CHAPTER X
GENERAL CONCLUSION

10.1. Spatial Management from the rule of law perspective

The rule of law (or in the Indonesian case: the *Rechtsstaat*) as an ideal notion demands not only that government actions are based on the law, but that law should be able to direct and control how state power is being exercised. The law should be able to restrain and put limit sto government action and thus protect citizens against abuse of power. Likewise, the same law should justify government action. Government action should be based on democratically made laws. It also means that people (the supposed beneficiaries of those laws) should be able to hold government officials accountable for the implementation and enforcement of them. This understanding of the rule of law had been in my mind at all times when discussing the multifold aspects of spatial management, how it changed due to the RGL 1999 and 2004, and lastly, how it influenced people's access to land.

The rule of law perspective as a normative yardstick had been used to evaluate not only how the spatial management system had been set up at the macro level but also how the planning system had been actualized by government officials at the ground level through the use of permits and binding recommendations controlling people's access to land and restricting its use "in the public interest". The litmus test will be whether the government has succeeded in establishing a fair and efficient spatial management system. It thus concerns not only whether government actions in spatial management are ruled by law but also whether the existing law has been used to rule fairly.[782]

(a) The main objective of the Spatial Planning Law

At the abstract and macro level, the main purpose of spatial management as perceived from the existing Spatial Planning Law (both the SPL 1992 and the SPL 2007) seems to focus on the distribution of spatial management responsibility to different government levels and agencies and establishing a hierarchal and centralized spatial planning system. Nonetheless, it is the changing Regional Government Law (from the Dutch colonial times up to Regional Government Laws of 1999/2004) which provides the legal context in which planning powers

[782] A point stressed by Stephen Golub, "Make Justice the Organizing Principle of the Rule of Law Field", Hague Journal on the Rule of Law, 1: 61-66, 2009, doi: 10.1017/S18764050900016X.

are distributed and dispersed at the central government level and below down to the districts and which determine the level of district government's accountability and responsiveness to local population needs and demands.[783]

Following that, I have focused on legal instruments by which existing spatial plans are implemented. At the ground level, permits and recommendations - the main legal instrument to implement spatial plans - regulate people's access to land and restrict freedom to use land. Here too, spatial planning should limit the discretionary power of government officials at the ground level when they process permit applications or requests to endorse recommendations. The general public, more so affected individual land owners or occupants (putatively enjoying and able to exercise the right to access information), should be able to demand public accountability of government officials authorized to process applications of permits or recommendations regulating access to land. In other words at all times should government decisions be *wetmatig* (according to the law), *rechtmatig* (fair) and *doelmatig* (purposive; non-arbitrary) as demanded by the prevailing law.[784]

Both the development and spatial planning system (to the extent it has been translated into land use planning and influences land use planning), seen from the rule of law perspective, should enable autonomous districts to effectively control land use by individual land owners or those who seek to acquire land for private investment of infrastructure development, and in case of violation react accordingly. Clarity of legal rules and non-discriminative treatment is thus absolutely required. This is even more so because the way spatial management is translated into government action (or in-action) certainly influences people's access to land and their tenurial security. Therefore, it is in the interest of individual citizens or communities to know what future (development or spatial) plans exist in regard to land, as it may impinge their basic rights such as the right to possess property (land) and the enjoyment of a clean and healthy environment. Accordingly, public participation, the right to be informed and fully participate in decision making affecting future land use, should not only be guaranteed by law, but also exercised at all stages of spatial management. Especially land owners and other occupants should possess voice in the formulation of spatial plans directly

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[783] A link underlined by Jesse C. Ribot: "Choice, Recognition and the Democracy Effect of Decentralization", working paper no. 5 (Visby-Sweden: ILCD, 2011). He also stressed the point that to be democratic, institutions must be representative: accountable to the people and empowered to respond (p.8).

[784] Law 28/1999 on the Management of the State free from Corruption, Collusion and Nepotism (*Penyelenggara Negara yang Bersih dari Korupsi, Kolusi dan Nepotisme*) & Law 32/2004 which refers to 'general principles of state management (*asas-asas umum penyelenggaraan Negara*)' comprising of a. legal certainty, orderly fashion of state management, public interest, openness-transparency, proportionality, professionalism, accountability, efficiency and effectiveness.

influencing and restricting their freedom to use land. To reiterate, spatial plans should be formulated and implemented in the context of a democratically accountable local government.

