may well have been a mayoral decree which basically functioned as a new kind of environmental impact assessment.⁶³⁵ Thus in fact, PT. DUSP already secured approval from the municipal government, i.e. an evaluation proving that its development plan was environmentally sound.

This may have influenced how officials from various services being part of the TKPRD perceived their role when they processed other permits needed to realize PT. DUSP's development plan. This included the city planning service (*dinas tata kota*), the civil works service (*dinas pekerjaan umum*), and the building service (*dinas bangunan*). They believed that it was their legal duty to further the realization of the development plan by awarding PT. DUSP the required permits. They also shared the impression that not awarding the company permits would be considered insubordination to a direct superior and hindrance of a development process already found to be "in the public interest". From the perspective of PT. DUSP this would be a breach of contract and good faith. Moreover, even if one or two services would refuse to grant specific permits, in the end it would not affect the overall development plan as approved jointly by those services within the framework of the TKPRD. Indeed, these services only handle technical issues or conditions which customarily can be easily settled by the permit applicant.

On the basis of the land clearance permit, PT. DUSP started preparatory work: removing trees, leveling and filling in valleys and hills, parceling land into individual plots and constructing roads and other kinds of infrastructure. It was at this time that PT. DUSP's plan became visible to the general population and only then did the local parliament (DPRD Kota Bandung) start to question the legality of the land clearance and other related permits. The

⁶³⁴ Letter issued by the Governor of West Java 660/5009/BLH dated 29 December 1995 on the evaluation of the environmental impact assessment and management (RKL/RPL) for the development of the integrated tourism area of Bukit Dago Raya. This approval was made in reference to the Ministry of Environment Decree of 1998 (Kep-35/MenLH/12/1998).

⁶³⁵ The earlier mentioned IPPT was issued on the basis of Mayoral Decree 640/Kep 641-Huk/2005, dated 12 August 2005 on the environmental feasibility of the development of an integrated tourism area as a new form of environmental impact assessment (*kelayakakan lingkungan pembangunan kawasan wisata dan wisata terpadu punclut sebagai bentuk izin amdal baru*).

local parliament argued that these were in violation of the Bandung Spatial Plan of 2004.⁶³⁶ During the same period, the governor of West Java also responded to the situation. On 20 February 2005, he sent a letter addressed to the Mayor of Bandung reminding him of regulations pertaining to the spatial planning of the North Bandung Area and suggesting a temporary cessation of any construction activity in the Punclut area⁶³⁷. However, this letter was to no avail. PT. DUSP, feeling secure in their possession of various permits and binding recommendations, paid no heed to calls for suspension of activities. Moreover, once the construction work started, PT. DUSP considered it economically infeasible to stop, even temporarily. From a legal point of view, cessation of work carried great risk, as the company would have to renegotiate all supply and work contracts with other companies or face a number of civil law suits. This could lead to the municipal government being sued before the administrative court by PT. DUSP and losing its goodwill in bringing about development. Consequently, it was important for the municipality to defend the permit scheme's legitimacy.

It therefore came as no surprise when government officials replied to such protests by pointing out that the area was in need of development and that local people had the right to enjoy the fruits of development.⁶³⁸ Additionally, they argued that PT. DUSP's development plan was an inseparable part of the municipal government's policy to halt the area's further deterioration.⁶³⁹ An important target of contestation was the validity of the Environmental Impact Assessment study conducted in 1995.⁶⁴⁰ It was argued that the municipal government

⁶³⁶ DPRD Minta Pembangunan Jalan di Punclut Dihentikan: Pemkot Harus Kaji Ulang Izin yang Diberikan kepada Pengembang, (Pikiran Rakyat, 20 January 2005); "DPRD Kota Bandung Ancam Interpelasi Walikota" (Suara Pembaruan Daily, 19 January 2005). Strangely, no parliament member was willing to meet any of the approximately 800 people who demonstrated before the DPRD Kota Bandung. Protesters later on moved to the provincial parliament which is also in Bandung. Ahmad Yunus, "800 orang Demo DPRD Kota Bandung" (Detiknews, 27 January 2005).

⁶³⁷ Letter 912/424/Bappeda. In this letter, the Governor reminded the Mayor of the applicability of the Governor Decree of 1982 (181.1/SK.1624 Bapp/1982) and a decree issued by the Ministry of Environment (Kep-35/MenLH/12/1998) containing general guidance on how to develop the Punclut area.

⁶³⁸ Pemerintah Kota Bandung, "Penataan Kawasan Punclut" (policy paper, 2004). Cf. "Bupati, 'Ekonomi Kawasan Itu Mesti Berkembang: Status Quo KBU Harus Jelas'", (Pikiran Rakyat, 2 October 2004). "Ketua REI Jabar: Mencegah Kerusakan Lebih Parah, Punclut Harus Segera Dibangun", (Pikiran Rakyat, 27 October 2004)

⁶³⁹ Ketua REI Jabar, "Mencegah Kerusakan Lebih Parah" Punclut harus segera dibangun", (Pikiran Rakyat, 27 October 2004).

⁶⁴⁰ The environmental impact study must be made under the auspices of the BPLHD and performed by a consultant approved by this Board. See GR 27/1999 on Amdal. PT. DUSP already made one in 1995 but it was considered obsolete in 2000 by Eva Yosvida, head of the sub-section Amdal, BPLHD Kota Bandung. See: "Amdal Tak Layak Lagi untuk Bangun Punclut" (Kompas, online, 26 January 2005); "PT. DAM Belum Ajukan Amdal Punclut" (www.pikiran-rakyat.com/ 6 may 2005).

deliberately disregarded real social and environmental cost incurred not only by local people but also by the whole populace of Bandung metropolitan. One legal scholar held the opinion that:⁶⁴¹

“The development of Punclut conducted without the appropriate environmental impact assessment should be stopped. Permits already granted by the municipal government should be revoked if the real estate developer (PT. DUSP) does not possess such document”

The word appropriate above should be stressed, as I was led to believe by a member of the Bandung BPLHD staff that such as study and recommendation can be easily obtained or prearranged (*diatur*). In addition the total cost to be incurred in the making of such environmental impact assessment plus the required recommendation or approval is rather low (Rp. 10 million in 2004).⁶⁴² While his opinion may not represent the general attitude of the BPLHD and therefore should not be construed as official policy, it raises serious doubt regarding the effective use of an impact assessment study to prevent environmental degradation. In contrast, Suharsono from the Environmental Impact Assessment Division of the Provincial BPLHD and Wisandana from the West Java Provincial Government strongly believed that environmental impact assessment were useful in preventing environmental degradation. However, both also suggested that an environmental impact assessment would not be needed if spatial plans really incorporate and reflected concern for sustainability principles.⁶⁴³

Nonetheless, Tjetje Soebrata, head of the Bandung Bappeda, replied that the 1995 impact assessment study was still relevant as a reference in processing permits. His opinion prevailed and there was little chance that a renewed environmental impact assessment would even matter. To appease the general public and most probably to emasculate criticism directed against government agencies issuing permits without a proper and valid environmental impact assessment study, a second study was conducted and a report published in March 2005. In this report, reference was made to people's protest and objections and even to the possible environmental impact, but the conclusion of the original environmental impact

⁶⁴¹ Amiruddin Dajaan Imami, head of the research centre on environmental law and spatial planning law of the University of Padjadjaran as quoted in “Tanpa Amdal, Izin Punclut Dicabut” (*Pikiran Rakyat*, 13 January 2005).

⁶⁴² Personal communication, 23 July 2004. Denny, as I heard later in 2010, was transferred to another service.

⁶⁴³ Personal communication, Suharsono; September 15 2004. Wisandana, August 30, 2004.

assessment was upheld. PT. DUSP even went as far as to conduct a socialization program in February 2005, informing the public of its development plan and assuring them that the project would be beneficial to local people as well. The conclusion was that PT. DUSP's project development was feasible and to be completed.⁶⁴⁴

8.3.7. Belated and failed responses against the Punclut Land Use Plan

The development of Punclut does not seem to correspond well with the legal obligation imposed by the SPL 26/2007 that cities maintain 30% of their space as open-green areas. At the moment, the Bandung municipality only has 7.86% allocated for this purpose. The municipal government's official response to this criticism was that it was agreed in the site permit that only 20% of the Punclut area was going to be built on. The remaining 80% would still be open-green space. In this way, PT. DUSP would be assisting the municipal government (and society) in meeting this obligation. To test whether this is true, we can look at PT. DUSP's site plan, attached to the land use allocation permit (*Izin Peruntukan Penggunaan Tanah/IPPT*). The site plan shows clusters of residential areas spread along the hills and valleys of Punclut with only slopes that are technically impossible to cultivate left untouched. However, even many of these will be used for a golf course. It may be the case that 80% open green space refers to this golf course. Open green space will also be maintained by following the rule on building coverage ratio as specified in the land use permit and individual construction permits (IMB) to be requested separately for each construction to be built.

However, this claim remains dubious. A golf course may well be open green space but its effectiveness as water catchment is scientifically questionable.⁶⁴⁵ Moreover, a quick visit to the area reveals that completed town houses disregarded many technical and detailed rules found in the municipal building code, such as the building coverage ratio per parcel. This may relate to the fact that individual land buyers (PT. DUSP's consumers), in contrast to other developed residential areas where customers only possess the option to buy houses already constructed by the company (but not empty land),⁶⁴⁶ have to go directly to the

⁶⁴⁴ Studi Amdal (Review) Pembangunan Kawasan Wisata dan Hunian Terpadu-Punclut-Kota Bandung (March 2005) as prepared by PT. Dam Utama Sakti Prima. See especially chapter II (ruang lingkup studi).

⁶⁴⁵ Ahmad Sarmidi, from the biology department of ITB (personal communication, 12 July 2005).

⁶⁴⁶ Housing construction companies actually offer people the option to own land on the basis of a right to building (*hak guna bangunan*). However, in practice, those house owners may later up-grade their land title to full ownership (*hak milik*).

building service to apply for a construction permit and construct their own house according to their own plan.⁶⁴⁷ In such case, the building service will evaluate individual applications and look only at individual parcels and in the process completely ignore the earlier site and development planning submitted by PT. DUSP. This creates a wrongful impression that the earlier land use conditions as imposed on PT. DUSP through existing permits do not apply to individual land owners. Exacerbating this situation is the municipal building service's low capability to secure compliance and act decisively in the face of blatant violation of building regulations.⁶⁴⁸ Taken as whole, the above cast serious doubt about PT. DUSP's ability to meet the terms part of the conditions of the development permits it holds.

One NGO in particular, DPKLTS (*dewan pemerhati kehutanan dan lingkungan tatar sunda*: The Foundation for the Monitoring of Sundanese Forests and Nature Conservation), has taken the side of the local people arguing that it would be better to develop Punclut into an area for agriculture and agro-tourism.⁶⁴⁹ They believe that the local people may be able to participate in this kind of development project. This NGO even decided to contest the permit approving the use of land in accordance with the earlier land use allocation permit before the Bandung administrative court.⁶⁵⁰ However, it was to no avail. During the Court process, they failed to convince the Court to issue a court order stopping all construction work until the case had been settled. In the final decision, the Administrative Court sided with the municipal government and determined that it had not breached any law in awarding the IPPT. The legality of the permit was upheld. Pushed out of the consideration were

⁶⁴⁷ Similar situations are encountered by the estate management of Dago Resor Pakar (in North Bandung), where individual land owners construct their own house in disregard of the estate management site plan (personal communication, Agustinus Pohan, resident of on Dago Resor Pakar, 25 July 2006). The same problem exist in Rancamaya (Bogor), where the estate management faced difficulty in imposing land use restrictions on individual land owners which can shop forum and go directly to the municipality to obtain a construction permit (personnal communication, Joshua Wahyudi, 30 July 2005).

⁶⁴⁸ One illustrious case was the refusal of the owners of Hotel Planet (Vue Hotel) in Bandung to demolish the top floor of the hotel which was arguably built in violation of the construction permit granted. The head of the legal service of the Bandung municipality, Eric, told me that the municipality decision to demolish the top floor was contested before the administrative court and that the municipality lost because the court endorsed the plaintiff's argument that the municipality should accept monetary compensation rather than impose its ruling to demolish as it will result in plaintiff's economic loss (personal communication, 23 May 2010).

⁶⁴⁹ "Soal Punclut Bingungkan Warga, Konsep Masyarakat, Berbeda dengan PT. DUSP" (Pikiran Rakyat, 2001).

⁶⁵⁰ DPKLTS Minta Parpol Ikut Bertanggungjawab: Kebijakan Pemkot Tidak Pro-lingkungan", (Pikiran Rakyat, 18 January 2005), "Sejumlah Organisasi Akan Gugat Wali Kota ke PTUN", (Pikiran Rakyat, 25 January 2005); "DPKLTS Gugat Walikota, Terkait Pemberian Izin Pembangunan Jalan di Punclut", (Pikiran Rakyat, 17 February 2005). The Administrative Court of Bandung decided in favor of the Bandung municipal government and PT. DUSP in August 2005. DPKLTS appealed the decision, but this motion did not prevent PT. DUSP from continuing the land clearing operation for which it obtained a permit (14/6.tun/2005/ptun-bdg).

environmental issues and the need for a more environmentally friendly development plan for the Punclut Area. But this was not DPKLTS's fault, as by using this legal option, only the formal legality of the permits was put to question. The initial motive may well have been to use the process as a means to raise public attention to the issue and thus put political pressure on the municipality and the local parliament.

Rather than roll back its decision to allow PT. DUSP developing said area, the municipal government chose to amend its 2004 spatial planning regulation the preparation of which already began in 2005.⁶⁵¹ The draft amendment was subsequently brought before the local parliament. It was hotly debated within the local parliament,⁶⁵² which correctly argued that in justifying the existing development plan initiated by PT. DUSP the proposed revision went against the West Java Provincial Spatial Plan (PD 2/2003) and, last but not least, the need to protect and preserve the above protection zone. Protest was voiced also by a local MP, Tedy, from the Social Justice Party (PKS/Partai Keadilan Sosial). He stated that the amendment to the Bandung Spatial Plan should be postponed awaiting the promulgation of the Bandung Metropolitan Spatial Plan.⁶⁵³ The same document in the end provided the local parliament with the impetus to establish a working group on Punclut (*Tim Perumus Pengkajian Punclut DPRD Kota Bandung*) and bring the issue of Punclut's future designation to the public attention once again.⁶⁵⁴

Nonetheless, apparently in the end a compromise was reached that protection and preservation of Punclut could as well be satisfied by allowing for the 'rejuvenation' of Punclut which the officials at the Bappeda had designated as critical area and open for development albeit under stringent conditions.⁶⁵⁵ This is clear from the endorsement of the draft amendment and the acceptance of Punclut's changed designation. In the revised map enclosed to the draft amendment (officially accepted and endorsed by the local parliament) the color code of Punclut area was changed from green (indicating protected area where

⁶⁵¹ Bandung PD 2/2004 on spatial planning of the city of Bandung (*rencana tata ruang wilayah kota Bandung*) dated 10 February 2004). In 2006, the municipal government issued PD 3/2006 on the amendment of PD 2/2004. This amended only a few articles related to certain rules on the development of north Bandung.

⁶⁵² "DPRD Kota Bandung Tidak Setuju Punclut Dibangun", (Kompas, 26 June 2004); "Wali Kota Dinilai Langgar Perda RTRW: 12 Anggota Dewan Dukung Interpelasi" (Pikiran Rakyat, 19 January 2005).

⁶⁵³ "Perda RTRW Hanya Utk Ekonomi Jangka Pendek" (Kompas, 3 January 2006).

⁶⁵⁴ "Agar Persoalan Kontroversial itu tidak Berlarut-larut: DPRD Akan Percepat Pengkajian Punclut " (www.pikiran-rakyat.com/18 May 2005).

⁶⁵⁵ Bappeda Jabar proposed a concept of a limited development coefficient (*koefisien wilayah terbangun*) to be applied in protected zones such as Punclut. Under this concept, 20% of protected area may be allocated for "cultivation" while the rest (80%) must be left undisturbed. See: "Harus Gunakan Konsep Koefisien Wilayah Terbangun: DPRD Dukung Penataan Punclut" (www.pikiran-rakyat.com/ 12 May 2005).

development should not be allowed as found in the original version) to yellow (cultivation area). As told by Eric, at that time staff of the legal service of the Bandung municipality, the parliament members at first did not realize the impact of the changes proposed as they were provided only with black and white copies of the revised map.⁶⁵⁶

A more likely explanation is that the local parliament in the end decided to endorse the amendment based on the consideration that the Punclut Area, mismanaged for years, was in dire need of ‘rejuvenation’ and that as the Mayor pointed out, the local population of Punclut demanded that development would be continued.⁶⁵⁷ Moreover, one could also imagine the effort of the municipal government as to convince the local parliament that it would be in the best interest of the public that the rejuvenation of Punclut be performed by PT. DUSP: a company which already acquired land and possessed all necessary permits and which showed its willingness to develop land under the condition that it would only use 20% of the land available, bear the reforestation cost of Punclut, and build all infra-structure needed - and lastly, for free built an international school as evidence of its corporate social responsibility.⁶⁵⁸

With the promulgation of the revised Bandung Spatial Plan, one small obstacle hindering the full development of Punclut by PT. DUSP was also taken away. Under the original Bandung Spatial Plan (Art. 100) the construction of roads connecting the area with the rest of the city was prohibited. During parliamentary meetings this issue became hotly contested in relation to the awarded land use allocation permit. But under the amended version, the issue is solved and construction of connecting roads is allowed. An earlier permit allowing PT. DUSP to do just that was now justified. Field visits to the area in 2005-2009 confirmed that public roads had already been constructed allowing access to PT. DUSP area from Dago and Ciumbuleuit. There were also plans to connect the area to Lembang farther north. From a marketing perspective, this is understandable. The area would not be very marketable if its connection to the city would be allowed through one gate only.

⁶⁵⁶ Personal communication, 8 August 2007. Interestingly, he retold this incident more as a practical joke rather than a deliberate effort to mislead the local parliament. Cf. “Ada Manipulasi Perda RTRW Kota Bandung” (Kompas, 22 June 2004). Taufan from DPKLTS, on the other hand, perceived it as a deliberate effort to mislead local parliaments.

⁶⁵⁷ As stated by Dada Rosada, mayor of Bandung, in “Ada Manipulasi Perda RTRW Kota Bandung” (Kompas, 22 June 2004).

⁶⁵⁸ “KBU dan Bosscha Jadi Perhatian Pansus RUU” (Republika Online, 1 September 2006). Dada Rosada, the Mayor of Bandung was quoted as stating that the construction of an international school at Punclut would benefit the Bandung population.

Interestingly, this action deviated from PT. DUSP's original plan, to limit access only to Dago. By doing this, they blatantly disregarded a number of regulations issued by the central and provincial governments intended to strictly control development for the North Bandung Area. However, PT. DUSP could easily justify its action by referring to the Bandung spatial plan as amended. This amendment was promulgated in disregard of recommendations issued by other government agencies. A letter from the Director General of Spatial Planning, the Ministry of Public Works (PR.01.08-DR/14 dated 3 February 2006) on the evaluation of the draft amendment to the Bandung spatial plan, stated that:

"(...) the development of KBU having the primary function as area providing protection for the whole Bandung basin (*cekungan Bandung*) should be strictly monitored as not to hamper or diminish its function as water catchment. In addition, parts of Bandung area already converted to other uses should be returned as green open area."

Likewise, the Governor of West Java reminded the municipal government to preserve the area's function as water catchment in his recommendation about the same draft amendment (188.342/7/10/Huk dated 6 March 2006). This action was to no avail. Stressing the provincial loss of control, the Governor, in response to blatant violations of the provincial restrictions to develop the North Bandung Area, requested the public and press to 'punish' the private construction companies involved.⁶⁵⁹

Strangely, as this is a matter outside its formal authority, the BPK (*Badan Pemeriksa Keuangan*; National Auditors Board) was also pulled into the conflict. In 2007, it asserted that a spatial planning violation had occurred in the development of Punclut.⁶⁶⁰ At the local level, the head of the municipal parliament (*DPRD Kota Bandung*), Husni Multaqin, voiced his concern over a Bandung environmental crisis in response to a well-known local environmentalist's warning that rain water run off had increased to 60% due to land conversion in the North Bandung Region.⁶⁶¹ Nonetheless, such efforts described above would have no bearing on the legality of endorsed and already promulgated amendments to the

⁶⁵⁹ "Gubernur Danny Setiawan meminta masyarakat dan pers menghukum para pengembang", as quoted in "Gub. Jabar: Masyarakat Bisa Hukum Pengembang" (Kompas, 17 May 2004)

⁶⁶⁰ The BPK's report on this case is available at

www.bpk.go.id/doc/hapsem/2007.ii/APBD/273_Kota_Bandung_Perc_Lingk-udara.pdf

⁶⁶¹ As reported in "Sekitar 80% Air Hujan Tak Dapat Diserap" (Kapanlagi.com; 11 December 2006).

Bandung Spatial Plan. Accordingly, the revised Bandung Spatial Plan of 2004 provided legal justification for the completion of PT. DUSP's plan to develop Puncut.

Importantly, the West Java Governor was powerless in stopping the realization of development plans over autonomous regions⁶⁶². Although he correctly argued that PT. DUSP's development plan violated the Provincial Spatial Plan, GR 20/2001 (on Protected Areas), Bandung Spatial Plan 2/2004 and a Joint Decree to develop the Bandung Metropolitan Area (between the Governor of West Java, Regent of Bandung, Regent of Sumedang, Mayor of Bandung and Cimahi), the provincial government could do nothing to rescind decisions made at the district level.⁶⁶³ There were no legal avenues open for the provincial government to bring troublesome permits and binding recommendations made by the districts before an administrative or even civil court and it lacked the legal and practical power to intervene by itself.⁶⁶⁴

Another token of concession, unfortunately, is to be found in Provincial Regulation 1/2008⁶⁶⁵. This provincial regulation is a legal move to recapture controlling power over the spatial management of the North Bandung Area, rightly to be considered a trans-district border issue falling under the competence of the provincial government.⁶⁶⁶ Nonetheless, in this regulation, the provincial government concedes that certain areas worthy of and having the potential to be developed (*wilayah yang layak dan potensial*) should be designated as cultivated area (*dikembangkan untuk kegiatan budidaya*), with due regard to the need to maintain its function as protected or conservation area (*dengan tetap mempertahankan fungsi lindung*) (Art. 11). It also provides that previous existing land use plans or development projects made before the promulgation of this regulation may be continued under the condition that it shall not hinder the need for conservation. (*sepanjang tidak mengganggu fungsi konservasi*) (Art. 42). Considering the choice of words in those articles, it

⁶⁶² "Walikota Tidak Dapat Putuskan Permintaan DPRD – Soal Pembangunan Puncut", (Kompas, 27 January 2005); "Pemkot Tetap Bangun Jalan di Kawasan Puncut, Gubernur Tidak Dalam Posisi Menolak atau Mengizinkan", (Pikiran Rakyat, 27 January 2005)

⁶⁶³ "Difokuskan kepada masalah Amdal, DPRD dan Pemkot sepakat kaji Puncut", (Pikiran Rakyat, 11 February 2005).

⁶⁶⁴ The SPL 2007 was not able to address this successfully; it only reasserted the need for synchronization and penalization.

⁶⁶⁵ West Java Provincial PD. 1/2008 tentang Pengendalian Pemanfaatan Ruang Kawasan Bandung Utara (control over land use of the North Bandung Region).

⁶⁶⁶ See RGL 33/2004. Art. 13 (b) attributes the provincial government the authority over spatial management of the provincial area (including conservation zones straddling two/more districts).

comes as no surprise then that PT. DUSP's plan to develop Puncut shall be continue unabated.

In the end, no one contested the fact that PT. DUSP possessed legal-formal title over the 140 hectares it needed to realize its project. It was PT. DUSP which was in the comfortable position to decide when and how to actuate the development plan. At the moment of writing (2010), the construction work continues unhindered. One may reasonably predict that the area will be fully converted into the planned integrated tourism area within five to ten years. The Bandung municipal government will surely reap monetary benefits from such a huge development project, both during the construction process and after it has become fully operational. First, PT. DUSP will finance and obtain land certificates for each parcel of land it offers for sale, thereby increasing the amount of titled land in Bandung. Prospective clients will surely check the legality of land being offered for sale. Second, each building constructed within the area will be made in compliance with existing building codes and other safety regulations, as denoted by the existence of the construction permit. Those parcels of land will then become fully taxable and thus important sources of revenue for the municipality. PT. DUSP is therefore considered an important agent of development and social change. Additionally, the government believes that they will be adequately protected against possible civil damage claims by the 2000 site permit.

Nevertheless, protest over the development project has continued to simmer. In 2008, I.E.Yogaswara, Head of a Committee Environment Advocacy and Civil Rights (*komite advokasi lingkungan hidup dan hak-hak sipil*) voiced his intention to file a judicial review request to the Supreme Court⁶⁶⁷ contesting the legality of the Bandung Spatial Plan (PD. 3/2006). It claims that the spatial plan was made in violation of the SPL 2007, GR 47/1997 (National Spatial Plan), the West Java provincial spatial plan (PD. 2/2003) and the Joint Decree on Bandung Metropolitan. In his own words:⁶⁶⁸

“Our goal is to teach government officials a lesson so that they will be more careful when issuing permits”

⁶⁶⁷ For a brief explanation of judicial review in Indonesia see: ELSAM, Judicial Review: Antara Trend dan Keampuhan bagi Strategi Advokasi (paper prepared as reading material for litigation lawyers course X, 2005). The main legal basis for judicial review is PCA Decree 3/1978 (art. 11 par. (4); Law 14/1970 as amended by Law 14/1985 on the Supreme Court. The procedural law for judicial review is Supreme Court Regulation 1/1993 as amended by 1/1999 on judicial review.

⁶⁶⁸ “*Kami ingin memberi proses pembelajaran kepada pejabat pemerintah hati-hati memberikan izin*”. Ahmad Fikri, “Bandung Utara Rusak, Pengacara Lingkungan Ajukan Gugatan” (August 7, 2008).

Environmental activists have organized a demonstration protesting the construction of the first building in the area, the Singapore International School (later renamed the Stamford International School). Taufan, from the North Bandung Region Forum of Struggle, decided to symbolically close and declare the building in violation of existing law as it did not have an environmental impact analysis document and was allegedly built in violation of PT. DUSP's land use allocation permit.⁶⁶⁹ According to this document, PT. DUSP is allowed to construct: 1. Tourism facilities (*fasilistas pariwisata*); 2. Residential areas (landed houses, town houses and apartments); 3. Hotel, a sports club, a club house and a cultural centre (*sasana budaya*). No mention is made to schools. However, it is likely that the school possesses a separate land use allocation permit and construction permit. Even if it does not have one, this situation can easily be rectified by submitting a request post factum.

At any rate, the protest seems to have been of no avail. The construction work has continued unabated and a number of town houses are already visible. This highlights the importance of factual possession as well as the government's weakness in imposing land use restrictions and even spatial planning.

In any case, transplanting a modern residential (integrated tourism) area into a peri-urban environment is going to have a deep and long lasting effect on kampong residents living on the fringes. Kampong residents who have depended on agriculture for their livelihoods have lost access to land and currently face a high rate of unemployment. From this perspective, the development plan excludes these people. Contrary to what the municipal government has argued, the plan does not benefit local people but rather leads to their further marginalization. As with other gated communities found in Bandung, PT. DUSP's development area will eventually be walled off and watched over by private security guards, restricting access to the general public and creating an atmosphere of exclusivity.

Access to basic needs, such as garbage disposal and clean water, will also be provided exclusively to residents or visitors to hotels, malls and the golf course. These benefits will not be available to neighboring kampongs. As has been observed in other gated communities, the developer will establish a town/estate management system which will be responsible for providing "public" services to the residents. Public service previously falling exclusively within the purview of the municipal government will thus be fully privatized. Residents

⁶⁶⁹ "Activists protest Singapore International School in Bandung" (Jakarta Post, August 9, 2008). However, it continues to operate and presently (2010) houses for 200 students, mostly, as a security guard led me to believe, of Chinese descent.

must pay an additional “private tax” to maintain “public” service in addition to what they pay the government for land and building taxes.

The transformation of the Punclut area into an international golf course with luxurious residential town houses and hotels will surely diminish the North Bandung Area’s capacity to sustain the 2-7 million people living in the Bandung basin. The development of the area will surely have a long lasting impact on both the sustainability of natural springs⁶⁷⁰ and the ground water level of the whole Bandung Area. Djumarna Wirakusumah, a geologist from the Bandung Institute of Technology has warned that land conversion in the North Bandung Area will have repercussions on the area’s water catchment function and will result in a deepening of the water crisis already felt by the basin’s populace.⁶⁷¹

8.4. Conclusion

Normatively speaking, the central and regional governments have adopted the view that spatial planning should be used to advance public over private interests. This principle is embodied in Art. 6 of the BAL which explicitly state that all land should possess a social function. This point of view has been elaborated in spatial planning, zoning regulations and building codes. Spatial management should be implemented to protect the public interest. However, as the Punclut case demonstrates, the public has no way of debating the feasibility of a project involving the land acquisition process as performed by a private commercial company. Over the course of this process, the municipality of Bandung felt that it adequately represented the public interest. It also drives home the point that the central and provincial government failed in their duty to monitor actual land use at the district level. Rather, they too seemed to endorse the view that the municipal government’s primary goal is to make the ‘best’ use of land. In doing so, it necessarily developed and made use of a public

⁶⁷⁰ The North Bandung Area encircles the Bandung basin which has been home to quite a number of natural springs (*seke* in Sundanese) which the local people have traditionally preserved as common property. It is now common that some natural springs, considered a nuisance by real estate developers, have been closed down and ceased to exist altogether. A number of them have been preserved, but only to provide clean water to residents or to water golf fields or supply water to swimming pool owned by hotels. Consequently, natural springs have now become private property and have lost their status as “protected areas” under the SPL. In the case of PT. DUSP, the company has acquired control over two natural springs located outside its site permit area to provide clean water.

