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

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CHAPTER I
GENERAL INTRODUCTION

1.1. Introduction

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

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

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

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

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

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

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

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

This does not mean, however, that the Indonesian government has completely ignored land dispute issues. During the New Order, such disputes already caught the attention of President Soeharto, who instructed the head of the NLA in 1989 to pay attention to the plight of those land owners losing their land to development projects. In fact, by that time, insecure land tenure, the by-product of public infrastructure development projects and natural resource management policy had become a problem for millions of citizens in urban as well as rural areas. Nonetheless, Soeharto saw the problem in terms of how to secure consensus in the land appropriation process by providing compensation for loss of homes and sources of income – in fact only a small part of the natural resource management system.[6] In this view individual or communal claims on land must always yield to the overriding interest of the state to exploit natural resources. No attention is thus given to the legitimacy of the land appropriation process, nor to the impact of its consequences on those concerned and society at large. Other problems with regard to access to land, tenure security, and subsequent land use were thus ignored. This perspective may be contrasted to the way the government perceived land disputes after the fall of the New Order regime, as indicated in a decree issued by the Consultative Assembly in 2001.[7] Nonetheless, land disputes have continued to occur and to contribute to worsening environmental degradation, social inequity and injustice, as the numbers quoted above indicate.

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

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

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

Disputes related to land have moreover become increasingly common and acute because of the staggering pace of urbanization in Indonesia, like in other developing countries.[8] In terms of land use control and management, it is indeed extremely challenging to find workable solutions to a complex of social and environmental problems brought about by the densification of cities combined with their rapid and massive expansion into the countryside. In the process, many self-sustaining rural communities lose their ancestral and agricultural land to urban development. Previously semi -autonomous villages become part of the growing number of slum areas, the potential locus of environmental and human disasters for years to come. Particularly disturbing is the problem of rapid and massive conversion of prime agricultural land, which threatens the nation's food security[9]. This problem has been raised and discussed by several authors noting the mass conversion of agricultural land in residential areas and other urban uses in Indonesia[10] as well as in other countries.[11] In sum, land disputes are rooted in competing views on how to best utilize scarce land. It is this issue which forms the topic of the present thesis.

1.2. Review of Theoretical Approaches to Land Disputes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[22] But see also: Agrarian Reform: Is it really pro-poor? (Down to Earth, 72/March 2007).
[23] Hernando de Soto, The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere, 1st ed., (Basic Books, 2000).
[24] Jan Michiel Otto, "Rule of Law Promotion, Land Tenure and Poverty Alleviation: Questioning the Assumptions of Hernando de Soto" in Hague Journal on the Rule of Law (vol.1, 2009, no. 1), pp. 173-194.
[25] Djaka Soehendera, Pembangunan, Sertipikat Tanah dan Warga Miskin: Kasus di Kampung Rawa, Jakarta Pusat (dissertation written in relation to the INDIRA project, Post Graduate Study Program University of Indonesia. 2006). Cf. Reerink G., van Gelder, J.L., "Land titling, perceived tenure security, and housing consolidation in the kampongs of Bandung Indonesia, (Habitat Internasional (2009), doi:10/1016/habitatint.2009.07.002.
[26] Daniel Fitzpatrick, "Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Areas", (the Yale Law Journal 115: 996, 2006): 996-1048.

He further points out that:

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

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

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

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

[27] See Renske Biezeveld, "Discourse shopping in a dispute over land in rural Indonesia" (Ethnology Vol. 43, March 2004.

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

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

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

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

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

[31] Noer Fauzi, "Sendi-sendi Pembaruan Hukum Agraria" (Seminar, Jakarta, 1999): p. 9.

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

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

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

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

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

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

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

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

1.4. Research Question

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

As regards land acquisition, the thesis explores how the current system of land acquisition and utilization for development purposes could be improved by making it more sensitive to social and environmental issues. This entails questions such as how immaterial losses associated with land alienation can be translated into monetary compensation. According to the law, land use has a social function[36], which potentially facilitates the idea of compensation for the environmental degradation brought about by changing patterns of land use. For all of those who lose their land in the name of development, those who are forced to

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

seek employment in cities and who come to live in the poorer quarters of these cities, how do we compensate for the loss of their basic right to enjoy a clean and healthy environment?[37] How do we balance the needs of the greater good against the individual rights of those adversely affected[38]?