(b) The evolution of City Planning to Spatial Management

The exposition of how the law and policy pertaining to the use of land, in Bandung and West Java have evolved shows that spatial management originated from the idea that autonomous municipalities (and later also districts in the strict sense: *kabupaten*) required master plans to direct and regulate city development. Initially urban master plans were developed based on the idea that autonomous municipalities (*stadsgemeentes*) ideally possess freedom to decide how scarce urban land should be utilized in the best interest of the (European and indigenous) urban community. A master plan, therefore, reflected the public interest of the colonial urban community. In addition the zoning and building regulations (a derivative of the Master Plan) purporting to restrain land use in the public interest were enforced to all urbanites without prejudice to their ethnicity. Equality before the law and government, at least in terms of the implementation of urban master plan, zoning and building regulations applied to all. To what extent the same government was accountable to its constituents (European and indigenous people alike), however, depended on the level of representativeness of the Bandung municipal government.[785]

The same basic idea regarding city government autonomy and city master plan still pervades urban spatial planning after Indonesia gained its independence. Nonetheless, urban spatial planning, as developed since the 1960, cannot but be understood as a small part of a top down and centralized spatial and development planning system. It had been transformed into a nationwide effort at developing a network of urban areas as economic growth poles (NUDS) in the 1980s. In addition, considering the changing legal and political landscape, the SVO (the city planning ordinance) of 1948 and its implementing regulation (the SVV of 1949), and existing urban master plans left behind by the Dutch autonomous *stadsgemeentes* practically became dead letter laws. No autonomous *stadsgemeente* existed after 1945. They did not survive the Old and New Order regimes. Certainly no autonomous municipality (Bandung included), remained in existence under the 1974 Regional Government Law. Even after 1999, with the promulgation of the Regional Government Laws of 1999 and 2004,

[785] See further Jan Michiel Otto, (1991) ' Een Minahasser in Bandoeng: Indonesische oppositie in de koloniale gemeente', in H.A. Poeze en P. Schoorl (eds) *Excursies inCelebes,* Reprint VVI; 91/1, Leiden: KITLV, blz. 185-215.

districts, for other reasons, haven't been able to obtain full authority to determine land use within their administrative borders.

Another important finding in this context is the fact that the municipal government of Bandung mistakenly perceived the zoning and building regulations derived from the earlier Bandung master plan to be discriminatory. The result had been the unwillingness to apply zoning and building regulation to control land grabbing by the indigenous communities flocking to the city after 1960 and halt the spreading of informal housing in the urban kampongs.[786] The municipal government thus not only allowed for illegal occupation of land but also decided (whether deliberately or out of ignorance) to flout existing zoning and building regulations on a grand scale. The end result has been informality not only in land holding but also in land use. In addition, the municipal government, believing that they were not capable to finance city development and in need of continuing influx of investment, decided to develop a land use policy based on market initiatives. Zoning and building regulations were pushed aside so as not to hinder investment initiatives. Without doubt, in this situation, the actual hands off ("floating") land-use policy did not much concern itself with the environmental and social cost of informality or market based land use. A similar hands-off policy resulting in failure to implement existing master plans (including zoning and building regulations) can also be observed in other big cities in Indonesia.

This does not mean the end of master plans. Attention to urban planning revived in the late 1980 and culminated in the promulgation of the first Spatial Planning Law (4/1992) which revoked the SVO and SVV. One significant change was that the focus in spatial management was not so much on empowering autonomous municipalities to develop available land according to predetermined master plans but rather on strengthening the state's right to control in matters of natural resource management and empowering all government levels to control access to land. Initially the SPL was envisaged to function as a sort of umbrella act, i.e. to address the sectoralism or siloism in natural resource management resulting in conflicting land use policies. The legal basis of spatial management is the state's right to control, encompassing the authority to (a) regulate (*mengatur*) and manage (*menyelenggarakan*) the allocation (*peruntukan*), reservation *(persediaan*) and maintenance-preservation (*pemeliharaan*) of earth, water and air space; (b) determine (*menentukan*) and regulate the legal relationship between individuals and the earth, water and air-space; and (c) determine and regulate legal relationships between people and any other legal transactions

[786] Of course inability played a role as well.

made pertaining to the ownership and utilization of earth, water and air space.[787] The SPL 26/2007 replacing the SPL 4/1982 retained this idea of spatial management.