⁶⁷¹. See “Cekungan Bandung Krisis Air, Akibat Perubahan Lahan Konservasi dan Penyedotan Air Tanah” (Pikiran Rakyat 03-09-2004).

private partnership which legally blurred the necessary separation between public and private accountability.

In legal practice, this resulted in non-accountability of government agencies in spatial management and the disappearance of the dichotomy between government authorities and private actors. Society, to the extent it knows about the existence of such permits and potentially may be affected by them, should possess the capability to demand government accountability. There should be a clear separation between the public and private spheres. However, the distinction between public and private is not without its problems. As indicated by Weintraub:⁶⁷²

“The use of the conceptual vocabulary of public and private often generates as much confusion as illumination, not least because different sets of people who employ these concepts mean very different things by them – and sometimes, without quite realizing it, mean several things at once”.

He also asserts that the basis for using the term “public” to describe the actors and agents of the state (so that public/private=state/non-state) lies in the state’s claim to be responsible for the general interests and affairs of a politically organized collectivity.⁶⁷³ In the end, it would be in the interest of government accountability that a clear separation between the public and private spheres be maintained and preserved.

This raises an important question: is such a separation between the private and public spheres realistically attainable? In the above case, a commercial enterprise (PT. DUSP) succeeded in acquiring the full support of the municipal government. Land was acquired on the justification that it served the interests of the company, the government (in terms of investment, economic growth and a possible increase from land tax revenues) and the public (in terms of the revitalization and reforestation of the area). In return, the company had to

⁶⁷² J.A. Weintraub & K. Kumar (eds.), *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy* (Chicago: Chicago University Press, 1997). pp. 1-8. Jeff Weintraub argues that there are four major themes which distinguish public from private. These are: 1. the relation of the state to the market (liberalism); 2. The republican emphasis on the political community (public sphere) as opposed to the market and private life (citizenship: from the polis to the “public sphere”), 3. The contrast between sociability, in urban space, and private life, in the sense of intimacy or domesticity for example, (public life as sociability); and 4. the distinction between the larger economic and political order and the family (feminism: private/public as family/civil society).

⁶⁷³ *Ibid.* But, he also adds that other arguments are equally applicable, to wit that in order to advance the public interest, rulers must maintain “state secrets” and have recourse to the arcane imperii. p. 5.

accept the burden of financing and fulfilling certain public duties. For PT. DUSP, this meant the revitalization of critical land considered mismanaged by the local people, bringing development to local people and reforestation in the name of the maintenance of Punclut as a water catchment area. In short, a public-private partnership had been established between the municipal government and PT. DUSP to bring development. Here permits, notably the permit-in-principle and site permit and other related land use permits and recommendations played a significant role in influencing the form and content of the partnership.

However, as the Punclut case implied, these permits and related recommendations can also be seen as the net result of transactions involving power and money, power and influence or power and networks. Through such frameworks, we can see not only how government institutions behaved, but also how legal rules were transformed and adjusted to the needs of the institutions responsible for granting the permits and recommendations in the first place. Here, we can see the ways in which the ideal usage of permits and recommendations is often markedly different from the ways they are used day-to-day.

To better understand the situation, we should consider that a single permit never stands alone and cannot be evaluated outside of the system which gives such permit context and meaning. From the municipal government's perspective, the legitimacy of any single permit had to be evaluated in relation to earlier approvals and recommendations granted by other government institutions. Revoking a single permit in this context would shake the whole system's foundation. As a result, the municipal government was reluctant to let one government agency take the blame and let the whole system unravel. For them, adjusting the existing spatial planning was a justifiable risk. An additional incentive is that in that way, the municipal government could more easily defend the already established public-private agreement made with PT. DUSP to bring development to Punclut.

While the above may point to a generally tolerated susceptibility of government agencies to corruptive practices, it does not diminish the important role the public interest plays as justification to acquire government support. Private entities seeking to acquire and use land for commercial purposes must arguably attempt to recast their commercial considerations into a proposal advancing public interest. Private interest thus became intertwined with public interest. A tendency noticeable in the above discussed case indicates how the

conflation of and the intertwining of urban spatial and development planning paves the way for aligning private and public interest.⁶⁷⁴

While this mixing of public and private commercial interests seems to be unavoidable, other disturbing issues have remained unresolved. One issue, as the above case indicates, is the susceptibility of existing development or spatial plans to private commercial interest and initiatives. In the final analysis implementation of development/spatial plans becomes the end result of a negotiated agreement between private commercial and public actors. Actual land use patterns are thus market driven, rather than directed by government intervention through spatial planning instruments, i.e. permits regulating access and restricting use. Given too that private commercial actors are more driven by the need to gain short term profit, lofty ideals embodied in the notion of sustainable urban development become compromised. What in its stead emerges is a fragmentary and market driven land use policy which more often than not disregards social and environmental cost. In other words, the finally implemented spatial/development plan will be attuned to short term economic interests rather than long term social or environmental concerns, unless they are somehow able to provide profit.

Another issue concerns the accountability of public officials important in the context of the effort at establishing good governance or rule of law. In such public-private arrangements as determined by a network of permits and recommendations, which party should be held accountable for the end result? What if the individual actors involved were not fully accountable in serving the public interest? This problem has been identified by Weddel who coined the term “flex organization” to denote the symbiosis of public officials and their business counterpart and the resulting labyrinths of interconnected state and private structures.⁶⁷⁵ In concrete cases as related to the permits and recommendations which interconnect government actors and private enterprises, what may and does happen is that public officers offer their services for other gains, not quite private but not quite public either. The end result is a quasi contractual arrangement to realize development plans as initiated by private enterprises. In such public-private collaboration, made possible by the use of permits and recommendations, it is extremely difficult for the general public to demand accountability of public officials or the government as a whole.

⁶⁷⁴ As indicated by the interrelationship between development and spatial planning. Cf. Marco Kusumawijaya, “Megapolitanisme: Membayangkan Megalopolis”, (Tempo No. 8/XXXV, April 2006): 84.

⁶⁷⁵ Janine R. Wedel, “Blurring the State-Private Divide: Flex Organizations and the Decline of Accountability” in Max Spoor (ed.), *Globalization, Poverty and Conflict: A Critical Development Reader*, (Dordrecht (NL) & Boston: Kluwer Academic Publisher, 2004), pp. 217-235

CHAPTER IX

LAND ACQUISITION IN THE PUBLIC INTEREST: THE JATIGEDE HYDROELECTRIC POWER PLANT CASE

9.1. Introduction

This chapter explores the processes and mechanisms of land acquisition performed in the public interest in Indonesia during and after the New Order, with special attention for the concept of public interest. My main point of departure is that infrastructure development should be geared to meeting the general populace's basic needs and support sustained local and national economic growth.⁶⁷⁶ Accordingly, the rules on land acquisition in the public interest should be perceived as an important legal instrument in spatial management.

In bringing together the critical issues of the public interest and national development, as I have done in previous chapters, I raise two important questions. First, why does the implementation of rules and regulations pertaining to spatial management and land acquisition persistently provoke social and environmental conflict?⁶⁷⁷ And second, why has the government been unwilling or unable to reverse its spatial management practice, which clearly threatens developmental sustainability⁶⁷⁸?

These questions are linked to a normative concern: how can a working system of land acquisition for development purposes be made more sensitive to issues of social and environmental justice in Indonesia? How can, for instance, immaterial losses associated with dispossession of land be translated into monetary compensation? Is there any way to truly compensate for environmental degradation brought about by the changing patterns of land use? How can those who lose their land and are forced to relocate in the name of

⁶⁷⁶ Heru Dewanto, "Tiba Saat Tiba Akal". (Kompas 10 May 2010). This article asserts that the second approach is more dominant in Indonesia. The National Middle Term Development Plan 2010-2014 states that the government must set aside an investment in infrastructure development amounting to 5% of the GDP or equal to Rp. 2000 trillion within 5 years to support a continued economic growth of 7%.

⁶⁷⁷ See Ulrich Löffler, "Land Tenure Development in Indonesia (1996)", in www.mekonginfo.org/mrc. For a different perspective, Owen J. Lynch & Emily Harwell, Whose Natural Resource? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia. (Jakarta: Lembaga Studi dan Advokasi Masyarakat (ELSAM), 2002). The point asserted is that disputes over natural resources relate to issues of land proprietorship and management.

⁶⁷⁸ Charles Victor Barber, "The Case Study of Indonesia", occasional paper: Project on Environmental Scarcity, State Capacity, and Civil Violence, (Cambridge: American Academy of Arts and Sciences and the University of Toronto, 1997).

development be compensated for the loss of their basic right to enjoy a clean and healthy environment?⁶⁷⁹ In such situations, how is justice evaluated? In short, how do we balance the needs of the greater good against the rights of those adversely affected and inadequately compensated by development⁶⁸⁰? In addressing these questions, I present a case study on land acquisition in the public interest – the Jatigede hydroelectric power plant and dam infrastructure development.⁶⁸¹ This case will demonstrate how poorly rules and regulations on land acquisition are followed and how weaknesses in the laws themselves contribute to this. It will also show how and why rules and regulations on land acquisition in relation to existing provincial and district spatial planning tend to disregard social and environmental justice concerns, and how this ultimately jeopardizes the legitimacy of the government⁶⁸². One important element in such an evaluation is the extent to which the law has been clear in its content, accessible and predictable to the people affected by the acquisition process. Also at issue is the law's general applicability, so that it may serve as a tool for controlling government action in the land acquisition process.⁶⁸³ In this respect, the case is fairly representative of land acquisition practices throughout Indonesia.

One reason for choosing Jatigede in West Java for a case study is that the project is only a small part of a larger project to modernize and industrialize the country from the center. It provides a good example of how a top-down development approach, collides with local people's interests. Previous chapters have already explained how this top-down approach has been embedded in spatial and development planning. As the national capital's hinterland, West Java has to buttress Jakarta's transformation into a megalopolitan city.⁶⁸⁴ Thus, the national government has drawn up plans for massive development projects, such as the hydro-electric power plant (Jatigede) in Sumedang, an international airport (Kertajati) and an adjacent urban-industrial area (Majalengka), the upgrading of Cirebon's port so that it can

⁶⁷⁹ Art. 5(1) of the Environmental Management Act (23/1997), Art. 28 H of the 1945 Constitution and Art. 9(3) Law 39/1999 on Human Rights.

⁶⁸⁰ Maria SW, Kebijakan Pertanahan: Antara Regulasi dan Implementasi (Jakarta: Kompas, 2001), pp. 73-75.

⁶⁸¹ As will be discussed below, the land acquisition process started in 1984/1985 and was discontinued. It was restarted under the Soesilo Bambang Yudhoyono administration in 2005 and has continued up until the present (2010).

⁶⁸² Philipus Hadjon et. al. Pengantar Hukum Administrasi Indonesia, 4th ed. (GadjahMada University Press, Yogya: 1995), Especially chapter 9, pp. 279-286.

⁶⁸³ For a discussion on the rule of law and good governance see Chapter 1.

⁶⁸⁴ Sri Hartati Samhadi, "Dilema Megapolitan", (Kompas, 17 February 2007): 33.

service international commercial shipping, and a trans-Java toll road from Cikampek to Surabaya.⁶⁸⁵

This chapter is structured as follows. The first section outlines the existing rules on land acquisition in the public interest in light of spatial management. Similarly, as discussed earlier regarding land acquisition in the private interest, the government should ideally represent public interests over private/individual interests. How the public interest is articulated in the existing spatial plan and how it informs the whole process of land acquisition in practice will serve as a litmus test in this respect. Tenure security is greatly influenced by the ways in which spatial and development planning are translated into “infrastructure development projects” which serve to justify the land acquisition process. The next section will discuss the land acquisition process for the Jatigede hydroelectric power plant situated in Sumedang district in West Java. The protracted process of land acquisition for this infrastructure development project has taken years and has yet to be completed at the time of writing of this chapter (2010). The last part of this section will discuss from a rule of law perspective and draw some general conclusions.

9.2. Land Acquisition Procedures and Spatial Planning

Land acquisition in the public interest or specifically performed in the context of infrastructure development projects inevitably results in the dispossession of land owners, albeit not necessarily in revocation of their rights. In this sense, the rules on land acquisition in the public interest have been evaluated in terms of the threat they pose to people’s tenurial security. Understandably, they have been mostly perceived negatively as facilitating massive land grabs and /or evictions sponsored by the state in violation of the basic human right to enjoy possession in peace.

However, from a legal viewpoint, this view oversimplifies the issue at hand. While land acquisition may inevitably result in dispossession, it is erroneous to equate it - as many

⁶⁸⁵ These infrastructure development projects have been heavily criticized as threatening Indonesian food security. See: “Tol Picu Konversi Lahan Sawah: Kereta Api Bukan Menjadi Pilihan” (Kompas, 17 November 2008). This article suggests that the development of infrastructure (toll roads) will soon be followed by the urbanization (development of residential areas and its amenities) of the surrounding area. See also Bambang PS. Brojonegoro, “Kurangi Beban Ekonomi Pulau Jawa” (Kompas, 17 November 2008).

human rights activist tends to do - with a human rights violation.⁶⁸⁶ Governments do need the possibility to be authorized to reserve and allocate land for infrastructure development performed in the public interest. There should be a legal way to acquire land for public use, the legality of which is related to a fixed procedure elucidating the rights and obligations of land owners as well as those looking to acquire land. Therefore, dispossession should not be considered unlawful in and of itself.

9.2.1. A Brief Historical Overview of Land Acquisition Mechanisms

This section will outline the evolution of land acquisition procedures from the Dutch colonial era until now. Its aim is to trace how certain concepts and strategies have been borrowed and adapted with changing contexts and situations and to reveal the extent to which spatial plans play a role in controlling land acquisition in the public interest.

Land Acquisition under the Dutch Colonial Government

Land acquisition “in the public interest” was first introduced in Indonesia by the promulgation of an *onteigeningsordonnantie* (land expropriation ordinance; S.1864-6 as amended by S.1920-574). The 1920 ordinance provided the colonial government with a legal instrument to acquire land through the involuntary release of land rights. A department (e.g. public works) had to submit a proposal explaining the nature of their development project, stressing that it would serve the public interest or common benefit (*algemeen nut*). The Governor-General then issued an *ordonnantie* (government regulation) declaring the project

⁶⁸⁶ Such an ‘oversimplification’ can be found in many articles published in national newspapers discussing the new regulations on land acquisition in the public interest promulgated in 2005. See, for instance, “DPR Dorong Penyempurnaan UU Agraria” (Kompas, 31 May 2005); “DPR Minta Revisi, Komnas HAM Minta Cabut”, (Kompas, 14 June 2005); “Liberalisme, Perpres No 36/2005, dan Hak Rakyat” (Kompas, 25 June 2005); “Perpres No 36/2005 Potensial Picu Konflik” (Kompas, 18 May 2005); “Perpres No 36/2005, Dampaknya bagi Kepentingan Umum, (Kompas, 16 June 2005) and “Perpres No 36/2005, Langkah Maju atau Mundur, Kompas, 11 May 2005). See also “Bila Modal Menggusur Rakyat” in *Pembaruan Tani: Mimbar Komunikasi Petani*, edisi 19, IV, May-June 2005, pp. 6-8. Cf. Adrian Sutedi, *Implementasi Prinsip Kepentingan Umum dalam Pengadaan Tanah untuk Pembangunan*, (Jakarta: Sinar Grafika, 2007). He argues that Presidential Regulation No. 36/2005 violates the basic precepts of Art. 17 Universal Declaration of Human Rights (UDHR) and Art. 11 of the International Covenant on Economic-Social and Cultural Rights (ICESCR). Both articles pertain to the basic economic right to possess or own land (pp. 230-1).

to be in the public interest based on this proposal (Art. 6(1)) and established a committee with the task of receiving and processing complaints or objections against the development project (Art. 7-13). Compensation was determined in direct negotiation with land owners (Art. 14). Failing this, a fixed amount of compensation was to be determined by virtue of a court judgment (Art. 15). If an ex-landowner continued to refuse the compensation, the money would be deposited by the court registrar (Art. 61-62), whereupon the person concerned could be removed from the land by force if necessary. This legal path was provided to avoid delays in the completion of development projects in the public interest.

With the promulgation of the SVO the use of land acquired by the public works service was controlled through a construction permit (*aanlegvergunning*) to be regulated further in a building ordinance (*bouwverordening*). Art. 18 of the SVO stipulated that on the basis of the building ordinance all public works activities would be prohibited unless a prior construction permit had been granted by the mayor (*burgemeester*) and aldermen (*wethouders*) on the basis of an approved construction design plan. Likewise, the public must be notified ahead of time. Par. (3) stipulated that a permit application could be refused if the construction design plan was not in conformity with any *stadsvormingsvoorschrift* (conditions for the establishment of cities). The SVO further authorized the mayor and aldermen to attach conditions to the construction permit in so far as they related to the public interest (Art. 18 par. (4) and (5)). In short, the SVO established a framework for preventing misuse of land acquired by the government in the public interest.

The Indonesian expropriation law

The colonial land expropriation ordinance was simply taken over by the Indonesian government with minor changes (S-1947: 96). It was later replaced by Law 20/1961 on the revocation of property rights on land and other objects on land (expropriation law). This law was an elaboration of Art. 16 of the BAL which stipulates that:

“In the public interest as well as in the interest of the nation and the state and the common interest of the people, land may be expropriated, (on the condition that) adequate compensation shall be granted according to the law.”

Law 20/1961 defines the “public interest” widely, comprising of:

- (1) The Nation's or State's interest
- (2) The common interests of the people
- (3) The interest of development (*kepentingan pembangunan*).

The procedure established by Law 20/1961 was limited to land acquisition and more relevant to infrastructure development projects than to natural resource management. This was made explicit in the law's implementing regulations issued in 1973 (GR 39/1973 and Presidential Instruction 9/1973). Here, it is helpful to consider that the promulgation of Law No. 20/1961 followed the first Broad Guidelines of State Policies (PCA' Decree II/1960). As discussed earlier, later on the term "development" became interchangeable with the interests of the state, nation and people.⁶⁸⁷ "Development" programs were considered to be in the public interest automatically, and this was sufficient justification in itself for expropriating land for infra-structure development – uncontrolled by any effort at spatial planning.

GR 39/1973⁶⁸⁸ provided land owners with a legal avenue to contest the amount of compensation offered in the event that land was needed for government sponsored construction development projects. However, it was only applicable to expropriation based on a Presidential Decree, not to other expropriation procedures such as land clearance (*pembebasan tanah*). In the same year, President Soeharto issued an instruction to ministers and governors with general directions on the procedure to revoke property rights on land⁶⁸⁹. Art. 1 of this Instruction elaborated on the notion of public interest. It is stipulated that:

“A development project (*suatu kegiatan dalam rangka pelaksanaan pembangunan*) shall be of a public interest nature, if the project relates to (*menyangkut*):

- a. the state and nation's interest; and/or
- b. the interest of society (*masyarakat luas*); and/or
- c. the interest of the people (*rakyat banyak*); and/or

⁶⁸⁷ Cf. Chapter 1 (sub-section 1.2.2.) which discusses the notion of *rechtsstaat* and development and Chapter 3 (sub-section 3.4.). At issue here is how law (spatial and development planning) has been perceived as a tool for bringing about the modernization and industrialization of society (development). In short, spatial and development planning are mutually constitutive and both reassert the state's right to control (*hak menguasai Negara*).

⁶⁸⁸ GR 39/1973 on the procedure for the determination of compensation by the High Court in the case of revocation of property rights on land and objects on land (*acara penetapan ganti-kerugian oleh pengadilan tinggi sehubungan dengan pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*) is a further elaboration of Art. 8 of Law 20/1961.

⁶⁸⁹ Presidential Instruction 9/1973 on the implementation for the revocation of property rights on land and objects on land (*pelaksanaan pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*).

d. the interest of development”

The second paragraph continued with an extremely broad list of what development activities should be considered as in the nature of the public interest.⁶⁹⁰

That this list was not even exhaustive can be seen in the next paragraph which granted the president authority to decide what other activities fell under the public interest. The instruction did add the important condition that a development project could only be declared in the public interest by means of the development plan (*rencana pembangunan*) or the regional development master plan (*rencana induk pembangunan daerah*) (Art. 2). This suggests that such expropriation only applied to infrastructure development, as natural resource exploitation or management was regulated in special plans falling under the monopolistic jurisdiction of the Minister of Forestry and the Minister of Minerals and Energy.⁶⁹¹

However, expropriation by Presidential Decree was considered impractical and placing too much of a burden on the President. Moreover, only a small fraction of land was titled at the time and only land with formal titling could be expropriated this way.⁶⁹² Considering that until the present informal titles in land tenure are the norm rather than the exception, the government issued three ministerial regulations on the basis of Art. 10 of Law. 20/1961, which allowed government agencies and private sector to acquire land on the basis of an agreement. It concerns:

1. Ministry of Home Affairs Regulation (MHAR) 15/1975 on the procedure of land acquisition (*tata cara pembebasan tanah*),
2. MHAR 2/1976 on the utilization of the land acquisition procedure for the government by private companies; and
3. MHAR 2/1985 on land acquisition for development projects performed in sub-districts (*pengadaan tanah untuk keperluan pembangunan di wilayah kecamatan*).

⁶⁹⁰ Defense, public works, general equipment provision service (*perlengkapan umum*), public service; religious affairs; science, arts and culture; health, sports; public safety in regard to natural disaster; social welfare; cemeteries; tourism and recreation; and other economic activities beneficial to the general welfare.

⁶⁹¹ About the fragmented approach to land use and natural resource management, see Chapter 3 (sub section 3.4.2).

⁶⁹² Low level of land titling, and informality of land transactions which result in low accuracy of ownership data certainly made the effort to revoke land certificates difficult. Additionally, land owners (those whose name are mentioned in the land certificate as owner) may not physically possess land. Empty land (private or state owned) may well be occupied by squatters or other occupants claiming possession under adat law or peaceful possession for a number of years. See also Chapter 7.

Art. 1 of the 1975 Ministerial Regulation stipulated that land acquisition or release (*pembebasan tanah*)⁶⁹³ is the act of giving compensation to land owners for releasing all property claims, whether formal or informal. Consequently, land came under the direct control of the state and the NLA could then award a title to the applicant. While the official basis of this procedure was consensus (*musyawarah mufakat*), in practice the option to negotiate existed only in regard to the form and amount of compensation – not in a refusal of land release.

The most important part of MHAR 15/1975 concerned the procedure to release land of property claims. The governor was to establish a (permanent) land acquisition or “release” team (*panitia pembebasan tanah*) in each district under his jurisdiction (Art. 1). It consisted of:

1. The head of the NLA’s district branch office (as team leader);
2. One official from the district government;
3. The head of the land tax office;
4. A representative of the government agency needing the land (if an applicant is a private enterprise, an official representing the company);
5. The head of the public works service or the agricultural service;
6. The head of the sub-district;
7. The village head;
8. A secretary appointed from the land office (as non-member of the team).

Government agencies needing land had to submit an application to the governor, who would forward it to the land acquisition team. The team was then to represent the applicant’s interest (Art. 4) and should:

- (1) conduct a survey on the land’s condition;
- (2) conduct direct negotiation (*musyawarah*) with land owners/occupants;
- (3) estimate the amount of compensation;
- (4) prepare the report on land acquisition operations;
- (5) act as witness to the payment of compensation.

MHAR 2/1976 declared this procedure applicable to private investors as well.

⁶⁹³ To denote “*pembebasan*” I use the term release (see note 55 chapter III) which is used interchangeably with the term acquisition (*pengadaan*). Both purport to release land from all existing or competing property claims. Whereas the term land clearance is used to denote the physical act of removing all objects from land in preparation of the proposed land use (see chapter VII on the land use permits).

This procedure did not apply for land acquisition of less than 5 hectares within a single sub-district. According to MHAR 2/1985 (Art. 4 and 5 par(2)), in this case the amount of compensation should be determined in favour of the government (*paling menguntungkan Negara*) or based on a fixed rate (*harga dasar*) as determined by the head of district in accordance with MHAR 15/1975. The project leader himself was to conduct direct negotiations with the land owners (Art. 5 par (1)) and report the results to the sub-district head. However, obviously in such a situation there was no room for negotiation: the project leader could only convey the government's formal offer, which the land owners were expected to accept "in the public interest". Still, legally land owners could refuse the offer and thus force the development project's relocation.

Negotiations were usually initiated by publicly announcing the development plan to the land owners at the sub-district office. This is better known as "*sosialisasi*" in Indonesia. If land owners had any objections regarding the amount of compensation offered, the governor held the authority to decide on the matter (Art. 8), except in small projects, where the project leader had to find a different location (MHAR 2/1985). The governor's central role in determining the allocation of land was also emphasized by Presidential Instruction 1/ 1976,⁶⁹⁴ which charged him with coordinating the management of land for development projects where exploitation rights had already been granted by central government ministers.

MHAR 1/1975 became notorious when it was used to dispossess rural villagers objecting to the World Bank sponsored Kedungombo dam building project in Central Java. Apparently, villagers were 'tricked' into accepting the government compensation in the form of resettlement and many in fact refused it". In the words of Rumansara:⁶⁹⁵

"The process of reaching consensus had been based on an environmental impact assessment conducted in 1984 by a State University in Bandung which concludes that 75% of the people in the proposed reservoir area were willing to transmigrate. The accuracy of the figure was clearly dubious because of the misleading nature of the survey questions".

⁶⁹⁴ Presidential Instruction No. 1/1976 on the synchronization of the implementation of governmental task in land issues with forestry, mining, transmigration and public works (*sinkronisasi pelaksanaan tugas bidang keagrariaan dengan bidang kehutanan, pertambangan, transmigrasi dan pekerjaan umum*)

⁶⁹⁵ Augustinus Rumansara, "Indonesia: the struggle of the people of Kedung Ombo", in Jonathan A Fox & L. David Brown (eds.), *The Struggle for Accountability: the World Bank, NGO's and Grassroots Movements*, (Massachusetts Institute of Technology, 1998), pp. 123-150.

The Regulation fell into further disrepute when the government decided to adopt a settlement procedure, allegedly reserved to settle private debts but actually with the intention to speed up the process of land appropriation. This mechanism, called “*konsinyasi*”, allows the debtor to deposit the money due at the court if a creditor refuses to accept payment. In the Kedungombo case it was used to deposit the compensation at the Boyolali district court, and in this way the government was supposed to have fulfilled its obligations towards the villagers who refused to accept the compensation. This system was not new; it was a part of the *Onteigeningsordonnantie* and later adopted by Presidential Regulation 36/2005.⁶⁹⁶

In the face of the controversies surrounding the use of MHAR 1/1975, the government in the end decided to replace it by Presidential Decree 55/1993, which refined the scheme of land release and removed some of its harshest features.⁶⁹⁷

Presidential Decree 55/1993

PD 55/1993 provided a separate procedure for land acquisition by private enterprises (foreign and domestic), which was already discussed in earlier chapters (the permit-in-principle and location permit scheme).⁶⁹⁸ It emphasised the principle that land should be acquired on the basis of consensus.⁶⁹⁹ An important difference with MHAR 15/1975 was that it specifically mentioned that requests for land acquisition (*pengadaan tanah*)⁷⁰⁰ should be evaluated against existing district spatial plans (Art. 4). Only if application to acquire land was found to be in conformity with the district spatial plan, the district head (if the land requested lay within the borders of one district) or the governor (if the land requested was located in two or more districts) could issue an ‘agreement to determine the location for development in the public interest’ (*persetujuan penetapan lokasi pembangunan untuk kepentingan umum*). This

⁶⁹⁶ See further: Yusi A.P. et al, “Dua Wajah dari Kedungombo” (Tempo, 38/XXX 19 November 2001)

⁶⁹⁷ Presidential Decree 55/1993 concerning the procedure to acquire land for development projects in the public interest (*pengadaan tanah bagi pelaksanaan pembangunan untuk kepentingan umum*). The Ministry of Agraria/Head of the National Land Agency issued an implementing regulation: MAR 1/1994.

⁶⁹⁸ See Chapter VII and VIII on the permit and recommendation system regulating land acquisition by private enterprises.

⁶⁹⁹ Circular Letter of NLA 508.2-5568-D.III dated 6 December 1990 on the establishment of a committee to supervise and monitor land release performed by private entities (*tim pengawasan dan pengendalian pembebasan tanah untuk keperluan swasta*) and Letter of Ministry Agraria/Head of NLA no. 22/1993 dated 4 December 1993. These letters stipulated that private entities wishing to clear land must do so in consensus with the land owners, on a voluntary basis, under the supervision of the NLA.

⁷⁰⁰ It should be noted that since then the term “pembebasan” was never used anymore.

agreement was prepared by the provincial or district land office (Ministry of Agraria/Head of NLA Regulation 1/1994) and comparable to the permit-in-principle and the site permit scheme. The NLA had to co-ordinate the procedure with the head of the district service concerned. In practice, this meant the Head of the District or Provincial Development Planning Board had to issue a recommendation on the appropriateness of the project plan with relevant spatial or development plans.

