Tenure Security for Indonesia's Urban Poor : a socio-legal study on land, decentralisation, and the rule of law in Bandung

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3 State rights and individual obligations

A general overview of Indonesian land law

3.1 Introduction

As discussed in Chapter 2, as part of colonial legal dualism, from the early years of colonial rule until 1960, the Indonesian population residing in the autonomous villages that had been engulfed by the expanding city could apply their own customary or *adat* law, administration, and administration of justice. This *adat* law was supposedly of a traditional, customary, unwritten, and often communal character.[1] It could also be applied in relation to land, which in the autonomous villages qualified as 'indigenous land'. Land outside the autonomous villages was qualified as 'European land', which was subject to the provisions of the Civil Code of the Dutch East Indies ('Burgerlijk Wetboek voor Nederlandsch-Indië').

The Indonesian government believed that the dualist system, meant to serve colonial interests, had failed in creating legal tenure security. Immediately after the transfer of sovereignty, it therefore started to draft a bill on land, water, and airspace. Article 33(3) of the 1945 Constitution formed the point of departure of this effort. It states that land, water, and the natural resources contained therein shall be under the authority of the state and be used to the greatest benefit of the people.[2] Article 33(5) stipulates that the provisions of this article (including Sub-clause 3) must be implemented by act of parliament (*undang-undang*).

In 1960, after twelve years of preparations (Tan 1977:1), the Indonesian government finally enacted the law implementing Article 33(3) of the 1945 Constitution: the Basic Agrarian Law. The word 'basic' (*dasar*) indicates that the BAL lays the foundation for a system of agrarian law; its general principles should be implemented by other laws and regulations.[3] The word 'agraria' does not imply that the law is about agriculture or agricultural land, but it is a term from colonial times that refers to land, water, and air-

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1 *Adat* is Arabic for custom. For Indonesia, *adat* law was defined during the colonial era as all customs with legal consequences, without implying that the latter and other *adat* can be strictly (and easily) divided (Snouck Hurgronje 1893:16). Although Snouck Hurgronje introduced the term (Slaats 2000:49), *adat* law became well known by the contributions of Van Vollenhoven.

2 In Indonesian this section reads: *Bumi dan air dan kekayaan alam yang terkandung di dalamnya dikuasai oleh negara dan dipergunakan untuk sebesar-besar kemakmuran rakyat*. The Elucidation to Art. 33 explained that land, water and the natural resources must be under the power of the state because they form the basis for the people's welfare.

3 Compare Explanatory Memorandum, General Elucidation, pt. I BAL.

space.[4] To this day, the BAL provides the general framework of Indonesian land law.

As discussed in Chapter 1, the success of approaches to the enhancement of tenure security depends on enforceability of property and/or human rights. This requires a rule of law environment, in which urban poor are protected against arbitrary behaviour by the state or private parties. In order to be able to answer the main questions addressed this book, this chapter therefore gives a general overview of Indonesian land law in the context of Indonesia's changing rule of law environment. It thus forms the point of departure for a more detailed legal and empirical review in later chapters.

Following the three political periods it addresses, this chapter comprises five sections. The next section focuses on the implementation of land law during Guided Democracy (*Demokrasi Terpimpin*, 1957-1965), Section 3.3 on the implementation of land law during the New Order (*Orde Baru*, 1965-1998), and Section 3.4 on the implementation of land law during the Post-New Order (since 1998), after which the chapter concludes.

3.2 Guided Democracy: land law in a state of revolution

A general overview of Indonesian land law requires first a few words on the 1945 Constitution, on which the BAL is based, and Guided Democracy, the prevailing political ideology during the period in which the BAL was enacted and was first implemented.

Promulgated on 18 August 1945, the day after the proclamation of independence, the 1945 Constitution was Indonesia's first constitution. It was a vague and ambivalent document. The Constitution consisted of no more than 37 articles – which made it the world's shortest constitution. In addition, it was based on two contradictory notions of state ordering, namely that of a 'Rechtsstaat' (in Indonesian: *negara hukum*) and of a so-called 'integralist state'.[5] The exact meaning of the 'integralist state' concept is unclear, but at least it represents a strong state, in which there can be no dualism between the state and the people, as they form an organic unity (Mulya Lubis 1999:173). Formally, the latter notion was dropped. So the General Elucidation to the 1945 Constitution indicated that Indonesia

4 Compare Art. 5 BAL.

5 This ambivalence was the result of a controversy between several members of the Constitutional Committee: Yamin and Hatta, who were supporters of a 'Rechtsstaat' notion, and Soepomo and Soekarno, who had a preference for the notion of an 'integralist state'. For a discussion of the historical background of this controversy, please refer to Bourchier 1999. There were also supporters in the committee for an Islamic state, an issue that does however not deserve much attention in the context of this book.

formed a 'Rechtsstaat', not a 'Machtsstaat'.[6] However, the 1945 Constitution gave no definition of the 'Rechtsstaat' concept.[7] Worse, various provisions were more in line with the notion of the 'integralist state', for instance those on the position of the executive branch, which was clearly dominant.[8] Reference to human rights was limited.[9]

When in 1949 the Dutch government finally granted independence to the Republic of the United States of Indonesia, the 1945 Constitution was replaced by the Federal Constitution (*Konstitusi Republik Indonesia Serikat*). In 1950, the Federal Constitution was again replaced by the Provisional Constitution (*Undang-Undang Dasar Sementara*), in which the influence of European ideas on democracy was apparent (Lindsey 1999b:15). The enactment of the Constitution indeed marked the beginning of a period of constitutional democracy. In 1955 the first parliamentary elections were organised. As Lev concluded, there was a balance between state and society and there were limits on public authority in these years (Lev 2007:239).

The period of constitutional democracy was short-lived though. In 1957, growing political unrest in the regions (such as the *Darul Islam* rebellion in West-Java, discussed in Chapter 2), among political parties as well as between the political parties/civilian government and the army formed a reason – or an excuse – for President Soekarno to declare martial law. This step marked the beginning of 'Guided Democracy', which was followed by three major political decisions. First, the imposition of a mutual cooperation (*gotong royong*) cabinet of the major parties that was advised by a council of functional groups (youth, workers, peasants, religions, regions, etc.), strengthening the position of the President, limiting the influence of political parties, and allowing for military participation. Second, the introduction of the 'Middle Way of the Army' (later called the *dwifungsi* or dual-function of the armed forces), on the basis of which the army would not only have a role in national defence, but also a socio-political role. Two years later, in 1959, the transition to Guided Democracy was completed, when President Soekarno reintroduced the 1945 Constitution by decree (Lev 2007:239-40).

According to President Soekarno, the new form of government was meant to revive the spirit of the revolution, support social justice, and retool the state apparatus in the name of the ongoing revolution (Ricklefs 2001:323). These aims formed an excuse to sweep away legalism. Soekarno

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6 In Indonesian, the General Elucidation reads "*Indonesia ialah negara yang berdasar atas hukum* (rechtsstaat), *tidak berdasarkan atas kekuasaan belaka* (machtsstaat)."

7 The 1945 Constitution did refer to separate elements of the Indonesian 'Rechtsstaat', such as regarding the independence of the judiciary. So according to the Elucidation to Art. 24-25, "Judicial authority is an independent authority, in the sense that it is beyond the influence of government." It is not clear what is meant by independent authority, which allowed for various interpretations of the 'Rechtsstaat' notion.

8 See for instance Art. 5, 12, and 22 of the 1945 Constitution.

9 See Art. 27, 28, 29, 31, 34 of the 1945 Constitution.

had a disregard for lawyers, which he considered to be instrumental in maintaining vested interests. What the country needed, was revolutionary law (*hukum revolusi*), he believed.

Under these circumstances, the legal system gradually collapsed. Although the colonial criminal code created enough room to silence opposition, Soekarno issued directives on political activity in 1963, stipulating that almost any political activity required the permission of the authorities, and on anti-subversion, which set a maximum gaol term of seven years for a wide range of activities that might be considered subversive, while denying suspects normal procedural protections.[10] With the enactment of laws in 1964 and 1965 that empowered the President to interfere in judicial matters, even the separation of powers fell victim of Soekarno's revolutionary ideas.[11] Besides, corruption started to affect the courts required impartiality and limited their access. It was the beginning of a phenomenon that, as will be discussed in Section 3.3 below, would become widespread in later years, also outside the judiciary (Lev 2007:240-1).

Under Guided Democracy the Indonesian government undertook a few major substantive law reforms. These reforms aimed at ending the colonial and feudal system and instead imposing a national and socialist economic order. The natural resources sector, including land, was an important target of the reforms. In 1960, the reforms resulted in the enactment of the BAL.

Enacted in the period of Guided Democracy, the BAL is a product of its time. It is based on anti-colonial, nationalist, and socialist principles.[12] The BAL is as full of aspirations and symbolic meaning as a number of its key provisions are vague and ambivalent. The BAL stresses that land has a social function (*fungsi sosial*) and that particularly vulnerable groups should be protected.[13] It therefore grants the state a strong authority in land matters. This authority finds its basis in the state's right of control (*hak menguasai dari negara*), which extends to all land, water, and airspace, including the natural resources contained therein.[14] This right allows the state to 'hold the land in custody' as the representative of the Indonesian people (Gauta-

10 Presidential Directive No. 5/1963 on Political Activities (*Penetapan Presiden No. 5/1963 tentang Kegiatan Politik*); Presidential Directive No. 11/1963 on the Eradication of Anti-Subversive Activities (*Penetapan Presiden No. 11/1963 tentang Pemberantasan Kegiatan Subversi*).

11 Law No. 19/1964 on the Basic Principles of Judicial Power (*UU No. 19/1964 tentang Ketentuan-Ketentuan Pokok Kukuasaan Kehakim*) and Law No. 13/1965 on Justice in the Sphere of the General Courts and the Supreme Court (*UU No. 13/1965 tentang Pengadilan dalam Lingkungan Peradilan Umum dan Mahkamah Agung*).

12 Art. 5 BAL. For a general overview of the principles of the BAL please refer to: Harsono 2005:162-75.

13 Art. 6 and 11 BAL.

14 Art. 2 BAL.

ma & Harsono 1972). As long as the state has not granted any rights on state land, it holds a direct right of control over the land.[15]

Land matters are in principle under the authority of the central government. Within the framework of co-governance ('medebewind'), it can transfer the authority to exercise the state's right of control over land to the Provinces and the Districts/Municipalities. For these regional governments land can become a source of income.[16] Besides, the central government can grant a (state) management right (*hak pengelolaan*) to authority bodies, state companies, and regional companies.[17] This right is not explicitly acknowledged by the BAL, but is referred to in the General Elucidation.[18] It is further elaborated by Ministerial Regulations.[19]

The state's right of control allows the state to grant individual land rights (*hak-hak perorangan*), to limit these rights, or to revoke them. If the state grants individual land rights, it still holds an indirect right of control over the land. Rights the state can grant, comprise four primary rights: an ownership right (*hak milik*), long-lease right (*hak guna usaha*), construction right (*hak guna bangunan*), and usage right (*hak pakai*). Someone holding an ownership right can grant a lease right (*hak sewa*), which forms a secondary right.[20] These rights resemble the rights that could be held on European land during the colonial period, but are not the same.[21] For instance, the BAL makes no distinction between real rights (rights *in rem*) and relative rights (rights *in personam*), which are indeed unknown in the *adat* law on which the BAL is claimed to be based (Tan 1977:36-7).