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

To put it differently, the *Negara Hukum* concept, understood as an universal human good in the sense that the government should be constrained by law and be held legally accountable to the people it is supposed to serve[39] should provide a standard - a base line – for the way governmental power as exemplified in legal rules and policies is to be exercised.[40] It should function as a guarantee for the proper exercise of state power. My focus will thus be on processes offering guarantees that the state (or government) will not abuse power or authority, even if this offers no guarantee for substantively good outcomes. My focus is on how the state formulates and implements laws and policies, how it can be held accountable for its actions, and how the *Negara Hukum* should provide a starting point in legal reform efforts at the national and regional level, including attempts at reforming the existing spatial management laws and regulations.

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

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

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

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

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

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

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

1.5. Research Site

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

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

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

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

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

1.6. Approach

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

[43] Biro Pusat Statistik (Katalog 2120), December 2002

law and empirical practice, but instead attempt to look into the interrelationship between law and government institutions that are the main producers and users of the law and, finally, its impact on society. In this respect, I follow Schift who stated that in a socio-legal approach[44]:

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

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

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

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

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

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

[46] Ibidem, pp.116-117.

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

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

There is a practical reason as well. My own experience working as a practicing lawyer has taught me that a socio-legal approach, although not referred to as such, has been used for a long time by legal consultants or legal practitioners in Indonesia when advising their clients. The same applies to volunteers working at legal aid institutions. Sound legal advice will always convey information about the law (prescriptive), but also about practice (descriptive), and what the law and practice should look like (normative)[49]. The advantage of this socio-legal approach is that it enables me to focus not only on how "black letter law" (as found in legal documents) has been articulated, but, more importantly, on how it has been further interpreted and put into practice by real actors in the field. Such an approach moreover has the potential to demonstrate that state law and the formal legal system are not merely discrete entities and as such unproblematic[50].

1.7. Data Collection

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.8. Theoretical Framework

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

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

The formation and implementation of laws and policies related to spatial management shall be evaluated using the yardstick provided by the rule of law as an ideal normative concept. Rule of law implies a government under law, meaning that the organs of government must operate not only through the law but in accordance with it. Likewise, in the *Rechtsstaat*, all government action must be based on law (due process) and in this way government power is restrained by law. This understanding of the *Rechtsstaat* as due process significantly determines the legitimacy of government action which should be based on the law. On that particular basis the state may demand that all citizens obey the law[52].

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

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

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

An additional, but equally important, problem is how to embed abstract and general values or norms falling under the broad notion of rule of law (as a normative ideal) in the national or local milieu[55]. Hence, besides knowing exactly what the notion of *Rechtsstaat* as ideal norm implies the attempt at understanding the extent to which the state (or government) as well as law is being embedded or manifests itself in society is equally important. As argued by other authors[56], "(t)he notion of [*Negara Hukum*] refers to the relationship between the State and law. Not a more or less accidental relationship, but an essential one." Similar assertions stressing the point that the *Rechtsstaat* should be understood as an ideal type of normative ordering of society have been made by other authors as well. O'Hagan argued that "the characteristic form of the most advanced modern social order is that of a *Rechtsstaat*" which he defines as a "more or less sovereign state made up by citizens who are united by abstract impersonal ties of recognition of the state as an authoritative source of power and

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

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

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

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

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

The same concern lies at the core of Asshiddiqie's redefinition of the Indonesian *Rechtsstaat* in which he requires the state to be established on democratic principles and recognition of human rights[58]. He asserts that: "in a *Rechtsstaat,* law not men governs. Law here is understood as an integrated normative legal ordering [of society] with the constitution at its apex (*kesatuan hierarkhis tatanan norma hukum yang berpuncak pada konstitusi*). On that basis, he further declares that Indonesia ought to be established as a constitutionally democratic *Rechtsstaat*. As argued by Asshiddiqie elsewhere, in the Indonesian *Rechtsstaat* it is important not to separate the *cita Negara* (the ideal state) from the *cita hukum (*the ideal law)[59]. Historically, the *Rechtsstaat* idea cannot be understood separately from the development of the Indonesian state (and government) since Independence,[60] the effort at modernizing the Indonesian legal system as captured in the term legal development (*pembangunan*) or legal renewal (*pembaharuan)*[61] and the broad notion of development.

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

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[57] Timothy O'Hagan, "Four Images of Community" (Praxis International 2/1998), pp. 183-192.

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

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

[60] Ibidem.

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

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

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

As indicated earlier, an important part of the effort at rule of law formation is legislative engineering. In Indonesia legal development and reform are the result of legislative engineering rather than of the slow process of judicial lawmaking, which is thought to better serve the nation building and modernization effort. One major objective is to substitute legal pluralism[64] for a unified national legal system applicable to all citizens. Whilst Tamanaha and others argue that[65] legal pluralism is actually a common situation observed in developing as well as developed countries, from a developing state perspective and the need to promote, initiate, control and regulate the process of political, economic and social development of a nation in the post independence era[66], the same phenomenon understandably is perceived as obstructing the nation and state building effort and moreover as hindering the attainment of development goals as initiated by the government. This explains why rule of law formation is often – incorrectly – equated with establishing uniform laws applicable to all.