The rest of the process followed the original procedure: a team established by the governor representing the government agency (the public interest) would conduct a preliminary survey, invite land owners to a meeting, directly negotiate with them and witness the payment of compensation (Art. 8). Here, the terms *pengadaan* (literary ‘making available’) and *pembebasan* (release the land of all property claims) actually referred to the same thing, i.e. the acquisition of land by offering compensation to land owners. If land owners were to object to the compensation offered, the governor would arbitrate and decide on their final compensation (Art. 20). It was also the governor who could initiate the process of expropriation of Law 20/1961 as a last resort if land owners continued to refuse the compensation offered (art. 21).

Another similarity was the use of the expression “public interest” (*kepentingan umum*). PD 55/1993 defined it as the interest of all levels of society (*kepentingan seluruh lapisan masyarakat*; Art. 1 (5)) and, as further explained in Art. 5, that it only applied to development projects and activities performed and owned by the government. It could not be used to seek profit. Art. 5 (1) listed the government projects covered by the term public interest,⁷⁰¹ which included all government projects decreed to be in the public interest by the President. The latter thus held wide discretionary power in this matter, not unlike the governor-general under the colonial expropriation law.

As already mentioned, Indonesia underwent massive urbanization during the 1980s and 1990s, resulting in unstoppable land conversion and a sharp rise in land disputes. As a result society at large became more aware of land’s economic value and more reluctant to accept the interpretation of the social function of land as meaning that individual or communal land owners must consent to dispossession at all times.

⁷⁰¹ (1) public roads, sewers and drainage; (2) dams and other water-works constructions, including irrigation; (3) public hospitals and health centers/clinics; (4) sea and airports; (5) buildings of worships; (6) public schools; (7) public markets; (8) public cemeteries; (9) public safety facilities; (10) post and telecommunication; (11) sports facilities; (12) broadcasting stations (radio and television); (13) government offices; (14) facilities for the armed forces.

Refinement of the Land Acquisition Procedure

After the start of *Reformasi*, the central government decided to replace PD 55/1993 with Presidential Regulation (PR) 36/2005, which only put into place minor changes. The basic principles remained the same:

1. Land acquisition (in the form of voluntary release and transfer of property rights or expropriation) would only be allowed if based on existing spatial plans. Conformity with these plans must be evidenced by a decree on the allocation of land for the development project (*surat keputusan penetapan lokasi*) to be issued either by the governor or district head.
2. A land committee comprising of government officials was to be established, either at the district/provincial level or by the Ministry of Home Affairs, if the land to be acquired would be located in more than one district viz. province.
3. This committee should conduct negotiations (*musyawarah*) on the form and amount of compensation.

However, a number of other things did change. In addition, to the above tasks, the committee was entrusted with the supervision of the realization of the development project on site. Furthermore, Art. 5 provided a longer, but exhaustive, list of what comprises development in the public interest.⁷⁰² Development projects not included in the list were therefore not legally considered to be in the public interest, meaning that land acquisition by government agencies in those cases could only be effected through direct negotiation with land owners. This limited government discretion in deciding what constitutes public interest and was quite an improvement over the 1993 ruling. On the other hand, the general provisions defined the public interest quite broadly, as the interest of a large part of society (*sebagian besar lapisan masyarakat*).

⁷⁰² Comprising of: (a) public roads, toll roads, railways; clean water distribution installation, sewers and drainage; (b) dams, irrigation works and other waterworks constructions; (c) public hospitals and health centers; (d) air and sea-ports, bus and railway terminals; (e) houses of worship; (f) schools; (g) public markets; (h) public cemeteries; (i) public safety facilities; (j) post and telecommunication; (k) sport facilities; (l) radio and televisions broadcast stations; (m) government offices, embassies/consulates, the UN and other international organizations under the UN; (n) facilities for the armed forces and police force; (o) prisons; (p) apartments for the low income; (q) garbage dump sites; (r) nature and culture conservation sites; (s) public parks; (t) orphanages; and (u) electrical generating, transmission and distribution installations.

PR 36/2005 provoked a lot of critique. One legal aid institution in Palembang even threatened to apply for a judicial review.⁷⁰³ The main fear was that private investors would manage to again start utilizing the land acquisition process intended for government projects, because the list contained some projects typically suitable for private investment or public-private partnership.

In response to such critique from scholars, parliament and NGOs, the President decided to amend PR 36/2005 by PR 65/2006.⁷⁰⁴ The list now only contains seven development projects: (a) public road, toll ways, railways; clean water installation and sewerage; (b) dams, irrigation works and other waterworks constructions; (c) public hospitals and health centers; (d) air and sea-ports, bus and railway terminals; (e) public safety facilities; (f) garbage dump sites; (g) nature and culture conservation sites and (h) electrical generating, transmission and distribution installations. Topics such as sports facilities and houses of worship have been removed. The list is still exhaustive (Art. 2 par.(2)), but it also suggests that there is little or no room to negotiate the amount of compensation if the development project fits the above list of government projects in the public interest. However, releasing land rights has remained a voluntary act.

Consistent with its goal of providing a speedy land acquisition process, PR 65/2006 has established a statutory time limit for negotiation. If the development project cannot be moved to another location, and the 120 negotiation days have expired, the land acquisition committee can decide the amount of compensation to be paid. This sum can be deposited with the Court's registrar (the so-called *konsinyasi*; Art. 10). Land owners may still contest the amount of compensation by submitting an appeal to the High Court in accordance with Law 20/1961 and GR 39/1973 (Art. 18a). The cross reference to Law 20/1961 also suggests that in the end land owners can be disposed against their will, i.e. by using the title revocation procedure as a last resort measure.

The above Presidential Regulation should be read in conjunction with its implementing regulation, MAR (Ministry of Agraria/Head of NLA Regulation) 3/2007.⁷⁰⁵ Soemardjono has criticized this implementing regulation as going against the consensual principle underlying

⁷⁰³ Taufik Wijaya, "Langgar HAM, Perpres Pengadaan Tanah akan dijudicial review" (detikNews, 21/05/2005). The Palembang Legal Aid argued that the possibility of depositing compensation money to the court's registrar would result in human rights violations as happened during the New Order era.

⁷⁰⁴ "DPR: Revisi Perpres Pengadaan Tanah" (www.suarapembaruan.com, 09/06/2005) ; Perpres Pengadaan Tanah Lebih Kejam Dari Aturan Sebelumnya : Perpres no. 36/2005 dinilai bisa menjadi alat efektif untuk penggusuran, (<http://hukumonline.com>, 9/05/2005)

⁷⁰⁵ MAR 3/2007 on the implementation of PR 36/2005 as amended by PR 65/2006.

the land acquisition process.⁷⁰⁶ Physical development may only be initiated after consent has been obtained and compensation has been received by the dispossessed land owners. MAR 3/2007 instead provides that physical development may be initiated without the land acquisition process being completed. This seems to support the allegation that the decision to promulgate PR 36/2005 was a response to the demand by potential investors at the infrastructure summit hosted by the Indonesian government in January 2005⁷⁰⁷ that the government provides a system where land can be acquired in a speedy manner, both for infrastructure development and commercial purposes.

MAR 3/2007 explicitly refers to the possibility of relocating the site project. It provides that the land acquisition committee⁷⁰⁸ (Arts. 14-18) shall inform land owners of the planned project site and its goals. If 75 percent of the land owners object to the location of the site, the team must go through the socialization process a second time. If this fails to be successful, the government shall look for alternative options – that is, if it is feasible to relocate the site. If not, the land acquisition committee may request the district head or mayor to initiate the expropriation procedure of Law 20/1961 (Art. 19). Thus, it is ultimately left to the discretion of the government whether to relocate the site project or dispossess land owners using the procedure available in Law 20/1961. This is consistent with the NLA's approach to the socialization process (*penyuluhan*). The elucidation of Article 19 suggests that socialization involves a one way communication process. It consists of the land acquisition committee informing the land owners of the goals and usefulness of the development project to society in general rather than a genuine “*musyawarah*” involving public participation.

⁷⁰⁶ For a more elaborate comment on MAR 3/2007, see Maria S.W. Soemardjono, *Tanah dalam Perspektif Hak Ekonomi Sosial dan Budaya* (Jakarta: Kompas, 2008), particularly Chapter 7 “Pengadaan Tanah untuk Kepentingan Umum”.

⁷⁰⁷ Periksa www.iisummit2005.com, last accessed 13/01/2005. For comments and criticism regarding this huge infrastructure development plan, see Sunarsip, “Reorientasi infrastruktur pasca Tsunami” (<http://groups.msn.com>, last accessed 13/01/2005).

⁷⁰⁸ This is the same land acquisition committee (better known as the *Panitia Sembilan*) as referred to by Presidential Decree 36/2005 (amended by PD 65/2006) which at the least should comprise of: regional secretary (*sekretaris daerah*) as head of the committee, a government official 2nd echelon, Head of the NLA at the district/municipal level and Head of the (district or provincial) service for which the land acquisition project will be performed (Art. 14).

9.3. Land Acquisition for Development in the Public Interest

This section looks at a case study of land acquisition, with particular attention for the role of spatial-development plans and changing circumstances caused by district and provincial legislation. It concerns the Jatigede case, a hydro-electrical power plant project situated in Sumedang, West Java. The land acquisition process for this case began in 1983/84 and at the time of my last fieldwork (2007/2008) was still ongoing.

9.3.1. The Jatigede Dam

The case concerns the building of a multi-purpose dam in Sumedang district, north of Bandung. It was a pet project of the Ministry of Public Works, which fizzled out in the late 1970s and was resumed by the central government after 1999. The project was to produce a water reservoir for irrigation purposes and hydroelectric power for neighboring regions and as such key to other development projects in the adjacent regions. China agreed to finance the project in 2007. Construction work may commence soon, even though the land acquisition process has not been fully completed yet.

9.3.2 Justifying the Construction of the Dam

Already in the 1960s, the central government sought to build a multi-purpose dam in Jatigede, an area spread out across the districts of Sumedang and Bandung, adjacent to the Majalengka and Indramayu districts in the west and north respectively.⁷⁰⁹ The site map (see below) shows how the dam will enable the irrigation of 90,000 hectares of land down river and will cover an area of 4,891.13 hectare with a water catchment area of 1,460 km². The total land area to be acquired for this development project amounts to 1,768.69 hectares: several villages had to be relocated, and 1,200 hectares of state forest land managed by PT. Perhutani were to be included.⁷¹⁰ The Jatigede area forms part of the Cimanuk-Cisanggarang watershed, which covers an area of 7,711 km² and runs through two adjacent provinces

⁷⁰⁹ The exact site for the future dam was determined by a survey conducted by a foreign geologist in 1963, and later corroborated by recommendations made by the Netherlands Engineering Consultants-Snowy Mountains Engineering Corporation (SMEC) in 1973 and again in 1978-1980.

⁷¹⁰ Data provided by Bappeda Sumedang as quoted by Litbang Kompas, (Kompas 20 May 2010). The Sumedang district website provides the same numbers. See: “Pembangunan Bendungan Jatigede” (www.sumedangkab.go.id, last accessed 20 May 2010).

(West and Central Java) and several districts within both provinces. Hence, the central government has the authority over the spatial management of the Cimanuk watershed.⁷¹¹



Figure 9-6: Site map of Jatigede: adapted by Kompas (April 20, 2010) from Balai Besar Wilayah Sungai Cimanuk-Cisanggarung)

The proposal was initiated in the context of developing the larger Cimanuk river basin and its adjacent regions. Driving the plan was the need to provide water to sustain the productive rice fields and other agricultural activities. In 1967 another multi-purpose dam (the Jatiluhur

⁷¹¹ Pursuant to Ministry of Public Works Regulation (MPWR) 11A/2006. However, authority concerning irrigation is equally shared between the central, province and district governments (MPW Decree 390/Kpts/M/2007) on the status of irrigated areas whose management falls under the authority of the central, provincial and district governments (*penetapan status daerah irigasi yang pengelolaannya menjadi wewenang dan tanggungjawab pemerintah, pemerintah provinsi dan pemerintah kabupaten/kota*).

Hydro electrical power plant) was already built closer to Jakarta to comply with the rising demand for electricity.

Responding to a letter from the Ministry of Public Work, the Governor of West Java issued a decree in September 1975⁷¹², placing the future site of the dam under status quo. People within the area lost their right to conduct land transactions or any other new activities related to land, as the the Jatigede area had been reserved for the project. Consecutive West Java spatial plans also allocated the area as the future site for the dam.

In 1979 the Jatigede project was halted temporarily. Soeharto's development policy at the time concentrated on natural resource exploitation (forestry, oil and gas and mining). However, these views changed quickly, even if formal explanations were not offered, and in 1982 the government revived the project and started preparing for acquiring the land. During the same period, the government initiated the Cirata and Saguling hydroelectric power plants in the Citarum river basin with financial support of the IBRD/World Bank. These were taken into use in the late 1980s.

9.3.3. Formal Announcement of the Plan and/or Socialization

In 1983, the district government, on the basis of an instruction from the Governor, began the socialization process. In 1984, awaiting the availability of state budget, the Governor appointed the land acquisition committee (*panitia sembilan*).⁷¹³ At a number of village meetings in 1984 the locals present were told to accept the compensation as it would be decided by the land acquisition committee on the basis of three decrees from the Sumedang District Head. These were issued in 1984-1985 and contained a value assessment of land,

⁷¹² No: 293/AI/2/T.Pra/75 dated 26 September 1975 renewed in 1981 and 2000 by Governor of West Java Decree 181.1/SK1267-Pem.Um/1981 dated 16 September 1981 and No. 36/2000 dated 23 November 2000. After the promulgation of the RGL 1999, the head of the now autonomous regions held the power to place land under status quo, by a *surat persetujuan Penetapan Lahan untuk Pembangunan or surat persetujuan penetapan lokasi* (approval that a certain piece of land shall be used for development purposes), except for development projects straddling two or more districts, in which case the Governor still held the authority.

⁷¹³ On the basis of MHAR 3/1973 and 15/1975. This ad hoc committee (established by virtue of a decree issued by the governor) consisted of regional government officials: the regent or mayor (heading the committee) and the deputy for government affairs, head of the regional land agency (*kantor wilayah badan pertanahan*) and one section head of the same office, the head of the Land Tax and Building Office, the head of the building service (*dinas bangunan*), the head of the agriculture service (*dinas pertanian*), and the head of the sub-district (*camat*) and lurah/village head within the land area targeted for acquisition..

buildings and agricultural products.⁷¹⁴ At the same occasion, the people were warned that objection to the project, including rejection of the predetermined level of compensation, would be interpreted as efforts to obstruct national development. Under the New Order, such “subversive” behavior was equated with having sympathy for leftist/communist ideas. Given the dire consequences such associations had under Soeharto’s regime, this strategy – which was used extensively during the New Order – instilled a sufficient amount of fear in the local populace not to raise any objections.⁷¹⁵

The district government also sought the assistance of the local military unit. As reported by the Bandung Legal Aid Foundation (*Lembaga Bantuan Hukum Bandung*)⁷¹⁶, people at Jatigede who refused the compensation offered in the 1980s were summoned to the Sumedang district military court. They were accused of stirring up political unrest, interrogated, and two of them were severely beaten. Publicly, the military declared that it was their legal duty to control and monitor land acquisition in the interest of national development.⁷¹⁷

LBH Bandung also reported that local people were never given the choice as to whether or not to move, and were not consulted about the value of their land and property. Instead, they were tricked into accepting the payments by officials. For instance, the committee led locals to believe that rejection of the offer would result in forfeiture of any right to compensation, since the recalcitrant would be seen to be obstructing gain for the greater good, or in the New Order parlance, “development”. In this way, the government created the impression that compensation – whatever the amount or form – is not a right,⁷¹⁸ but a benevolent gift from the government.

⁷¹⁴ District Head of Sumedang Decree 590/SK.7-Ag/1984 and 590/SK.45/Ag/1985 on the value estimation of land held in possession by land owners and Decree 604/SK.186-PUK/1984 on the value estimation of buildings.

⁷¹⁵ As reported by ELSAM, the same strategy was used in the Kedung Ombo and the Cirata dam cases.

⁷¹⁶ See Yayasan Lembaga Bantuan Hukum, Bandung, “Mengungkap Pelanggaran Hak Asasi Manusia, Hukum dan Korupsi di Bendungan Jatigede, Sumedang-Jawa Barat (sebuah laporan alternatif), (LBH-Bandung, Law Firm Adnan Buyung & Partners, West-Java Corruption Watch: Agustus 2003).

⁷¹⁷ “Jatigede dam campaign gain momentum” (Down to Earth no.61, May 2004); West Java mega-dam looms (Down to Earth no. 59, November 2003). Both articles refer to a September 2003 report compiled by LBH Bandung which documented the human rights violations associated with the project’s land acquisition.

⁷¹⁸ As determined in Art. 17 Universal Declarations of Human Rights. Cf. on the national plane: Art. 28H of the Indonesian Constitution of 1945 (second amendment of 2000); Art. 23/32 of PCA Decree 17/1998 on Human Right as further elaborated in Law 39/1999 (on human rights (Art. 29 and 36(2)).

9.3.4. Bureaucratic Hurdles and Corrupt Practices

Considering the government's power one would expect that the land for the project would be easily acquired. However, this was not the case. From 1984 up to the 1990s, the committee only acquired 2,159 hectares of land.⁷¹⁹ Neither did the subsequent years bring much result. Several reasons account for this. First, members of the land acquisition committee did not work full-time on the process as they all had other government duties to attend too. Second, red tape hampered efficient and reliable data collection on the details of the land to be acquired. For instance, the NLA's data on formal land ownership were incomplete and in part conflicted with those of the tax office on land and building tax payers. As a result the committee first had to collect and verify data from different sources. Third, this uncertainty created room for corruption, which in its turn led to mismanagement of the budget and further delays. The Director of LBH Bandung revealed that about 6 billion rupiah ($\pm$ 600,000 US\$) had been lost as a result:⁷²⁰

“Only an estimated 12-33% of the compensation fund allocated in the government budget has reached individual land owners. (...) Compensation had been granted in violation of the District head decrees on the value estimation of land and buildings.”

Apparently during the New Order government such transgression of the law did not result in any legal response at all. This changed after *Reformasi* when some locals decided to take matters into their own hand. In 2006, a few inhabitants from two villages at Jatigede brought a class-action civil lawsuit against the government of Indonesia before the Bandung district court with the support of several legal aid institutions.⁷²¹ They demanded a re-evaluation of the land acquisition process, a fairer treatment with regard to the valuation of land and relocation to an area close by.⁷²² They explicitly mentioned the intimidation and fear instilled by government officials which marred the *musyawarah* principle that was supposed to be upheld by both parties. Unfortunately, they lost the case at this stage because the government's lawyer could prove to the court that the land owners who had shown up during the socialization process had signed a document that expressed their consent with the development project, while quite a number of other land owners had agreed to be

⁷¹⁹ “Proyek Bendungan Jatigede Sumedang: Catatan Kelabu dalam Lembar Pembangunan” (Republika online, 4 February 2003).

⁷²⁰ “Gubernur Jabar Kaget: LBH Temukan Dugaan Korupsi Waduk Jatigede” (Sinar Harapan, 5 March 2004).

⁷²¹ LBH-Bandung and the legal aid bureau of the Parahyangan University Law Faculty.

⁷²² “Warga Jatigede Gugat Presiden” (Sinar Harapan, 12 September 2006).

compensated and accepted the money offered. The court concluded that it was proven beyond reasonable doubt that *musyawarah* had been reached and that the full amount of compensation had been paid in accordance with the law.⁷²³

In regard to the corruption charges (committed in the 1980s and 1990s), as revealed by the police which began investigating in 2009, individual landowners and outsiders also participated in the misappropriation of compensation funds. Various criminal schemes were developed by and in co-operation with local government officials, such as ‘marking up’ the amount of land to be compensated, demanding compensation for the same land more than once and misrepresenting people as landowners and collecting compensation on their behalf.⁷²⁴ As mentioned earlier, a lack of reliable land and population records in combination with the widespread informality of land tenure facilitated such practices.

Government responses to the corruption problems have been largely ineffective. In 2009 the National Planning Agency (*Bappenas*) established a team headed by Ms. Rinella Tambunan to inquire into the compensation process of the Jatigede project before and after 2007. The result of this inquiry has not come forth at the time of writing, but will be in the form of a policy recommendation on the compensation process, addressed to the central government and the government of Sumedang.⁷²⁵ No corruption charges were filed against members of the land acquisition committee suspected of embezzling funds to be used for the land acquisition process in 1984-1985. Only the secretary of the Sumedang district land acquisition committee was found guilty of misappropriating funds allocated for land acquisition during the 2004-2005 budget year. For this, the District Court of Sumedang sentenced him with a mere one year of imprisonment in 2009.⁷²⁶

9.3.5. Availability of Funding

Problems with funding also caused delay. Similar to Kedung Ombo, the Jatigede dam would be funded by foreign loans. However, the World Bank decided to stop funding the project and cancelled its plan to allocate US\$ 37 million after a negative feasibility study in 1988.⁷²⁷ A

⁷²³ “Gugatan Warga Jatigede Ditolak” (Sinar Harapan, 26 July 2007); Pengadilan Negeri Bandung Tolak Gugatan Warga Jatigede (Gatra online, 25 July 2007). An appeal is still pending.

⁷²⁴ “Ganti Rugi Jatigede Diselewengkan” (Tribun Jabar online, March 1, 2009).

⁷²⁵ Bappenas Evaluasi Ganti-Rugi Proyek Waduk Jatigede (Sindo online, 24 August 2007).

⁷²⁶ “Terpidana Kasus Jatigede Dieksekusi” (Pikiran Rakyat, 21 Oktober 2009).

⁷²⁷ “Jatigede dam project attractive, but at what cost to environment?” (The Jakarta Post, 06-11-2007). In 1985, in cooperation with the Dept of Planology of the ITB, the government made a relocation plan for around the

second blow to the project came with the economic crisis of 1997, which caused the government to officially stop the ongoing land acquisition process by PD 39/1997, a decision reinforced by the political turmoil following the crisis. Priority was given to fundamentally reconstruct the legal, political and economic foundations of the state and government rather than conduct huge infrastructure projects.

Three years later, in 2000, President Wahid at least officially restarted the project, by rescinding PD 39/1997.⁷²⁸ According to the government projects such as Jatigede were needed to jumpstart the national economy. However, nothing happened as the President got embroiled in a long political fight eventually leading to his impeachment in 2001. Neither were efforts by his successor Megawati to rekindle the project successful.

This changed under the Presidency of Soesilo Bambang Yudhono. In January 2005, the President held an infrastructure summit in Jakarta to convince international investors that his new government was serious about attracting foreign investment. A few months later, the West Java provincial government followed suit and offered 57 infrastructure projects worth US\$3.5 billion to the 174 foreign and domestic investors attending that summit.⁷²⁹ Projects included the construction of toll roads connecting West Java's economic centres and a new international airport in Majalengka. Many believed these projects were indispensable for increasing the region's comparative competitiveness in attracting investment.⁷³⁰

As discussed earlier the President also decided to amend PD 55/1993 and replaced it with PR 36/2005, and subsequently PR 65/2006. The Minister of Public Works, Joko Kirmanto, explicitly stated that the aim of the Decrees was to provide the government and investors alike with a way to acquire land as quickly as possible. He added that once an area is allocated for a certain public purpose, the people living within said area lose their right to

lake. The feasibility study was conducted in 1989-1990 by the Lembaga Ekologi (ecology institute) of the Padjadjaran State University at Bandung. It was the same institution which conducted the environmental impact study in 1992. See also Amaliya et al, "Mengejar Mimpi Setengah Abad" (Pikiran Rakyat, June 7, 2010).

⁷²⁸ By virtue of Presidential Decree No. 64 of 2000.

⁷²⁹ For a critical comment on both summits which reflect a policy of prioritizing direct investment and infrastructure development see "A recipe for injustice" (Down to Earth no. 69, May 2006).

⁷³⁰ Asep Mh. Mulyana, "Jabar genjot proyek infrastruktur" (www.bisnis.com, 08/07/2005). The West Java Chamber of Industry and Commerce (Kadin Jabar) were behind the provincial government's initiative for such infrastructure development projects, as, if realized, the province's comparative competitiveness should increase and, in addition, reduce the unemployment rate up to 30-40%".

sell their land to third parties.⁷³¹ The new regulation further enabled continuation of the project even if the land acquisition process had not been completed.

These efforts paid off when the Chinese government agreed to offer a loan, subject to the condition that a Chinese contractor firm be appointed to do the construction work. The contract between the government of Indonesia and Chinese contractor SinoHydro Coop Ltd was signed on April 30, 2007.⁷³² On a state visit to China Vice-President Jusuf Kalla officially met with representatives from SinoHydro coop Ltd.⁷³³ At the end of 2007, Djoko Kirmanto confidently stated that:

“The government had signed a loan agreement amounting to US\$ 239.57 million with the government of China as represented by the Chinese Exim Bank. Hence the money is available, the contract had been signed and now we must proceed to start the work.”⁷³⁴

In this manner the Minister of Public Works brought pressure to bear on the provincial and district governments to finally complete the land acquisition project. As the government perceived it, protests concerned not the project itself but rather local people’s dissatisfaction with the amount of compensation received and uncertainty about relocation.⁷³⁵

9.3.6. People’s objections against the project

The tendency of government officials to perceive the issue at hand only as land occupants’ dissatisfaction with the compensation amount offered, unfortunately, had been further strengthened by the fact that in 2007 people from nine villages in Jatigede (representing 1,054 families) who formed a *Gabungan Rakyat Daerah Rencana Genangan Jatigede* (Jatigede people’s association) and *Pokja Gugatan Proyek Jatigede* (compensation claim task force) contested the amount of compensation granted to them in 1983-1984. The main ground was allegation of the use of threat to manufacture consent on the compensation amount

⁷³¹ See: “Kepentingan Umum, Globalisasi, dan Percaloan”, (Kompas on line, 25 June 2005); “Pembebasan Tanah Akan Dipermudah”, (Tempointeraktif.com, 17 January 2005).

⁷³² “Kontrak Pembangunan Jatigede Ditandatangani” (Kapanlagi.com, 30 April 2007)

⁷³³ “Kalla Bertemu Pimpinan BUMN Cina” (Kapanlagi.com, 7 Juni 2007).

⁷³⁴ “Proyek Jatigede Dimulai” (Tempointeraktif, 25 November 2007); Soedrajat Tisnasasmita and Irwan Natsir, “Implikasi Waduk Jatigede Bagi Jawa Barat”(Pikiran Rakyat, 15 February 2008)

⁷³⁵ “Penolakan Warga Meluas”(Koran Sindo, 23 October 2007).

offered.⁷³⁶ As mentioned earlier above, these people with the help of the Bandung Legal Aid earlier brought this matter before the Bandung court which dismissed the case. No other legal avenue is open to them anymore.

However, in response the government, in the same year, conducted a tripartite meeting of central, provincial and district government officials (from Sumedang, Majalengka, Indramayu and Cirebon). In that meeting was decided that the provincial government would do the “social engineering” (*rekayasa sosial*) required to move the project forward. This meant that they would try to convince locals who still retained claims on land, to voluntarily release their claims and accept indemnity in the form of relocation. The districts were charged with allocating and reserving land for this purpose.⁷³⁷ This task was quite a challenge, because many of those who had earlier been forced to release their land and been relocated to the outer islands under a transmigration program had by now returned because of the hardships they had experienced.⁷³⁸ These people had since reoccupied the land they had released and that had not been used since.

Nonetheless, the government wished to sustain its commitment made in 2003, i.e. to relocate all of the locals.⁷³⁹ Earlier in 2006, the central government officially requested provincial governments from outer regions to accept the relocation of people from Jatigede to their areas. Representatives of Riau province and the districts of Bengkalis and Indragiri Hilir were invited to Jakarta and notified of the central government’s decision to reserve land for this purpose.⁷⁴⁰ However, the central government could not force transmigration upon these governments, and its requests met with a sceptical reaction. Such difficulty in dealing with regions in determining sites to relocate people from Java was certainly absent during the Soeharto administration.

⁷³⁶ See: Waduk Resahkan Warga (Kompas 1 July 2008); Warga Jatigede Tuntut Gantirugi Tanah (Tempo interaktif, 5 May 2008). A similar negotiation (*musyawarah*) process was used in the land acquisition for the construction of the Kedung Ombo Dam in Central Java. See: In the Name of Development: Human Rights and the World Bank in Indonesia, a joint report of the Lawyers Committee for Human Rights and the Institute for Policy Research and Advocacy (ELSAM), July 1995.

⁷³⁷ “Bantu Relokasi Warga Jatigede” (Pikiran Rakyat, 27 august 2007).

⁷³⁸ See: “Pemerintah keluarkan 4 opsi soal proyek jatigede”(Kemitraan Air Indonesia, 10-9-2003, www.inawater.com/news); “Bendungan Dibangun, Rakyat Malah Merana”, suara public-edisi May 2004; Dilema Pembangunan Proyek Tokek Waduk Jatigede”, (Kompas online, 1 November 2004).

⁷³⁹ West Java mega-dam looms (Down to Earth no. 59, November 2003).

⁷⁴⁰ “Riau Bakal Terima Warga Transmigrasi dari Jawa Barat” (Riau online, 19 January 2006).