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15 In this context a distinction is often made between a broad conception and a narrow conception of the state right of control. For a narrow definition see for instance Art. 1(3) of GR No. 24/1997 on Land Registration (*PP No. 24/1997 tentang Pendaftaran Tanah*) (Harsono 2005:476-7).

16 Art. 2 BAL and Elucidation in conjunction with Art. 33(3) of the 1945 Constitution. It should be noted, however, that the state cannot lease out land, since it is not the owner of the land (Elucidation Art. 44 and 45 BAL).

17 The institution holding a management right can in turn grant individual land rights to third parties. Third parties can obtain an ownership right, construction right, or usage right to the land. State land should not be confused with land to which government institutions hold a usage right. Instead of a direct right to avail, it then holds a private land right. Such land forms an asset of the state, which falls under the responsibility of the Minister of Finance (Harsono 2005:271-80).

18 Section II, under 2 BAL.

19 See Minister of Home Affairs No. 5/1974 on Provisions on the Disposal and Provision of Rights for the Needs of Companies (*Permen Dalam Negeri No. 5/1974 tentang Ketentuan-Ketentuan mengenai Penyediaan dan Pemberian Hak untuk Keperluan Perusahaan*); Regulation of the Minister of Home Affairs No. 1/1977 on the Procedure for the Request and Settlement of Granting Rights on Land Plots with Management Rights and their Registration (*Permen Dalam Negeri No. 1/1977 tentang Tatacara Permohonan dan Penyelesaian Pemberian Hak atas Bagian-Bagian Tanah Hak Pengelolaan serta Pendaftarannya*).

20 Other secondary rights that can be granted are the right to reclaim land (*hak membuka tanah*) and the right to collect forest products (*hak memungut-hasil-hutan*) (Art. 16 BAL).

21 See also Elucidation Art. 16 BAL.

In order to secure individual interests, private rights are part of a 'truly Indonesian' unified system of land rights, of which, as will be further discussed in Chapter 4, the primary rights must be registered in a legal registry.[22] The BAL thus tries to bring an end to colonial dualism in land law.

While it is the objective of the BAL to create a unified system of land rights, it maintains one *adat* law figure: the community's right of avail (*hak ulayat* and its equivalents).[23] The legislator's wish to come to a unified system is obvious though: the community's right of avail is only acknowledged if apparently still existing and not contrary to the national interest and interests of the state, on the basis of the unity of the people, and if not contrary to higher state legislation (Haverfield 1999:51-4).[24]

The state can limit the exercise of land rights (and claims) on the basis of spatial planning, as will be discussed in further detail in Chapter 5. The central government is responsible for national planning, on the basis of which the regional governments can undertake regional planning, which is formalised by the enactment of bylaws. According to the BAL, such bylaws only become valid after the approval, with regard to Provinces, by the President, with regard to Districts/Municipalities, by the Governors (*Gubernur*), and with regard to Sub-Districts, by the District-Heads/Mayors (*Bupati/Walikota*).[25]

The state can revoke land rights if individuals (and families) hold too much land (land reform), or, as will be discussed in further detail in Chapter 6, if such revocation is in the public interest (*kepentingan umum*). In addition, land rights become forfeited if land qualifies as neglected land (*tanah terlantar*). In all cases, right holders are entitled to compensation.[26] As discussed in Chapter 2 and will also be discussed in further detail in Chapter 6, the state can also clear land if it is occupied without permission from the title holder.

In the first years after the enactment of the BAL, only few provisions of the law were implemented by other laws and lower regulations. Implementing legislation that was enacted included a government regulation in lieu of law on land reform, a government regulation on land registration, which will be discussed in further detail in Chapter 4, a law on the use of land without permission from the title holder and a law on the revocation of land rights, which will be discussed in further detail in Chapter 6.

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22 See Art. 23, 32, and 38, in conjunction with Art. 19 BAL.

23 For a discussion of the conception of *adat* law as a universal principle and specific *adat* rights acknowledged by the BAL, see Harsono 2005:176-218.

24 Art. 3 BAL. See also General Elucidation II (3), which notably explains that an *ulayat* community cannot simply refuse that the state develops its land to realise large projects for the purpose of increasing food production or transmigration. Indeed, on the basis of Art. 33(3) of the 1945 Constitution, the state has the right and the duty to exploit land to the greatest benefit of the people.

25 Art. 14 and Elucidation and General Elucidation, Sub II, under 8 BAL.

26 Art. 10; Art. 17 in conjunction with Art. 7; Art. 18 BAL.

Guided democracy did not lead to stability. In fact, the tensions between the Indonesian Communist Party (*Partai Komunis Indonesia* or PKI), the military, and religious organisations only grew stronger. The unlawful occupation of land with the support of the PKI, discussed in Chapter 2, contributed to these tensions. State initiated land reforms, in later years, were equally controversial. When in 1965 lower ranked military allegedly affiliated to the PKI staged a coup against the army's supreme command, General Soeharto, the highest in rank to survive the coup, seized the opportunity to stage a counter-coup, eliminating the PKI and eventually removing Soekarno from office. The accompanying massacre of an estimated 500,000-1,500,000 alleged communists have in part been connected to the land reforms in previous years (Cribb 1990).

3.3 The New Order: land law in a 'developmentalist' state

When in 1966 General Soeharto became the new President of the Indonesian Republic, there were strong hopes that the Indonesian 'Rechtsstaat' would be restored. Rhetorically, the Soeharto regime was indeed strongly committed to the rule of law.

The proclaimed goal of Soeharto and his so-called New Order regime was to build a modern, prosperous nation. He therefore adopted a 'developmentalist' approach to stimulate economic growth, focusing on state-led industrialisation, intensification of agriculture, and large scale exploitation of natural resources. So in 1967 and 1968, two laws were enacted on foreign and domestic investment respectively.[27] Economic objectives at the broadest level were enunciated by the Broad Outlines of Government Policy (*Garis-Garis Besar Haluan Negara* or GBHN) and the Five-Years Development Plans (*Rencana Pembangunan Lima Tahun* or REPELITA). The National Development Planning Agency (*Badan Perencanaan Pembangunan Nasional* or BAPPENAS) and the Regional Development Planning Agencies (*Badan Perencanaan Pembangunan Daerah* or BAPPEDA) at the provincial and district/municipal level would play a pivotal role in planning.[28]

27 Law No. 1/1967 concerning Foreign Investment (*UU No. 1/1967 Penanaman Modal Asing*) and Law No. 6/1968 on Domestic Investment (*UU No. 6/1968 tentang Penanaman Modal Dalam Negeri*). These laws were slightly revised by Law No. 11/1970 on the Revision and Extension of Law No. 1/1967 on Foreign Investment (*UU No. 11/1970 tentang Perubahan dan Tambahan UU No. 1/1967 tentang Penanaman Modal Asing*) and Law No. 12/1970 on the Revision and Extension of Law No. 12/1967 on Domestic Investment (*UU No. 12/1970 tentang Perubahan dan Tambahan UU No. 6/1968 tentang Penanaman Modal Dalam Negeri*) respectively.

28 For a (critical) assessment of the New Order 'developmentalist' approach, see Robison 1986:174-5; Hill 2000; Rosser 2002.

Economic growth required political stability. After having purged the country of alleged communists, Soeharto thus built a centralist regime of authoritarian rule with strong military backing. Centralism was confirmed by the enactment of the 1974 Decentralisation Law, which left the regions very limited authority.[29] The judiciary remained far from independent, also after the enactment of a revised law on judicial power in 1970, which in fact created new room for executive interference.[30] Political activity was further curtailed, culminating in the enactment of five laws on political organisation in 1985, prescribing all non-governmental organisations to be formally based on the *Pancasila*, thus creating a so-called '*Pancasila*-democracy', referring to the five principles forming Indonesia's state ideology.[31] As a result, the New Order was in fact just "a continuation of the model of guided democracy (by the executive) but without Soekarno's 'left-wing rhetoric'" (Lindsey 1999a:8). The 1945 Constitution proved a proper basis for this 'integralist' type of rule (Lindsey 1999b:17-8).[32]

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29 Law No. 5/1974 on the Principles of Government in the Regions (*UU No. 5/1974 tentang Pokok-Pokok Pemerintahan di Daerah*). For a discussion of this law and previously decentralisation laws, see Niessen 1999:41-88.

30 Law No. 14/1970 on the Basic Provisions for Judicial Power (*UU No. 14/1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman*). Law No. 2/1986 and 6/1986, which replaced Law 14/1970, were of the same kind (Mulya Lubis 1999:174-5). It should be acknowledged that the law created the authority of the Supreme Court to review legislation below the rank of acts of parliament against higher legislation, however only if in relation to an appeal case (Art. 26 Law No. 14/1970). This authority was later confirmed by Art. 11(4) People's Consultative Assembly Directive No. III/MPR/1978 on the Position and Working Relation of the Highest State Bodies with/or between High State Bodies (*TAP MPR No. III/MPR/1987 tentang Kedudukan dan Hubungan Tata-Kerja Lembaga Tertinggi Negara dengan/atau antar Lembaga-Lembaga Tinggi Negara*). See also Art. 31 Law No. 14/1985 on the Supreme Court (*UU No. 14/1985 tentang Mahkamah Agung*). From 1993, a request for review no longer had to be related to an appeal case, but could be initiated separately following a complaint or a request. See Regulation of the Supreme Court No. 1/1993 on the Right to Substantive Review (*Peraturan Mahkamah Agung No. 1/1993 tentang Hak Uji Materiil*) in conjunction with Art. 79 Law No. 14/1985.

31 Law No. 1/1985 on the Revision of Law No. 15/1969 on the Election of Members of the Consultative Assembly/Representative Councils as Earlier Revised by Law No. 5/1975 and Law No. 2/1980 (*UU No. 1/1985 tentang Perubahan atas UU No. 15/1969 tentang Pemilihan Anggota-Anggota Badan Permusyawaaratan/Perwakilan Rakyat Sebagaimana Telah Diubah Dengan UU No. 5/1975 dan UU No. 2/1980*); Law No. 2/1985 on the Revision of Law No. 16/1969 on the Organisation and Mode of Operation of the People's Consultative Assembly, the People's Representative Council, and the Regional People's Representative Councils as Earlier Revised by Law No. 5/1975 (*UU No. 2/1985 tentang Perubahan atas UU No. 16/1969 tentang Susunan dan Kedudukan MPR, DPR, dan DPRD Sebagaimana Telah Diubah dengan UU No. 5/1975*); Law No. 3/1985 on the Revision of Law No. 3/1975 on Political Parties and the Functional Groups (*UU No. 3/1985 tentang Perubahan atas UU No. 3/1975 tentang Partai Politik dan Golongan Karya*); Law No. 5/1985 on Referendum (*UU No. 5/1985 tentang Referendum*); Law No. 8/1985 on Civil Organisations (*UU No. 8/1985 tentang Organisasi Kemasyarakatan*).