In this sense, the early master plans as envisaged under the SVO and SVV differ from spatial management. Spatial management has become more of an issue of how to empower central, provincial and district government. Formulating land use planning and its implementation has and continues to be cast as the central, provincial and district government duty in controlling land use derived from the state's right of avail. Understandably, the state's right of avail (as transformed into spatial management powers), has often been defined in relation to the welfare state (or development state) idea within which the state is positioned as the most important institution managing natural resources for the purpose of securing the attainment of the people's prosperity.[788] Apparently the position of the state is built on the basic assumption that the government, positioned above society, shall decide where and when land shall be utilized for investment for the good of the governed.[789] Development planning, with the focus on bringing welfare to society, and spatial management, to the extent that both determine access to land, thus became intertwined and city planning as it existed became but a very small part of the enterprise.

(c) The role and impact of the complementarity principle in spatial management

One of the most salient features of the spatial management system is its interlinking with development planning. At this stage it is important to distinguish this concept of development as usually understood in Indonesia with the more comprehensive notion of (sustainable) development as used in literature.[790] In the Indonesian context development planning should be understood more in its connection to the effort to realize the State's goals as written in the 1945 Constitution and articulated in legal documents such as the People's Consultative Assembly's decree on the Guidelines of State Policy (*TAP MPR tentang GBHN*) and other development plans formulated by the central, provincial or district level (general plans) or those which are formulated at the ministerial level (sectoral planning).

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[787] See A.P. Parlindungan, Aneka Hukum Agraria (Bandung: Alumni,1986), pp. 3-4.

[788] Tri Hayati, dkk, Konsep Penguasaan Negara di Sektor Sumber Daya Alam berdasarkan Pasal 33 UUD 1945, (Jakarta : Sekretariat Jenderal MKRI dan CLGS FHUI, 2005), hal. 17.

[789] Karel Martens, "Actors in a Fuzzy Governance Environment" in Gert de Roo and Geoff Porter (eds.) Fuzy Planning: The Role of Actors in a Fuzy Governance Environment (AshgatePublishing, 2007) pp.43-66.

[790] See the discussion on the concept of development in Chapter 1.

To the extent those development plans specify tangible targets such as how to sustain the growth and spread of modern urban areas (primary centers for industries) and future infra-structure projects throughout Indonesia directly influence and direct future land use in the regions. Such development planning, according to the SPL 1992 and 2007 must be further translated and articulated by corresponding spatial plans at the central, provincial and district level. Thus it is those spatial plans which regulate how land should best be utilized to support development projects.

Apparently, however, here applies what may be labeled as the complementarity principle. In the absence of spatial planning, existing (general or sectoral-particular) development plans are used as reference in deciding on future land use. This can be inferred from the actual practice of government (central, provincial and districts) which in the absence of viable spatial plans at the district level continues to process permit applications allowing government actors or private commercial enterprises to acquire land.

Thus, the absence of spatial plans (at the central, provincial or district level) does not prevent the government from allowing individuals, commercial enterprises or government agencies acting in the public interest or in the name of development to access land and use it according to whatever plan they have in mind. Government officials at the ground level do not experience absence of spatial plans as an impediment in processing permit applications or granting recommendations which regulate access to land or restrict freedom on use. Nor does absence of spatial plans causes the cessation of land acquisition performed in the public interest or in the name of development. Simply stated, in the absence of spatial plans, any existing development plan can and has been used instead as a reference to regulate access to land and its use.