The most important district government concerned, Sumedang took no concrete steps towards relocation until 2008,⁷⁴¹ when the district head issued a decree pertaining to the relocation of 5,891 families to a nearby location. Still, this left a large number of other families in doubt about their future.⁷⁴² Dedi Kusmayadi, head of a local NGO, *Komunike Bersama*, moreover criticized the above decree for not taking into consideration land owners' wishes. He argued that:

“(...) the government should priorly consult with us (the people) in determining the relocation site. The government decision to relocate, without prior consultation and consensus building (musyawarah), will only cause unnecessary suffering of people in their new location.”⁷⁴³

National environmental NGO WALHI argued that the dam would devastate the local community, forever uprooting the local people from their ancestral land and destroying their traditional culture.⁷⁴⁴ The dam would submerge nearly 5,000 hectares, comprising of 35 villages (or 70,000 villagers).⁷⁴⁵

NGOs also objected to restarting the project for environmental reasons. In a 2004 discussion with the Deputy of Environmental Impact Assessment of the Ministry of Environment, the head of the FKRJ, Kusnadi Chandrawiguna pointed out that the environmental impact assessment made for the project in 1992 was no longer valid.⁷⁴⁶ According to WALHI, the continuation of the project would mean a considerable reduction of already scarce forested

⁷⁴¹ Notwithstanding the fact that already back in 2005, in support of that effort the regency of Garut agreed to reserve an area for relocation. See: “Sang Tauladan dari Arinem”, Info Ketransmigrasian Volume I no. 2 th. 2005. The article advertises transmigration by an alleged success story of individuals who are better off as transmigrants. “Rencana Relokasi Warga Belum Serius” (Pikiran Rakyat, 22 Februari 2006); “Belum Pasti Pemindahan Warga Jatigede”, (Pikiran Rakyat, 23 September 2007).

⁷⁴² Decree of the Head of the Sumedang District 503.PL/SK.015-PTPSP/2008 on the determination of location for resettlement. See further Yosa, “Peristiwa di Balik Pembebasan Lahan Bendungan Jatigede” (progresif jaya online, 14 December 2009).

⁷⁴³ Ibidem.

⁷⁴⁴ “Bendungan Dibangun, Rakyat Malah Merana” (Suara Publik Online, edisi mei 2004)

⁷⁴⁵ “LSM Minta Proyek Pembangunan Waduk Jatigede Dihentikan”, (Media Indonesia, 14 mei 2004). Dihentikan)

⁷⁴⁶ “Warga Tolak Waduk Jatigede”(Kompas, 13 Mei 2004).

area in West Java⁷⁴⁷ and would furthermore violate the general rule prohibiting productive rice field conversion.⁷⁴⁸

In an effort to find an ally within the central government against the Public Works Ministry and the provincial government, the FKRJ lobbied the Ministry of Environment to stop the project.⁷⁴⁹ To such attempts the Public Works Minister responded by arguing that the Minister of Environment held no authority to decide on the future of the project, except in case a new environmental impact assessment study would determine that the project was not feasible.⁷⁵⁰ But even then, it was improbable that a new environmental impact assessment would be able to put a halt to a project in which the central, provincial and district governments had already invested so much money – indicating the weakness of the Minister of Environment in controlling development projects and the failure of the environmental impact assessment to function properly.⁷⁵¹

It should also be noted that the two impact assessments made in justification of the Jatigede dam skirt the question as to whether continuous habitat fragmentation through other dam related activities, such as the construction of new cities and roads, is a reasonable price to be paid. The feasibility study only addresses what actions should be undertaken in order to minimize or control the environmental impact of the project itself, not of its longer term consequences.⁷⁵² As a result, issues of social and environmental justice tend to be

⁷⁴⁷ See West Java PR 3/1994 and commentary by Yaman Mulyana, “Memantapkan Kawasan Lindung Jawa Barat”, (Pikiran Rakyat, 19 July 2002).

⁷⁴⁸ Adig Suwandi, “Pengurusan Lahan Pertanian Produktif”, (Republika online, 09.09.02); “perjuangan merebut tanah” (down to earth no. 40, February 1999 in <http://dte.gn.apc.org>; cf. “Mengerem Konversi Lahan dengan Pendekatan Pasar”, (www.kompas.com, 16 oktober 2002); Bambang Irawan et al, “Perumusan Model Kelembagaan Riset Lahan Pertanian”, in Bulletin AgroEkonomi, volume 1, no. 2, February 2001, “Lahan Pertanian di Jawa tidak boleh Dikonversi”, (Kompas online, 24 September 2002)., “Konversi Sawah Beririgasi Akan Dilarang”, (Tempo Interaktif, 20 June 2006), “Revitalisasi Pertanian Baru Daftar Keinginan”, (Kompas online, 2 February 2005). Cf. Law 25/2004 (national development planning system) and Presidential Regulation 7/2005 on middle term development plan 2004-2009, especially chapters 19 and 25.

⁷⁴⁹ “LSM Minta Proyek Pembangunan Waduk Jatigede Dihentikan”, (Media Indonesia, 14 May 2004).

⁷⁵⁰ “Amdal Kadaluarsa: Menteri LH Larang Lanjutkan Proyek Waduk Jatigede” (Kompas, 29 March 2004).

⁷⁵¹ According to Wisandana, a former government official working at the BPLHD West Java province, in legal practice the environmental impact study lost its preventive function and degenerated into an administrative requirement without any consequence. Wisandana, “Pokok-pokok Amdal (pengertian, lingkup, prosedur, kegunaan, kedudukan dan fungsi)” paper without date (Bandung: BPLHD, 2007).

⁷⁵² An interesting comparison here is the Three Gorges dam project in China. Were Chinese environmentalists did look into this critical issue Jianguo Wu, Jian Hui Hiang, Xinggou Han, Zongqian Xie and Xianming Gao, “Three Gorges Dam-Experiment in Habitat Fragmentation? (Science 23 May 2003, Vol. 300 no. 5623):pp. 1239-1240. Dai Qing, Philip B. Williams, John Thibodeau (eds.), The River Dragon Has Come!: The Three Gorges Dam and the Fate of China’ Yangtze river and Its People, (Probe International, International Rivers Network),

marginalised and criticism against the ideological underpinning of the Jatigede project did not get the government's official attention.⁷⁵³

In 2008 WALHI announced that it was seeking support from other NGOs to boycott the project. Spokesman Dadang Sudardja repeated some of the earlier complaints, but added arguments related to climate change:⁷⁵⁴

“The dam would displace more than 70,000 people, submerge five districts and villages. It would damage the ecosystem because it would inundate some 1,200 hectares of Perhutani state forest (...) the dam would also create massive amounts of methane and carbon dioxide gas which would contribute significantly to the greenhouse effect”.

To such criticism, the governor of West Java only responded that: “In every development project, it’s normal to have pros and cons”.⁷⁵⁵ Such a remark is representative of the dismissive attitude of government officials of sustainable development principles when it comes to genuine choices to be made, as also indicated by the weakness of environmental impact assessments. This attitude has underlied Indonesian government (unofficial) policy for decades.⁷⁵⁶

The disregard for the position of those afflicted by such projects and their consequences is also visible in the absence of taking public participation seriously.⁷⁵⁷ Instead, the official policy seems to be geared only towards boosting economic growth by enabling the completion of infrastructure development projects. This leitmotif runs along the government response to protest voiced against the project, as will now be further elaborated.

see also Jun Jing, “Rural Resettlement: Past Lessons For the Three Gorges Project”, (the China Journal no. 38, July 1976): 65-92, who mentions the enormous difficulties of economic recovery of those resettled in other locations.

⁷⁵³ As written by Stanley, Seputar Kedung Ombo, (Elsam: Jakarta, 1994) and other NGOs.

⁷⁵⁴ “Jatigede project meets opposition, (the Jakarta Post, March 17, 2008); “Villagers and NGOs: Jatigede dam bad plan (the Jakarta Post, June 18, 2008).

⁷⁵⁵ Ibidem.

⁷⁵⁶ See also J. Arnscheidt, ‘Debating’ Nature Conservation: Policy, Law and Practice in Indonesia; a discourse analysis of history and present, dissertation Leiden University (Leiden: Leiden University Press, 2009). She stresses the influence of the *pembangunan* discourse on nature conservation policy. However, the same discourse also influences the position of the Ministry of Environment and determines the role and function granted to environmental impact assessment studies to influence development (land use) policies.

⁷⁵⁷ Dadang Purnama, “Reform of the EIA process in Indonesia: improving the role of public involvement” (Environmental Impact Assessment Review 23 (2003)): 415-439.

9.3.7. Government response

The status of environmental impact assessments became a bone of contention in the Jatigede case. In 2008, a spokesman of the Ministry of Public Works - referring to the principle of sustainable development as adopted at the World Summit of 2002 in Johannesburg- asserted that an environmental impact assessment could influence the decision but not cancel it. Other criteria would have to be taken into consideration, such as technical and economical feasibility and the social and political acceptability of the project.⁷⁵⁸ Implicitly, he also referred to the Jatigede project being crucial for the completion and operation of other huge infrastructure development plans in the region, notably the earlier mentioned construction of an international airport in Majalengka⁷⁵⁹ and the expansion of the Cirebon seaport.⁷⁶⁰

Another issue was the meaning of public interest, which government officials interpreted as the interest of the majority of the people. Don Murdono, the Sumedang District Head, put it like this:

“Despite being controversial, the government will go ahead with plans to build the Jatigede dam. There has been debate among the public. The government believes that the construction of the dam will benefit the majority so we will move on with it.”⁷⁶¹

Danny Setiawan, the then governor of West Java, refused to talk with the farmers from Jatigede who came to Bandung to protest against the dam in 2005. He claimed that the issue had been settled in 2004.⁷⁶² His successor, Achmad Heryawan, reiterated that his administration would go ahead with the project, which would benefit the majority of the people in the province:

“Why would we stop projects which have been running well? We will go ahead and complete them for the community’s sake.”⁷⁶³

⁷⁵⁸ “Pemda dan Masyarakat Minta Waduk Jatigede Dilanjutkan”, (September 2008) www.pu.go.id/index.asp, last accessed 15 January 2009.

⁷⁵⁹ “*Jabar akan Miliki Bandara Internasional*” (Suara Karya, 29 Oktober 2007).

⁷⁶⁰ “Jabar genjot proyek infrastruktur” (Pikiran Rakyat online, 8 July 2005).

⁷⁶¹ Yuli Tri Suwarni and Nana Rukmana, “Government will go ahead with Jatigede dam project” (Jakarta Post, August 9, 2004).

⁷⁶² “Protest color summit” (Jakarta Post, August 20, 2005).

⁷⁶³ “Villagers and NGOs: Jatigede dam bad plan (Jakarta Post, June 18, 2008).

The Sumedang district government even petitioned the Ministry of Public Works to continue the project despite that it meant the loss of 1,510 hectares of irrigated rice fields. To compensate for this, they also asked the central government to finance the construction of three small dams in Rengrang, Cikandung Girang, Cikandung Hilir and Leuwishaeng.⁷⁶⁴

The district government of Sumedang also pointed out that locals from neighboring regencies would benefit from the Jatigede dam. Farmers in the lowlands of Cirebon, Indramayu and Majalengka, represented by the Association for Harmony among Farmers (*Himpunan Kerukunan Tani* or HKTI), who have suffered alternatively from annual floods and water shortages,⁷⁶⁵ saw the dam as a solution to their problems.⁷⁶⁶ The project therefore would not only serve national, but also provincial and district interests. Public interest was understood as the interest of the majority of the people. Local people, considered a minority, must make way for development performed in the interest of the majority. It comes as no surprise then that social and environmental interests were dismissed.

Such a policy is both against the law and against common sense. Not only did this approach blatantly ignore the sustainable development principle embodied in the SPL 1992 and 2007 and EMA 1997, but also the World Commission on Dams' demand that all dam projects must result in sustainable improvement of human welfare, i.e. a significant advance in human development on a basis that is economically viable, socially equitable, and environmentally sustainable.⁷⁶⁷ Simply stated, it is against the law to grant a permit and continue with a project which has a negative Environmental Impact Assessment.

9.3.8. The final stage: construction of the dam

Financing and completing the project as quickly as possible were the two things that seemed to matter most to the government.⁷⁶⁸ Following a "socialization" seminar conducted in 2003

⁷⁶⁴ "Kompensasi Hilangnya 1.510 ha Areal Sawah: Sumedang Ajukan 3 Bendungan Baru" (Galamedia 11 March 2010).

⁷⁶⁵ "Pembangunan Waduk Jatigede Dimulai Tahun 2007" (Kompas online, 27 juni 2005).

⁷⁶⁶ "Percepat Pembangunan Jatigede: Petani Korban Banjir Kesulitan Tanam Ulang", (Pikiran Rakyat, 06 februari 2006). This statement is voiced in response to Bappenas's intention to shelve the Jatigede project. See also "Jatigede Dam Campaign Gains Momentum" (Down to Earth no. 61, May 2004).

⁷⁶⁷ World Commission on Dams, *Dams and Development: A New Framework for Decision Making*, the Report of the World Commission on Dams, London: Earthscan Publications Ltd, November 2000).

⁷⁶⁸ "Nasib Waduk Jatigede Masih Teka-Teki", (Pikiran Rakyat, 04 februari 2004).

under the auspices of the West Java provincial governor⁷⁶⁹ in 2006 the Governor of West Java established a special task force (*Satgas Jatigede*) to accelerate the project's completion.⁷⁷⁰ Soon thereafter the Director General of Water Resources of the Public Works Department, Siswoko, announced that 60% of the land needed (4,000 hectares) had been acquired.⁷⁷¹ In 2007-2008, only a small number of farmers living in remote and inaccessible areas had not yet been approached. The Task Force also started negotiations with Perum Perhutani in order to get them to release their claim on state forest land needed for the completion of the project.⁷⁷² After the construction contract with SinoHydro Coop Ltd was signed in 2007, Siswoko confidently announced that even though not all of the land had been acquired yet, the construction work could begin in 2007, could be completed in 2012 and the dam could be operational in 2013.⁷⁷³

In 2008, the Ministry of Public Work, rather boastfully, announced that 90% of the land had been acquired. The figure mentioned, however, might not represent what actually happened on the ground. During the same period, as mentioned earlier above, quite a number of land occupants reclaimed their land or contested the legality of the land acquisition process conducted earlier.⁷⁷⁴ Quite a number of land owners (villages) had not even heard of the project and did not yet (in 2008-9) know that they would be removed from their land. In any case, the Ministry further argued that the final 10% would pose no problem as MS. Kaban,

⁷⁶⁹ In the above "socialization seminar" (30 December 2003) two key speakers, Ir. Maksoem from the Dinas PSDA Jabar and Ir. H. Mardjono Notodihardjo from Tarumanagara University-Jakarta argued that the Jatigede project must be completed and if necessary financed by off-shore loans. See: walhinews@yahoogroups.com, 31 December 2003.

⁷⁷⁰ Governor of West Java Decree 611.1/kep.124-sarek/2006. This Task Force also maintains a website: <http://satgas-jatigede.com> providing visitors with information on actions performed. Articles published on the site reflected the government's views on such matters as socialization and the social-environmental impact of the Jatigede project. However, information available may not be up to date as daily maintenance is lacking.

⁷⁷¹ "Rp.2.1 Triliun untuk Waduk Jatigede", (Tempointeraktif, 2 April 2004); Andri setyawan/harun mahbub, "Proyek Waduk Jatigede Dilengkapi Pembangkit Listrik", (Tempo interaktif, 10 July 2006). Fortunately, from the government's viewpoint, China pledged its support in the form of a loan amounting to USD 190 million to partially finance the project. The remaining money needed (some Rp. 103 billion) to complete the land appropriation phase would be allocated from the 2006 state budget.

⁷⁷² Tita Pati working for the Provincial Directorate General of Public Works asserted that she even met villagers upstream who had not even heard about the Jatigede plan when she conducted a field visit in 2007 (interview, 5 August 2007).

⁷⁷³ "Kontrak Pembangunan Bendungan Jatigede Ditandatangani", (www.kapanlagi.com, 30 April 2007, last accessed 25/06/2010).

⁷⁷⁴ "Korban Waduk Dibantu" (www.suarakarya-online.com, 18 November 2008). It was reported that Eldhie Suwandie, a Member of Parliament (Commission V) visited protesting villagers which demanded repayment of compensation. He was there to inform society on the result of a hearing with the Ministry of Public Works conducted in Jakarta earlier (17 September 2008).

the Forestry Minister, had already agreed in principle to relinquish his claim on the state forest land needed for the completion of the project. He promised to provide a substitute forest (*lahan hutan pengganti*) to compensate Perhutani, as required by law.⁷⁷⁵ However, at this moment no fixed plan has been adopted as to where this substitute forest will be acquired, within or outside Sumedang.⁷⁷⁶ In fact, no one seems in a hurry to settle this matter, since together the Minister of Forestry and Perum Perhutani issued a land use dispensation allowing for the construction work to commence⁷⁷⁷ pending the settlement of substitute land.⁷⁷⁸ This means that the Forestry Minister has effectively relinquished his claim on state forest land.

Two years later, Moch. Amron, from the Directorate General of Water of the Ministry of Public Works, mentioning a different percentage of total land acquired, announced that the total amount of land acquired in the 2009 budget year reached 75% of the land needed for the project, comprising of land owned by locals (3,455.37 hectares) and state forest land (185 hectares). Only 1,305 hectares remained to be acquired and in the end the government will certainly obtain all the land it needs.⁷⁷⁹ Besides simply continuing with the construction project and, as was done in the Kedung Ombo case, flood the land, still occupied by recalcitrant villagers, the government also has several legal options. They may choose to use the expropriation procedure under Law 20/1961 or the available mechanisms provided by PR 65/2006. Under PR 65/2006, the land acquisition committee can simply decide the amount of compensation to be paid and deposit this sum with the Court's registrar (the so-called *konsinyasi*; Art. 10). While land owners may contest the amount of compensation by submitting an appeal to the High Court in accordance with Law 20/1961 and GR 39/1973 (Art. 18a), their claim on land is already effectively revoked.

⁷⁷⁵ Mahfud, "Pembangunan Waduk Jatigede Cirebon Terhambat Pembebasan Lahan Perhutani" (www.perumperhutani.com, 14 April 2008, last accessed 25/06/2010.)

⁷⁷⁶ Endy Rossady, "1.300 Ha Hutan Sumedang Bakal Ditenggelamkan Proyek Jatigede" (www.perumperhutani.com, 25 June 2008, last accessed 25/06/2010).

⁷⁷⁷ Letter nos. S.314/Menhut-VII/2008 and 182/044.2/Kum/Din (perhutani) concerning the dispensation granted to use forest land to start construction work of the Jatigede dam (*dispensasi pemanfaatan kawasan hutan untuk dimulainya pelaksanaan pembangunan waduk jatigede*).

⁷⁷⁸ "Ditolak, Penggusuran 50.000 ha Lahan HGU untuk Waduk Jatigede dan Proyek Pembangunan", (Pikiran Rakyat, 29 August 2008). See also: "Lahan Hutan Jatigede Sudah Ada Gantinya", (Kapanlagi.com, 09 February 2009, last accessed 25/06/2010). As reported, the district of Sumedang was able to acquire only 400 hectares to compensate Perhutani's loss amounting to 1,200 hectares in 2010. See "Jatigede Tenggelamkan 1.200 hektar Hutan" (www.tribunjabar.co.id, 31 January 2010, last accessed 25/06/2010). Cf. Lahan Hutan Jatigede Sudah Ada Gantinya, (www.kapanlagi.com, 09 February 2009, last accessed 25/06/2010)

⁷⁷⁹ As reported by the Directorate General of Water (ditjen sumberdaya air), Moch Amron: "Perampungan Waduk Jatigede Molor ke 2014 (Detikcom, 25/4/2010).

While the correct figures on land acquisition are conflicting – denoting that the process itself has not been successfully completed – it is certain that the construction project has already been initiated. If everything runs according to plans, West Java will possess a multi-functional dam in the near future, making the construction of other huge infrastructure projects in adjacent districts, such as the Majalengka international airport and Kertajati aero city, possible. In turn, these will cause similar social and environmental problems as those engendered by the Jatigede project.⁷⁸⁰

9.4. Conclusion

What can we learn from the evolution of laws and rules on land acquisition as well as those pertaining to expropriation and its implementation? In retrospect, it seems as though the overriding concern of how to establish a speedy process to appropriate land and utilize it for “development” lies at the core of the issue of land acquisition in the public interest. Less attention is given by law makers and government agencies (the users of the process) to the question of how to protect citizens against abusive land acquisition practices. Even if it has been brought up, it has been trivialized in light of the overriding interest to bring development to the majority.

The long record of mass evictions performed in the name of development resulting in land disputes and conflicts is likely to have played an important role in creating negative perceptions regarding land acquisition projects. Surprisingly, every regulation issued both before and after 1999 has concentrated on “*musyawarah*” as the ideal form for conducting negotiations on the amount and form of compensation, but never on the ‘public interest’. The bargaining position of the land acquisition committee, representing the government agency needing the land, is barely taken into serious consideration in the amendments regarding regulations on land acquisition. Moreover, even less attention is given to how spatial management (planning, implementation and oversight) should provide a basis for building a consensus on a sustainable land use system. In this light, land acquisition plays only a small role in the implementation of spatial management. By treating land acquisition

⁷⁸⁰ “8.000 KK Bakal Tergusur Bandara Internasional Jabar: Gubernur: Penanganan Dampak Sosial Jadi Persoalan Penting” (Pikiran Rakyat, 22 October 2005). Cf. Hilman Hidayat, “Pembangunan bandara internasional Jabar masih ‘menghitung kancing’ (Bisnis Indonesia, 18 November 2005). The Majalengka District government as quoted in this article offers a different number. Approximately 15.402 (5.168 families) will be relocated; 356 hectares will be appropriated and 4.596 houses will be destroyed. In contrast, the airport would need 5000 hectares, double runways (900-1.800 hectares) and a parking lot for approximately 1000 vehicles.

as a separate system, the government has lost an opportunity to openly engage the public and land owners in the process of discussing the government's need to manage land use for "the majority of society" in the public interest.

It is equally clear that land acquisition is prohibited if it goes against the existing spatial plans (city-district or provincial). Spatial plans seem to provide justification for the choice of the "development" site and therefore they should inform the public on the future status of the land by itself. In this sense, spatial plans influence the tenurial security of individual citizens. It is therefore imperative that such plans are made in a transparent and participatory manner so that the general public is always well informed on what public interest development projects are being planned, where and when. The list provided by the Presidential Regulation 35/2006 provides a clear boundary on what makes up the public interest. From this perspective, any land acquisition process is to be considered a logical consequence of the democratically made spatial plan. If there is no such development or spatial plan, land owners should at least be involved in decisions regarding the future use of their land. On the other hand, in terms of spatial management, the government must be able to implement spatial plans and therefore acquire land, even if it goes against the wishes of individual land owners.

The extent to which the government is able or willing to change its ways in acquiring land for development purposes is a different issue altogether. Not surprisingly, little seems to have changed. Despite new laws and regulations, the processes and mechanisms for land acquisition seem to have remained constant: favouring private entities and government agencies and thereby putting land owners at a disadvantage in terms of their legal position and chances of retaining their claim on land or obtaining just compensation. This dire legal position is even worse as they play no role in the drafting and implementation of development and spatial plans, despite numerous provisions prescribing public participation.

Both during the New Order regime and during *Reformasi*, development has been the main form of legitimization of the government, demonstrating the government's ability to bring material benefits to the people. The power over the definition of "development" has been guarded by the state and has remained closely associated with the national interest.⁷⁸¹ The national interest in turn is closely linked to the belief that development depends on quality infrastructure and the continuous influx of foreign and domestic investment to support modern industry. In addition, it is worth noting that development continues to be mainly

⁷⁸¹ Victor Barber, op.cit. Section III (new order state capacity: growth, strength and weakness). p. 9

interpreted as any activity in the context of supporting and developing modern industry in and around urban areas in post-Soeharto Indonesia, as well as developing large scale agricultural plantations and exploiting natural resources. In this light, development in the public interest is focused on the bolstering of infrastructure upon which urban, industrial and plantation areas depend for growth. Understandably, notwithstanding regional autonomy and legal reform under *Reformasi*, laws regarding land acquisition have been designed to further such particular interests.

CHAPTER X

GENERAL CONCLUSION

10.1. Spatial Management from the rule of law perspective

The rule of law (or in the Indonesian case: the *Rechtsstaat*) as an ideal notion demands not only that government actions are based on the law, but that law should be able to direct and control how state power is being exercised. The law should be able to restrain and put limit to government action and thus protect citizens against abuse of power. Likewise, the same law should justify government action. Government action should be based on democratically made laws. It also means that people (the supposed beneficiaries of those laws) should be able to hold government officials accountable for the implementation and enforcement of them. This understanding of the rule of law had been in my mind at all times when discussing the multifold aspects of spatial management, how it changed due to the RGL 1999 and 2004, and lastly, how it influenced people's access to land.

The rule of law perspective as a normative yardstick had been used to evaluate not only how the spatial management system had been set up at the macro level but also how the planning system had been actualized by government officials at the ground level through the use of permits and binding recommendations controlling people's access to land and restricting its use "in the public interest". The litmus test will be whether the government has succeeded in establishing a fair and efficient spatial management system. It thus concerns not only whether government actions in spatial management are ruled by law but also whether the existing law has been used to rule fairly.⁷⁸²

(a) The main objective of the Spatial Planning Law

At the abstract and macro level, the main purpose of spatial management as perceived from the existing Spatial Planning Law (both the SPL 1992 and the SPL 2007) seems to focus on the distribution of spatial management responsibility to different government levels and agencies and establishing a hierarchal and centralized spatial planning system. Nonetheless, it is the changing Regional Government Law (from the Dutch colonial times up to Regional Government Laws of 1999/2004) which provides the legal context in which planning powers

⁷⁸² A point stressed by Stephen Golub, "Make Justice the Organizing Principle of the Rule of Law Field", *Hague Journal on the Rule of Law*, 1: 61-66, 2009, doi: 10.1017/S18764050900016X.

are distributed and dispersed at the central government level and below down to the districts and which determine the level of district government's accountability and responsiveness to local population needs and demands.⁷⁸³

Following that, I have focused on legal instruments by which existing spatial plans are implemented. At the ground level, permits and recommendations - the main legal instrument to implement spatial plans - regulate people's access to land and restrict freedom to use land. Here too, spatial planning should limit the discretionary power of government officials at the ground level when they process permit applications or requests to endorse recommendations. The general public, more so affected individual land owners or occupants (putatively enjoying and able to exercise the right to access information), should be able to demand public accountability of government officials authorized to process applications of permits or recommendations regulating access to land. In other words at all times should government decisions be *wetmatig* (according to the law), *rechtmatig* (fair) and *doelmatig* (purposive; non-arbitrary) as demanded by the prevailing law.⁷⁸⁴

Both the development and spatial planning system (to the extent it has been translated into land use planning and influences land use planning), seen from the rule of law perspective, should enable autonomous districts to effectively control land use by individual land owners or those who seek to acquire land for private investment of infrastructure development, and in case of violation react accordingly. Clarity of legal rules and non-discriminative treatment is thus absolutely required. This is even more so because the way spatial management is translated into government action (or in-action) certainly influences people's access to land and their tenurial security. Therefore, it is in the interest of individual citizens or communities to know what future (development or spatial) plans exist in regard to land, as it may impinge their basic rights such as the right to possess property (land) and the enjoyment of a clean and healthy environment. Accordingly, public participation, the right to be informed and fully participate in decision making affecting future land use, should not only be guaranteed by law, but also exercised at all stages of spatial management. Especially land owners and other occupants should possess voice in the formulation of spatial plans directly

⁷⁸³ A link underlined by Jesse C. Ribot: "Choice, Recognition and the Democracy Effect of Decentralization", working paper no. 5 (Visby-Sweden: ILCD, 2011). He also stressed the point that to be democratic, institutions must be representative: accountable to the people and empowered to respond (p.8).

⁷⁸⁴ Law 28/1999 on the Management of the State free from Corruption, Collusion and Nepotism (*Penyelenggara Negara yang Bersih dari Korupsi, Kolusi dan Nepotisme*) & Law 32/2004 which refers to 'general principles of state management (*asas-asas umum penyelenggaraan Negara*)' comprising of a. legal certainty, orderly fashion of state management, public interest, openness-transparency, proportionality, professionalism, accountability, efficiency and effectiveness.

influencing and restricting their freedom to use land. To reiterate, spatial plans should be formulated and implemented in the context of a democratically accountable local government.

(b) The evolution of City Planning to Spatial Management

The exposition of how the law and policy pertaining to the use of land, in Bandung and West Java have evolved shows that spatial management originated from the idea that autonomous municipalities (and later also districts in the strict sense: *kabupaten*) required master plans to direct and regulate city development. Initially urban master plans were developed based on the idea that autonomous municipalities (*stadsgemeentes*) ideally possess freedom to decide how scarce urban land should be utilized in the best interest of the (European and indigenous) urban community. A master plan, therefore, reflected the public interest of the colonial urban community. In addition the zoning and building regulations (a derivative of the Master Plan) purporting to restrain land use in the public interest were enforced to all urbanites without prejudice to their ethnicity. Equality before the law and government, at least in terms of the implementation of urban master plan, zoning and building regulations applied to all. To what extent the same government was accountable to its constituents (European and indigenous people alike), however, depended on the level of representativeness of the Bandung municipal government.⁷⁸⁵

The same basic idea regarding city government autonomy and city master plan still pervades urban spatial planning after Indonesia gained its independence. Nonetheless, urban spatial planning, as developed since the 1960, cannot but be understood as a small part of a top down and centralized spatial and development planning system. It had been transformed into a nationwide effort at developing a network of urban areas as economic growth poles (NUDS) in the 1980s. In addition, considering the changing legal and political landscape, the SVO (the city planning ordinance) of 1948 and its implementing regulation (the SVV of 1949), and existing urban master plans left behind by the Dutch autonomous *stadsgemeentes* practically became dead letter laws. No autonomous *stadsgemeente* existed after 1945. They did not survive the Old and New Order regimes. Certainly no autonomous municipality (Bandung included), remained in existence under the 1974 Regional Government Law. Even after 1999, with the promulgation of the Regional Government Laws of 1999 and 2004,

⁷⁸⁵ See further Jan Michiel Otto, (1991) 'Een Minahasser in Bandoeng: Indonesische oppositie in de koloniale gemeente', in H.A. Poeze en P. Schoorl (eds) *Excursies in Celebes*, Reprint VVI; 91/1, Leiden: KITLV, blz. 185-215.

districts, for other reasons, haven't been able to obtain full authority to determine land use within their administrative borders.