32 For a further discussion on the collapse of the Indonesian 'Rechtsstaat' under the New Order, see Lev 2000a.

Meanwhile, the problem of 'corruption, collusion and nepotism' (*korupsi, kolusi dan nepotisme* or KKN) became epidemic in all branches and at all levels of government. From 1967 various half-hearted efforts were made to fight corruption through the establishment of anti-corruption institutions, but as a result of, *inter alia*, opposition from other state institutions and a lack of supporting legislation, they were little successful (Assegaf 2002:134-6). According to Lev, the opportunity of self-enrichment made available to supporters was actually the glue that kept the New Order structure together (Lev 2007:244).

While constitutional law provided the stability required for economic development, the New Order regime created a new framework of substantive laws and regulations that were to facilitate such development. Existing legislation was not always annulled, but often marginalised and reinterpreted.

Land law was also reformed to facilitate economic development, leading to significant legal inconsistencies. The socialist oriented BAL was maintained. As the law grants the state a broad authority in land matters, it was basically a suitable instrument to implement New Order 'developmentalist' policies. However, the BAL's reference to Indonesian socialism was reformulated as the strive for "a just and prosperous society in accordance with the Pancasila" (Harsono 2005:166-7). Furthermore, the BAL's scope was strongly limited by the enactment of various sectoral laws, such as the 1967 laws on forestry and mining and, as will be further discussed in Chapter 5, the 1992 law on spatial management, which also regulates spatial planning (including land use planning, which is an integrated part of spatial planning, which again forms an integrated part of spatial management).[33]

Various prominent legal scholars argue that, despite the enactment of the above laws, the BAL, being an 'umbrella law', remains the highest law in hierarchy in the field of *agraria*.[34] This point of view is however untenable: the Indonesian legal system has never formally acknowledged the distinction between 'umbrella laws' and 'ordinary laws'.[35] In addition, with the enactment of various sectoral laws, the BAL can be considered itself a sectoral law, no longer applicable to tenure and use of natural resources, but only to tenure of non-forest land, which covers only 30 per cent of Indonesia's total land area (Wallace 2008:195).

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33 Law No. 5/1967 on the Principles of Forestry (*UU No. 5/1967 tentang Pokok-Pokok Kehutanan*) and No. 11/1967 on the Principles of Mining (*UU No. 11/1967 tentang Pokok-Pokok Pertambangan*); Law No. 24/1992 on Spatial Management (*UU No. 24/1992 tentang Penataan Ruang*).

34 See for instance to Gautama 1993 [1960]; Parlindungan 1998:21-38; Harsono 2005:174-5; Sumardjono 2005.

35 Compare Explanatory Memorandum, General Elucidation, pt. I BAL, in which it is confirmed that formally there is no difference between the BAL and other acts of parliament.

As far as the BAL still played a role, much of its required implementing legislation was never enacted during the New Order. In 1994, Parlindungan estimated that the enactment of more than 40 laws and regulations were still awaited.[36] At the same time the body of detailed, subordinate legislation and 'soft law' grew, consisting of thousands of regulations, administrative standards, and announcements (Wallace 2008:201). Most of this material was produced by the National Land Agency (*Badan Pertanahan Nasional* or BPN, hereafter NLA), currently a non-departmental body residing under and directly responsible to the President, which holds authority over land matters. This legislation and 'soft law' reflected the New Order regime's extreme 'integralist' interpretation of key concepts of the BAL, such as the social function of land, the state's right of control, and public interest.[37] Examples of such legislation, which will be discussed in further detail in Chapters 6 and 7 respectively, are the Regulation of the Minister of Home Affairs and the Presidential Decision on land clearance for development in the public interest and the Regulations of the Minister of Home Affairs and later the NLA on site permits (*izin lokasi*), permits that allow developers to initiate commercial land clearance.

As will be discussed in detail in Chapters 4, 5, 6, and 7, the combination of i) a 'developmentalist', centralist-authoritarian, and corrupt New Order state, ii) a (marginalised) BAL granting a strong role to that state, and iii) a lack of implementing legislation that, as far as it was in place, reflected an extreme 'integralist' interpretation of key-concepts of the BAL resulted in the central government retaining strong discretionary powers in the land sector that could easily be and indeed were commonly abused in the name of 'development' (*pembangunan*), affecting the tenure security of ordinary landholders. In short, it proved hard for particularly the urban poor to register their land, the New Order government showed little concern for the interests of these people in spatial planning, security forces evicted landholders from their land against little or no compensation, and they assisted commercial developers to equally do so. As Fitzpatrick noted, development became a legal norm, which the bureaucracy and the courts used to subjugate formal procedures that were actually meant to protect landholders (Fitzpatrick 1997:199).

The above practices, and repressive politics and corruption in general, increasingly affected the regime's legitimacy. Combined with the rise of an educated middle class, Soeharto faced increasing criticism from students, opposition parties, NGOs, and even the military. As a response, he endorsed a policy of 'openness' (*keterbukaan*) in 1989. While never imple-

36 'Prof Dr AP Parlindungan: Lebih dari 40 Produk Hukum Perintah UUPA Belum Dibuat', *Kompas*, 12 August 1994.

37 See also Sumardjono in 'Penyempurnaan UUPA dan Sinkronisasi Kebijakan', *Kompas*, 24 September 2003.

mented to the full, for several years after 1989 the regime allowed for more dissent and somewhat loosened press restrictions.

The period of political openness was accompanied by two major legal reform measures. In 1991 the regime established Administrative District Courts (*Pengadilan Tata Usaha Negara* or PTUN) in District capitals / Municipalities and Administrative Courts of Appeal (*Pengadilan Tinggi Tata Usaha Negara* or PTTUN) in provincial capitals. The jurisdiction, powers of review, and remedial powers of the Administrative Courts were limited. They could only review government institutions' written decisions with legal effect that were individual, concrete, and final.[38] Furthermore there were only three grounds for review i) contravention of laws and regulations; ii) misuse of power, and; iii) arbitrariness.[39] A litigated decision in principle maintained its validity, but plaintiffs could demand its suspension.[40] The courts did not have the remedial power to revoke a decision, but they could *order* revocation of the decision.[41] Finally, they could award damages, but such damages were limited to Rp. 5 million.[42]

Two year later, in 1993, the Jakarta-based National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia* or Komnas HAM) was founded. It is to monitor compliance with human rights, to investigate violations, as well as to give (non-binding) opinions, judgements and advice to government bodies on the implementation of human rights.[43]

Developments looked promising, but the period of political openness was short-lived. As soon as President Soeharto managed to reconsolidate his power, repression was re-imposed. Such was marked by the revocation of the press licences of the magazines Tempo, Editor, and Dëtik in 1994 (Aspinall 2005:47-8). Nonetheless, both the Administrative Courts and particularly the National Human Rights Commission continued in putting the executive branch under considerable scrutiny, not least in land cases (Lev 2007:244-6).

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38 Art. 47 in conjuction with Art. 1(4) in conjunction with Art. 1(3) Law No. 5/1986 on Administrative Justice *(UU No. 5/1986 tentang Peradilan Tata Usaha Negara).*

39 Art. 53(2) Law No. 5/1986. The law did not allow the courts to review decisions for contravening general principles of proper administration. The minutes of parliamentary debates on the law show that the initial idea was to grant the courts the authority to review decisions on the basis of these principles, but that for political reasons, the government did not want to refer to them explicitly in the law. In practice, the courts have invoked this ground for review from the start. The Supreme Court has accepted this practice (Bedner 2009:215-6).

40 Art. 67 Law No. 5/1986.

41 Art. 116 Law No. 5/1986.

42 Art. 97(10) Law No. 5/1986 in conjunction with Art. 3 GR No. 43/1991 on Compensation and its Implementation in the Context of Administrative Justice (*PP No. 43/1991 tentang Ganti Rugi dan Tata Cara Pelaksanaan pada Peradilan Tata Usaha Negara*). For additional compensation, the plaintiff had to start a separate procedure at a General Court.

43 Art. 4, under c Presidential Decision No. 50/1993 on the National Human Rights Commission (*Keppres No. 50/1993 tentang Komisi Nasional Hak Asasi Manusia*).

3.4 Post-New Order: land law in a decentralised 'Rechtsstaat'?

The 1997 monetary and economic crises created the right circumstances for students and other opposition groups to finally bring down Soeharto in May 1998.[44] Soeharto's resignation cleared the way for *reformasi* (reform). The IMF, which the Indonesian government had addressed for assistance in October 1997, and other donors added to the pressure. The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), People's Representative Council (*Dewan Perwakilan Rakyat* or DPR) as well as Soeharto's successor, President Habibie, responded by initiating an ambitious reform programme, also in relation to land. What follows is an overview of these reforms, starting with the general reforms, then regional autonomy, and finally land law reform. The reforms are only discussed as far as they may, in one way or the other, change practices in the land sector.

3.4.1 General reforms [45]

The general reforms addressed the three main characteristics of New Order rule: 'developmentalism', authoritarian rule, and corruption. Indonesia's reorientation of its development policy was ambivalent though. The first priority of the new government was to overcome the economic crisis. The International Monetary Fund (IMF) and World Bank offered financial assistance and imposed reforms, many of which were informed by neo-liberal economic policy. Between 1997 and 2000, the Indonesian government signed 16 Letters of Intent to the IMF, which formed the basis for a series of structural adjustment measures (Hadiz & Robison 2005:225-6). Pressured by emerging people's power, the People's Consultative Assembly however at the same time enacted various directives for reforms toward a 'people's economy' (*ekonomi kerakyatan*).[46] A broad base of small and medium-scale enterprises was to form the main pillar of national economic development.[47]

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44 For an analysis of the role of the various oppositional forces in this historic event, see Aspinall 2005.

45 For a further discussion of these reforms, see Lindsey 2001; Lindsey 2002; Lindsey 2004; Stockmann 2004; Lev 2007; Lindsey & Santosa 2008.

46 See People's Consultative Assembly Directive No. X/MPR/98 on the Reform Principlies for Development in the Framework of the Recovery and Normalisation of National Life (*TAP MPR No X/MPR/1998 tentang Pokok-pokok Reformasi Pembangunan dalam Rangka Penyelamatan dan Normalisasi Kehidupan Nasional)* and People's Consultative Assembly Directive No. XVI/MPR/98 on Political Economy within Economic Democracy (*TAP MPR No. XVI/MPR/1998 tentang Politik Ekonomi dalam Rangka Demokrasi Ekonomi*). Directive No. X/MPR/98 eventually led to the enactment of a new law on development planning, Law No. 25/2004 on the National Development Planning System (*UU No. 25/2004 tentang Sistem Perencanaan Pembangunan Nasional*).

47 See Preamble, under: Consideration (b) and Art. 7 People's Consultative Assembly Directive No. XVI/MPR/98.

Indonesia's reorientation of its development policy was translated into the National Policy Guidelines and entailing development plans. The 2000-2004 National Development Programme (*Program Pembangunan Nasional* or PROPENAS), which succeeded REPELITA VI), gave priority to the development of a people's economy. According to the document, such an economy should combine economic growth with social values, including equity, quality of life, and environmental protection. Poverty alleviation and the provision of basic needs as well as the development of micro, small, and middle-size companies and cooperatives formed other policy objectives. A final objective relevant to mention here formed the development of infrastructure to further economic growth. From New Order experience, we know that these objectives can heavily collide in Indonesia. However, the Plan did not give notice of such risk, let alone mention any preventive measures.

