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

Moeliono, T.P.

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 x 10^6 Km^2 archipelagic waters, 0.3 x 10^6 Km^2 Territorial sea, 2.7 x 10^6 Km^2 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 all.,"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, Tanggerang 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 footprint[135] 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, Kementrian 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. Ress. 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 Suprapto, 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 Ethiophia and Indonesia" in Emilian Kavalski and Magdalena Żŏlkoŝ (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 GHBN) 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 Konstitutional 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.

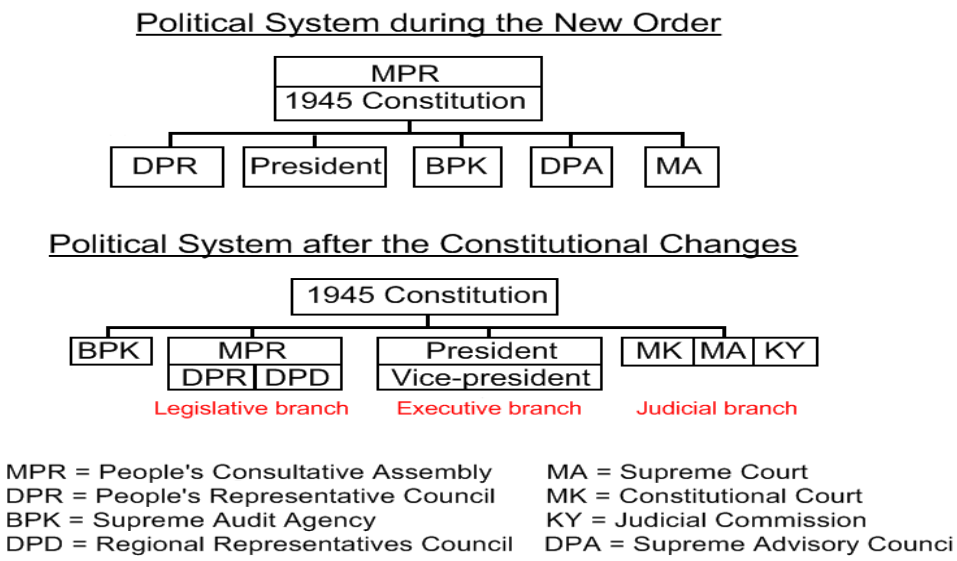

Figure 2-2: State Organizational Structure

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 that 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 Kartasasmita, (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 resources[165] 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 system[170]:

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

Substance	RGL 5/1974	RGL 22/1999	RGL 32/2004
Government structure	Hierarchical 1st tier Provincial Government; 2nd 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 (*kanwil*) and those	In the hand of the regional autonomous government, notably the districts *Kanwil* and *Kandep* 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 (*kandep*).		
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 Bünte, "Indonesia's protracted decentralization: contested reforms and their unintended consequences" in Marco Bünte & 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 Confict 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 "Waspadai Upaya Pemekaran Wilayah di Jabar" (Pikiran Rakyat, 30 Mei 2009).

2.4.4. The (formal) Legal System[179]

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	(*Undang-Undang Dasar (Diamendemen)*
2	Parliament Enacted Law/Government Regulation in Lieu of Legislation	(*Undang-Undang / Peraturan Pemerintah Pengganti Undang-Undang*
3	Government Regulation	*Peraturan Pemerintah*
4	Presidential Decree	*Keputusan Presiden, since 2004 Peraturan Presiden*
5	Regional Regulation	*Peraturan Daerah* 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. *peratuan daerah propinsi* (provincial regulation) 2. *peraturan daerah kota/kabupaten* (district/municipality regulation), and 3. *peraturan desa* (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, Beginselen 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.