The extent to which the complementarity principle applies must also be understood in the context of the failure to establish the centralized top down spatial planning system as envisaged by the SPL 1992 and 2007. The failure does not so much relate to the dependence of the SPL on implementing regulations which more often than not the government has failed to make[791], but more on how all government levels and other sectoral ministries have

[791] The vice Head of Committee I of the DPD (regional representative boar/senate),Wasis Siswoyo (Jawa Timur), commented that the SPL 2007 cannot yet be implemented due to government failure to promulgate the required implementing regulations, its inconsistency with other laws and the fact that violators still enjoys impunity (DPD: Pelaksanaan UU Tata Ruang Tidak Konsisten, http://m.antaranews.com, 22 June 2010). Cf. Dadang Rukmana (kepala bagian hukum dirjen penataan ruang), Peraturan Pelaksanaan UUP: Catatan Singkat tentang Progress Penyusunan RPP tentang Perizinan Pelaksanaan UUPR (http://bulletin.penataanruang, edisi maret-april 2008) last accessed August 2010. He recorded that the UUPR required implementing regulations in

respond to the obligation to formulate planning and develop land use policies consistent with it. In this respect, how the West Java province and Bandung municipality have responded to the SPL 1992 and 2007 as analyzed here may be indicative of how in general other regions in Indonesia perceive their obligations under the same laws.

The first National Spatial Plan (RTRWN, GR 47/1997) promulgated was more of an implementing regulation of the SPL 1992, and moreover contained only general directives repeating much of what had already been found in the SPL 1992 and general indications of future land use nationwide. This situation unfortunately has not changed much even after the SPL 1992 had been amended by the SPL 2007. Likewise, the second National Spatial Plan (RTRWN, GR. 26/2008), made as implementing regulation of the SPL 2007 comprises only of general directives clarifying certain criteria and rules. [792]

Before 1999, with West Java more of an exception, not all provinces possessed spatial plans or even felt the need to promulgate one. The situation did not change much after 1999. Not surprisingly the majority of existing districts failed to comply with their obligation under the SPL 1992. The belief apparently persisted that only cities needed master plans. This happened obviously because ministerial regulations on urban master plans existed, but no comparable implementing regulations for rural areas. A disturbing notion in this respect has been the general tendency, as found in the SPL 1992 and related provincial and municipal spatial plans to view rural areas (including agricultural land) as not in need of proper spatial management. This substantiates the policy of viewing rural areas lying adjacent to cities as under-managed and therefore to be held in reserve for city development. In part this explains the rate at which agricultural land in peri-urban areas has been converted to other uses with the express or implicit consent of the government, even if it goes against regulations prohibiting the conversion of arable and irrigated rice fields.

The low record of viable spatial plans, especially at the district level, has persisted after 1999. The promulgation of the SPL 2007 did not offer a remedy instead it has made matters worse. Two factors seem to be working against the realization of good spatial management. First, the fact that hierarchical and overlapping systems of spatial plans as envisaged by the SPL 2007 are far from being realized. Only a few regions have had their spatial plans revised or made

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the form of law (3), government regulation (18), Presidential Regulation (2), Ministerial Regulation (8) and Regional Regulation (4).

[792] It was made to fulfill the obligation as stipulated in Art. 20 par.(6) SPL 26/2007.

in line with the SPL 2007.[793] This suggests that most districts and provinces in Indonesia continue to implement outdated spatial plans (should they even possess one) or, even worse, use development plans instead to control who will get access to land. The same situation has also made possible the widespread practice of un-planned land-use development. Either way, the by-product of such approaches is that environmental and social considerations are pushed aside as the motive to sustain economic growth becomes more prominent. This endangers the effort of establishing a viable and sustainable spatial planning system which should and can be used as a normative reference by the public to monitor government policies and actions.

10.2. The impact of the Regional Government Laws of 1999 and 2004

The decentralization laws of 1999 and 2004 have reaffirmed the importance or ideology of development (concentrating on sustained economic growth and infra-structure development) and the role of law in engineering society. By virtue of the RGL 1999, the state's duty to develop--embodied in the 1945 Constitution, previously the sole responsibility of the central government--is transferred to the autonomous regions. Districts--as stipulated in the decentralization laws--have also been empowered, even legally obliged[794], to devise their own development plans, the purpose of which, according to the Director General of Regional Autonomy of the Ministry of Home Affairs, is to create government at the district level that is effective, efficient and accountable.[795] In support of these changes the central government has effectively transferred authorities over land use and planning to the districts, last but not least the authority in regard of permits regulating access to land (the permit-in-principle and site permit).