General reforms also focussed on the dismantling of the authoritarian state. To that aim, the People's Consultative Assembly enacted several directives.[48] More importantly, as noted in Chapter 1, between 1999 and 2002 it amended the 1945 Constitution four times.[49] The document is now three times longer than it used to be. Although still containing some imperfections, it now clearly reflects rule of law ideology, creating a separation of powers, establishing democracy, and acknowledging human rights. The People's Representative Council and the central government supported the constitutional amendments by implementing legislation and programmes. What follows is an overview of the most important constitutional reforms.

First, the (discretionary) power of the executive branch was limited. The position of the armed forces (*Angkatan Bersenjata Republik Indonesia* or ABRI) weakened. It was split up into the Indonesian National Army (*Tentara Nasional Indonesia* or TNI) and the Police of the Indonesian Republic

48 See for instance People's Consultative Assembly Directive No. III/MPR/1998 on General Elections (*TAP MPR No. III/MPR/1998 tentang Pemilihan Umum*, later revised and extended by Directive No. XIV/MPR/1998); People's Consultative Assembly Directive No. XV/MPR/1998 on the Organisation of Regional Autonomy, Regulation, Division and Use of National Natural Resources in a Just Manner, and the Financial Relation between the Centre and Regions within the Framework of the Unitary Republic State of Indonesia (*TAP MPR No. XV/MPR/1998 tentang Penyelenggaraan Otonomi Daerah, Pengaturan, Pembagian, dan Pemanfaatan Sumber Daya Nasional yang Berkeadilan, serta Perimbangan Keuangan Pusat dan Daerah dalam Kerangka Negara Kesatuan Republik Indonesia*); People's Consultative Assembly Directive No. XVII/MPR/1998 on Human Rights (*TAP MPR No. XVII/MPR/1998 tentang Hak Asasi Manusia*); People's Consultative Assembly Directive No. VIII/MPR/1998 on the Revocation of People's Consultative Assembly Directive Np. IV/MPR/1983 on Referenda (*TAP MPR No. VIII/MPR/1998 tentang Pencabutan TAP MPR No. IV/MPR/1983 tentang Referendum*).

49 The 1945 Constitution was amended on the following dates: First Amendment, 19 October 1999; Second Amendment, 18 August 2000; Third Amendment, 9 November 2001; Fourth Amendment, 10 August 2002.

(*Polisi Republik Indonesia* or POLRI).[50] Moreover, the security apparatus' *dwifungsi* came to an end, which means the army and police no longer hold seats in the People's Consultative Assembly, People's Representative Council, Provincial Assemblies, or District/Municipal Councils (on both regional levels called the *Dewan Perwakilan Rakyat Daerah* or DPRD).

Second, a mechanism for the review of the constitutionality of legislation was established, potentially enhancing the legal framework's consistency. A Constitutional Court (*Mahkamah Konstitusi*) was founded, which reviews the constitutionality of acts of parliament against the Amended 1945 Constitution.[51] However, this review mechanism only applies to legislation passed after the First Constitutional Amendment, i.e. after 19 October 1999. The Supreme Court's (*Mahkamah Agung*) authority to review legislation below the rank of acts of parliament was reinforced in the Constitution. However, legislation below the rank of acts of parliament can no longer be reviewed against higher legislation, but only against acts of parliament.[52]

Third, democracy was strengthened. Not only members of the People's Representative Council and of the newly established Representative Council of the Regions (*Dewan Perwakilan Daerah* or DPD), which now together form the People's Consultative Assembly, and of the Provincial Assemblies and District/Municipal Councils are now directly elected, but also the President, provincial Governors, and District-Heads/Mayors.[53] Four of the five New Order laws on political organisation were revised, as a result of which there is no longer a limit on the number of political parties and on political activities.[54] Soekarno's heavily criticized anti-subversion law was

50 See Presidential Instruction No. 2/1999 on Policy Steps in the Framework of the Separation of the Police from the Armed Forces of the Republic of Indonesia (*Inpres No 2/1999 tentang Langkah-Langkah Kebijakan dalam Rangka Pemisahan Kepolisian Negara Republik Indonesia dari Angkatan Bersenjata Republik Indonesia*); Art. 30 Amended 1945 Constitution.

51 Art. 24C Amended 1945 Constitution; Law No. 24/2003 on the Constitutional Court (*UU No. 24/2003 tentang Mahkamah Konstitusi*).

52 Art. 24A Amended 1945 Constitution; Art. 11(2), under b Law No. 4/2004 on Judicial Power (*UU No. 4/2005 tentang Kekuasaan Kehakiman*); Art. I Law No. 5/2004 on the Revision of Law No. 14/1985 on the Supreme Court (*UU No. 5/2004 tentang Perubahan atas UU No. 14/1985 tentang Mahkamah Agung*) (revising Art. 31 Law No. 14/1985). The aforementioned Regulation of the Supreme Court No. 1/1993 on the Right to Substantive Review was replaced by Regulation No. 1/1999, which was again replaced by Regulation No. 1/2004.

53 See Art. 2(1), 6A, 18(3-4), 19(1), 22C(1), and 22E Amended 1945 Constitution.

54 See Art. 85 Law No. 3/1999 on General Elections (*UU No. 3/1999 tentang Pemilihan Umum*), revised by Law No. 12/2003 (*UU No. 12/2003 tentang Pemilihan Umum Anggota DPR, DPD, dan DPRD*), which was again revised by Law No. 10/2008; Art. 47 Law No. 4/1999 on the Legislature (*UU No. 4/1999 tentang Susunan dan Kedudukan MPR, DPR dan DPRD*), revised by Law No. 22/2003; Art. 21 Law No. 2/1999 on Political Parties (*UU No. 2/1999 tentang Partai Politik*), revised by Law No. 31/2002, which was again revised by Law No. 2/2008; Law No. 6/1999 on Referenda (*UU No. 6/1999 tentang Pencabutan UU No. 5/1985 tentang Referendum*), and, the law which has not yet been revised, Law No. 8/1985 on Societal Organisations (*UU No. 8/1985 tentang Organisasi Kemasyarakatan*).

repealed.[55] There is more room for public participation, for instance in law-making.[56] Democracy was also strengthened by the enactment of the 1999 and 2004 Regional Autonomy Laws, discussed in Section 3.4.2 below.

Fourth, controlling mechanisms were improved. Existing courts became more independent from the executive. A new appointment procedure was introduced for members of the Supreme Court, in which the Judicial Commission (*Komisi Yudisial*) plays a central role.[57] The Supreme Court now not only has substantive but also administrative-financial control over the courts.[58] Judges of the General and Administrative Courts are appointed by the President at the proposal of the Chief Justice of the Supreme Court.[59] The jurisdiction of the judiciary broadened. Specialised courts were established, such as a Corruption Court, discussed below, and a Human Rights Court, which has jurisdiction in cases of gross human rights violations.[60] Review powers and remedial powers of the judiciary, particularly of the Administrative Courts, broadened too. Several general principles of proper administration now explicitly form criteria for review by these courts and the mechanism ensuring the implementation of their judgements was strengthened.[61]

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55 Law No. 26/1999 on the Annulment of the Law on the Eradication of Anti-subversive Activities (*UU No. 26/1999 tentang Pencabutan UU No. 11/PNPS/Tahun 1963 tentang Pemberantasan Kegiatan Subversi*).

56 Art. 53 Law 10/2004 on Lawmaking (*UU No. 10/2004 tentang Pembentukan Peraturan Perundang-Undangan*).

57 See Art. 24A(2-4) and 24B(1) Amended 1945 Constitution; Law No. 22/2004 on the Judicial Commission (*UU No. 22/2004 tentang Komisi Yudisial*). Notably, in August 2006 the Constitutional Court stripped the Judicial Commission of its oversight role by ruling that the law establishing the body did not clearly state what it would monitor.

58 Art. I Law No. 35/1999 on the Revision of Law No. 14/1970 on the Basic Provisions for Judicial Power (*UU No. 35/1999 tentang Perubahan atas UU No. 14/1970 tentang Ketentuan-Ketentuan Pokok Kekuasaan Kehakiman*) (revising Art. 11 Law No. 14/1970); Art. 13 Law No. 4/2004.

59 Art. I Law No. 8/2004 on the Revision of Law No. 2/1986 on General Jurisdiction (*UU No. 8/2004 tentang Perubahan atas UU No. 2/1986 tentang Peradilan Umum)* (revising Art. 16 Law No. 2/1986); Art. I Law No. 9/2004 on the Revision of Law No. 5/1986 on Administrative Justice *(UU 9/2004 tentang Perubahan atas UU No. 5/1986 tentang Peradilan Tata Usaha Negara)* (revising Art. 16 Law No. 5/1986).

60 Art. 4 Law No. 26/2000 on the Human Rights Court (*UU No. 26/2000 tentang Pengadilan Hak Asasi Manusia*).

61 Art. I Law No. 9/2004 (revising Art. 53(2) under b and 116(4-5) Law No. 5/1986). Regarding the general principles of proper administration, the Elucidation to Art. 53(2) under b Law No. 5/1986 refers to principles mentioned in Law No. 28/1999 on the Organisation of a State Clean and Free of Corruption, Collusion and Nepotism (*UU No. 28/1999 tentang Penyelenggaraan Negara yang Bersih dan Bebas dari Korupsi, Kolusi dan Nepotisme*). These principles are: the principles of legal certainty, proportionality, disciplined state management, transparency, professionalism, and accountability. Bedner has noted that the latter four principles were unknown in the Administrative Courts' practice and seem hard to apply in the context of the Administrative Courts. In addition, Law No. 28/1999 does not refer to the previous grounds of review of misuse of power and arbitrariness. However, a quick review of recent rulings of Administrative Courts indicates that the grounds are still applied (Bedner 2009:216-7).

The Indonesian judiciary itself appeared aware that there was a need for major reforms. In October 2003 the Indonesian Supreme Court announced a comprehensive reform plan for the structure and the management of the judiciary. The reform plan is set down in five reports that are collectively referred to as the Supreme Court Blueprints, which have been designed by partnership between state institutions and civil society. The Blueprints focus on the following themes: i) the Supreme Court, ii) the Judicial Commission, iii) court personnel management, iv) court financial management, v) permanent education of judges, vi) the Commercial Court, vii) the Anti-Corruption Court, viii) the Human Rights Court, and, ix) the needs assessment. In 2004, the Supreme Court established a Judicial Reform Committee, consisting of the leadership of the Supreme Court as well as civil society representatives, which has the task to implement the Blueprints.