Another important finding in this context is the fact that the municipal government of Bandung mistakenly perceived the zoning and building regulations derived from the earlier Bandung master plan to be discriminatory. The result had been the unwillingness to apply zoning and building regulation to control land grabbing by the indigenous communities flocking to the city after 1960 and halt the spreading of informal housing in the urban kampongs.⁷⁸⁶ The municipal government thus not only allowed for illegal occupation of land but also decided (whether deliberately or out of ignorance) to flout existing zoning and building regulations on a grand scale. The end result has been informality not only in land holding but also in land use. In addition, the municipal government, believing that they were not capable to finance city development and in need of continuing influx of investment, decided to develop a land use policy based on market initiatives. Zoning and building regulations were pushed aside so as not to hinder investment initiatives. Without doubt, in this situation, the actual hands off ("floating") land-use policy did not much concern itself with the environmental and social cost of informality or market based land use. A similar hands-off policy resulting in failure to implement existing master plans (including zoning and building regulations) can also be observed in other big cities in Indonesia.

This does not mean the end of master plans. Attention to urban planning revived in the late 1980 and culminated in the promulgation of the first Spatial Planning Law (4/1992) which revoked the SVO and SVV. One significant change was that the focus in spatial management was not so much on empowering autonomous municipalities to develop available land according to predetermined master plans but rather on strengthening the state's right to control in matters of natural resource management and empowering all government levels to control access to land. Initially the SPL was envisaged to function as a sort of umbrella act, i.e. to address the sectoralism or siloism in natural resource management resulting in conflicting land use policies. The legal basis of spatial management is the state's right to control, encompassing the authority to (a) regulate (*mengatur*) and manage (*menyelenggarakan*) the allocation (*peruntukan*), reservation (*persediaan*) and maintenance-preservation (*pemeliharaan*) of earth, water and air space; (b) determine (*menentukan*) and regulate the legal relationship between individuals and the earth, water and air-space; and (c) determine and regulate legal relationships between people and any other legal transactions

⁷⁸⁶ Of course inability played a role as well.

made pertaining to the ownership and utilization of earth, water and air space.⁷⁸⁷ The SPL 26/2007 replacing the SPL 4/1982 retained this idea of spatial management.

In this sense, the early master plans as envisaged under the SVO and SVV differ from spatial management. Spatial management has become more of an issue of how to empower central, provincial and district government. Formulating land use planning and its implementation has and continues to be cast as the central, provincial and district government duty in controlling land use derived from the state's right of avail. Understandably, the state's right of avail (as transformed into spatial management powers), has often been defined in relation to the welfare state (or development state) idea within which the state is positioned as the most important institution managing natural resources for the purpose of securing the attainment of the people's prosperity.⁷⁸⁸ Apparently the position of the state is built on the basic assumption that the government, positioned above society, shall decide where and when land shall be utilized for investment for the good of the governed.⁷⁸⁹ Development planning, with the focus on bringing welfare to society, and spatial management, to the extent that both determine access to land, thus became intertwined and city planning as it existed became but a very small part of the enterprise.

(c) The role and impact of the complementarity principle in spatial management

One of the most salient features of the spatial management system is its interlinking with development planning. At this stage it is important to distinguish this concept of development as usually understood in Indonesia with the more comprehensive notion of (sustainable) development as used in literature.⁷⁹⁰ In the Indonesian context development planning should be understood more in its connection to the effort to realize the State's goals as written in the 1945 Constitution and articulated in legal documents such as the People's Consultative Assembly's decree on the Guidelines of State Policy (*TAP MPR tentang GBHN*) and other development plans formulated by the central, provincial or district level (general plans) or those which are formulated at the ministerial level (sectoral planning).

⁷⁸⁷ See A.P. Parlindungan, *Aneka Hukum Agraria* (Bandung: Alumni, 1986), pp. 3-4.

⁷⁸⁸ Tri Hayati, dkk, *Konsep Penguasaan Negara di Sektor Sumber Daya Alam berdasarkan Pasal 33 UUD 1945*, (Jakarta : Sekretariat Jenderal MKRI dan CLGS FHUI, 2005), hal. 17.

⁷⁸⁹ Karel Martens, "Actors in a Fuzzy Governance Environment" in Gert de Roo and Geoff Porter (eds.) *Fuzzy Planning: The Role of Actors in a Fuzzy Governance Environment* (Ashgate Publishing, 2007) pp.43-66.

⁷⁹⁰ See the discussion on the concept of development in Chapter 1.

To the extent those development plans specify tangible targets such as how to sustain the growth and spread of modern urban areas (primary centers for industries) and future infrastructure projects throughout Indonesia directly influence and direct future land use in the regions. Such development planning, according to the SPL 1992 and 2007 must be further translated and articulated by corresponding spatial plans at the central, provincial and district level. Thus it is those spatial plans which regulate how land should best be utilized to support development projects.

Apparently, however, here applies what may be labeled as the complementarity principle. In the absence of spatial planning, existing (general or sectoral-particular) development plans are used as reference in deciding on future land use. This can be inferred from the actual practice of government (central, provincial and districts) which in the absence of viable spatial plans at the district level continues to process permit applications allowing government actors or private commercial enterprises to acquire land.

Thus, the absence of spatial plans (at the central, provincial or district level) does not prevent the government from allowing individuals, commercial enterprises or government agencies acting in the public interest or in the name of development to access land and use it according to whatever plan they have in mind. Government officials at the ground level do not experience absence of spatial plans as an impediment in processing permit applications or granting recommendations which regulate access to land or restrict freedom on use. Nor does absence of spatial plans causes the cessation of land acquisition performed in the public interest or in the name of development. Simply stated, in the absence of spatial plans, any existing development plan can and has been used instead as a reference to regulate access to land and its use.

The extent to which the complementarity principle applies must also be understood in the context of the failure to establish the centralized top down spatial planning system as envisaged by the SPL 1992 and 2007. The failure does not so much relate to the dependence of the SPL on implementing regulations which more often than not the government has failed to make⁷⁹¹, but more on how all government levels and other sectoral ministries have

⁷⁹¹ The vice Head of Committee I of the DPD (regional representative board/senate), Wasis Siswoyo (Jawa Timur), commented that the SPL 2007 cannot yet be implemented due to government failure to promulgate the required implementing regulations, its inconsistency with other laws and the fact that violators still enjoys impunity (DPD: Pelaksanaan UU Tata Ruang Tidak Konsisten, <http://m.antaranews.com>, 22 June 2010). Cf. Dadang Rukmana (kepala bagian hukum dirjen penataan ruang), Peraturan Pelaksanaan UUP: Catatan Singkat tentang Progress Penyusunan RPP tentang Perizinan Pelaksanaan UUPR (<http://bulletin.penataanruang>, edisi maret-april 2008) last accessed August 2010. He recorded that the UUPR required implementing regulations in

respond to the obligation to formulate planning and develop land use policies consistent with it. In this respect, how the West Java province and Bandung municipality have responded to the SPL 1992 and 2007 as analyzed here may be indicative of how in general other regions in Indonesia perceive their obligations under the same laws.

The first National Spatial Plan (RTRWN, GR 47/1997) promulgated was more of an implementing regulation of the SPL 1992, and moreover contained only general directives repeating much of what had already been found in the SPL 1992 and general indications of future land use nationwide. This situation unfortunately has not changed much even after the SPL 1992 had been amended by the SPL 2007. Likewise, the second National Spatial Plan (RTRWN, GR. 26/2008), made as implementing regulation of the SPL 2007 comprises only of general directives clarifying certain criteria and rules.⁷⁹²

Before 1999, with West Java more of an exception, not all provinces possessed spatial plans or even felt the need to promulgate one. The situation did not change much after 1999. Not surprisingly the majority of existing districts failed to comply with their obligation under the SPL 1992. The belief apparently persisted that only cities needed master plans. This happened obviously because ministerial regulations on urban master plans existed, but no comparable implementing regulations for rural areas. A disturbing notion in this respect has been the general tendency, as found in the SPL 1992 and related provincial and municipal spatial plans to view rural areas (including agricultural land) as not in need of proper spatial management. This substantiates the policy of viewing rural areas lying adjacent to cities as under-managed and therefore to be held in reserve for city development. In part this explains the rate at which agricultural land in peri-urban areas has been converted to other uses with the express or implicit consent of the government, even if it goes against regulations prohibiting the conversion of arable and irrigated rice fields.

The low record of viable spatial plans, especially at the district level, has persisted after 1999. The promulgation of the SPL 2007 did not offer a remedy instead it has made matters worse. Two factors seem to be working against the realization of good spatial management. First, the fact that hierarchical and overlapping systems of spatial plans as envisaged by the SPL 2007 are far from being realized. Only a few regions have had their spatial plans revised or made

the form of law (3), government regulation (18), Presidential Regulation (2), Ministerial Regulation (8) and Regional Regulation (4).

⁷⁹² It was made to fulfill the obligation as stipulated in Art. 20 par.(6) SPL 26/2007.

in line with the SPL 2007.⁷⁹³ This suggests that most districts and provinces in Indonesia continue to implement outdated spatial plans (should they even possess one) or, even worse, use development plans instead to control who will get access to land. The same situation has also made possible the widespread practice of un-planned land-use development. Either way, the by-product of such approaches is that environmental and social considerations are pushed aside as the motive to sustain economic growth becomes more prominent. This endangers the effort of establishing a viable and sustainable spatial planning system which should and can be used as a normative reference by the public to monitor government policies and actions.

10.2. The impact of the Regional Government Laws of 1999 and 2004

The decentralization laws of 1999 and 2004 have reaffirmed the importance or ideology of development (concentrating on sustained economic growth and infra-structure development) and the role of law in engineering society. By virtue of the RGL 1999, the state's duty to develop--embodied in the 1945 Constitution, previously the sole responsibility of the central government--is transferred to the autonomous regions. Districts--as stipulated in the decentralization laws--have also been empowered, even legally obliged⁷⁹⁴, to devise their own development plans, the purpose of which, according to the Director General of Regional Autonomy of the Ministry of Home Affairs, is to create government at the district level that is effective, efficient and accountable.⁷⁹⁵ In support of these changes the central government has effectively transferred authorities over land use and planning to the districts, last but not least the authority in regard of permits regulating access to land (the permit-in-principle and site permit).

⁷⁹³ "Tata Ruang: Ketidakberesan RTRW Hambat Investasi di Daerah" (Kompas, 6 March 2010): 23. According to SPL 2007, all provinces and districts had to have their spatial plans revised two years after the promulgation of this law.

⁷⁹⁴ Article 7 of Law 22/1999 & Article 14 of the Law 32/2004.

⁷⁹⁵ As stressed in a formal speech presented in a Discussion on Decentralization and Regional Autonomy Policy, Jakarta 27 November 2002. Likewise Made Suwandi from the same office in his paper, "Pokok-pokok Pikiran Konsepsi Dasar Otonomi Daerah Indonesia (dalam upaya mewujudkan pemerintah daerah yang demokratis dan efisien), Jakarta 2002 and again in his paper: "Review Hubungan Pemerintah Pusat dan Pemerintah Daerah di Indonesia", paper presented before a seminar on regional government organized jointly by Indonesia and Japan at Sumedang, Jakarta, 2010. Cf. Mudrajat Kuncoro, Otonomi dan Pembangunan Daerah: Reformasi, Perencanaan, Strategi dan Peluang (Erlangga: Yogyakarta, 2002).

In this endeavor to construct a more district-based approach in spatial and development planning, autonomy is understood as the regional government's legal obligation to make their own development and spatial planning more in line with local needs⁷⁹⁶. On paper, this lessens the importance of national law and policy making, while putatively bringing law and government closer to the people. Thus the hope has been raised that local people's involvement in the law and policy making process will increase. Law in this new political and legal setting is expected to function not merely as an instrument to advance national development but more as a consensus on local governance, binding the people and government officials alike.⁷⁹⁷ However to take effect this requires that citizens have voice and exit options for local governance (political decentralization)⁷⁹⁸ and that the local government elected should be allowed home rule in fiscal, regulatory and administrative matters (fiscal and administrative decentralization). All of these elements must be in place to ensure effective decision making at the local level.⁷⁹⁹ And as this study shows it also requires the development of a more inclusive and bottom up approach to planning. In other words, as argued by Hobson⁸⁰⁰, for planning to achieve social justice it must be based on a broader and inclusive notion of social justice which rejects the 'claim of undisputed authority of modernist rational planners'.

However, the brief experiment in devolving spatial management powers fully to the district during 1999-2004, backfired. The ecological risk involved in continuing this fragmentary approach to spatial planning, treating each district administrative territory as a separate entity, is much too obvious to be ignored. One particular area which suffered from mismanagement due to the district based approach to spatial planning is the North Bandung

⁷⁹⁶ Article 14 of Law 32 of 2004.

⁷⁹⁷ Cf: Jimly Asshiddiqie, "Otonomi Daerah dan Peluang Investasi", paper presented before "Government Conference" (Peluang Investasi dan Otonomi Daerah), Jakarta, 29-30 September 2000. He asserts that the decentralization polity main goal is to create a more democratic and self sustaining local governance.

⁷⁹⁸ Rosie Campbell, Keith Dowding and Peter John, "Modelling the exit—voice trade off: social capital and responses to public services", paper for the "Workshop on structural equation modeling: applications in the social sciences", Centre for Democracy and Elections, University of Manchester, February 28, 2007. They argue that there are four possible responses to a decline in the quality of some product- that is exit- that is shift to another product; they might voice- complain and persuade to provide better product; or they might do nothing; and the last, they might exit and voice.

⁷⁹⁹ As asserted by Anwar Shah and Theresa Thompson, in a paper, "Implementing Decentralized Local Governance: A Treacherous Road with Potholes, Detours and Road Closures", paper presented at the conference "Can Decentralization Help Rebuild Indonesia?" sponsored by Andrew Young School of Policy Studies, Georgia State University, Atlanta Georgia, May 1-3, 2002.

⁸⁰⁰ Cf. Jane Hobson, "New Towns, the Modernist Planning Project and Social Justice: the cases of Milton Keynes, UK and 6th October, Egypt", working paper no. 108 (September 1999): p.7.

Area. Such cases reinforced the belief (prominent at the provincial and central government) that spatial management must be re-centralized. In that light, GR 38/2007 and the SPL 2007, shifted the main responsibility in spatial management back to the central government. Unfortunately, this change did not result in a more comprehensive and ecological approach to spatial planning as the Puncut and Jatigede case demonstrate. This may well be the most important flaw in the existing spatial management system, i.e. the inability to address space as one ecological system.

In any case, with the promulgation of SPL 2007, existing provincial and (aberrant) district spatial plans have to be adjusted and reformulated according to the new spatial management system under the SPL 2007. While this may be better suited to accommodate a more ecologically correct approach to spatial management, still a compromise must be found on how to synchronize this with the need to make district government accountable for mis-managing the administrative area under its control. This said considering also the fact that the same complementarity principle remained in place and accordingly has reinforced central government control over the districts. Consequently, government officials at the ground level can and continue to use centrally made or approved development planning as their point of reference when processing permit applications to acquire land. Existing development plans, as shown in the Jatigede and Puncut case, thus in fact regulate access to land and justify land acquisition by public and private entities. This certainly put to doubt the necessity of going through all the trouble of translating development planning into general and detailed spatial plans at different government levels. Nonetheless other factors have also played a role in hindering the establishment of a viable spatial management system.

10.3. Other impediments to establishing a viable spatial management system

(a) Distribution of spatial planning power

Just as the previous SPL 1992, the SPL 2007, demands the establishment of a top-down centralized planning system. However, this top-down system runs counter to the general intention of the RGL 2004 which purports to establish a more autonomous district government, more attuned and accountable to the local population. In terms of spatial management, the general intention of the RGL concords with the observation made that to attain sustainability, the 21 century (urban) planning, management and governance must be participatory and therefore decentralized. This allows for better responses to local needs and

requirements and favors community ownership of projects.⁸⁰¹ Although UN Habitat only refers to urban planning this principle may well apply to spatial management in general.

Even so, the SPL 2007 attempted to impose a spatial management system through which districts' powers in spatial management are heavily curtailed. District spatial plans to be adjusted to the new system established under the 2007 SPL, following established procedures, are to be approved before being promulgated by the Ministry of Home Affairs and Ministry of Public Works⁸⁰². In this fashion, the role of the local parliament has become marginalized. Their voice does not carry weight anymore in the endorsement of district or provincial regulations on spatial plans. In such a system it is the central government which determines the legitimacy of district spatial plans.

Such an approach to law making has created inefficiency. Given the current rate of administrative fragmentation in Indonesia,⁸⁰³ the provincial government, Minister of Home Affairs and Ministry of Public Works will be very busy controlling and monitoring the formulation of spatial plans at the provincial and district level. Particularly, districts must overcome this bureaucratic hurdle before being able to implement and enforce their spatial plans. The voice of those monitoring agencies will carry more weight than the voice of the local parliament and population.

This system is flawed as well since it departs from a centralized and top down government system which the RGL actually wanted to reform. The SPL 2007 took back the districts' autonomy granted under the RGL. The end result is that spatial management power has remained fully in the hands of the central government. It has become a concern far removed from the local population, and specifically land owners which have a great stake in knowing how the government regulates access to land. In this sense, spatial plans will certainly fail to curb government power and provide protection to individual land owners.

⁸⁰¹ Thierry Naudin (ed.) UN Habitat 2008 Annual Report (UN Human Settlement Programme, 2009), p.22.

⁸⁰² For a brief commentary on the evaluation process, see: H. Gunawan, Peraturan Menteri Dalam Negeri Nomor 28 Tahun 2008 tentang Tata Cara Evaluasi Rancangan Peraturan Daerah tentang Rencana Tata Ruang Daerah (Buletin elektronik penataan ruang, Juli-Agustus 2008. <http://bulletin.penataanruang.net/index.asp?> (last accessed 21/07/2010).

⁸⁰³ Heryawan, the incumbent governor of West Java province, for instance, argued that West Java experiencing rapid population growth (with 26 districts/municipalities) urgently needs to establish new districts. He compares West Java with East Java (38 districts with a population of 38 million) and Central Java (35 districts with a population of 35 million). See Jawa Barat Minta Pengecualian Moratorium Pemekaran, (www.tempointeraktif.com, 14 Desember 2009) & DPRD Jabar Desak Pemerintah Realisasikan Pemekaran Wilayah (<http://antarajawabarat.com>, 16 July 2010).

Looking at how the West Java provincial government and Bandung municipality have implemented the SPL 1992 before and after 1999 one cannot avoid noticing the failure of the SPL to fulfill its promise to create a comprehensive and integrated land use planning system. As the continuing dispute about how to best manage the North Bandung Area has demonstrated, there is no ready legal solution to solve the issue who get to regulate conservation areas straddling more than one district. There is also at the moment no clarity on the question which government (at what level and which agency) should be authorized to manage river basins, springs, artificial and natural lakes, and other protected areas. The mismanagement of those areas will certainly diminish the carrying capacity and threatens the sustainability of not only one district but two or more adjacent ones.

The fact that the SPL 2007 has further reinforced, rather than diminished, central and provincial government power to carve out considerable areas from under the districts administrative jurisdiction. Unfortunately this system is more driven by economic concerns, i.e. the need to establish centers of economic growth that are centrally controlled, rather than ecological considerations. It allows for the continuation of the previous practice of the central government to promulgate overlapping and competing spatial plans.

The SPL 1992 (and 2007) also continue to allow for the continuation of sectoral/silo-ism in natural resource management. This is demonstrated by the Ministry of Forestry's sustained refusal to acknowledge the provincial power to determine land use planning for the whole provincial area. Conversely, the Minister of Forestry had been and shall continue to be able to force the Provincial Government to recognize its exclusive authority in areas declared as state forest by way of a *padu serasi* agreement. The Minister of Mining has also retained its exclusive authority to issue mining concessions even in forest declared as protected forest (*hutan lindung*) without having to bother about provincial or even district spatial plans.⁸⁰⁴

All of the above shows the erroneous basis the spatial planning system builds upon. Distribution and re-distribution of authorities according to administrative borders and scope of government tasks is considered more important in spatial management than treating land

⁸⁰⁴ Presiden Jual Hutan Lindung Seharga Pisang Goreng, Siaran Pers JATAM, WALHI, Huma, Sawit Watch -16 Februari 2008, <http://genenetto.blogspot.com/2008/02/presiden-jual-hutan-lindung-seharga.html>, (last accessed February 20, 2008). According to Walhi currently 158 mining companies are in possession of mining concessions within protected forest, amounting to 11.4 million hectares. It was granted in accordance with GR 2/2008: "non tax tariff stemming from the use of forested areas for non-forestry use" (*jenis dan tarif atas jenis penerimaan negara bukan pajak yang berasal dari penggunaan kawasan hutan untuk kepentingan pembangunan di luar kegiatan kehutanan yang berlaku pada departemen kehutanan*).

as one ecological continuum. It shows also the fragmented nature of state power in regard to spatial management which is distributed and redistributed not only between different government levels but also between competing ministries.

(b) Legal instruments to implement spatial planning

Another important flaw in the spatial management system as envisaged by both the SPL 1992 and 1997 has been that, paradoxically, it fails to address the salient widespread practice of formal-informal land use by society in general which does not necessarily conform to existing spatial plans (should they exist). Investors (house construction companies), (rural and peri-urban) communities as well as individuals have continued to appropriate land and utilized it as they deemed fit without bothering much about the government's official land use policy, whether in the form of spatial plans or general prohibitions such as not to convert irrigated rice fields or develop conservation zones or other protected areas.

To better understand the above situation we should take cognizance of a number of interlinking facts. The first is that we cannot hold on to the assumption that the state is at all times powerful (able to wield its attributed authority) and therefore communities are powerless.⁸⁰⁵ The failure at establishing a viable spatial planning system enabling the district to effectively control land use at the ground level proves the first point. The second is that in practice access to land has been determined more by the power relationship between the government and investors, influenced by how the licensing system or land acquisition system have been implemented in practice. This, again, is not to say that at all times land occupants (individual or communities) are powerless. The Punclut and Jatigede land acquisition case demonstrate the difficulties in appropriating and developing land against the wishes of land owners. Re-empowering the central and provincial government to control and monitor the drafting of district spatial plans may be seen as an inappropriate legislative response to unsustainable and uncontrolled land use patterns and impedes rather than improves district government power to control land use in the public interest. The third refers to how the district bureaucracy utilizes the licensing and recommendation system regulating access to land.

⁸⁰⁵ As pointed out by Aswini Chhatre when discussing the extent to which communities may articulate their political choices and districts accountability. See Aswini Chhatre, "Political Articulation and Accountability in Decentralization: Theory and Evidence from India", (working paper no. 22, November 2007, Center for International Development at Harvard University, USA), p. 1.

Both the SPL 1992 and SPL 2007 regard permits (spatial utilization permits: *izin pemanfaatan ruang*) and permits for development sites: *perizinan lokasi pembangunan*) as the main instrument to control access to land. As the names of the permit indicated the permits mentioned in the SPL 1992 and 2007 are concerned with how to secure access to land and control its use in the name of development. The SPL 2007 differs with the SPL 1992 in that it provide for the criminalization of the use of permits granted not according to well-established rules. Bad governance, to the extent it relates to the processing of permits, is currently considered a criminal offence. While this development is laudable, implementation and enforcement is a problem.

First of all, there is no clarity whether those permits have any relation at all with existing permits and recommendations regulating access to land and its use. They are not the same at all. It suggests that a deep chasm or fault line exist between spatial plans and existing permits (and recommendations). What in practice exists are other permits (permits-in-principle, site permits and other related permits and recommendations) utilized by various government agencies (at different levels) not directly related to the spatial plans but which should be regarded as instruments to implement other laws (for instance the building permit as a tool to implement the building regulations). Reference to spatial plans are made but usually only symbolically.

Those permits and recommendations while habitually used to regulate access to land have been utilized more in the light of accommodating private investment initiatives or in general implementing contentious infra-structure projects. How those permits are used has been driven more by government concern over how to sustain continued economic growth and support industrialization. Additionally it is difficult to see how criminalization of deviant bureaucratic behavior in the processing of permits will help secure good governance or increase government official's accountability certainly in light of the above failure to establish viable spatial plans and their complementarity to development planning. Secondly, these permits, even if related to spatial planning, play only a marginal role in controlling land acquisition in the public interest. The exposition of the changing land acquisition rules and regulation performed in the public interest and the way those rules were implemented in the Jatigede case explicitly demonstrate the marginalization of spatial planning (including permits as a tool to control access to land). Likewise, as the Puncut case indicated, enforcement of criminal sanctions will also be extremely difficult considering that the bureaucracy processes permits behind closed doors, far removed from the prying eyes of the parliament or the public.

The above also underscores the dangers of the non-transparency of the permit application and approval mechanisms which affects government accountability in regard to land acquisition practices, in particular considering the way permits and recommendations regulating access to land have been used to secure a private-public partnership to bring development in the public interest. It is this network of permits and recommendations which in practice determine and influence the way government officials understand and protect the public interest. The legal imbalance between the government and private commercial enterprises in this regard influences the way government officials understand and protect the public interest. Private commercial enterprises generally determine how and when 'the public interest' will play a role in making and actuating development plans since they are the ones who typically make and finance the plans in the first place, which result in the district government becoming accountable to the private sector and not in the first place to the local population.

(c) Permits and 'public accountability'

Considering the network of permits and recommendations, rent seeking practices may well have been a hidden and inseparable part of the process. The process of requesting and acquiring permits certainly allows for an increased level of contact between the company and various government officials. The personal interaction between government officials (monopolizing the permits and recommendations) and the business community to smoothen the process of bringing development to the people (or infrastructure development) becomes breeding ground for informal dealings and corruption. Here, as de Sardan reminds us, one has to treat everyday corruption as a social activity regulated *de facto* and in accordance with complex rules, tightly controlled by a series of tacit codes and practical norms.⁸⁰⁶ Spatial planning implementation seen from the use of permits in legal practice blurs the division between state and society and market, and certainly requires us to look at spatial management from a different angle. Permits related to land access and its use can appropriately be perceived as an important legal instrument enabling government units

⁸⁰⁶ G. Blundo and J.-P. Olivier de Sardan, "Why should we study everyday corruption and how should we go about it?" in G. Blundo and J.-P. Olivier de Sardan (ed), *Everyday Corruption and the State: citizens and public officials in Africa* (London: Zed Books Ltd, 2006). Here, corruption is defined (p.5-6) as all practices involving the use of public office that are improper – in other words, illegal and/or illegitimate from the perspective of the regulations in force or from that of users – and give rise to undue personal gain.

(acting on behalf of the state) to join with business enterprises to exploit Indonesian natural resources.⁸⁰⁷

Likewise, Rakodi, for instance, suggests that on the basis of the failure of traditional land use planning, we should forget (urban spatial) planning and pay more attention to governance arrangements, politics and the process of decision making.⁸⁰⁸ These issues are certainly vital and there is truth in the assertion that law-making and in particular its spatial-development planning variant with regard to control over land has and continues to be the product of competition and contest among the different government levels and agencies⁸⁰⁹. As such law relating to spatial management understood as the product of political processes lacks objectivity and neutrality⁸¹⁰ and puts to doubt the ability of the government to represent the public interest.

Accordingly we must accept that law including spatial management law has been and shall continue to be the result of political processes and compromises. Lastly we also cannot but accept that the notion of the public interest is and will always be problematic, even more so in the light of the shift from the ideal of government to governance captured in the notion of good governance. None the less, referring to the goal of decentralization of bringing government closer to people, the solution may well be to open up the possibility of involving local people in all stages of spatial planning and land use management. In any case, district governments should again be empowered to make their own democratically accountable spatial planning. But, at the same time, they should be forced to leave more room for the promotion and support of dialogue and negotiation among land users, which includes people and government from adjacent districts. Spatial management and other land use regulations

⁸⁰⁷ Henk Schulte Nordholt and Hanneman Samuel in their introduction, "Indonesia After Soeharto: Rethinking Analytical Categories" to a book they edited, *Indonesia in Transition: Rethinking Civil Society, Region and Crisis*, (Jakarta: Pustaka Pelajar, 2004), pp.1-15.

⁸⁰⁸ Carole Rakodi, "Forget planning, put politics first? Priorities for urban management in developing countries", (*Jag* Volume 2, issue 3, 2001), pp. 209-223.

⁸⁰⁹ See inter alia, Denny Zulkaidi, "Kepentingan Nasional dan Kepentingan Propinsi dalam Penataan Ruang" in Haryo Winarso, Pradono, Denny Zulkaidi and Miming Mihardja (eds.). *Pemikiran dan Praktek Perencanaan dalam Era Transformasi di Indonesia*, (Bandung: Departemen Teknik Planologi-ITB, 2002), pp. 77-93. Cf, in the same book, an article written by Andi Oetomo, "Transisi Otonomi Daerah di Indonesia: Dilema bagi Penataan Ruang Berkelanjutan", pp.95-101, and Aca Sugandhy, "Peran Penataan Ruang Bagi Keterpaduan Pembangunan Berkelanjutan di Era Otonomi dan Globalisasi", pp. 103-111.