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[793] "Tata Ruang: Ketidakberesan RTRW Hambat Investasi di Daerah" (Kompas, 6 March 2010): 23. According to SPL 2007, all provinces and districts had to have their spatial plans revised two years after the promulgation of this law.

[794] Article 7 of Law 22/1999 & Article 14 of the Law 32/2004.

[795] As stressed in a formal speech presented in a Discussion on Decentralization and Regional Autonomy Policy, Jakarta 27 November 2002. Likewise Made Suwandi from the same office in his paper, "Pokok-pokok Pikiran Konsepsi Dasar Otonomi Daerah Indonesia (dalam upaya mewujudkan pemerintah daerah yang demokratis dan efisien), Jakarta 2002 and again in his paper: "Review Hubungan Pemerintah Pusat dan Pemerintah Daerah di Indonesia", paper presented before a seminar on regional government organized jointly by Indonesia and Japan at Sumedang, Jakarta, 2010. Cf. Mudrajad Kuncoro, Otonomi dan Pembangunan Daerah: Reformasi, Perencanaan, Strategi dan Peluang (Erlangga: Yogyakarta, 2002).

In this endeavor to construct a more district-based approach in spatial and development planning, autonomy is understood as the regional government's legal obligation to make their own development and spatial planning more in line with local needs[796]. On paper, this lessens the importance of national law and policy making, while putatively bringing law and government closer to the people. Thus the hope has been raised that local people's involvement in the law and policy making process will increase. Law in this new political and legal setting is expected to function not merely as an instrument to advance national development but more as a consensus on local governance, binding the people and government officials alike.[797] However to take effect this requires that citizens have voice and exit options for local governance (political decentralization)[798] and that the local government elected should be allowed home rule in fiscal, regulatory and administrative matters (fiscal and administrative decentralization). All of these elements must be in place to ensure effective decision making at the local level.[799] And as this study shows it also requires the development of a more inclusive and bottom up approach to planning. In other words, as argued by Hobson[800], for planning to achieve social justice it must be based on a broader and inclusive notion of social justice which rejects the 'claim of undisputed authority of modernist rational planners'.

However, the brief experiment in devolving spatial management powers fully to the district during 1999-2004, backfired. The ecological risk involved in continuing this fragmentary approach to spatial planning, treating each district administrative territory as a separate entity, is much too obvious to be ignored. One particular area which suffered from mismanagement due to the district based approach to spatial planning is the North Bandung

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[796] Article 14 of Law 32 of 2004.

[797] Cf: Jimly Asshiddiqie, "Otonomi Daerah dan Peluang Investasi", paper presented before "Government Conference" (Peluang Investasi dan Otonomi Daerah), Jakarta, 29-30 September 2000. He asserts that the decentralization polity main goal is to create a more democratic and self sustaining local governance.

[798] Rosie Campbell, Keith Dowding and Peter John, "Modelling the exit—voice trade off: social capital and responses to public services", paper for the "Workshop on structural equation modeling: applications in the social sciences", Centre for Democracy and Elections, University of Manchester, February 28, 2007. They argue that there are four possible responses to a decline in the quality of some product- that is exit- that is shift to another product; they might voice- complain and persuade to provide better product; or they might do nothing; and the last, they might exit and voice.

[799] As asserted by Anwar Shah and Theresa Thompson, in a paper, "Implementing Decentralized Local Governance: A Treacherous Road with Potholes, Detours and Road Closures", paper presented at the conference "Can Decentralization Help Rebuild Indonesia?" sponsored by Andrew Young School of Policy Studies, Georgia State University, Atlanta Georgia, May 1-3, 2002.

[800] Cf. Jane Hobson, "New Towns, the Modernist Planning Project and Social Justice: the cases of Milton Keynes, UK and 6th October, Egypt", working paper no. 108 (September 1999): p.7.

Area. Such cases reinforced the belief (prominent at the provincial and central government) that spatial management must be re-centralized. In that light, GR 38/2007 and the SPL 2007, shifted the main responsibility in spatial management back to the central government. Unfortunately, this change did not result in a more comprehensive and ecological approach to spatial planning as the Punclut and Jatigede case demonstrate. This may well be the most important flaw in the existing spatial management system, i.e. the inability to address space as one ecological system.