Alternative institutions of dispute settlement were founded, such as the National Ombudsman Commission (*Komisi Ombudsman Nasional* or KON).[62] Upon complaints by citizens, the Commission has the authority to ask for clarification on, to monitor, or to investigate acts of government institutions, including judicial institutions.[63] The position and mandate of the National Human Rights Commission was strengthened. It now has equal status to other state institutions. Besides, the Commission receives funding from the National Budget instead of the Budget of the Cabinet Secretariat, making it accountable to the People's Representative Council instead of the Cabinet and thus less susceptible to political interference by the latter. Aside from existing functions, the law expands the Commission's functions in relation to protecting and promoting human rights (Herbert 2008:460-1).[64] It also has the authority to investigate gross human rights violations.[65]

Fifth, as noted in Chapter 1, Indonesia has now formally committed itself to first as well as second generation human rights, including the right to adequate housing. Various international treaties were ratified, including the International Covenant on Social, Economic, and Cultural Rights (ICSECR), the most important treaty to recognise the right to adequate housing. Furthermore, the Amended 1945 Constitution includes a bill of rights, which is based on the Universal Declaration of Human Rights.[66] It also contains a provision on the right to an adequate standard of living and the (derived) right to adequate housing.[67] The provision states *inter alia* that

62 Presidential Decision No. 44/2000 on the National Ombudsman Commission (*Keppres No. 44/2000 tentang Komisi Ombudsman Nasional*).
63 Art. 2 Presidential Decision No. 44/2000.
64 Law No. 39/1999 on Human Rights (*UU No. 39/1999 tentang Hak Asasi Manusia*), in particular Art. 75-99.
65 Art. 18 Law No. 26/2000.
66 Art. 28A-J Amended 1945 Constitution.
67 Art. 28H(1) Amended 1945 Constitution.

every person has a right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment.[68] Finally, implementing legislation supporting human rights has been enacted.[69] The establishment of the above specialised Human Right Court and the strengthening of the position of the National Human Rights Commission potentially contribute to the realisation of these rights.

The general reforms also dealt with the problem of KKN. In 1998 the People's Consultative Assembly enacted anti-corruption Directive No. XI/MPR/1998.[70] This was followed by the enactment of two anti-KKN laws in 1999.[71] It led to, *inter alia*, the creation of an Audit Commission on Wealth of State Officials (*Komisi Pemeriksa Kekayaan Penyelenggara Negara* or KPKPN). The Commission has the task and authority to carry out audits of the wealth of state officials, receive reports from the public on corruption and gather evidence.[72] Furthermore, an anti-money laundering law was enacted, which led to the establishment of an Anti-Money Laundering Agency (*Pusat Pelaporan dan Analisis Transaksi Keuangan* or PPATK).[73] It assists the Office of the Chief Prosecutor, the National Police and the Corruption Eradication Commission (to be discussed below) in corruption matters by obtaining financial transaction reports. In 2002 another anti-KKN law was enacted, which established in addition to the existing prosecution service and court structure a Corruption Eradication Commission (*Komisi Pemberantasan Tindak Pidana Korupsi* or KPK) and a specialised Corruption Court (*Pengadilan Khusus Tindak Pidana Korupsi* or Tipikor).[74] The Corruption Eradication Commission supervises and coordinates the handling of corruption cases, including their investigation and prosecution. The Corruption Court

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68 In Indonesian the section reads: *Setiap orang berhak hidup sejahtera lahir dan batin, bertempat tinggal, dan mendapatkan lingkungan hidup yang baik dan sehat serta berhak memperoleh pelayanan kesehatan*.

69 See for instance Law No. 40/1999 on the Press (*UU N0. 40/1999 tentang Pers*), which supports the freedom of press.

70 People's Consultative Assembly Directive No. XI/MPR/1998 on the Organisation of a State Clean and Free of Corruption, Collusion and Nepotism (*TAP MPR No. XI/MPR/1998 tentang Penyelenggaraan Negara Yang Bersih dan Bebas Korupsi, Kolusi, dan Nepotisme*).

71 Law No. 28/1999; Law No. 31/1999 on the Eradication of Corruption Offences (*UU No. 31/1999 tentang Pemberantasan Tindak Pidana Korupsi*). Law No. 31/1999 was revised by Law No. 20/2001 on the Revision of Law No. 31/1999 on the Eradication of Corruption Offences (*UU No. 20/2001 tentang Pemberantasan Tindak Pidana Korupsi*). See also Assegaf 2002.

72 Art. 10-9 Law No. 28/1999 in conjunction with Presidential Decision No. 81/1999 on the Establishment of an Assets Auditing Commission (*Keppres No. 81/1999 tentang Pembentukan Komisi Pemeriksa Kekayaan Penyelenggara Negara*). See also Sherlock 2002.

73 Law No. 15/2002 on Money Laundering Offences (*UU No. 15/2002 tentang Tindak Pidana Pencucian Uang*). The Law was amended by Law No. 23/2003.

74 Law No. 30/2002 on the Corruption Eradication Commission (*UU No. 30/2002 tentang Komisi Pemberantasan Tindak Pidana Korupsi*). The Law in part forms an implementation of Art. 43 Law No. 31/1999. See also Assegaf 2002.

has exclusive competence in corruption cases.[75] Notably, in the first years after their establishment, the above institutions were located in Jakarta only.[76]

3.4.2 *Regional autonomy* [77]

The 1999 Regional Autonomy Laws

One of the most significant reform initiatives of the Post-New Order period, deserving separate attention, was the enactment of two 1999 regional autonomy laws (hereafter the 1999 RALs), which came into effect on 1 January 2001.[78] Contrary to the previous 1974 Decentralisation Law, the 1999 RALs led to substantial administrative and political (or democratic) decentralisation from the central government to the Provinces and particularly the Districts/Municipalities as well as new fiscal relations between these government levels.

Administrative decentralisation involved the devolution of government authorities. To the Districts/Municipalities, Law No. 22/1999 devolved (obligatory) authorities in eleven important sectors, including land.[79] To the Provinces, on the contrary, few authorities were devolved and deconcentrated, namely: (1) authorities for issues that cross border between two or more districts/municipalities; (2) authorities not yet, or not able to be handled by the districts/municipalities; (3) authorities transferred from the central government by means of deconcentration.[80] Besides, the central government could assign certain tasks to regions (and villages) as part of

75 Notably, in August 2006 the Constitutional Court ruled that the Corruption Court was unconstitutional. In order to prevent the Corruption Court would lose its competence in favour of the General Courts, the People's Representative Council had to enact a new law by 19 December 2009. The law, Law No. 46/2009 on the Corruption Court (*UU No. 46/2009 tentang Pengadilan Tindak Pidana Korupsi*), was enacted on 29 October 2009. It replaces Art. 53-62 of Law No. 30/2002.

76 On 17 December 2010, the Chief Justice of the Supreme Court established Corruption Courts in Bandung, Semarang and Surabaya (see Decree of the Chief Justice of the Supreme Court No. 191/KMA/SK/XII/2010). On 7 February 2011, he established 14 other Corruption Courts in Medan, Padang, Pekanbaru, Palembang, Tanjung Karang, Serang, Yogyakarta, Banjarmasin, Pontianak, Samarinda, Makassar, Mataram, Kupang and Jayapura (see Decree of the Chief Justice of the Supreme Court No. 022/KMA/SK/II/2011).

77 For a further discussion of the regional autonomy laws, see Bell 2001; Rifai 2002; Fane 2003; Ryaas Rasyid 2003; Schmitt 2008.

78 The 1999 RALs consist of Law No. 22/1999 on Regional Governance (*UU No. 22/1999 tentang Pemerintahan Daerah*) and Law No. 25/1999 on the Financial Balance between the Central Government and the Regions (*UU No. 25/1999 tentang Perimbangan Keuangan antara Pemerintah Pusat dan Daerah*). The laws found their constitutional basis in Art. 18, 18A, and 18B of the 1945 Amended Constitution.

79 Art. 11 Law No. 22/1999.

80 Art. 9 Law No. 22/1999.

co-governance.[81] Notably, the Provinces and Districts/Municipalities became independent and no longer had a hierarchal relationship to each other.[82]

Although involving a far-reaching form of decentralisation, the 1999 RALs did do not render the central government powerless. It retained authority over foreign policy, defence and security, the administration of justice, monetary and fiscal affairs, religion and 'other sectors'. In 'other sectors' the authority to develop policy for planning and control was included.[83] Otherwise, its role concentrated on supporting and supervising the regions. The central government provided guidelines, guidance, training, direction, and supervision.[84] It could thus intervene if the regions failed to meet certain standards, for instance if a regional government did not enforce prevailing legislation or if it enacted a bylaw that contravened the public interest or higher legislation.[85] However, bylaws no longer had to be approved by the Governor or the Minister of Home Affairs prior to their enactment; they could be annulled afterwards.[86]

The transfer of authority to the regions not only involved administrative decentralisation, but also empowered the Provincial Assemblies and District/Municipal Councils, thus leading to political or democratic decentralisation. Their legislative and budgetary powers were reinforced, and their control over the executive branch strengthened. The representative bodies got the authority to elect the regional heads (Governors and Districts-Heads/Mayors).[87]

Decentralisation had to be accompanied with the transfer of means and the authority to the regions to gain their own revenues.[88] Law No. 25/1999 therefore set out new fiscal relations between the central government and the regional governments. In relation to devolved authorities the regional governments have at their disposal several regional revenue sources, namely the Balance Fund (*Dana Perimbangan*), Regionally Generated Revenues (*Pendapatan Asli Daerah* or PAD), Regional Loans (*Pinjaman Daerah*), and Other Legal Revenues (*Lain-lain Penerimaan yang Sah*).[89] These sources

81 Art. 13 Law No. 22/1999.

82 Art. 4(2) Law No. 22/1999. For this reason, the regions were no longer called Province Region Level I and District/Municipality Region Level II, but simply Province and District/Municipality (Art. 121 Law No. 22/1999).

83 Art. 7(2) Law No. 22/1999.

84 Art. 112 and Elucidation Law No. 22/1999.

85 Art. 7 GR No. 25/2000; Art. 114 Law No. 22/1999.

86 Law No. 22/1999 required that the provisions on support and supervision were implemented by government regulation. This requirement was met by the enactment of GR No. 20/2001 on Support and Supervision of the Implementation of Regional Governance (*PP No. 20/2001 tentang Pembinaan dan Pengawasan atas Penyelenggaraan Pemerintahan Daerah*).

87 Art. 18-9 Law No. 22/1999.

88 Art. 8; General Elucidation, under 8 Law No. 22/1999.

89 Art. 3 Law No. 25/1999.

are all part of the Regional Budget (*Anggaran Pendapatan dan Belanja Daerah* or APBD).[90]

Several of the regional revenues are land related. The Balance Fund is particularly important, as it defines land as a source of revenues. It includes the Revenues Sharing Fund (*Dana Bagi Hasil*).[91] This fund comprises revenues from Land and Building Tax (*Pajak Bumi dan Bangunan* or PBB) as well as Land and Building Right Retribution (*Bea Perolehan Hak atas Tanah dan Bangunan* or BPHTB), of which the Districts/Municipalities receive a major share.[92] In many Districts/Municipalities, Regionally Generated Revenues include revenues from licensing, such as land use permits (*izin peruntukan penggunaan tanah* or IPPT), building permits (*izin mendirikan bangunan* or IMB), and permits for the use of municipal land and/or buildings (*izin pemakaian tanah dan/atau bangunan* or IPTB). Moreover, since the Districts/Municipalities now also have the authority to grant site permits for commercial land clearance, as will be discussed below, the revenue base of the licensing system has broadened.