⁸¹⁰ Patrick McAuslan, *The Ideologies of Planning Law* (Oxford: Pergamon Press, 1980). Cf. Jane Hobson, *op.cit.*, p. 2 & 7.

should thus set the principles and procedures of accountable, transparent and inclusive negotiation and dialogue.⁸¹¹

In terms of implementation, a more transparent and inclusive permit system (directly related to spatial plans) should also be put into place, allowing the general public to monitor and influence future land use plans whether initiated by private investors or the government in the name of the public interest. Consequently, we should reject the way the socialization process has been understood and implemented, i.e. a way to inform the local population most affected about existing land use plans (initiated by private or public agencies) approved prior by the government (as evidenced by the permits and recommendation system). How the “socialization process” should be implemented must be radically altered. It should, instead, become an open invitation for dialogue in regard to the best alternative to use land in a sustainable way. But this again rests on the requirement that local government shall fulfill its role as a capable mediator and enforcer.⁸¹²

⁸¹¹ That such an approach is possible can be demonstrated by anecdotal examples of the district government of Surabaya and Solo. Both districts developed a more inclusive and humanistic approach to spatial planning. See: Airlangga Pribadi, “Terjebak di Labirin Transisi” (Kompas, 2 March 2011).

⁸¹² See Melanie Wiber and Chris Milley, “Introduction, Seeking Clarity, Legitimacy and Respect: The Struggle to Implement Special Rights” (Journal of Legal Pluralism and Unofficial Law, no. 55/2007), pp.1-10. Cf. Esther Mwangi and Stephan Dohrn, “Biting the Bullet: How to Secure Access to Dryland Resources for Multiple Users. CAPRI Working Paper, Washington DC: IFRI, 2006.

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SUMMARY

Spatial Management in Indonesia: from Planning to Implementation, Case Studies from West Java and Bandung (A socio-legal study)

This dissertation discusses the use of spatial management in Indonesia. As a starting point and with the purpose of getting at useful generalizations, it addresses how spatial management, i.e. the formation and implementation of law and policy pertaining to the use of land, in Bandung and West Java Province has evolved since the 1990s, what its results have been, which factors underlie it, and finally how spatial management in West Java and Bandung can potentially be improved. In addition, in this book I also explore the current system of land acquisition and utilization for development purposes and discuss how it could be improved by making it more sensitive to social and environmental issues. This, in my opinion, is best analysed in the context of spatial management. Central is the question to what extent the law serves as an instrument in guiding and controlling government behaviour to protect citizens from abuse and mismanagement in determining their access to land.

The present study attempts to provide such an analysis. It describes the transformation process of national spatial planning law into lower and detailed regulations, at different levels of governments, and how they inform decision-makers at the 'street level' dealing with permit applications and other government instruments which purport to control and limit in the public interest land occupants' freedom to use land. This study also traces the interconnectedness of spatial planning with land acquisition made in the public and private interest.

These issues are not only analyzed in their socio-political context, but also evaluated as part of the continuing struggle to establish the Indonesian *Negara Hukum* (or *Rechtsstaat*) which as a framework provides the most promising blueprint to establish an orderly and civilized society ruled by law in its broadest sense. The *Negara Hukum* concept, understood as a universal human good in the sense that the government should be constrained by law and be held legally accountable to the people it is supposed to serve, should provide a standard (or base line) for the way government power as laid down in legal rules and policies is to be exercised. It should function as a guarantee for the proper exercise of state power.

My contention in the first chapter is that the huge number of continuing and unresolved land disputes and conflicts in Indonesia should be understood in a larger context as government failure in spatial management. The pervasiveness of horizontal as well vertical land disputes and conflicts found in Indonesia should thus be perceived as a result of the government's failure in accommodating competing views on how to best utilize scarce land. The seriousness of this problem goes beyond the number of disputes/conflicts treated or left untreated. Hidden behind these numbers are social injustice and inequity, and massive environmental degradation suffered by perhaps a majority of the population. The success or failure of spatial management should thus be considered as an important factor in determining the extent to which individual and communal land occupants enjoy tenurial security.

However, while tenurial security may be important in itself, my focus will be more on the related rule of law aspect. For this reason I place my book in the theoretical framework of rule of law development and expect to contribute to the debates about this issue. At the same time, this dissertation indirectly touches upon the extent to which decentralization, especially the distribution and shifting of powers from the central to the regions, has affected the powers enjoyed by the district government in spatial management and determining people's access to land.

In the second chapter I offer the reader a bird's-eye view on Indonesia. As this book is concerned with the ways in which government agencies formulate and use the law pertaining to land use planning in the context of spatial management, the readers will need an overview of the legal and institutional framework of the Indonesian state. The discussion shows the complex relationship between the Indonesian government system on the one hand and the legal system on the other. The extent to which good governance can be realized depends on the efficient working of both the government system and the legal instruments available to it. On the other hand, the limits of government power (also in spatial management) to a great extent depend on what kind of working relationship are put in place governing the distribution of power by and between the central and regional government.

The third chapter addresses the issue to what extent regional governments in Indonesia during the Old and New Order enjoyed genuine autonomy in making and implementing spatial management policy and what factors influenced these processes. It demonstrates how the Town Planning Regulatory Framework Law of 1948 (SVO 1948) inherited from the Dutch colonial government and its successor, the Spatial Planning Law 24 of 1992 (SPL 1992)

became part of the top down development planning system introduced in the early 1960s. As a result, district and municipal governments were never allowed to formulate land use planning autonomously, or supervise its implementation without interference from the central government. Consequently, district spatial plans were far removed from the concerns of individual and communal land owners and failed to function as a government tool to control land use. In addition the SPL 1992, while promising a comprehensive spatial management policy comprising of planning, implementation and oversight (to be developed by the central government and to be elaborated further by the provinces and districts), did not leave much room for public participation, transparency and public accountability of spatial plans. In that respect too the SPL 1992 failed to deliver on its promise. It did not succeed in changing the embedded political and economical interests of the New Order regime, which thrived under the existing fragmented and sectoral natural resource management system. There was no clarity on the meaning and scope of SPL as an umbrella act. Effectively, it only provided only a very weak invitation to integrate the existing fragmented natural resources regime.

In the fourth chapter I discuss how the SPL 1992 as an umbrella act was further translated (and transformed) into by-laws (provincial and district regulations) providing guidance for future land use by land owners and other occupants, with a particular focus on West Java province and Bandung municipality. The most important finding is that the hierarchical system of spatial planning as envisaged by the Spatial Planning Law (SPL 24/1992) failed to materialize. Several factors contributed to this. First, comes to mind Scott's analysis on how the capacity of state simplification to transform the world, here by utilizing the top-down and centralized development-spatial plans, must be balanced against the capacity of society and lower level government institutions to modify, subvert, block, or even overturn the categories imposed upon it. Apparently the drafters of the SPL severely miscalculated the extent to which the embedded fragmented approach to natural resource management could be corrected, while also underestimating the difficulty of transforming town planning into spatial-development planning. Especially problematic has been the unwillingness of the Minister of Forestry to relinquish his monopolistic power to regulate and manage land use of the extended areas under his jurisdiction. Moreover, the architects of the SPL 1992 also miscalculated the extent to which both ministries in charge of urban planning (the Ministry of Home Affairs and the Ministry of Public Works) would be willing to force municipalities to adjust their spatial planning documents. Another problem was that by design the SPL 1992 engendered the formulation of overlapping and sometimes conflicting spatial plans, i.e. by allowing the central and provincial government to determine and provide spatial

planning for specific areas or protected areas. Thus, the SPL 1992 contained within itself the seeds for preserving a fragmented approach to spatial planning and it is likely that the main reason was the unwillingness of the central government to let development matters be regulated and controlled at the district level.

The fifth chapter deals with the extent to which the decentralization policy, initiated through the Regional Government Laws of 1999 and 2004, have been instrumental in changing the New Order stance towards spatial management. Previously, district spatial plans were simply made subservient to the top-down centralized development planning, or they were bypassed by it. West Java province and Bandung municipality and district are used as case studies to highlight how the re-distribution of government authorities influenced the whole planning system to align it with the intent to bring about district autonomy and accountability at the local level. As it turns out, the West Java provincial government and Bandung municipality responded to changes in the state and legal system in a way that shows the relocation of power to be more than a conscious division of labour between the central and regional governments but also a struggle over political and economic resources. At the core is the extent to which districts may enjoy autonomy in spatial management and development planning. The use of regional regulations to assert territorial claims and authority within administrative borders has been an important part of this struggle.

Real power in spatial management, which includes the power to formulate spatial plans relatively free from central government interference, was briefly delegated to the regions using the legal opportunities opened up by Regional Government Law 22/1999 and GR 25/2000. As the case study indicates, Bandung and other autonomous districts (the district of Bandung and Cimahi) for the first time enjoyed concrete authority in spatial management. With regional autonomy came the realization that spatial management could be used to establish borders of jurisdiction important in asserting control over natural resources and limiting the central government's intrusion into local affairs.

Nonetheless this came at a price. The loss of the hierarchical structure in spatial management made possible that districts exploited their areas without concern for negative spill-over into adjacent districts. Understandably, the central government made a conscious effort to take back delegated powers. What it did was superimposing a centralized, top-down planning system on top of the new decentralized government structure. The result of this has been a general confusion regarding which level of government holds the authority to do what in terms of spatial management and the extent to which it may be held accountable for its actions. The confusion stems from a tug of war between competing interests that have a

concrete, material basis rather than a technical governance issue. How regional governments produce and implement spatial and development planning takes place in this context, between efforts to push decentralization forward and efforts to roll it back.

The sixth chapter discusses the central government's manoeuvres to prevent the emergence of national and provincial spatial planning as a mosaic of disparate district spatial plans. A number of legislative moves have been instrumental in this, the most important being the promulgation of the Spatial Planning Law of 2007, which revoked the SPL 1992. A re-assertion of the hierarchical structure of spatial planning forced the readjustment of district regulations on spatial planning, underlining the supremacy of national spatial planning. The attempt went completely against the idea of granting district real autonomy, but was justified as necessary in the interest of maintaining the viability of Indonesia as a unitary state. Parallel to this a concomitant development planning system has been established in order to re-affirm the national government's power to control and influence law and policy making at the district level.

The negative effect of this has been the re-establishment of a system where the focus is to make the central government guide spatial utilization for investment purposes. Central and provincial governments have also enjoyed greater leverage than the districts, by having the power to determine if and when district spatial plans can be approved and declared ready for use. This has clearly discouraged local accountability. One important finding in this respect is that the decentralization movement has failed to give more exit and voice options to local people. They have had little power in deciding or even influencing the course of development and spatial planning. Public participation is thus mostly rhetorical. The existing spatial-development planning system has also weakened the extent to which government officials, especially at the district level, can account for others and be held accountable in a similar themselves.

In the next chapter I discuss the most important instruments of spatial management, permits regulating access to land. These permits comprise an important but much neglected part of spatial management in Indonesia. The role and influence of such permits in determining people's access to land, their tenurial security and the extent to which they restrain individual freedom in the use of land have been insufficiently appreciated. While spatial plans have a practical value as a guiding tool in the creation of detailed planning, zoning regulations and other land use policies, it is these permits which at the ground level determine access to land and use patterns. The same permits (and the process of acquiring them) moreover greatly influence the relationship between the government, permit holder/

beneficiary and society at large. The various ways in which the government/bureaucracy wields permits influence formality and informality in land use and the cost society will bear in preserving their rights of ownership to land.

In practice the whole licensing scheme, especially as related to land acquisition and land use, tends to become the embodiment of negotiated agreements with conditions appended to the permits. As the Bandung case discussed in this chapter shows, the complex network of permits and binding recommendations tends to obscure the underlying public-private partnership used to bring “development” to the people. All of the permits and related binding recommendations discussed in this chapter may be better understood as the end result of a negotiated agreement between investors and the government which may or may not represent the public interest. Consequently, a permit or license forms an important interface between the law, government officials, individual permit seekers and the general public. Unfortunately, it is not clear how the spatial utilization and development location permits, as mentioned in the SPL 1992 and SPL 2007, ought to function. In addition the sheer number and variety of permits and related binding recommendations makes it extremely difficult to trace which government agency must be held accountable in the event that actual land use by investors violates spatial plans. The habitual use of certain permits to waive government responsibility, especially in regards to a permit holder’s actual land use, adds to the confusion.

The next two chapters concern land acquisition cases, one performed in the private (commercial) interest and the other in the public interest. It concerns two different cases of land acquisition in Bandung and one in Jatigede (district of Majalengka), West Java Province. The cases highlight how changing spatial-development plans relate to land acquisition practices. The main issue discussed in Chapter eight concerns how the licensing system works and how it influences tenure security and people’s access to justice. To do that I discuss the Punclut case which concern the initiative of a private company (PT DUSP) to acquire land for an integrated tourism development centre within a conservation area (Punclut - a part of the North Bandung Area, straddling several districts). The network of licenses and binding recommendations directly or indirectly related to the Bandung spatial plan has been part of the government’s strategy, at least officially, to develop a public-private partnership to bring development to local people (or more accurately, just to bring about development). However, the same licensing system became the basis for developing transactions not only between power (government) and money (private investment) but also between power and influence, and between power and networks. It shows how in practice

legal rules were transformed and adjusted to the needs of the institutions or individuals responsible for granting the permits or recommendations in the first place. In the process, goals inherent in the use of permits to protect public interest were compromised and displaced. In the final analysis, the permit system failed to establish sustainable land use and in the light of public accountability the partnership was found wanting.

In chapter nine I present a different case study: land acquisition performed in the public interest, in this case the Jatigede hydro-electrical power plant and irrigation dam. Here the licensing system played only a minor role. More influential to people's tenurial security was the determination of the government to push the project through at all cost. This chapter explores the processes and mechanisms of land acquisition performed in the public interest in Indonesia during and after the New Order. The above case, taking into consideration that the land acquisition process had been performed under different successive regulations and changing provincial/district spatial plans, brings to the fore how poorly rules and regulations on land acquisition are practiced, to which contributing factors are the weaknesses in the laws themselves. They also show how and why rules and regulations on land acquisition in relation to existing provincial and district spatial planning tend to disregard concerns of social and environmental justice. The focus on rules and regulations also shed light on problems related to the legitimacy of government actions with regard to land acquisition and the extent it provides legal protection to land owners. Apparently, at the core of all regulations above on land acquisition in the public interest lays the overriding concern of how to establish a speedy process to appropriate land and utilize it for "development". Less attention is given on the question how to protect citizen (land owners) against abusive land acquisition practices and the objective 'to bring development to the majority of the people' as contrasted with the interest of a minority of land owners

In the final chapter, I draw general conclusions from the research. The litmus test is to what extent the government had succeeded in establishing a fair and efficient spatial management system. It thus concerns not only whether government actions in spatial management are according to the law but also whether the existing law had been used to rule fairly. Both the development and spatial planning systems (to the extent they have been translated into and influence land use planning), seen from the rule of law perspective, should enable autonomous districts to effectively control land use plans of individual land owners or those who seek to acquire land for private investment of infrastructure development, and in case of violation react accordingly. Clarity of legal rules and non-discriminative treatment is thus absolutely required. This is even more so because the way spatial management is translated

into government action (or in-action) influences people's access to land and their tenurial security.

SAMENVATTING (SUMMARY IN DUTCH)

Ruimtelijke Beheer in Indonesië: van planning tot implementatie: Case studies uit West-Java en Bandung, Een rechtssociologische studie

Dit proefschrift heeft de doelstelling om patronen bloot te leggen in de ontwikkeling van ruimtelijke ordening in Indonesië vanaf de jaren 1990. Daarbij richt het zich in het bijzonder op wetgeving en beleid in zake ruimtelijk beheer en grondgebruik. In deze case study wordt het ruimtelijke ordening beleid van de stad Bandung en de provincie West-Java geëvalueerd, er wordt bekeken welke factoren aan het beleid ten grondslag liggen, en er worden aanbevelingen gedaan over hoe ruimtelijk beheer in West-Java en Bandung kan worden verbeterd. Het boek verkent het huidige systeem van grondverwerving en grondgebruik in het kader van ontwikkelingsprojecten. Daarbij geldt dat naar mijn mening sociale en milieuaspecten van grondgebruik het beste geanalyseerd kunnen worden vanuit het perspectief van ruimtelijke ordening. Centraal staat de vraag of de wetgeving afdoende mechanismes bevat om de regering te controleren en de burgers te beschermen tegen misbruik en wanbeheer die hun eigendoms- en gebruiksrechten in gevaar kunnen brengen.

Mijn onderzoek beschrijft het proces waarin nationaal ruimtelijke ordeningsbeleid getransformeerd wordt in lagere regelgeving, doordat daar de details uitgewerkt worden die bepalen hoe partijen in de praktijk om dienen te gaan met vergunningaanvragen. Deze en andere middelen van de overheid beperken de vrijheid van de grondbezitter om redenen van algemeen belang. Deze studie zal ook de verbondenheid van de publieke en private sfeer in ruimtelijke ordening en grondverwerving aantonen.

De bovenstaande aspecten worden in de lokale sociaal-politieke context geplaatst en geëvalueerd in het licht van de Indonesische *Negara Hukum* (Rechtsstaat) die ik als het meest veelbelovende raamwerk zie om een ordelijke en beschaafde samenleving op te bouwen. Het concept *Negara Hukum*, dat inhoudt dat de bewegingsruimte van de overheid beperkt is door de wet en dat de overheid de burger moet beschermen en dienen, behoort de standaard te zijn voor de manier waarop de overheid omgaat met haar wetgevende en uitvoerende taak. Alleen op deze wijze kan een goede uitoefening van de staatsmacht gegarandeerd worden.

In het eerste hoofdstuk verdedig ik de stelling dat het enorme aantal onopgeloste grondconflicten in Indonesië moet worden gezien als de consequentie van een breed overheidsfalen op het gebied van ruimtelijk beheer. De alomtegenwoordigheid van horizontale en verticale grondconflicten is een gevolg van een overheid die haar beleid met betrekking tot het gebruik van schaarse grond weigert te herzien. De ernst van het probleem is zelfs nog groter dan het aantal geschillen of conflicten doet vermoeden; de cijfers verhullen namelijk de ware omvang van de sociale en milieuproblemen voor de bevolking. Het ruimtelijk beheer moet derhalve worden beschouwd als een factor die in belangrijke mate de rechtszekerheid bepaalt voor individuele of gemeenschappelijke grondgebruikers. Tegelijkertijd worden in dit proefschrift indirect ook de gevolgen van het decentralisatiebeleid besproken, in het bijzonder in hoeverre het overdragen van bevoegdheden betreffende de ruimtelijke ordening van de centrale regering aan de regio's gevolgen heeft op de toegang tot grond van de lokale bevolking.

In het tweede hoofdstuk bied ik de lezer een overzicht van de formeel-juridische en institutionele structuur van de Indonesische overheid. Mijn analyse legt de complexe relatie tussen de Indonesische overheidstructuur en de juridische instituties bloot. De mate van goed bestuur hangt af van zowel de werking van de overheidsinstituties als van de rechterlijke macht. Verder zijn de grenzen van overheid (ook in ruimtelijk beheer) voor een groot deel afhankelijk van de kwaliteit van de regelgeving betreffende de bevoegdheden van de centrale en regionale overheid.

In het derde hoofdstuk bespreek ik welke factoren de mate van autonomie bepaalden van de Indonesische regionale overheden in het maken en uitvoeren van ruimtelijk beleid tijdens de Parlementaire en Geleide Democratie (1945-1965) en de Nieuwe Orde (1965-1998). De van de Nederlandse koloniale regering overgenomen Stadsvormingsordonnantie 1948 (SVO 1948) en haar opvolger de wet op Ruimtelijke Ordening (WRO 1992) faciliteerden een systeem van top-down ontwikkeling dat vanaf de vroege jaren 1960 een hoge vlucht nam. In dit systeem hadden districts- en gemeentelijke overheden geen vrijheid om ruimtelijke ordening autonoom te formuleren, of om zelfs maar supervisie op de uitvoering ervan uit te oefenen zonder inmenging van de centrale overheid. Als gevolg daarvan staan ook nu nog de regionale bestemmingsplannen ver af van de belangen van de individuele en gemeenschappelijke grondeigenaren en functioneren ze niet als een overheidsmiddel om een sociaal en duurzaam grondgebruik te garanderen. Bovendien garandeert de WRO 1992 niet

veel ruimte voor inspraak en transparante besluitvorming. De WRO 1992 is te zeer geworteld in het Nieuwe Orde regime en haar politieke en economische belangen, die floreerden in een gefragmenteerd en sectoraal beheer van natuurlijke hulpbronnen. De reikwijdte van de WRO 1992 als overkoepelende wet was niet duidelijk geformuleerd en als gevolg hiervan kon het gefragmenteerde natuurlijke hulpbronnen regime gemakkelijk worden voortgezet.

In het vierde hoofdstuk bespreek ik hoe de WRO 1992 als overkoepelende wet verder werd vertaald (en getransformeerd) in lokale regelgeving van de provincie West-Java en Bandung. Mijn belangrijkste bevinding is dat in de praktijk het hiërarchische top-down systeem van ruimtelijke ordening, zoals voorzien door de WRO 1992, anders uitpakte. Verschillende factoren droegen hiertoe bij. Ten eerste blijkt dat de macht van de centrale overheid in bepaalde opzichten niet opwoog tegen de macht van de maatschappij en lagere overheidsinstellingen om de opgelegde categorieën te wijzigen, ondermijnen, saboteren, of zelfs om te keren. Blijkbaar hebben de opstellers van de WRO 1992 zich ernstig verkeken op de mate waarin de bestaande praktijk van een gefragmenteerd beheer van natuurlijke hulpbronnen zou kunnen worden gecorrigeerd. Bovendien verkeek men zich op de moeilijkheid om ruimtelijke ordeningswetgeving te vertalen naar een praktisch uit te voeren ruimtelijk beheer. Vooral problematisch is de onwil van het ministerie van Bosbouw om haar macht in te perken en jurisdictie over het grondgebruik van de uitgebreide gebieden onder beheer van dit departement beheer af te staan. Daarnaast hadden de architecten van de WRO 1992 onvoldoende rekening gehouden met het gebrek aan bereidheid van de beide ministeries die verantwoordelijk zijn voor stedelijke planning (Binnenlandse Zaken en Openbare Werken) om hun ruimtelijke ordeningsbeleid aan te passen. Dat werd ook in de hand gewerkt doordat de tekst van WRO 1992 overlappende en soms tegenstrijdige bevoegdheden toekende aan centrale en provinciale overheden op bepaalde specifieke gebieden en in beschermde gebieden. Zo hield de WRO 1992 zelf een gefragmenteerde aanpak van ruimtelijke ordening in stand. Waarschijnlijk was dit zelfs bewust beleid, zodat de centrale overheid regulering van ontwikkelingsprojecten niet aan het districtsniveau hoefde over te laten en dus controle behield.

In het vijfde hoofdstuk bespreek ik de mate waarin het decentralisatiebeleid, geïnitieerd door de Decentralisatiewet van 1999 (geamendeerd in 2004), heeft bijgedragen aan veranderingen in ruimtelijk beheer ten opzichte van de periode van de Nieuwe Orde. Ruimtelijk beheer op districtsniveau was voor de decentralisatie in de praktijk slechts een onderdeel van top-down

gecentraliseerde planning. Ruimtelijke ordeningsplanning vond centraal plaats, terwijl de controle op het grondgebruik lokaal was. De case study in de provincie West Java en de stad Bandung illustreert hoe in de nieuwe situatie van decentralisatie de planning veranderde met de bedoeling om autonomie op lokaal niveau te vestigen. De reactie van de overheden van West-Java en Bandung op de veranderingen in de overheids- en juridische structuren moet echter niet gezien worden als een weerspiegeling van een nieuwe taakverdeling tussen de centrale en regionale overheden, maar weerspiegelt vooraleer ook een strijd om politieke en economische controle. Het gebruik van regionale regelgeving om territoriale aanspraken en autoriteit te laten gelden binnen de administratieve grenzen is een belangrijk onderdeel van deze strijd. De inzet is de mate waarin de districten de ruimtelijke ordening en ontwikkelingsprojecten kunnen controleren.

Voor een periode van ongeveer vier jaar was de jurisdictie in ruimtelijk beheer kortstondig gedelegeerd aan de regio's middels de Decentralisatiewet (22/1999) en het implementerende Regerings Reglement 25/2000, inclusief de bevoegdheid om ruimtelijke plannen vrij van bemoeienis van de centrale overheid te formuleren. Zoals aangegeven in de *case study*, genoten Bandung en andere autonome districten (het district Bandung en Cimahi) een reële bevoegdheid voor ruimtelijk beheer. Door de regionale autonomie ontstond het besef dat ruimtelijke beheer kan worden gebruikt om de grenzen van bevoegdheden vast te stellen, wat belangrijk is bij het krijgen van controle over natuurlijke hulpbronnen en het inperken van de bemoeienis van de centrale overheid in wat nu gezien werd als lokale aangelegenheden.

Decentralisatie heeft ook negatieve kanten. Het verlies van een hiërarchische structuur in ruimtelijk beheer maakte het mogelijk dat districten hun grond en natuurlijke bronnen benutten zonder rekening te houden met negatieve *spill-over* effecten in aangrenzende districten. Als reactie op de vele problemen in ruimtelijk beheer van de districten, die bijvoorbeeld regelmatig bewust negatieve milieueffecten negeerden, heeft de centrale overheid zich een deel van de gedelegeerde bevoegdheden opnieuw toegeëigend. In 2004 werd een gecentraliseerde, *top-down* planning boven de nieuwe gedecentraliseerde overheidsstructuur gezet. Het resultaat is algehele verwarring over de centrale en lokale bevoegdheden op het gebied van ruimtelijke ordening en wie verantwoording draagt voor negatieve consequenties van dat beleid.

Het zesde hoofdstuk bespreekt verder ingrijpen van de centrale overheid met de uitdrukkelijke bedoeling om te voorkomen dat nationale en provinciale ruimtelijke ordening verworden tot een onsamenhangend mozaïek van ruimtelijke plannen op districtsniveau. Van groot belang is de afkondiging van een nieuwe Wet Ruimtelijke Ordening in 2007 (WRO 2007). Door herstel van de hiërarchische structuur van ruimtelijke ordening probeert de centrale overheid de districten te dwingen hun ruimtelijke ordeningsregelgeving aan te passen. De WRO 2007 gaat volledig in tegen het idee van districtsautonomie, maar wordt gerechtvaardigd als zijnde essentieel voor het voortbestaan van Indonesië als een eenheidsstaat. Een hieraan gerelateerde maatregel is het inzetten van een nieuw ontwikkelingsbeleid, eveneens gericht op het herstel van bevoegdheden van de nationale overheid in ruimtelijk beheer ten koste van het districtsniveau.

Het gevolg is dat het oude systeem is herleefd, en de nadruk weer is komen te liggen bij een centraal aangestuurd ruimtelijk beheer ten behoeve van economische ontwikkeling. In dit systeem hebben provinciale overheden grotere bevoegdheden dan districten. Zowel centrale als provinciale overheden moeten bestemmingsplannen goedkeuren. De top-down ruimtelijk beheer-structuur geeft de centrale overheid controle over de lokale overheden, maar dat hoeft nog geen stimulans te zijn voor een sociaal en duurzaam ruimtelijk ordeningsbeleid. Een van de redenen dat decentralisatie van ruimtelijke ordening faalde is dat de lokale bevolking niet kon participeren in het lokaal ruimtelijke beheer. Publieke participatie bleek vooral retorisch. De decentralisatie had ook als effect dat ambtenaren, vooral op districtsniveau, minder verantwoording hoefden af te leggen en moeilijker ter verantwoording geroepen konden worden.

Het zevende hoofdstuk bespreekt de belangrijkste instrumenten van ruimtelijk beheer, de vergunningen voor grondgebruik. Vergunningsprocessen vormen een belangrijk, maar verwaarloosd onderdeel van ruimtelijk beheer in Indonesië. De rol die vergunningverlening speelt bij verschillende onderdelen en aspecten van grondgebruik wordt veelal ondergewaardeerd, of het nu gaat om gebruiksrechten, de begrenzing van gebruiksrechten, of rechtszekerheid. Waar bestemmingsplannen een praktische waarde hebben als leidraad voor de gedetailleerde planning, zonering en andere beleid voor ruimtelijke ordening, zijn het de vergunningen die de toegang tot en het gebruik van grond legitimeren. Deze vergunning (en het vergunningsproces) bepalen ook sterk de relatie tussen de overheid, vergunninghouder / begunstigde en de maatschappij in het algemeen. De voorwaarden waaronder de overheid / bureaucratie de vergunningen voor grondgebruik afgeeft bepalen

voor een groot deel de mate van formaliteit van het grondgebruik en de kosten die burgers moeten opbrengen om eigendomsrechten op het land te behouden.

In de praktijk bestaat het hele vergunningsproces met betrekking tot grondverwerving en grondgebruik uit uitonderhandelde overeenkomsten. Zoals de case study van Bandung laat zien, verhult het complexe netwerk van vergunningen de onderliggende publiekprivate samenwerking die wordt gelegitimeerd als "ontwikkeling" voor de gemeenschap. De vergunningen en aanverwante bindende aanbevelingen zijn in werkelijkheid het eindresultaat van onderhandelingen tussen investeerders en de overheid die wettelijk het algemeen belang vertegenwoordigen. Bijgevolg is een vergunning een belangrijke schakel tussen de wet, ambtenaren, individuele vergunningzoekers, derdebelaanhebbenden en het grote publiek. Helaas, maakt het grote aantal en de verscheidenheid van vergunningen en aanverwante bindende aanbevelingen het uiterst moeilijk om te achterhalen welke overheidsinstantie ter verantwoording zou moeten worden geroepen in het geval grondgebruik in strijd is met bestemmingsplannen. De gewoonte om in bepaalde vergunningen uitzonderingen op het bestemmingsplan toe te laten, in het bijzonder met betrekking tot het grondgebruik, draagt bij aan de verwarring.