(b) Rechtsstaat and Development

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

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

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

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

Consequently, the effort to realize the *Negara Hukum* ideal is an important part of development goal in Indonesia.[67] This has been translated into a continuous effort at simultaneously empowering the government to act in the public interest when bringing development to the people and into reducing governmental arbitrariness[68].

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

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

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

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

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

(c) Spatial Management

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

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

In that sense, spatial management in Indonesia as elsewhere has been linked with the notion of the environment's carrying capacity and sustainable development, in particular of urban areas.[70] Lurks, in comparison, argues that:[71] "spatial planning (in a broad sense) is focused on determining the best division of spatial use with the purpose of optimizing its use by society. Spatial planning involves taking into account and coordinating all societal development with spatial aspects and effects[72]".

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

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

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

[72] Ibidem. "de ruimtelijke ordening is gericht op de best denkbare indeling van de ruimte ten behoeve van een optimaal gebuik daarvan door de samenleving. Ruimtelijk ordenen bestaat uit het afwegen en coördineren van alle maatschapelijke ontwikkelingen met ruimtelijke aspecten en effecten".

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

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

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

This list does not say anything about how land ought to be used, but apart from that it is fairly complete. In this study it will be used to evaluate the institutional arrangements regarding spatial planning and how they have changed over time. Thus, in this study spatial management denotes legal instruments and policies through which the government makes decisions pertaining to allocation and subsequent utilization of land (agrarian and natural resources) to secure some predetermined goals and objectives[75]. Such decisions, taken in the

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

[74] Patrick McAuslan, op. cit.

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

context of spatial management, affect the interests of different groups in different ways[76] and reflect the distribution of political, social and economic power[77]. As such, it is also the product of a specific legal and government culture, to be studied in the context of its relation to a broader social system[78].

(d) Spatial Management and Sustainable Development

As indicated above, most literature links the notion of spatial management to sustainable development[79]. Sustainable development itself has been defined in many ways, but the most frequently quoted definition is from the Bruntland report 'Our Common Future'. This report defines sustainable development as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs[80]". As further explained in the Report, the notion of sustainable development contains two key concepts: the concept of needs aimed in particular at the essential needs of the worlds' poor, to which overriding priority should be given; and the idea of the environment's ability to meet the present and future needs in relation to existing social organizations and advances in science and technology. This suggests that poverty reduction and environmental protection should be incorporated into development strategies and policies. The concept thus combines ethical norms of welfare, distribution and democracy while recognizing that nature's ability to absorb human-made encroachments and pollution is limited. Consequently, a sustainable

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

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

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

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

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

development strategy will create healthy economic growth, preserve environmental quality, lead to wise use of environmental resources and enhance social benefits[81].

One can easily imagine why this concept holds much appeal to developing countries. While relatively rich in natural resources, most of them continue to grapple with issues of underdevelopment and widespread poverty. The problem is that the sustainable development concept may degenerate into a justification for development policies which focus merely on ensuring economic growth, as measured by increases in real per capita income. The trickle down effect or "economic growth comes first" development strategy pursued by many developing countries, including Indonesia, may become the direct cause of social inequity and ecological disasters. Alternatively, the definition of sustainable development may be undercut by incorporating every desirable goal into it that relates to social and ecological issues. The concept has even been used to advocate the supremacy of the free-market against state-led development[82].

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

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

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

[83] Wilfred Beckerman, "The Chimera of "Sustainable Development", (the Electronic Journal of Sustainable Development (2007) 1(1)), pp. 17-26.

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

One way to accomplish that is by seeking a reasonable balance between desired goals of development and the available means and resources[85].

(e) Spatial management and the Government

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

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

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

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

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

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

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

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

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

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

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

(f) Public Interest in Spatial Management

As argued above, spatial management functions as an important tool to secure the public interest understood as development goals. This presupposes a division between the governing body and the governed, or between government and society[92]. The governing body is positioned above the governed and has the task to steer society for the good of the governed. The only actors that have the authority to take decisions are part of the governing body. They are the ones able to articulate the public interest, to determine the need for

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

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

[91] Ibidem p.18-22.