Various scholars have noted that Law No. 25/1999 did not lead to fiscal decentralisation. The central government continued to control all major tax bases and thus the majority of revenues of the regional governments. Besides, it still held the authority over development spending (Fane 2003:161). Silver et al. suggest that the regional government's financial reliance on the central government even increased (Silver, *et al.* 2001:347). At the same time, however, the regional governments got more fiscal discretion, since most revenues were no longer earmarked. Besides, there was more room to create regional taxes, although the central government could annul bylaws on this matter.

It should be noted that the 1999 RALs were enacted under exceptional circumstances. There were rising demands in various Provinces, particularly in those possessing much of Indonesia's natural resources, for region-

90 Art. 2(1) Law No. 25/1999.

91 Art. 7-8 Law No. 25/1999.

92 Provinces receive 16.2 per cent of Land and Building Tax revenues, districts/municipalities 64.8 per cent, while 9 per cent is reserved to cover the cost of collection. Another 10 per cent goes to the central government, of which 65 per cent is equally distributed among all districts/municipalities, while 35 per cent is distributed as incentives to districts/municipalities of which realized contributions in the previous year exceeded estimated revenues from certain sectors. Provinces receive 16 per cent of the Land and Building Right Retribution revenues, districts/municipalities 64 per cent, while 20 per cent goes to the central government. See Art. 2, 4, 5 GR No. 104/2000 on the Balancing Fund (*PP No. 104/2000 tentang Dana Perimbangan*), as revised by GR No. 84/2001 on the Revision of GR No. 104/2000 (*PP No. 84/2001 tentang Perubahan PP No. 104/2000*) in conjunction with Art. 6(2-4) Law No. 25/1999). See also GR No. 16/2000 on the Distribution of Land and Building Tax Revenues between the Central Government and the Regions (*PP No. 16/2000 tentang Pembagian Hasil Penerimaan Pajak Bumi dan Bangunan antara Pemerintah Pusat dan Daerah*); Law No. 20/2000 on the Revision of Law No. 21/1997 on Land and Building Right Retribution (*UU No. 20/2000 tentang Perubahan atas UU No. 21/1997 tentang Bea Perolehan Hak atas Tanah dan Bangunan*).

al autonomy. Such demands coincided with severe pressure from international donors to implement decentralisation. This gave the ruling party Golkar reason to support the initiative, for it could draw regional electorates. The team within the Department of Home Affairs responsible for the initiative (the so-called Team of Seven – *Tim Tujuh*), consisting of key Golkar figures, included US-trained political scientists who could mediate international decentralisation policy with local agendas (McCarthy 2005:157).

Considering the exceptional circumstances under which the 1999 RALs were enacted and the widespread confusion it created within the state apparatus as to who should do what, it is no surprise that shortly after they had been enacted, they met with growing calls for revision. There was however no agreement as to whether this revision should lead to further decentralisation or to recentralisation. In 2000 and 2002, the People's Consultative Assembly passed directives calling for a prompt revision of the laws toward further decentralisation.[93] This was also required by the Second Amendment of the 1945 Constitution of August 2000 regarding the direct elections of the regional heads. At the same time national departments and agencies, which under the laws had lost so many of their authorities to the regions, lobbied for recentralisation. Voices for recentralisation gained influence when in 2001 Megawati Sukarnoputri was elected President. She had strong reservations about regional autonomy, believing it endangered the Indonesian unitary state her father had created (Barr, *et al.* 2006:51).

The resistance against regional autonomy was nowhere as strong and nowhere as successful as in the land sector.[94] Initially it seemed that in this sector, in accordance with Law No. 22/1999, the Districts/Municipalities would obtain exclusive authority, particularly at the expense of the NLA.[95]As early as in December 1999, the newly elected President Abdurrahman Wahid promulgated Presidential Decision No. 154/1999 on the basis of which the role of the NLA was marginalised by putting it under the

93 People's Consultative Assembly Directive No. IV/MPR/2000 on Recommendations on the Policy and Implementation of Regional Autonomy (*TAP MPR No. IV/MPR/2000 tentang Rekomendasi Kebijakan dan Penyelenggaraan Otonomi Daerah*); People's Consultative Assembly Directive No. VI/MPR/2002 on Recommendations on the Reporting of the Implementation of People's Consultative Assembly Directives by the President, Supreme Advisory Council, People's Representative Council, Supreme Audit Board, and Supreme Court to the People's Consultative Assembly's Annual Session of the Year 2002 (*TAP MPR No. VI/MPR/2002 tentang Rekomendasi atas Laporan Pelaksanaan Putusan MPR Republik Indonesia oleh Presiden, DPA, DPR, BPK, MA pada Sidang Tahunan MPR Republik Indonesia Tahun 2002*).

94 See also Thorburn 2004.

95 Art. 11(2) Law No. 22/1999.

leadership of the Minister of Home Affairs. The Minister was instructed to bring the tasks and functions of the NLA in accordance with the RALs.[96]

The new balance of power in the land sector was affirmed by Government Regulation No. 25/2000, which divided the authorities between the central government and the Provinces.[97] In relation to the land sector, it referred to a number of matters over which the central government would keep authority, matters that basically remained limited to the formulation of standards and guidelines.[98] The central government also retained some authority in relation to spatial planning. It determined national spatial planning on the basis of spatial planning of the Provinces and Districts/Municipalities.[99] The provinces only retained (limited) authority in the field of spatial management. They determined spatial management in agreement with the Districts/Municipalities. The provinces also supervised the implementation of spatial management.[100]

The Districts/Municipalities held all remaining authorities over land matters, but it would take years before these authorities were specified.[101] The reason for the delay was pure political. Fearing to lose its powers, the NLA started to lobby for a revision of the above legislation – in part successfully.[102] This resulted in a legal limbo, particularly because of the enactment and promulgation of contradictory legislation, as we shall see below.

One month after the 1999 RALs came into effect, President Wahid promulgated Presidential Decision No. 10/2001, which stated that pre-existing legislation pertaining to land matters would remain in force until all implementing legislation of Government Regulation No. 25/2000 had been promulgated. Meanwhile the districts/municipalities had been invited, on

96 Art. I-II Presidential Decision No. 154/1999 on the Revision of Presidential Decision No. 26/1988 on the National Land Agency (*Keppres No. 154/1999 tentang Perubahan atas Keppres No. 26/1988 tentang Badan Pertanahan Nasional*).

97 GR No. 25/2000 on Authorities of the Government and the Authorities of the Provinces as Autonomous Regions (*PP No. 25/2000 tentang Kewenangan Pemerintah dan Kewenangan Propinsi sebagai Daerah Otonom*).

98 The central government retained the authority to determine: i) the requirements for the issuance of land rights; ii) the requirements for land reform; iii) the standards for land administration; iv) the guidelines regarding the costs for land related services; v) the Basic Framework for a National Cadastre and the surveying policy for Order I and II of this Framework (Art. 2(3), under 14 GR No. 25/2000). See also Art. 3 of the implementing Presidential Decision No. 95/2000 on the National Land Agency (*Keppres No. 95/2000 tentang Badan Pertanahan Nasional*), which granted the NLA no more than a (coordinating) role in the development of land law and policy.

99 Art. 2(3), under 13 GR No. 25/2000.

100 Art. 3(12) GR No. 25/2000.

101 GR No. 25/2000 prescribed these authorities to be specified within six months after the enactment of the RALs, a period during which the regional governments could not employ their authorities, nor enact bylaws regarding the implementation of these authorities (Art. 9 and Elucidation GR No. 25/2000).

102 For instance, several critical articles regarding decentralisation in the sector of land were published on the NLA's website. See for example Anshari 2004.

the basis of Presidential Decision No. 5/2001, to formulate their authorities in a 'positive' list, to be acknowledged by the central government.[103] Both decisions contradicted the 1999 RALs, which devolved full authority over land matters to the Districts/Municipalities and certainly did not require the acknowledgement of this authority (World Bank 2003b:12; 2003c:11).

The Association of Local Governments (APEKSI) called upon the Minister of Home Affairs and Regional Autonomy to withdraw Presidential Decision No. 10/2001, but to no avail (Rieger, *et al.* 2001:21). In fact, President Wahid promulgated Presidential Decision No. 62/2001, which assured the authority of the NLA in the regions until all legislation pertaining to land had been enacted. The enactment of this legislation should take no more than two years.[104] This step was motivated by the argument that the Districts/Municipalities were not yet ready to hold these authorities. It is clear, however, that this presidential decision again conflicted with the 1999 RALs (World Bank 2003c10-1).[105]

In August 2003 the Districts/Municipalities' authorities over land matters were finally specified. On the basis of Presidential Decision No. 34/2003, which also implemented People's Consultative Assembly Directive No. IX/MPR/2001 to be discussed below, the number of functions was limited to nine in total, which were mostly related to spatial planning and land clearance.[106] The Presidential Decision again contradicted the 1999

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103 See Presidential Decision No. 5/2001 on the Acknowledgement of the Authorities of Districts/Municipalities (*Keppres No. 5/2001 tentang Pelaksanaan Pengakuaan Kewenangan Kabupaten/Kota*). It is said that most districts/municipalities complied, but some included authorities that belonged to the central government, while others left out some of the obligatory authorities of Art. 11 Law No. 22/1999.

104 Art. I, under 6 Presidential Decision No. 62/2001 on the Revision of Presidential Decision No. 166/2000 on the Position, Tasks, Functions, Authorities, Organisation, and Mode of Operation of Non-Departmental State Bodies as Revised Several Times, Lastly by Presidential Decision No. 42/2001 (*Keppres No. 62/2001 tentang Perubahan atas Keppres No. 166/2000 tentang Kedudukan, Tugas, Fungsi, Kewenangan, Susunan Organisasi, dan Tata Kerja Lembaga Pemerintah Non Departemen sebagaimana Telah Beberapa Kali Diubah Terakhir dengan Keppres No. 42/2001*).

105 The Decision was part of a series of Presidential Decisions regarding the tasks and structure of Non-Departmental Institutions (*Lembaga Pemerintah Non Departemen* or LPND). See Presidential Decision No. 166/2000; 173/2000; 178/2000; 17/2001; 42/2001; 60/2001; 62/2001; 103/2001. See also Presidential Decision No. 110/2001 on the Unit Organisation and Tasks of Echolon I Non Departmental Institutions (*Keppres No. 110/2001 tentang Unit Organisasi dan Tugas Eselon I Lembaga Pemerintah Non Departemen*), which was revised by Presidential Decisions Nos. 3/2002; 4/2002; 12/2005, and; 52/2005.

106 See Art. 2 Presidential Decision No. 34/2003 on the National Policy in the Sector of Land (*Keppres No. 34/2003 tentang Kebijakan Nasional di Bidang Pertanahan*). The implementation of these authorities are further explained by Decision of the Head of NLA No. 2/2003 on the Norms and Standards concerning the Mechanism for the Organisation of the Authorities of the Government in the Sector of Land that are Implemented by the Districts/Municipalities (*Keputusan Kepala BPN No. 2/2003 tentang Norma dan Standar Mekanisme Ketatalaksanaan Kewenangan Pemerintah di Bidang Pertanahan yang Dilaksanakan oleh Pemerintah Kabupaten/Kota*).