Hoofdstukken 8 en 9 betreffen grondverwerving respectievelijk op basis van private belangen en op basis van het algemeen belang. In deze hoofdstukken bespreek ik twee verschillende gevalsstudies van grondverwerving, de een in Bandung en de andere in Jatigede (district Majalengka). Deze laten zien dat veranderingen in bestemmingsplannen gerelateerd zijn aan aankooppraktijken van grond. Het voornaamste punt in hoofdstuk 8 heeft betrekking op hoe de werking van het vergunningensysteem de rechtszekerheid alsmede de toegang tot de rechter negatief beïnvloedt. In de Puncut zaak neemt een particulier bedrijf (PT. DUSP) het initiatief om land te verwerven voor ontwikkeling van toerisme in een beschermd natuurgebied. De verstrekking van vergunningen en bindende aanbevelingen die direct of indirect gerelateerd zijn aan het bestemmingsplan van Bandung worden opgevat als onderdeel van het overheidsbeleid om publiekprivate samenwerkingen aan te gaan ten behoeve van economische ontwikkeling. Het verloop van het vergunningsproces toont hoe in werkelijkheid overheidsinstellingen hun taken uitvoeren, hoe wettelijke regels worden genegeerd en aangepast ten behoeve van de belangen van de instelling of privébelangen van degenen die verantwoordelijk zijn voor het verlenen van de vergunningen. Corruptie en nepotisme spelen dus een rol, maar van nog meer belang is dat duurzaam grondgebruik zoals vastgesteld in bestemmingsplannen gewoon buiten

beschouwing wordt gelaten. Er gaapt een kloof tussen de ideale of "ought to" functie van vergunningen en de vergunningverlening in de praktijk. Dit gaat ten koste van duurzaamheid en sociale rechtvaardigheid.

In hoofdstuk negen, bespreek ik de verwerving van gronden voor het algemeen belang, in dit geval de Jatigede stuwdam en een hydro-elektrische energiecentrale. In dit geval speelt het vergunningstelsel slechts een ondergeschikte rol. Duidelijk wordt hoe de rechtszekerheid van de lokale bevolking wordt ondermijnd door een overheid die koste wat het kost een project wil doordrukken. Het bovengenoemde grondverwervingproces werd uitgevoerd onder verschillende elkaar opvolgende regelingen en provinciale / districtsbestemmingsplannen en brengt aan het licht hoe slecht regelgeving inzake grondverwerving wordt uitgevoerd, waarbij het zwakke wetgevingsproces zelf een belangrijke factor is. Het geeft ook inzicht hoe en waarom regionale regelgeving de neiging heeft om sociale en ecologische aspecten te negeren.

De focus op wet- en regelgeving legt ook problemen bloot met betrekking tot de legitimiteit van overheidsacties in grondverwerving die proportioneel moet zijn ten opzichte van de mate van juridische bescherming die wordt geboden aan grondeigenaars. De grondgedachte van alle regelgeving over grondverwerving in het algemeen belang lijkt het garanderen van een snel proces te zijn, om "ontwikkeling" te kunnen brengen. Weinig aandacht wordt besteed aan de vraag hoe eigendom van de burger (landeigenaren) te beschermen tegen misbruik van de overheid. Eigendom wordt gebagatelliseerd, het dwingende belang om ontwikkeling te brengen gaat geheel voorbij aan de belangen van grondbezitters.

In het laatste hoofdstuk, trek ik algemene conclusies uit mijn onderzoek. De hoofdvraag die ik probeer te beantwoorden is in welke mate de Indonesische overheid er in is geslaagd een eerlijk en efficiënt ruimtelijk beheerssysteem op te zetten. Het gaat mij niet alleen om de vraag of overheidsmaatregelen op ruimtelijk beheer in overeenstemming zijn met wettelijke regelgeving, maar ook of de bestaande wetgeving gebruikt is om rechtvaardig te beslissen. Zowel het ontwikkelingsbeleid als het ruimtelijk ordeningsbeleid zou volgens de letter van de wet autonome districten in staat moeten stellen om daadwerkelijk toezicht te kunnen houden op grondgebruik door of grondverwerving van individuele grondeigenaren, en in geval van overtredingen op te kunnen treden. Eenduidigheid van de wettelijke regels en een niet-discriminerende behandeling zijn absolute voorwaarden daarvoor. Temeer, omdat de manier waarop ruimtelijk beheer op papier wordt door overheidsinstanties wordt vertaald

naar de praktijk, grote invloed heeft op de toegang en rechtszekerheid van individuele grondbezitters. Het zal weinig verbazing wekken gezien het vooraf beschrevene dat de eindconclusie is dat Indonesië nog een lange weg heeft te gaan alvorens dit is gerealiseerd.

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GLOSSARY

A

Adat law: customary law of adat (indigenous or traditional) communities

Reforma Agraria: Agrarian reform; land re-distribution

Aanlegvergunning: construction permit

Advies Planning: site plan approval

Arahan Lokasi Investasi: recommendations on investment location

B

Badan Pertanahan Nasional: National Land Agency

Badan Pembangunan Daerah: Regional Development Planning Board

Badan Pemeriksa Keuangan: National Auditors Board

Badan Pengembangan Kota: Urban Development Board

Badan Otorita: special board ruling specific or prioritized areas

Bappeda Provinsi: Provincial Development Planning Board

Berita acara penyerahan asset: process verbal of asset transfer

Beschikking: administrative decree

Bouwverordening: building ordinance

Bupati: district head

Burgemeester: mayor

C

Cita hukum: ideal notion of the law

Cita Negara: ideal notion of the State

D

Daftar Investasi Negatif: Negative Investment List

Desa: village

Dewan Perwakilan Daerah: Regional Representative Council

Dewan Perwakilan Rakyat Daerah: Regional Parliament

Dinas Bangunan: building service

Dinas Pekerjaan Umum: public work service

Dinas Pengairan: Water Management Service

Dinas Pertamanan: public parks services

Dinas Tata Kota: city planning service

Dir.jen Bina Pembangunan Daerah: Directorate General of Regional Development Supervision of the Ministry of Home Affairs

Doelmatig: purposive; non-arbitrary

E

Erfpacht verponding: Dutch colonial long lease

F

Fatwa Tata Guna Tanah: directive on land use

G

Gemeentes: municipal government

H

Hak Garap: the right to till the land

Hak Guna Bangunan: building rights

Hak Guna Bangunan Induk: master construction rights

Hak Guna Usaha: long lease

Hak Membuka Ladang: the right to open and cultivate land

I

Izin Lokasi: site or location permit

Izin Mendirikan Bangunan: Permits to build or construct buildings

Izin menggunakan tanah guna keperluan penanaman modal: permit to allow land use for the investment purpose

Izin Normalisasi Sungai: the permit to correct/alter the course of rivers

Izin Pemanfaatan Ruang: spatial utilization or land use permit

Izin Pematangan Lahan: land clearance permit

Izin Pembuatan Jalan Masuk Pekarangan: permits for road construction and other infrastructure

Izin Pemindahan Hak: permit to transfer land title

Izin Pencadangan Tanah: permit to reserve land for investment

Izin Pencadangan tanah/izin prinsip dalam rangka penanaman modal: permit to reserve land or permit-in-principle in the context of investment

Izin Pengadaan Tanah demi Kepentingan Investasi: permit allowing private investors to acquire land

Izin Perubahan Alur, Bentuk, Dimensi dan Kemiringna Dasar Saluran/Sungai: permit for the adjustment of the course, form, dimension and slope of waterways or rivers

Izin Peruntukan Penggunaan Tanah: Permits to Determine the Use of Land

Izin Prinsip: permit-in-principle

Izin Prinsip Penanaman Modal: investment permit-in-principle

Izin Usaha Sementara: Temporary Permit to Initiate business Activities

Izin Usaha Tetap: permanent business permit

J

K

Kabupaten: district

Kampongs: village

Kantor Tata Ruang: spatial planning office

Kawasan andalan: prioritized growth poles

Kawasan Budidaya: cultivation area

Kawasan Lindung: conservation area

Kawasan Prioritas: priority areas

Kawasan Strategis: Strategic Areas

Kawasan Tertentu: specific areas

Kebijakan mengambang: floating policy

Kecamatan: sub-district

Kegiatan pengukuhan (kawasan) hutan): acknowledgment and determination as forest land

Kelurahan: quarter

Ketahanan Pangan: Food security

Koefisien Dasar Bangunan: buiding coverage coefficient

Koefisien Lantai Bangunan: floor coverage coefficient

Komite Advokasi Lingkungan Hidup dan Hak-hak Sipil: Committee Environment Advocacy and Civil Rights

Kota: city or urban

Kurang cukup dipertimbangkan or onvoldoende gemotiveerd: not sufficiently reasoned out (judge deliberation))

L

Lahan Hutan Pengganti: substitute forest

M

Machtsstaat: state based on power

Majelis Permusyawaratan Rakyat: People's Consultative Assembly

Masyarakat Adat: Adat (traditional or indigenous) communities

Mede-bewind: delegation of certain government authorities to lower level government

Musyawaharah-Mufakat: deliberation to reach consensus

Musyawaharah Rencana Pembangunan (musrenbang): the development planning consensus

N

New Order: Oder Baru (government under President Soeharto (1967-2007))

O

Old Order: Orde Lama (government under President Soekarno (1959-1966))

Ontheigeningsordonnantie: ordinance on land appropriation

P

Padu Serasi: synchronizing provincial spatial plan with forest plan

Panitian Pembebasan Tanah: land acquisition or "release" team

Pelayanan Pertanahan: Land affairs or services

Pedoman: Directives

Peil Banjir: Recommendation regarding flood containment

Pembangunan: Development

Pembangunan Berkelanjutan: Sustainable development

Pembebasan Tanah: land title release

Pemekaran: literary blossoming; administrative fragmentation or involution

Penataan Ruang: Spatial management.

Pencadangan tanah bagi kegiatan pembangunan: land reserved for development projects

Penetapan lokasi investasi: allocating areas for investment

Pengadaan tanah: land acquisition

Pengarahan Pemanfaatan Ruang: recommendations on spatial use

Pengendalian Pemanfaatan Ruang: spatial utilization monitoring or oversight

Penggarap: land tillers (penggarap)

Penyuluhan: socialization process; publicly inform the populace about to be initiated government project

Peraturan Daerah: district regulation

Peraturan Walikota: general regulation issued by the mayor

Peraturan zonasi: zoning regulations

Perizinan lokasi pembangunan: development location permit

Perizinan Pemanfaatan Ruang: Spatial utilization permits

Perizinan Pembangunan: Development Permits

Persetujuan Penanaman Modal: investment approval letter

Persetujuan prinsip penanaman modal: investment–approval-in-principle

Perumahan Kampong perdusunan: housing for the indigenous population

Petunjuk: Instructions

Petunjuk Penyusunan Dokumen RPJP Daerah dan RPJM Daerah: Directives in the making or formulation of Regional Long and Mid Term Development Documents

Perusahaan Kawasan Industri: industrial estates companies

Pola Pembangunan Jangka Panjang: Long-Term National Development Plan

Q

R

Rechtmatig: in accordance with the law or fair-just

Rechtsstaat: State based on Law/Rule of Law (Negara Hukum)

Reformasi: Reformation

Rekayasa sosial: social engineering

Rekomendasi Pengarahan Pemanfaatan Ruang: Recommendation on spatial utilization

Rencana Bangunan: building plans (blue prints)

Rencana Detail Tata Ruang Kota: Detailed urban spatial planning

Rencana Kerja Pemerintah: Government Work Plan

Rencana Pembangunan Jangka Menengah: Mid-term development planning for a period of 5 years

Rencana Pembangunan Jangka Panjang: Long Term Development Planning

Rencana Pembangunan Tahunan: The annual national development plan

Rencana Pembangunan Tahunan Daerah: Annual Regional Development Plan

Rencana Rancangan: design plan

Rencana Tata Bangunan dan Lingkungan: Architectural and environmental design

Rencana Tata Ruang Kota: Urban Spatial Plan

Rencana Tata Ruang Wilayah: National Spatial Plan

Rencana Tata Ruang Wilayah Kabupaten/Kotamadya Daerah Tingkat II: Spatial Plan of Municipality/District

Rencana Teknik Ruang Kota: technical urban spatial plan

Rencana Umum Tata Ruang Perkotaan: urban area master plan

Ruang Terbuka Hijau: open-green area (p6 ch8)

S

Spatial management: penataan ruang

Stadsgemeente: Municipal/city (autonomous) government

Stads-VormingVerordening (SVV): Government Regulation on the establishment of cities

Stadsvormingsvoorschrift: regulation for the establishment of cities

Standar Pelayanan Minimal di bidang penataan ruang: the minimum service provisions in spatial planning

Strategi Nasional Pembangunan Perkotaan: the National Urban Development Strategy

Surat Konfirmasi Pencadangan Tanah: a confirmation letter to reserve land

Surat Penetapan Lahan untuk Pembangunan: land for development letter

Surat Persetujuan Penggunaan Tanah untuk Pembangunan: approval (letter) to reserve land for development

Surat Persetujuan Pemanfaatan Ruang: approval for spatial utilization

Surat Persetujuan Penetapan Lokasi: approval on site development letter

Surat Persetujuan Prinsip: approval -in principle

T

Tanah Garapan: tilted land

Tanah yang dikuasai Negara: state “owned” land

Tata Cara Pengendalian dan Evaluasi Pelaksanaan Rencana Pembangunan: procedure /protocol to monitor and evaluate the implementation of development plans

Tata Cara Penyusunan Rencana Pembangunan: procedure/protocol to draw up development plans

Toestemming: permit or license

U

Ultra vires: literary without authority/going beyond given scope of authority

Urusan Pilihan: optional government task

Urusan Wajib: obligatory government task

Uitbreidingsplan: urban development plan

V

Vrijstelling: dispensation

Verbod: prohibition

Volksraad: parliament during the Dutch colonial period

W

Walikota: major

Wetmatig: in accordance with the written law

Wethouders: aldermen

Wilayah perencanaan: planning region

X

Y

Z

APPENDIX I

LIST OF REGULATIONS

1851

Circular Letter of Ministry of Agraria/Head of NLA 410-1851 & 460-3346 of 1994 (prohibition to convert irrigated rice fields).

1854

The Dutch Indies constitution (*Regerings Reglement of 1854: reglement op het beleid der regering van Ned-Indie*).

Wet Houdende Decentralisatie van het Bestuur in Nederlands-Indie (Law on the decentralization of the government of Netherlands-Indies, dated 23 July 1903)

1932

The Provinciaal Blad van West Java (provincial gazette) on 29 February 1932 no. 2.

1940

Nuisance Ordinance Permit (*UU Izin Gangguan*) S.1926: 226 as amended by S 1940: 14

1945

The 1945 Constitution

1948

SVO, “Besluit van de Luitenant-Gouverneur-Generaal van 23 July 1948 no. 13”.

1950

Law 11/1950 (establishment of the Province of West Java)

1960

Law 19/1960 and Government Regulation 27/1968 (PT. Permina taken over by the state)

Law 37/Prp/1960 on Mining

Law 44/Prp/1960 on natural oil and gas

Law 56/Prp/1960 on the Limit to Agricultural Land (*penetapan luas tanah pertanian*).

1961

Law 20/1961 on the revocation of property rights on land and other objects on land (expropriation law)

Temporary PCA Decree 4 /1965 (*banting stir untuk berdiri di atas kaki sendiri di bidang ekonomi dan pembangunan*);

Agraria) 17/Insp.P/1961.

1963

GR 13 of 1963 (development of new buildings along the road between Jakarta – Bogor – Puncak – Cianjur).

Law 1/1967 on foreign investment (as amended by Law 11/1970; *Perusahaan Modal Asing*)

Presidential Regulation 13/1963 (*tentang ketertiban pembangunan baru disepanjang jalan antar Jakarta-Bogor-Puncak-Cianjur*)

1965

Temporary PCA Decree 5/1965 (*Amanat Politik Presiden/Pemimpin Besar Revolusi/Mandataris MPRS yang Berjudul “Berdikari” sebagai Penegasan Revolusi Indonesia dalam Bidang Politik, Pedoman Pelaksanaan Manipol dan Landasan Program Perjuangan Rakyat Indonesia*)

Temporary PCA Decree 6/1965 (*Banting Stir untuk Berdiri di Atas Kaki Sendiri di Bidang Ekonomi dan Pembangunan*).

1966

Temporary PCA Decree 21/1966 (*pemberian otonomi seluas-luasnya kepada daerah*)

Temporary PCA Decree 22/1966, on the hierarchical system of Indonesian legislation

Temporary PCA Decree 23//1966 and Temporary PCA Decree 33/1967 (*pencabutan mandataris MPRS dari Presiden Soekarno*).

1967

Law No. 1/1967 as amended by No. 11/1970 on foreign Investment

The Basic Forestry Law (5/1967)

The Basic Mining Law (11/1967)

1968

GR 27/1968 (fusion of PT. Permina and PT. Pertamina).

Law No. 6/1968 as amended by No. 12/1970 on Domestic Investment

1969

RGL 6/1969

1970

GR 21/1970 on logging concession and forest collecting rights in production forest (*tentang perusahaan hutan dan pemungutan hasil hutan pada hutan produksi*).

GR 33/1970 on forest planning (*perencanaan hutan*).

Law 14/1970 as amended by Law 4/2004 on Judicial Powers.

Presidential Decree 65/1970 on Batam's spatial and development planning.

1971

Bandung Municipal Parliament Decree (Surat Keputusan DPRD) 8939 of 1971.

1972

GR 15/1972 as amended by, and GR 30/2003 (establishment of Perum Perhutani)

GR 21/1972 (establishment of PT. Inhutani I-IV)

The Stockholm Declaration of 1972

Ministry of Home Affairs Regulation 6/1972;

Ministry of Home Affairs Regulation 6/1972 on the delegation of the authority to grant land rights (*pelimpahan wewenang pemberian hak atas tanah*).

Ministry of Home Affairs Regulation 6/1972 on the delegation of the authority to grant land rights (*pelimpahan wewenang pemberian hak atas tanah*).

1973

GR 39/1973 on the procedure for the determination of compensation by the High Court in the case of revocation of property right on land and other objects on land (*acara penetapan ganti-kerugian oleh pengadilan tinggi sehubungan dengan pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*) is a further elaboration of Art. 8 of Law 20/1961.

Presidential instruction (Instruksi Presiden RI) 9/1973 on the implementation (and procedure) to disposes land owners (*pelaksanaan pencabutan hak-hak atas tanah dan benda-benda yang ada di atasnya*).

MHAR 3/1973 (establishment of ad hoc committee for land acquisition)

Governor of West Java Decree 293/AI/2/T.Pra/75 dated 26 September 1975, amended 1981-2000

Ministry of Home Affairs Regulation 5/1973.

1974

Law 11/1974 on Irrigation (*pengairan*)

Ministry of Home Affairs Regulation (MHAR) 5/1974 regulating land reservation/allocation for private companies (*ketentuan-ketentuan mengenai penyediaan dan pemberian tanah untuk keperluan perusahaan*).

Decree of the Directorate General of Forestry 85/Kpts/DJ/I/1974; 102/Kpts/DJ/1983 as amended by Ministry of Forestry Decree 399/Kpts-II/1990 and Decree 634/Kpts-II/1996 (procedure for the determination of forest land (*pedoman pengukuhan hutan*)).

Ministry of Home Affairs Regulation 5/1974 on the reservation and granting of land for private companies (*ketentuan-ketentuan mengenai penyediaan dan pemberian tanah untuk keperluan perusahaan*).

Ministry of Home Affairs Regulation 5/1974 (permit for land allocation for development purposes (*izin pencadangan tanah/prinsip dalam rangka penanaman modal*))

Bandung District Regulation 11/PD/1974 dated 7 October 1974

Regional Government Law (RGL) 5/1974 (*tentang Pokok-Pokok Pemerintahan Di Daerah*)

1975

MHAR 15/1975 on the procedure of land acquisition (*ketentuan-ketentuan mengenai tata cara pembebasan tanah*).

Ministry of Home Affairs Regulation (MHAR) 15/1975 on land acquisition procedure

Letter dated 21 April 1975 (6156/75 no. 11).

1976

Presidential instruction 1/1976 guidance on how to synchronize agrarian management tasks with tasks delegated to the forestry, Mining, transmigration and public works. (*pedoman tentang sinkronisasi tugas keagrariaan dengan bidang tugas kehutanan, pertambangan, transmigrasi dan pekerjaan umum*).

Ministry of Home Affairs Regulation 2/1976 (allowing private enterprises to use procedure for land appropriation by the state).

1977

Bandung DR 18/PD/1977 (the eleventh amendment to the *Bouwverordening van Bandoeng*)

1978

GR 2/1978

Presidential Decree 41/1978 as renewed by Presidential Decree 94/1998 (determination of Batam as industrial zone).

1979

Village Government Law 5/1979

1980

Law 13/1980 (public roads),

Presidential Decree (PD) 54/1980 (rice field),

Decree 54/1980 (prohibition to convert fertile agricultural or irrigated land/rice fields)

Ministry of Home Affairs Regulation (MHAR-*Permendagri*) 4/1980 on directives for urban planning (*Pedoman Penyusunan Rencana Induk Kota*)

1981

Law 8/1981 (Code of Criminal Procedural Law)

181.1/SK1267-Pem.Um/1981 dated 16 September 1981

1982

GR 23/1982 (on irrigation).

Ministry of Home Affairs Instruction (Instruksi *Menteri Dalam Negeri*) 650-1223/1982 on the procedure for the formulation of urban planning (*Tata Kerja Penyusunan Rencana Kota*).

West Java Governor letter 181./SK.1624-Bapp/1982 dated 5 November 1982 (designation of north bandung area as conservationd area

Governor of West Java Decree 161.1/SK.1624-Bapp/1982 (*peruntukan lahan di wilayah inti bandung raya bagian utara*).

Governor of West Java decree (no 181.1 / SK.1624-Bapp / 1982 date 5 November 1982 regulating land use of KBU, designating Punclut as a protected area closed for development);

1983

PCA Decree 2/1983 Broad Guidelines on State Policy

PCA Decree 5/1983 (on the honorary title of Bapak Pembangunan bestowed on Soeharto).

Presidential Decree 48/1983 (*tentang Penanganan Khusus Penataan Ruang dan Penertiban serta Pengendalian Pembangunan pada Kawasan Pariwisata Puncak dan Wilayah Jalur Jalan Jakarta-Bogor-Puncak-Cianjur*),

Government Regulation 34/1983 (establishment of Batam as kota administratif)

PD 15/1983 (tourism)

PD 48/1983 (special arrangement for the spatial planning of and the control and ordering of the development of the tourism area of Puncak and the road connecting Jakarta – Bogor – Puncak – Cianjur outside the administrative territory of the capital city, Jakarta, the town of Bogor, the administrative town of Depok, the town of Cianjur and the town of Cibinong)

1984

Law No. 5/1984 (industry),

MHAR 1984 on the procedure and granting of rights to foreign and domestic investment companies (*tata cara penyediaan tanah dan pemberian hak atas tanah, pemberian izin bangunan serta izin undang-undang gangguan bagi perusahaan yang mengadakan penanaman modal menurut undang-undang 1/1967 dan undang-undang 6/1968*).

Ministry of Home Affairs Regulation 3/1984 on the procedure to reserve land and the granting of land rights, building permits and nuisance permits for foreign and domestic investment companies (*tata cara penyediaan tanah dan pemberian hak atas tanah, pemberian izin bangunan serta izin gangguan bagi perusahaan-perusahaan yang mengadakan penanaman modal menurut undang-undang no. 1/1967 dan undang-undang no. 6/1968*).

District Head of Sumedang Decree 590/SK.7-Ag/1984 and 590/SK.45/Ag/1985 on the value estimation of land held in possession by land owners and Decree 604/SK.186-PUK/1984 on the value estimation of buildings.

1985

GR 26/1985 on (the construction of) public roads;

Law 14/1985 on the Supreme Court as amended by Law 5/2004

Presidential Decree 79/1985 (spatial planning in the Puncak Area)

Presidential Decree 79/1985 tentang *Penetapan Rencana Umum Tata Ruang Kawasan Puncak*

Joint Decree (*surat keputusan bersama*) Ministry of Home Affairs and Ministry of Public Works (650-1595; 503/KPTS/1985) on the tasks and responsibilities with regard to town planning (*tugas-tugas dan tanggungjawab perencanaan kota*).

PD 8/1985 (housing)

PD 79/1985 (General Spatial Planning of the Puncak Area)

Municipality of Cirebon (DR) 3/1985 (RTRW Cirebon)

1986

GR 36/1986

Ministry of Public Works decree 640/KPTS/1986 (town planning)

Ministry of Forestry Regulation 137/1986 (THGK)

Ministry of Public Works Decree 640/1986 on town planning (*perencanaan tata ruang kota*)

Daerah tingkat II Bandung Regulation (PR) 3/1986 on the Master Plan of Bandung 1985-2005, as authorized and certified by the Ministry of Home Affairs by virtue of a letter 650-1056 dated 11 July 1986.

1987

GR 14/1987 on the delegation of parts of central government authority in public works to the regions (*tentang penyerahan sebagian urusan pemerintahan di bidang pekerjaan umum kepada daerah*).

GR.16/1987 (adjustment to the administrative borders of the municipality of Bandung and the Bandung district)

Ministry of Forestry Decree 46/Kpts-II/1987 on Consensus Forest Land Use Plan (*tata guna hutan kesepakatan*)

Presidential Decree 26/1988 on the National Land Agency (*Badan Pertanahan Negara*) as amended by Presidential Regulation 10/2006 on the NLA

Ministry of Home Affairs Regulation 2/1987 on directives for city planning (*pedoman penyusunan rencana kota*)

Ministry of Home Affairs Regulation 2/1987 on guidance or directive for town planning (*pedoman penyusunan rencana kota*).

Ministry of Home Affairs Regulation 3/1987 allocation and granting of land rights for house construction companies (*penyediaan dan pemberian hak atas tanah untuk keperluan perusahaan perumahan*) was relevant.

1988

PCA 2/1988 (Broad Guidelines of State Policies 1988)

Presidential Decree 53/1989 (on *kawasan industri*) as amended by 41/1996.

Presidential Decree 53/1989 (*on kawasan industri*) as amended by 41/1996.

Ministry of Home Affairs decree 22/1989 (*Tata Laksana Penertiban dan pengendalian pembangunan di Kawasan Puncak*).

Ministry of Industry's Decree 291/M/SK/10/1989 as amended by 230/M/SK/10/1993 (*tata cara perizinan dan standar teknis kawasan industri*).

West Java Provincial Regulation 8/1988 development planning of the West Java Province: *pola dasar pembangunan daerah propinsi daerah tingkat I jawa barat*

Peraturan Daerah tingkat II Bandung Regulation (DR) 1/1989 (development planning of the Bandung municipality: *pola dasar pembangunan daerah tingkat II Kotamadya Bandung*).

West Java Provincial Regulation 14/1989 on the management of roads and irrigation works (*garis sempadan jalan dan pengairan*);

1989

Presidential Decree 53/1989 on Industrial Estates (amended by Decree 98/1993 and 41/1996)

Ministry of Industry's Decree 291/M/SK/10/1989 as amended by 230/M/SK/10/1993 (*tata cara perizinan dan standar teknis kawasan industri*).

Bandung Municipal Regulation (DR 2/1992 (general city planning of Bandung)

Bandung Municipal Regulation (DR) 2/1996 (detailed spatial planning of Bandung).

1990

GR 8/1990 (construction and management of toll roads);

GR 35/1991 (management of rivers);

Presidential Decree 32/1990 on the management of conservation areas.

Presidential Decree 33/1990 (prohibition to convert fertile agricultural or irrigated land/rice fields)

Ministry of Forestry 399/Kpts-II/1990 (jo. 634/Kpts-II/1996) on forest determination directive (*Pedoman Pengukuhan Hutan*).

Bandung District Regulation (DR) 12/1990 (RUTRK Soreang; 1989-2009);

Bandung District Regulation (DR) 13/1990 (RUTRK Soreang; 1989 -2009);

Bandung District Regulation (DR) 19/1990 (RUTRK Soreang);

Bandung District Regulation (DR) 47/1990 (RUTRK Padalarang; 1995-2004);

Karawang DR 17/1991 (RTRW Karawang)

Circular Letter of NLA 508.2-5568-D.III dated 6 December 1990 on the establishment of a committee to supervise and monitor land release performed by private entities (*tim pengawasan dan pengendalian pembebasan tanah untuk keperluan swasta*)

1992

Presidential Decree 33/1992 (revoking 54/1977) on investment (*tata cara penanaman modal*).

SPL 24/1992.

Ministry of Agraria/NLA Head Regulation 3/1992 (*tentang tata cara bagi perusahaan untuk memperoleh pencadangan tanah, izin lokasi, pemberian, perpanjangan dan pembaharuan hak atas tanah serta penerbitan sertifikatnya*)

Ministry of Agraria/Head of NLA's Regulation No. 3 of 1992 as added and amended by No. 2 of 1993 (procedure to obtain site permit and right on land for companies established in relation to (foreign/domestic) investment).