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

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

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

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

Weintraub further argues that the basis for using the term "public" to describe the acts and agents of the state is based on the state's claim to be responsible for the general interest and the affairs of a politically organized collectivity as opposed to "private" – that is, merely a particular interest. Treating the state as the locus of the public may be combined with arguments for the openness or "publicity" of state actions[95]. The end result would be a clear separation of the public and private sphere, where public officials would pursue the public interest in contrast to private or commercial interest. The same basic idea underlies the

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

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

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

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

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

(g) Defining decentralization

Decentralization may be defined in different ways depending on one's legal/political perspective, ideology and practical needs.[96] Several scholars suggest that at present decentralization should be understood in the context of the attempt to reconcile two contrary tendencies: globalization and the wish for local self-governance[97]. Decentralization has thus been described[98]

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

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

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

[98] Ibid. p. 35.

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

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

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

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

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

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

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

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

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

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

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

[105] Stohr, op.cit.

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

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

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

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

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

Decentralization, as used in this book, thus means the transfer of power, tasks and resources from central government to lower levels of government. It implies a change in the working relationship between the central government and all other public and private institutions. Different forms of transfer are deconcentration; delegation; and devolution. The important issue here is what is involved in the transfer process: what form it takes and what is actually transferred.[111] Some authors speak of the need to develop a good design of the goals to be achieved first to avoid the negative aspects of decentralization[112]. In order to successfully decentralize, one should focus on such issues as how territory is to be divided, what institutions will be used to govern, which functions, authorities and resources will be assigned to what levels of government and what means of popular and sectoral participation will be introduced to which territories.

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

[110] Ibid, p.11 and again in the article conclusion (pp.26-27).
[111] Jan Michiel Otto, op.cit. p. 23.
[112] Mark Turner & Owen Podger (with Maria Sumardjono & Wayan K. Tirthayasa), Decentralization in Indonesia: Redesigning the state (Canberra: Asia Pasicif Press, 2003), pp.6-7.
[113] See Abdou Maliq Simone, Principles and Realities of Urban Governance in Africa (UN Habitat, 2002). pp. 10-12.
[114] Anwar Shah & Theresa Thompson, Implementing Decentralized Local Governance: A Treacherous Road with Potholes, Detours and Road Closures (World Bank Policy Research Working Paper 3353, June 2004).

1.9. Course of the Research

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

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

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

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

The second formative experience was my involvement through the Legal Aid Institution of the Law Faculty of UNPAR with the *Jatigede* case in 2003-2004, and a few other smaller cases concerning spatial management. The Legal Aid Institution was asked to represent and assist local people in their effort at demanding a more just and equitable compensation. What struck me most was the government authorities' feeling of righteousness when they spoke about the need to bring development to the people at all cost. Government officials seemed to hold on to the belief that they, as servants of the State (*abdi Negara* or *pegawai-negeri),* were merely following the dictates of the law, which aimed at bringing development to the people. This sentiment was voiced in its most extreme form by the former Armed Forces Chief of Staff, General (ret.) Wiranto when he tried to avoid the army's accountability for past human rights violations. He argued that in former times the security apparatus (armed forces personnel) were performing their duty in accordance with the law. (…) they were acting on the basis of written orders based on State policy[115]. The same argumentation in various forms and gradations was used by prominent officials and even lower ranking civil servants at regional governments (provincial and district/municipal level) whom I interviewed for this research project. They all seem to be convinced of their righteousness when performing their legal duty in the service of the state. Underlying this belief is the never questioned assumption that the overarching duty of government acting on behalf of the state is 'bringing development to the people'. These officials strongly believe that all existing laws are tools legitimizing the effort to pursue national or regional development goals in the public interest. The second incident opened my eyes to the impact that development as an ideology has had on all aspects of spatial management law, including the prevailing legal regulation concerning land acquisition. This also prompted me to place land disputes in a wider context of spatial management, which in the end determines who will have access to natural resources and who will enjoy the freedom to utilize them. In addition, both incidents showed the need to approach the issue not merely as a problem of 'corruption, collusion and nepotism' – a problem that, however, does offers a strong indication– of the extent to which the distinction between state and society has been blurred.

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

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

criticized *Kedung Ombo* Case during the 1990s, any criticism voiced against development projects initiated or supported by the government in the New Order period tended to be treated as a challenge to the state and the government's legitimacy[116]. This study will show that not much has changed. As a matter of fact many government officials I spoke to for my research just could not understand why individuals or local communities would not accept and welcome "development". The possibility of government error (in terms of spatial management or natural resource planning) is thereby categorized as non-existent: there are no bad (development) projects and mistreated people, but only "misunderstood" projects and "misunderstanding" people or NGOs[117]. Against such a position one should well keep in mind that the end does not necessarily justify the means. Following the law to the letter, even with the purpose of bringing about development, may certainly not be equated with the effort at bringing justice and treating citizens fairly.

1.10. Structure of the Book

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

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

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

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

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

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

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