RALs. Moreover, Districts/Municipalities already held most of the authorities mentioned in the presidential decision on the basis of sectoral legislation. Despite the contradictory status of the decision, it appears that most Districts/Municipalities accepted the revision.

The 2004 Regional Autonomy Laws

In 2004 the 1999 RALs were replaced altogether by Law No. 32/2004 and 33/2004 (henceforth 2004 RALs), which came into effect on 15 October 2004.[107] Considering the contradictory forces behind the idea of regional autonomy, it is no surprise that the 2004 RALs are rather ambivalent, leading to both administrative recentralisation and political decentralisation.

From an administrative perspective, the 2004 RALs involve two main revisions. First, in nearly all government matters the Districts/Municipalities have to share their authorities with the Provinces, including the – what is now called – mandatory authority over land matters.[108] Second, the 2004 RALs factually recreate a hierarchal order between the different regional administrative levels. It is stated that the relationship between the central government, the Provinces, and the Districts/Municipalities as well as between the different regional administrative levels are interrelated, interdependent, and synergic (or mutually supporting).[109] The hierarchal relationship is thus not re-imposed explicitly. However, since the provincial Governors may at the same time hold the deconcentrated central government authority to *inter alia* coordinate and to monitor and supervise the districts/municipalities, this is certainly the case in practice (Isra 2007).[110] So prior to their enactment, provincial and district/municipal bylaws regarding the regional budget, taxes and revenues, as well as spatial planning should be evaluated by the relevant Ministers and the Governor respectively.[111]

From a political perspective, the 2004 RALs involve two other important revisions. The regional heads are elected directly by citizens, who thus now have influence on the governance process.[112] Besides, the central government can unilaterally suspend Governors or District-Heads/Mayors if

107 Law No. 32/2004 on Regional Governance (*UU No. 32/2004 tentang Pemerintahan Daerah*); Law No. 33/2004 on the Financial Balance between the Central Government and Regional Governance (*UU No. 33/2004 tentang Perimbangan Keuangan antara Pemerintah Pusat dan Pemerintahan Daerah*). Since its enactment, Law No. 32/2004 has been amended by Law No. 8/2005 and Law No. 12/2008 respectively. The amendments are not relevant to be discussed in the context of this book.

108 Art. 13-14 Law No. 32/2004.

109 Art. 11(2) Law No. 32/2004. See also General Elucidation, which speaks of a harmonious relationship between the different administrative levels.

110 Art. 217, under c in conjunction with Art. 10(5), under b Law No. 32/2004.

111 Art. 189 in conjunction with Art. 185-6 Law No. 32/2004.

112 Art. 56-67 Law No. 32/2004.

they have been sentenced to more than five years imprisonment, or for corruption, terrorist acts, subversion, and/or threatening state security.[113] The Provincial Assemblies and District/Municipal Councils are thus stripped of two of the basic authorities that they previously held.

From a fiscal perspective, the 2004 RALs involve few revisions. Basically Law No. 33/2004 confirms the fiscal relations between the central government and the regions that were created by Law No. 25/1999. At the same time it diminishes the risk of a 'fiscal gap' between the authorities assigned to the regions and the revenues available to implement these authorities (Schmitt 2008:185). The regions receive practically the same share of land related revenues as before.

The 2004 RALs led to the enactment of a new series of legislation regarding the divisions of authority in the land sector, but this was a slow process. It took another two years before the tasks and structure of the NLA were finally specified. In 2006, the successor of Megawati Soekarnoputri, President Susilo Bambang Yudhoyono promulgated Presidential Decision No. 10/2006, on the basis of which the NLA no longer falls under the leadership of the Minister of Home Affairs but has a separate Head again.[114] More importantly, the decision leads to recentralisation in the land sector. The NLA holds tasks in the land sector on the national, regional, and sectoral level. Furthermore it holds a non-limitative number of 21 functions, mostly related to land administration, but also the implementation of spatial planning, the implementation of land law reform, and the handling of land disputes.[115] Not surprisingly, the presidential decision has been strongly criticised by representative organisations of regional governments and regional assemblies/councils for limiting their authorities in the field of land and for contradicting the 2004 RALs, arguments that indeed hold true.[116] This time it was the Association of Provincial Governments (APPSI) that called upon the Minister of Home Affairs to withdraw the presidential decision, but again to no avail.

Only in 2007, Government Regulation No. 25/2000 discussed above was replaced by Government Regulation No. 38/2007.[117] According to *Kompas* daily, one of the reasons for the delay was a disagreement between the

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113 Art. 30-1 Law No. 32/2004.

114 Presidential Decision No. 10/2006 on the National Land Agency (*Perpres No. 10/2006 tentang Badan Pertanahan Nasional*). The Decision annuls the Decisions mentioned in footnote 105 on the tasks and structure of Non-Departmental Institutions as far as related to the NLA (Art. 55).

115 Art. 2-3 Presidential Decision No. 10/2006.

116 See 'Badan Pertanahan Nasional Tak Mampu Benahi Birokrasi', *Kompas*, 17 May 2006; 'Pertanahan, Kewenangan yang Masih Diperebutkan', *Kompas*, 16 June 2006; 'Pemerintah Daerah Minta Hak Mengatur Investasi', *Hukum Online*, 29 June 2006.

117 GR No. 38/2007 on the Division of Government Affairs between the Government, Provincial Governments, and District / Municipal Governments (*PP No. 38/2007 tentang Pembagian Urusan Pemerintahan antara Pemerintah, Pemerintahan Daerah Propinsi, dan Pemerintahan Daerah Kabupaten/Kota*).

NLA and the Ministry of Home Affairs about the transfer of authority over land matters. The NLA wanted to base the division of authorities in the land sector on the BAL, while the Ministry of Home Affairs referred to the 2004 RALs.[118] The Ministry of Home Affairs appears to have won the argument: Government Regulation No. 38/2007 confirms what is stipulated in the 2004 RALs, namely that the regions hold the mandatory authority over land matters.[119] However, the attachment to the Government Regulation limits the regions' functions in the land sector to the same nine functions referred to in Presidential Decision No. 34/2003, which as discussed above are mostly related to spatial planning and land clearance. Meanwhile, Presidential Decision No. 10/2006 on the National Land Agency has not been revoked.

In sum, while the 1999 RALs promised to be a groundbreaking initiative of administrative, political, and perhaps even some type of fiscal decentralisation, they also resulted in much confusion, particularly in the land sector. Implementing legislation involving the division of authorities strongly limited administrative decentralisation, not least in relation to land matters. The 2004 RALs led to administrative recentralisation, also in the land sector. Contradictory implementing legislation has resulted in a somewhat inconsistent framework regarding the division of authorities over land between the central government, the Provinces, and the Districts/Municipalities. That being said, the 1999 RALs have indeed led to political decentralisation, to which the 2004 RALs further contributed, and both the 1999 and 2004 RALs have created new fiscal relations between Jakarta and the regions.

3.4.3 Land law reform

Indonesia's constitutional reforms, such as those related to human rights, suggested that much of its land law should be revised. This was confirmed by Law No. 22/1999, which stated that all existing sectoral laws, including the BAL, should be adjusted to the RALs.[120] Obviously this would not be easy. As discussed above, the BAL is in principle centralist in nature. However, in view of the intensive lobbying for land law reform, in the first years of the Post-New Order, by NGOs such as the Consortium for Agrarian Reform (*Konsortium Pembaruan Agraria* or KPA) and influential academics, such reform initially only seemed a matter of time.

A prelude to structural land law reform was supposed to be People's Consultative Assembly Directive No. IX/MPR/2001, which was promul-

118 See 'Pertanahan, Kewenangan yang Masih Diperebutkan', *Kompas*, 16 June 2006.
119 Art. 7 GR No. 38/2007.
120 Art. 133 Law No. 22/1999.

gated in November 2001.[121] It recognized that management of land and natural resources had caused environmental deterioration, an imbalance in the structure of control, ownership, use and exploitation of those resources, and given rise to conflict. The directive also acknowledged that existing legislation was overlapping and contradictory.[122] This situation required legal reforms, based on twelve principles, including supremacy of the law, decentralisation, democracy and participation, prosperity and justice for the people, as well as the recognition of human rights.[123] Legal reforms should focus on the revision of laws and regulations, land reform regarding both agricultural and urban land, collection of data regarding land through inventory and registration, dispute settlement, institutional strengthening and strengthening of authority, and the creation of funds for such reforms. [124] Notably, the directive does not refer to the BAL in any way whatsoever.

It should be noted that the legal status of People's Consultative Assembly Directive No. IX/MPR/2001 was weak. On the basis of the Third Amendment to the 1945 Constitution, which was passed on the same day as the Directive, the People's Consultative Assembly no longer has the right to enact directives that are binding to other state organs. Furthermore, in 2004 the legal status of People's Consultative Assembly Directive No. IX/MPR/2001 became uncertain, since on the basis of Law No. 10/2004, People's Consultative Assembly Directives no longer make part of the hierarchy of legislation.[125] According to the People's Consultative Assembly, the Directive however remains valid until the legislation it calls for has been enacted (Bedner & Van Huis 2008:187).[126]

After two years, the NLA was assigned the task, on the basis of Presidential Decision No. 34/2003 discussed above, to draft several bills in the land sector, including a bill revising the BAL.[127] It should have completed

121 People's Consultative Assembly Directive No. IX/MPR/2001 on the Renewal of Agraria and Natural Resources Management (*Ketetapan MPR RI No. IX/MPR/2001 tentang Pembaruan Agraria dan Pengelolaan Sumberdaya Alam*). For a description of the process that led to the promulgation of the directive as well as criticism on the directive, see Lucas & Warren 2003.

122 Preamble, under c-d People's Consultative Assembly's Directive No. IX/MPR/2001.

123 Art. 5 People's Consultative Assembly Directive No. IX/MPR/2001.

124 Art. 6(1) People's Consultative Assembly Directive No. IX/MPR/2001.

125 Art. 7 Law No. 10/2004 on Lawmaking (*UU No. 10/2004 tentang Pembentukan Peraturan Perundang-Undangan*).

126 Art. 4(11) People's Consultative Assembly Directive No. I/MPR/2003 on the Review of the Material and Legal Status of Directives of the Temporal People's Consultative Assembly and the People's Consultative Assembly of the Indonesian Republic of the Year 1960 to the Year 2002 (*Ketetapan MPR RI No. I/MPR/2003 tentang Peninjauan Terhadap Materi dan Status Hukum Ketetapan Majelis Permusayawaratan Rakyat Sementara dan Ketetapan Majelis Permusyawaratan Rakyat Republik Indonesia Tahun 1960 sampai dengan Tahun 2002*).