Peraturan Kotamadya Daerah Tingkat II Bandung Regulation (DR) 2/1992 on the Master Plan of Bandung (RUTRK

Peraturan Kotamadya Daerah Tingkat II Bandung 1991-2001) as endorsed and legalized by the Ministry of Home Affairs by virtue of a decree 76/1994.

Central Java PR 8/1992 (Provincial Spatial Planning-RTRW Propinsi)

District of Bandung Regulation (PD) 5/1992 as amended by 2/2001 (*izin pemanfaatan tanah di kabupaten Bandung*).

1993

GR 41/1993 (public transportation);

GR 43/1993 (traffic infrastructure);

Presidential Decree 55/1993 concerning the procedure to acquire land for development projects in the public interest (*pengadaan tanah bagi pelaksanaan pembangunan untuk kepentingan umum*). The Ministry of Agraria/Head of the National Land Agency issued an implementing regulation: MAR 1/1994.

Public Works Ministerial Regulation 63/PRT/1993 on the management of river basins (*sempadan sungai, daerah manfaat sungai, daerah penguasaan sungai dan bekas sungai*)

The October 23, 1993 policy package (*Pakto 1993*),

Ministry of Agraria/Head of NLA Regulation 2/1993 on the procedure for acquiring site permits and land rights for foreign/domestic investment companies (*tentang tata cara memperoleh izin lokasi dan hak atas tanah bagi perusahaan dalam rangka penanaman modal*)

Ministry of Agraria/Head of NLA Decision 22/1993 on the directives for the implementation of the Ministry of Agraria/Head of NLA Regulation 2/1993 (*tentang Petunjuk Pelaksanaan Pemberian izin Lokasi dalam Rangka Pelaksanaan Peraturan Menteri Agraria/ Kepala Pertanahan Nasional Nomor 2 Tahun 1993*).

Ministry of Industry Letter no. 5000-3302.A. dated 1 November 1993 (concerning government policy package of 23 October 1993).

Ministry of Industry Letter no. 5000-3302.A. dated 1 November 1993 (concerning government policy package of 23 October 1993).

Bogor District Regulation 5/1993 (district spatial planning-RTRW Kabupaten)

South Kalimantan PR 3/1993 (Provincial Spatial Planning-RTRW Propinsi)

Letter of Ministry Agraria/Head of NLA no. 22/1993 dated 4 December 1993.

1994

Law 12/1994 (property tax law: *undang-undang tentang pajak bumi bangunan*)

NLA Letter 460-3346, dated 31 October 1994) addressed to regional land offices with the request to pay attention to the conversion of irrigated rice fields to other purposes.

Ministry of Agraria/Head of NLA (Peraturan Menteri Agraria/Kepala BPN) 1/1994,

Ministry of Agraria/Head of the National Land Agency Regulation (MAR) 1/1994 (implementing regulation of the procedure to acquire land for development projects in the public interest (*pengadaan tanah bagi pelaksanaan pembangunan untuk kepentingan umum*)).

Bappenas Letter 5334/MU/9/1994 dated 19 September 1994.

Sulawesi PR 2/1994 (Provincial Spatial Planning-RTRW Propinsi)

Kuningan DR 6/1994 (RTRW Kuningan)

Majalengka DR 6/1994 (RTRW Majalengka)

West Java PR 3/1994 (Provincial Spatial Planning-RTRW Propinsi)

Site Permit Decree to PT. DUSP 460.02-809-94 (29 April 1994) for the development of “kawasan wisata terpadu bukit dago raya”.

1995

GR 13/1995 (industrial permits),

Minister of Agraria/Head of NLA Regulation 1/1995 as amended by 3/1995 on Systematic Land Titling.

Ministerial Regulation (of industry) 150/1995 (procedure).

West Java PR 20/1995 on the management of springs (*garis sempadan sumber air*)

Letter issued by the Governor of West Java No. 660/5009/BLH dated 29 December 1995 on the evaluation of the environmental impact assessment and management (RKL/RPL) for the development of the integrated tourism area of Bukit Dago Raya.

Bandung District Regulation (DR) 48/1995 (RUTK administrasi Cimahi; 1995-2004);

Bandung District Regulation (DR) 49/1995 (RUTRK Lembang; 1995-2004).

1996

GR 69/1996 on the implementation of the public's right and obligation, form and mechanism to participate in spatial planning (*pelaksanaan hak dan kewajiban, serta bentuk dan tata cara peran serta masyarakat dalam penataan ruang*)

Ministry of Forestry Decree 173/Kpts-II/1996 (TGHK).

Ministry of Home Affairs Decree 19/1996 *tentang pedoman koordinasi penataan ruang daerah tingkat I dan tingkat II* as amended by 147/2004 (*pedoman koordinasi penataan ruang daerah*).

West Java PR 2/1996 on protected areas (*kawasan lindung*)

East Java PR 4/1996 (Provincial Spatial Planning-RTRW Propinsi)

Purwakarta DR 47/1996 (RTRW Purwakarta)

Subang DR 28/1996 (RTRW Subang)

Bandung District Regulation (DR) 4/1996 on land use planning permit (*izin perencanaan penggunaan lahan*).

Cirebon DR 13/1996 (RTRW Cirebon)

1997

The Environmental Management Act (23/1997)

GR 6/1997 as amended by GR 3/2008 (*tata hutan dan penyusunan rencana pengelolaan hutan serta pemanfaatan hutan*)

GR 24/1997 on land registration.

GR 47/1997 (on the national spatial planning (*rencana tata ruang wilayah nasional*))
The Environmental Management Act (23/1997)

Ministry of Agraria/Head of NLA Decree 19-VIII-1997 dated 4 September 1997 on the revocation of the letter issued by the Head of the Agrarian Inspectorate of West Java Decree of 1961 regarding the granting of land under an ownership title covering an area of 84.21 hectares (the total area awarded to those ex-soldiers).

PD 3/1997 (on the determination of Jonggol as Indonesian's future capital)

West Java PR 12/1997 on the construction of building on riversides and around springs (*pembangunan di pinggir sungai dan sumber air*)

Indramayu DR 1/1997 (RTRW Indramayu)

Cianjur DR 7/1997 (RTRW Cianjur)

1998

People's Consultative Assembly (PCA) Decree 2/1998 (Broad Guidelines of State Policies).

PCA 11/1998 on the recommendation of policy direction to the removal and prevention of KKN (corruption-collusion-nepotism).

PCA Decree 17/1998 on Human Right

GR 68/1998 (management of nature conservation areas).

Presidential Instruction 22/1998 (*tentang penghapusan kewajiban memiliki rekomendasi instansi teknis dalam permohonan persetujuan penanaman modal*)

Presidential Instruction 23/1998 (*tentang penghapusan ketentuan kewajiban memiliki surat persetujuan prinsip dalam pelaksanaan realisasi penanaman modal di daerah*).

State Minister of Environment/Head of the Environmental Impact Monitoring Board Decree Kep-35/MenLH/12/1998: approval of the Environmental Impact Assessment, Regional Environment Management Development Plans (*Persetujuan Analisis Dampak Lingkungan, Rencana Pengelolaan Lingkungan Regional Pembangunan Kawasan Bandung utara Kabupaten Bandung dan Kotamadya Bandung. Propinsi Jawa Barat oleh Gubernur/Kepala Daerah Tingkat I selaku Koordinator Pemrakarsa*).

The Ministry of Environment Decree. Kep-35/MenLH/12/1998) containing general guidance on how to develop the Puncut area.

The Ministry of Environment Decree/Head of the Environment Impact Monitoring Board (Kep-35/MenLH/12/1998) on the approval of the environment impact analysis, regional environment management and monitoring plan for the development of the North Bandung Area.

The Ministry of Home Affairs Decree 9/1998 on public participation in spatial planning

Bandung DR 14/1998 on the construction of buildings in Bandung (*Bangunan di Wilayah Kotamadya Bandung*).

Bandung DR 25/1998 on land use determination permit (*izin peruntukan penggunaan tanah*)

Bandung Municipal Regulation (DR) 31/1998 as amended by 5/2002 on retribution for the use of the district's assets and performing cut and fill operation (*retribusi pemakaian kekayaan daerah dan pematangan tanah*)

Cianjur District Regulation 5/1998 (district spatial planning-RTRW Kabupaten)

1999

PCA Decree 4/1999 (Broad Guidelines of State Policies 1999-2004)

Law 28/1999 on the Management of the State free from Corruption, Collusion and Nepotism (*Penyelenggara Negara yang Bersih dari Korupsi, Kolusi dan Nepotisme*)

Law 39/1999 on Human Rights (*Hak Asasi Manusia*).

Forestry Law 41/1999

GR 27/1999 on the Environmental Impact Assesment (analisis mengendai dampak lingkungan)

GR 30/1999 on *Kawasan Siap Bangun* (area prepared for construction) and *Lingkungan Siap Bangun* (environment prepared for construction).

GR 80/1999 on ready to use residential areas or environment (*Kawasan Siap Bangun dan Lingkungan Siap Bangun yang Berdiri Sendiri*).

PD 114 of 1999 (Spatial Planning of Bogor-Puncak-Cianjur (Bopunjur) area).

Ministerial Regulation (Peraturan Menteri Agraria/Kepala BPN 5/1999 concerning guidelines to resolve problems of ulayat rights of adat communities/*pedoman penyelesaian masalah hak ulayat masyarakat hukum adat*)

Minister of Agraria/head of the NLA attachment letter dated 10 February 1999 to Regulation 2/1999.

Ministry of Agraria/Head of NLA Regulation 9/1999 on the procedure for the granting and cancellation of rights on state land and the right to manage (*tata cara pemberian dan pembatalan hak atas tanah Negara dan Hak Pengelolaan*)

Ministry of Agraria/Head of NLA Regulation 2/1999 (*tentang Izin Lokasi*).

Peraturan Menteri Agraria/Kepala BPN No. 2 tahun 1999 tentang izin lokasi

Ministry of Agraria/Head of NLA Regulation 2/1999 on site permits

Ministry of Agraria/Head of the NLA Regulation No. 2/1999 (on site permit).

District of Sukabumi (DR) 10/1999 (RTRW Sukabumi)

District of Tasikmalaya (DR) 8/1999 (RTRW Tasikmalaya)

Supreme Court Regulation (*peraturan MA*) 1/1993 jo. 1/1999.

Mayor of Bandung Decree 170/1999 on the procedure to process site permit applications.

Mayor of Bandung Decree 170/1999 on the procedure to obtain site permit as implementation of Ministry of Agraria/Head of NLA Regulation 2/1999 on site permit (*tata cara pemberian izin lokasi dalam rangka pelaksanaan*

Mayoral Decree (Keputusan Walikota Kepala Daerah Tingkat II Bandung) 170/1999 (on the process of issuing site permit to implement Ministry of Agraria/Head of BPN regulation 2/1999 on the procedure to obtain a site permit (*tatacara pemberian izin lokasi dalam rangka pelaksanaan PerMenAg/kepala BPN.2/1999*).

2000

PCA Decree 3/2000 on the Formal Legal Sources and Hierarchy of Law (*TAP MPR III/MPR/2000 tentang Sumber Hukum dan Tata*)

Law 23/2000 (establishment of the Province of Banten).

Law 25/2000 on the national development program (*program pembangunan nasional/propenas*)

GR 25/2000 on the scope of authorities of the central government and the province as autonomous region (*PP 25/2000 tentang Kewenangan Pemerintah dan Kewenangan Propinsi sebagai Daerah Otonom*).

GR 84/2000 on the directives on the establishment of regional government services and offices (*pedoman organisasi perangkat daerah*).

GR 129/2000 on the requirement to establish and criteria for the establishment, abolition and the joining of regions (*persyaratan pembentukan dan criteria pemekaran, penghapusan, dan penggabungan daerah*)

Presidential Decree No. 64 of 2000.

Presidential Decree 96/2000 as amended by 118 (2000): foreign investment negative list (*daftar investasi negative*).

Presidential Decree 98-118 of 2000 (amended list for investment) and other implementing regulations as elaborated by the Investment Coordinating Board at the central and regional levels.

Presidential Decree 4/2000 on recommendations for the implementation of regional autonomy

Bandung Major's Decree 593.82/SK.225-Yantap/2000 regarding the award of *izin lokasi* for the development of an integrated tourism area "Bukit Dago Raya" to PT. DUSP, dated 18 March 2000.

Bandung Municipality Regulation (DR) 5/2000 *tentang Pola Dasar Pembangunan Daerah Kota Bandung 2000-2004*,

Bogor District Regulation 17/2000 (RTRW Kabupaten Bogor)

Recommendation Letter 660.1/13A-Bapedalda (dated 8 February 2000).

Recommendation Letter 643/317.4-Bappeda (dated 4 March 2000)

Supreme Court Decision 512 K/TUN/2000; Administrative High Court Decision (22/B/1999/PT.TUN-Jakarta, 17 December 1999); Administrative Court in the first instance (05/G/1998/P.TUN. Bdg (13 August 1998) (with judges: Paulus E. Lotulung; Widayatno Sastroharjono and Titi Nurmala Siagian).

Supreme Court Decision 92 K/TUN/2000 (with judges: Hj. Asma Samik Ibrahim; Benjamin Mangkoedilaga and Laica Marzuki).

2001

The People's Consultative Assembly's (PCA) Decree 9/2001 (9 November 2001) re. Agrarian Reform and Management of Natural Resources (*Pembaruan Agraria dan Pengelolaan Sumber Daya Alam*).

Presidential Decree 10/2001 (implementation of regional autonomy in the field of land policy/law)

Presidential Decree 62/2001;

Presidential Decree 103/2001);

Presidential Decree 127/2001 on economic activities reserved for small-middle scale businesses (*bidang-bidang yang dicadangkan untuk UKM*) and business activities declared open for middle large-scale business with the obligation to form partnerships with small scale businesses (*bidang yang terbuka untuk usaha menengah dan besar dengan kewajiban bermitra*).

Decree 5/2001 on implementing the recognition of municipal/district attributed or delegated authorities (*tentang Pelaksanaan Pengakuan Kewenangan Kabupaten/Kota*).

Bandung District Regulation (DR) 1/2001 (RTRW; 2001-2010).

Bandung DR 9/2001 *tentang Program Pembangunan Daerah (Propeda) Kota Bandung 2000-2004*.

Bandung Mayoral decree (*Surat keputusan Walikotamadya Kepala Daerah Tingkat II Bandung*) 2/2001.

Bandung municipal regulation (*Peraturan Daerah Kota Bandung*) 2/2001 on the authorities the Bandung municipality possesses as an autonomous region (*tentang Kewenangan Daerah Kota Bandung sebagai Daerah Otonom* (7 March 2001).

District of Bandung Regulation (DR) 12/2001 (RTRW Kabupaten Bandung)

District of Bandung Regulation (DR) 1/2001 (RTRW Kabupaten Bandung).

Mayor of Bandung Decree 593/Kep. 434-BagHuk/2001 (determination of the area designated for land consolidation at the sub-district of Cidadap, Ciumbuleuit) dated 6 August 2001).

2002

PCA Decree 6/2002

Law 28/2002 on the Construction of Buildings

GR 34/2002 on forest planning, exploitation and use (*tata hutan dan penyusunan rencana pengelolaan hutan, pemanfaatan hutan dan penggunaan kawasan hutan*).

Ministry of Public Work Decree (KepMenKimpraswil) 327/Kpts/M/2002 on 6 guiding principles for spatial management (*penetapan enam pedoman bidang penataan ruang*).

Bandung DR 4/2002 (amendment to DR 25/1998 on land use determination permit)

Mayor of Bandung Decree 593/Kep.1068-Huk/2002; establishment of land consolidation team for Puncut/Ciumbuleuit Area).

Municipality of Bandung Regulation (Perda Kota Bandung) 27/2002 on the Nuisance Permit and Business Permit (*izin gangguan dan izin tempat usaha*).

2003

PCA Decree 5/2003

Law 12/2003 (general election for parliament members and regional representatives);

Law 22/2003 (on the status and position of the People's Consultative Assembly, Parliament, Regional Representative Body (*dewan perwakilan daerah*) and regional parliaments);

Law 23/2003 (general election to choose president and vice president).

Law 24/2003 (the Constitutional Court)

GR 8/2003 (amendment to GR 84/2000 on the directives on the establishment of regional government services and offices) PCA Decree 5/2003 (recommendations to State Organs)

GR 30/2003

Presidential Regulation 34/2003 on national policy in the land sector (*kebijakan nasional di bidang pertanahan*)

Presidential Decree 34/2003 (distribution of land authorities between the NLA and the Districts).

Presidential Decree 34/2003 (national policy on land policy/law).

Head of the NLA's Decision 2/2003 on norms and standard mechanisms for the performance of delegated land authorities to the districts (*tentang Norma dan Standar Mekanisme Ketatalaksanaan Kewenangan Pemerintah di Bidang Pertanahan yang Dilaksanakan oleh Pemerintah Kabupaten/Kota*).

West Java Provincial Regulation 2 of 2003 on Regional Spatial Planning)

Decree of the Head of the NLA 2/2003 on the norms and standard mechanisms for the implementation of the central government's authority in land affairs as performed by (*yang dilaksanakan oleh*) the regional governments.

District of Cimahi Regulation (DR) 23/2003 (RTRW Kota Cimahi).

Mayor of Bandung Decree No. 595.82/Jep.1132-Huk/2003 on the site permit granted to PT. Bumi Antapani Mas (*pemberian izin lokasi untuk keperluan pembangunan perumahan atas nama Pt. Bumi Antapani Mas beralamat di Jl. Cicalengka Raya no. 27 Bandung seluas $\pm 55/000 m^2$ (± 5.5 ha) terletak di Kelurahan Antapani, Kecamatan Cicadas Kota Bandung*).

Municipal Regulation (MR-Semarang) 16/2003 (RTBL Semarang).

Agreement made by governors in Indonesia at a national workshop organized by the National Spatial Planning Coordinating Board (*keepakatan Gubernur seluruh Indonesia pada Rapat Kerja Nasional Badan Koordinasi Tata Ruang Nasional*), (Surabaya 14 July 2003).

2004

The People's Consultative Assembly's Decree 4/1999 (Broad Guidelines on State Policy 2004-2009).

Law 10/2004 on Law-making (*UU 10/2004 tentang Pembentukan Peraturan Perundang-Undangan*).

Law 9/2004 (amending Law 5/1986) on the Administrative Court (PTUN)

Law 10/2004 on the process of law making (*pembentukan undang-undang*).

Law 14/2008 on transparency of public information (*keterbukaan informasi publik*)

Law 25/2004 concerning the national development planning system (*sistem perencanaan pembangunan nasional*).

Law 32/2004 as amended by Law 8/2005.

Government Regulation 16/2004 on land use (*penatagunaan tanah*).

GR 16/2004 on land use management (*penatagunaan tanah*).

GR on land use (16/2004; *penatagunaan tanah*).

Ministry of Culture and Tourism Decree KM.51/2004 and Ministry of Culture and Tourism Regulation PM.34/2008 on the protection of important national cultural objects or heritage (*pengamanan objek vital nasional di bidang kebudayaan dan pariwisata*).

Bandung Municipality Regulation (DR) 2/2004 on spatial planning of the city of Bandung (*rencana tata ruang wilayah kota Bandung*)

Joint declaration (Surat Kesepakatan Bersama) 31/2004; 23/2004, 21/2004; 650/Kep.521-Bappeda/2004; 23 of 2004) re. cooperation with regard to infrastructure management and development of the Bandung Metropolitan Area.

Perda No. 2/2004 on spatial planning of the city of Bandung (*rencana tata ruang wilayah kota Bandung*) dated 10 February 2004). In 2005, an effort to amend this Perda had already begun. In 2006, the municipal government issued Perda No.3/2006 on the amendment of Perda No. 2/2004.

The Memorandum of Understanding of 26 July 2004 by the Governor and the Mayor and District Head of respectively the municipalities of Bandung and Cimahi and the districts Bandung and Sumedang.

2005

Presidential Regulation (PerPres) 36/2005 (amended by PerPres 65/2006) on land acquisition for development in the public interest.

Presidential Regulation 7/2005 on middle term development plan 2004-2009 (*rencana pembangunan jangka menengah 2004-2009*).

Presidential Decree 36/2005 (amended by PD 65/2006)

Forestry Ministerial Regulation P.13/Menhut-2/2005, concerning the Organization and Management of the Forestry Planning Agency

PT. DUSP SIPPT as issued by the Bandung City Planning Service (*Dinas Tata Kota*) (503.640/3095/DTK/XII/2005 dated 8 December 2005).

Mayor of Bandung Permit (*Surat Izin Walikota Bandung*) 593/01-DBM/2005 allowing Fandam Darmawan to cut and fill land acquired by PT. DUSP (*Izin Pematangan Tanah/Lahan a.n. Fandam Darmawan*) (13 January 2005).

Ministry of Home Affairs Circular Letter 050/2020/SJ dated August 11, 2005 addressed to Governors, Heads of the Provincial Parliaments, Mayors and District Heads and local parliaments.

Bandung Permit (Surat Izin Walikota Bandung) 620/06-DBM/2005 dated 13 January 2005.

Bandung Mayoral Decree no. 640/Kep 641-Huk/2005, dated 12 August 2005 on the environmental feasibility of the development of an integrated tourism area as a new form of environmental impact assessment (*kelayakakan lingkungan pembangunan kawasan wisata dan wisata terpadu punclut sebagai bentuk izin amdal baru*).

2006

Presidential Regulation 10/2006 on the National Land Agency (*Badan Pertanahan Negara*).

Pursuant to Ministry of Public Works Regulation (MPWR) 11A/2006.

Bandung Municipality Regulation 3/2006 on the amendment of Bandung DR 2/2004

Governor of West Java Decree No. 611.1/kep.124-sarek/2006

Mayor of Bandung decree No. 593.82/Kep.158-Huk/2006 (*persetujuan penetapan lokasi pengadaan tanah untuk kepentingan pengembangan sarana olahraga terbuka di lingkungan kampus politeknik manufaktur Bandung*)

Mayoral Regulation (*Peraturan Walikota*) 981/2006 on the detailed spatial planning of the development area of Cibeunying (*Rencana Detail Tata Ruang Kota (RDTRK) Wilayah Pengembangan Cibeunying*)

Mayoral Regulation 685/2006 on the detailed planning for the development area of Gedebage (RDTRK *Wilayah Pengembangan Gedebage*).

2007

PCA decree “*tentang penyelenggaraan Otonomi Daerah; Pengaturan, Pembagian, dan Pemanfaatan Sumberdaya Nasional yang Berkeadilan; serta Perimbangan Keuangan Pusat dan Daerah dalam Kerangka Negara Kesatuan Republik Indonesia*”.

Law 12/2007 on the establishment of the West Bandung District (*pembentukan Kabupaten Bandung Barat*).

Law 17/2007 (*Rencana Pembangunan Jangka Panjang/RPJP* (Long Term Development Planning) of 2005-2025

GR 78/2007 (on the procedure for establishment, abolition and joining of regions (*tentang tata cara pembentukan, penghapusan dan penggabungan daerah*))

Decree of the President of the Supreme Court of the Rep. of Indonesia, 019/KMA/SK/II/2007 dated 19 February 2007 concerning the appointment of a research team to conduct evaluation on law making through Jurisprudence (*penunjukan tim penelitian pembentukan hukum melalui yurisprudensi*).

Joint Circular letter (Ministry of Home Affairs & Bappenas/State Ministry of National Development Planning) 0008/M.PPN/01/2007 – 050/264/A/SJ concerning technical directives to perform *musrenbang* in 2007 (*teknik penyelenggaraan musrenbang tahun 2007*).

Ministry of Home Affair Decree 050-187/Kep/Bangda/2007 concerning the guidance to evaluate the implementation of the development planning consensus (*pedoman penilaian dan evaluasi pelaksanaan penyelenggaraan musyawarah perencanaan pembangunan*).

Ministry of Home Affair Regulation 1/2007 on urban-open green area planning and management (*penataan ruang terbuka hijau kawasan perkotaan*)

Ministry of Public Works Decree 390/Kpts/M/2007

MAR 3/2007 on the implementation of PR 36/2005 as amended by PR 65/2006.

SPL 26/2007

2008

GR 2/2008: “non tax tariff stemming from the use of forested areas for non-forestry use” (*jenis dan tarif atas jenis penerimaan negara bukan pajak yang berasal dari penggunaan kawasan hutan untuk kepentingan pembangunan di luar kegiatan kehutanan yang berlaku pada departemen kehutanan*).

GR 26/2008 (the national spatial plan)

President Regulation 54/2008 on the management of Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak and

Ministry of Home Affair Regulation 1/2008 on directives for urban planning (*pedoman perencanaan kawasan perkotaan*).

Ministry of Home Affair’s Regulation 28/2008 on the procedure to evaluate draft regulations on provincial and district spatial planning (*tentang tata cara evaluasi rancangan peraturan daerah tentang rencana tata ruang daerah*)

Letter nos. S.314/Menhut-VII/2008 and 182/044.2/Kum/Din (perhutani) concerning the dispensation granted to use forest land to start construction work of the Jatigede dam (*dispensasi pemanfaatan kawasan hutan untuk dimulainya pelaksanaan pembangunan waduk jatigede*).

Peraturan Daerah Provinsi Jawa Barat No. 1/2008 tentang Pengendalian Pemanfaatan Ruang Kawasan Bandung Utara (control over land use of the North Bandung Region).

West Java Governoral Regulation 21/2009 on the technical guidance on the implementation of Provincial Regulation 1/2008.

West Java Provincial Regulation 1/2008 on the Monitoring of Land Use in the North Bandung region (*Pengendalian Pemanfaatan Ruang Kawasan Bandung Utara* no. 1/2008)

District of Bandung Regulation (DR) 3/2008 (RTRW Kabupaten Bandung)

Cianjur (*penataan kawasan Jakarta, Bogor, Depok, Tangerang, Bekasi, Puncak and Cianjur*).

Decree of the Head of the Sumedang District 503.PL/SK.015-PTPSP/2008 on the determination of location for resettlement.

2009

Law 25/2009 on public service (*pelayanan publik*).

Public Works Regulation 11/ppt/m/2009 pertaining to directives addressed to provinces and districts on how to formulate their respective general and detailed spatial plans (*tentang pedoman persetujuan substansi dalam penetapan rancangan peraturan daerah tentang rencana tata ruang provinsi dan rencana tata ruang kabupaten/kota beserta rencana rincinya*).

APPENDIX II

LIST OF INTERVIEWS/PERSONAL COMMUNICATIONS

Agus Setiawan (Setra Duta Regency), August-September 2004.

Adrian, working at the estate/town management of Kota Baru Bumi Parahyangan, 20 April 2005.

Agustinus Pohan, resident of Dago Resor Pakar, 25 July 2006.

Ani Widayani from the West Java Provincial Development Planning Board, 2 November 2004.

Ariadi Suryo Ringoringo, from the Poor People's Association/Serikat Rakyat Miskin Indonesia, 28 January 2009.

Asep Warlan Yusuf, 8 October 2005; 27 August 2005, 20 August 2006.

Djamhari, former Head of Bekasi District (1995-1999), 25 May 2005; 10 August 2005.

Dondy, a technical consultant (planner) for PT. Inaka Mulya, 12 January 2010.

Eric, The head of the legal service of the Bandung municipality, 23 May 2010.

Ibu Roros, long-time Kampong Cipicung resident, 20-21 June 2004.

Joshua Wahyudi, 30 July 2005.

Koerniatmanto, a professor in law at Unpar, 20 August, 2006.

Mrs. Sumi from sub section of planning, city planning service, 17 August 2005.

Nandang, from the Dinas Tata Kota Pemkot Cimahi, 25 February 2004.

Neneng, working at the Bappeda Bandung, 20 July 2004.

Reny SH, notary public, working in Bandung, 1 August 2005.

Rosiman Karmono, from the city planning service, Bandung, 10 August 2004.

Rudy Gandakusuma, Legal Officer at the West Java Provincial Government, 10 August 2005.

Setiawan, Bandung, 2 September 2005.

Soemardjito, NLA Jakarta, 17 February 2009; 25 March 2009.

Suharsono, West Java Provincial Bapedalda (Environmental Impact Monitoring Board), 15 August 2005; 15 September 2004.

Taufan Suratno, DPKLTS, 20 August 2004; 8 August 2007.

Teddy Kardin, 22 June 2005.

Tigor Sinaga, the vice head of West Java branch of Real-Estate Indonesia, 25 May 2005.

Tita Pathi, from the Directorate of Public Works for the West Java Province, 16 May 2005.

Wisandana, Environmental service of the West Java Province, 2 September 2005

CURRICULUM VITAE

Tristam Pascal Moeliono was born in Bandung, Indonesia, on 2 February 1965. He grew up and studied law in the same city, completing his graduate study at the Faculty of Law of the Catholic University of Parahyangan in 1989. He entered into legal practice in Jakarta for several years before, in 1995, he enrolled in the post-graduate programme of the University of Indonesia and completed his LL.M at the post-graduate programme of the Faculty of Law, University of Utrecht, the Netherlands (2000). Five years later, and after having taken up a position as as lecturer at the Faculty of Law of Parahyangan University he started his PhD research as a member of the Indonesia-Netherlands Study on Decentralization, Agrarian Reform and Rule of Law formation (INDIRA) project at the Van Vollenhoven Institute at Leiden University. This project was executed in the framework of the Scientific Programme Indonesia Netherlands and sponsored by the Dutch Royal Academy of Sciences. At present Tristam is still employed as lecturer at the Parahyangan University. He is married to Widati Wulandari, a lecturer at the neighbouring University of Padjadjaran Bandung and they have one daughter, Kayla Btari Laksmi.