127 Art. 1, under a Presidential Decision No. 34/2003.

this task before 1 August 2004.[128] Although the content of the Presidential Decision was not fully to the liking of the NGOs that had lobbied for the People's Consultative Assembly Directive, the legal status of the Presidential Decision is indisputably stronger than that of People's Consultative Assembly Directive No. IX/MPR/2001.[129]

By the end of 2004, the NLA presented a bill, drafted by Vice-Head of the NLA and Gadjah Mada University Professor Maria Soemardjono, which would replace the BAL altogether. The bill met with strong criticism from academics such as Trisakti University Professor Boedi Harsono, who in the 1950s was involved in the drafting of the BAL, and agrarian and environmental NGOs such as KPA. Referring to the fact that the drafting of the BAL had taken twelve years, Boedi Harsono found the bill a product of hasty work.[130] He agreed that the BAL contained some weaknesses, but this did not mean it should be replaced altogether. NGOs found the bill too much state and investor oriented. It did not recognise the community right of avail, confirmed sectoralism in the field of *agraria*, created room for the monopolisation of control over land and natural resources, and the envisaged simplification of the system of land rights would only add to existing confusion.[131] Trisakti University and NGOs both presented alternative bills revising certain parts of the BAL, but basically keeping it intact.[132]

The disagreement between the NLA, academics, and NGOs over the direction of the BAL's revision resulted in a deadlock. NGOs tried to convince the People's Representative Council to reject the bill of the NLA.[133] They were successful in this effort. The bill of the NLA did not receive a majority vote. Next, the NLA proposed an alternative bill, which consisted of an amendment to the BAL. This bill met the same fate as its predecessor.

Meanwhile little other land law has been reformed. As will be discussed in Chapter 5, a bill revising the 1992 Spatial Management Law was enacted in 2007. Otherwise, land law reform remained limited to the promulgation of lower legislation related to participation and transparency in

128 Art. 4 Presidential Decision No. 34/2003.

129 NGOs that had lobbied for the promulgation of People's Consultative Assembly Directive No. IX/MPR/2001 were concerned that the Presidential Decision did not implement the People's Consultative Assembly Directive as intended. The development of a land information and management system was believed to lead to an extension of the survey and registration of land through the World Bank supported Land Administration Project (LAP), discussed in further detail in Chapter 4 (Lucas & Warren 2003:1233).

130 'Meski Masuk Prolegnas, RUU SDA Belum Tentu Selesai Tahun Ini', *Hukum Online*, 23 March 2005.

131 'KPA: RUU Sumber Daya Agraria Dinilai Memiliki Empat Kelemahan', *Hukum Online*, 24 March 2005.

132 'Tiga Lembaga Ajukan Draf Revisi UU Pokok Agraria', *Hukum Online*, 13 October 2004; 'Jalan (Tak) Panjang Membahas RUU Sumberdaya Agraria', *Hukum Online*, 18 November 2004.

133 'Meski Masuk Prolegnas, RUU SDA Belum Tentu Selesai Tahun Ini', *Hukum Online*, 23 March 2005; Soal Agraria, Seharusnya Fokus pada Amanat MPR, *Kompas*, 30 May 2005.

spatial management, land clearance for development in the public interest, site permits for commercial land clearance, which, as will be discussed in Chapter 5-7, does not reflect the ambitious land law reform programme formulated in People's Consultative Assembly Directive No. IX/MPR/2001 or even comply with the Amended 1945 Constitution and the ratified ICESCR.

3.4.4 Access to justice and legal empowerment

The national reforms discussed above were closely related to various programmes supported by international donor organisations. GTZ for instance played a supporting role in the implementation of regional autonomy by the Department of Home Affairs. Since 1998, strengthening the rule of law has been a major point of interest for various international donor organisations, such as the Australian Agency for International Development (AusAID), the Netherlands Directorate-General for International Cooporation (DGIS), USAID, the World Bank, and the UNDP. While the former three have intensively collaborated with the judiciary, the latter two have set up access to justice initiatives that include legal empowerment components.

The World Bank launched in collaboration with BAPPENAS the Justice for the Poor (J4P) programme in 2002. Aside from research activities and building partnerships, a great variety of operational activities are undertaken under World Bank's J4P programme. First, it includes the Mediation and Community Legal Empowerment (MCLE) programme, which has the objective to empower communities to handle a variety of disputes and legal problems. The programme is implemented in Aceh and the Moluccas.[134] Second, under J4P, the Revitalisation of Legal Aid (RLA) pilot programme is being implemented. It has the objectives to establish a legal aid network for the poor in Indonesia, increase the capacity of community organisations to provide mediation, legal aid and education via village paralegals and mediators, and strengthen national and local government policies regarding legal aid for communities in Indonesia. The RLA programme has been operating since 2005 in Lampung, West Java and West Nusa Tenggara. The third programme operating under J4P is the Women's Legal Empowerment (WLE) programme. It has the objectives to increase women's knowledge and awareness of the law, particularly in relation to women's rights, increase the capacity of legal institutions to deliver training and provide effective services, increase the role and capacity of paralegals who work directly with the community, and increase policy advocacy

134 The MCLE programme is a component of the Support for Poor & Disadvantaged Areas (SPADA) programme, which facilitates local governments to accelerate development through increasing local social and economic capacity and strengthening governance and planning processes.

to realise women's rights. A WLE pilot programme was carried out from April 2005 to December 2008 in Brebes, Cianjur and West Nusa Tenggara. Since then, the programme expanded to East Nusa Tenggara, West Kalimantan, North Maluku, Jakarta, and Aceh. The Strengthening Access to Non-State Justice programme is another programme that is part of J4P. Its objective is to strengthen best practice informal dispute resolution in West Sumatra and West Nusa Tenggara. The fifth programme under J4P to mention is the Local Government Regulation programme. Its goal is to increase the quality of local government regulations and strengthen drafting processes and harmonization, specifically focused on public service delivery regulations. Strengthening Access to Justice in Aceh is the sixth programme under J4P. The objective of the programme is to support poor Acehnese communities to obtain fair and effective dispute resolution, through a time-efficient, unbiased and humane procedure.[135]

As noted in Chapter 1, in collaboration with BAPPENAS, UNPD initiated the Legal Empowerment and Assistance for the Disadvantaged (LEAD) programme in 2007. The programme include five steps: i) establishing a grant-making facility focused on civil society empowerment, ii) the provision of civil society support and capacity development, iii) ensuring legal and human rights empowerment at the grassroots level; iv) fostering a human rights-based approach with regard to grantee activity development and implementation; and v) constructively engaging state authorities. Grant activities seek to strengthen public awareness and legal empowerment, with an emphasis on, inter alia, land and natural resources and local governance issues, and assist the legal services community to provide free legal assistance to the most vulnerable and marginalised. Further, the programme facilitates community participation, and oversight of local government policies and service provision. The programme was initiated as a pilot project in North Maluku, Central Sulawesi, and Southeast Sulawesi.[136]

Both the World Bank and the UNDP have been involved in the development of a comprehensive National Strategy on Access to Justice (*Strategi Nasional Akses terhadap Keadilan* or SNATK) for inclusion in the 2010-2014 National Medium Term Development Plan (*Rencana Pembangunan Jangka Menengah Nasional* or RPJMN 2010-2014). In this framework, BAPPENAS initiated in collaboration with the UNDP, the World Bank, and the Van Vollenhoven Institute the joint programme Building Demand for Legal and Judicial Reform 2007- 2010: Strengthening Access to Justice in 2008. As part of the programme, case studies have been conducted in various regions in Indonesia focusing on various themes, including land. These findings have

135 This description was derived from the J4P page at www.worldbank.org.
136 This description was derived from the LEAD page at www.undp.org.

been translated into policy advice through policy-dialogues that bring together the most important stakeholders.[137]

3.5 Conclusion

This chapter gave a general overview of Indonesian land law in the context of Indonesia's changing rule of law environment. It forms a first effort to assess to what extent kampong dwellers in Bandung are protected against arbitrary behaviour by the state or private parties, which is a prerequisite for tenure security.

The general framework of Indonesian land law is formed on the basis of article 33(3) of the 1945 Constitution by the 1960 BAL, which was enacted during Guided Democracy, when the Indonesian 'Rechtsstaat' was under severe pressure and Soekarno was promoting Indonesian socialism, including 'revolutionary law'. As any law, the BAL is a product of its time. In order to protect vulnerable groups, it stresses that land has a 'social function'. To realise this function, the law grants the state a strong authority in land matters in the form of a state's right of control. It allows the state to grant individual land rights to landholders, to limit these rights, or to revoke them. The BAL required the enactment of implementing legislation, which only partly occurred though.

Guided Democracy was followed by the New Order period in 1965, marked by stability and economic growth. The Soeharto regime adopted a 'developmentalist' approach of state-led industrialisation, intensification of agriculture, and large-scale exploitation of natural resources. To implement this policy, it built a centralist regime of authoritarian rule with strong military backing. Throughout the years, the New Order was increasingly marked by KKN. While authoritarian interpretations of constitutional law provided the stability required for economic development, the New Order regime created a new framework of substantive laws and regulations that were to facilitate such development. Existing legislation was not always annulled, but often marginalised and reinterpreted. Land law was also reformed to facilitate economic development, leading to significant legal inconsistencies. The socialist oriented BAL was maintained. As the law grants the state a broad authority in land matters, it was basically a suitable instrument to implement New Order 'developmentalist' policies. The BAL's importance was however strongly reduced by the enactment of other legislation. Furthermore, little legislation implementing the BAL was enacted. What little implementing legislation was enacted reflected the New Order regime's 'integralist' interpretation of key concepts of the BAL. The combination of these conditions resulted in the central government

137 This description was derived from the Van Vollenhoven Institute's Access to Justice page at www.law.leiden.edu.

retaining strong discretionary powers in the land sector, which could easily be and indeed were abused in the name of 'development', affecting the tenure security of ordinary landholders.

The fall of Soeharto in 1998 marked the beginning of an ambitious political and legal reform programme, leading to a reformulation of Indonesia's development policy, a dismantling of the authoritarian state, and various measures against KKN. The 1945 Constitution was amended four times and implementing legislation was revised or enacted, thus strengthening the Indonesian 'Rechtsstaat', including more democracy, a clearer separation of powers, and better human rights protection. The right to adequate housing is now explicitly acknowledged in the Amended 1945 Constitution and through the ratification of major international human rights treaties. One of the most important initiatives following these constitutional reforms was the enactment of the 1999 RALs, revised by the 2004 RALs, which resulted in the devolution of tasks, authorities, political power, and resources from the central government to the districts/municipalities. Implementing legislation has however led to much confusion and has severely limited the scope of regional autonomy in the land sector. Land law has only been revised to a limited extent, despite calls for fundamental reform. It thus still contains clear trails of Guided Democracy and New Order ideology.

It follows from the above that compared to the New Order period, kampong dwellers in Bandung now seem more protected against arbitrary behaviour by the state or private parties. At least on paper, the rule of law environment in which land law is embedded, has improved significantly. The effect of this improvement may however be limited by the fact that land law itself has not yet been reformed. In order to assess this affect, the following chapters therefore take a closer look at the law and practice of four specific areas that are relevant in relation to the issue of tenure security: land registration (Chapter 4), spatial planning (Chapter 5), land clearance by the state (Chapter 6) and land clearance by commercial developers (Chapter 7).