In any case, with the promulgation of SPL 2007, existing provincial and (aberrant) district spatial plans have to be adjusted and reformulated according to the new spatial management system under the SPL 2007. While this may be better suited to accommodate a more ecologically correct approach to spatial management, still a compromise must be found on how to synchronize this with the need to make district government accountable for mis-managing the administrative area under its control. This said considering also the fact that the same complementarity principle remained in place and accordingly has reinforced central government control over the districts. Consequently, government officials at the ground level can and continue to use centrally made or approved development planning as their point of reference when processing permit applications to acquire land. Existing development plans, as shown in the Jatigede and Punclut case, thus in fact regulate access to land and justify land acquisition by public and private entities. This certainly put to doubt the necessity of going through all the trouble of translating development planning into general and detailed spatial plans at different government levels. Nonetheless other factors have also played a role in hindering the establishment of a viable spatial management system.

10.3. Other impediments to establishing a viable spatial management system

(a) Distribution of spatial planning power

Just as the previous SPL 1992, the SPL 2007, demands the establishment of a top-down centralized planning system. However, this top-down system runs counter to the general intention of the RGL 2004 which purports to establish a more autonomous district government, more attuned and accountable to the local population. In terms of spatial management, the general intention of the RGL concords with the observation made that to attain sustainability, the 21 century (urban) planning, management and governance must be participatory and therefore decentralized. This allows for better responses to local needs and

requirements and favors community ownership of projects.[801] Although UN Habitat only refers to urban planning this principle may well apply to spatial management in general.

Even so, the SPL 2007 attempted to impose a spatial management system through which districts' powers in spatial management are heavily curtailed. District spatial plans to be adjusted to the new system established under the 2007 SPL, following established procedures, are to be approved before being promulgated by the Ministry of Home Affairs and Ministry of Public Works[802]. In this fashion, the role of the local parliament has become marginalized. Their voice does not carry weight anymore in the endorsement of district or provincial regulations on spatial plans. In such a system it is the central government which determines the legitimacy of district spatial plans.

Such an approach to law making has created in inefficiency. Given the current rate of administrative fragmentation in Indonesia,[803] the provincial government, Minister of Home Affairs and Ministry of Public Works will be very busy controlling and monitoring the formulation of spatial plans at the provincial and district level. Particularly, districts must overcome this bureaucratic hurdle before being able to implement and enforce their spatial plans. The voice of those monitoring agencies will carry more weight than the voice of the local parliament and population.

This system is flawed as well since it departs from a centralized and top down government system which the RGL actually wanted to reform. The SPL 2007 took back the districts' autonomy granted under the RGL. The end result is that spatial management power has remained fully in the hands of the central government. It has become a concern far removed from the local population, and specifically land owners which have a great stake in knowing how the government regulates access to land. In this sense, spatial plans will certainly fail to curb government power and provide protection to individual land owners.

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[801] Thierry Naudin (ed.) UN Habitat 2008 Annual Report (UN Human Settlement Programme, 2009), p.22.

[802] For a brief commentary on the evaluation process, see: H. Gunawan, Peraturan Menteri Dalam Negeri Nomor 28 Tahun 2008 tentang Tata Cara Evaluasi Rancangan Peraturan Daerah tentang Rencana Tata Ruang Daerah (Buletin elektronik penataan ruang, Juli-Agustus 2008. http://bulletin.penataanruang.net/index.asp? (last accessed 21/07/2010).

[803] Heryawan, the incumbent governor of West Java province, for instance, argued that West Java experiencing rapid population growth (with 26 districts/municipalities) urgently needs to establish new districts. He compares West Java with East Java (38 districts with a population of 38 million) and Central Java (35 districts with a population of 35 million). See Jawa Barat Minta Pengecualian Moratorium Pemekaran, (www.tempointeraktif.com, 14 Desember 2009) & DPRD Jabar Desak Pemerintah Realisasikan Pemekaran Wilayah (http://antarajawabarat.com, 16 July 2010).

Looking at how the West Java provincial government and Bandung municipality have implemented the SPL 1992 before and after 1999 one cannot avoid noticing the failure of the SPL to fulfill its promise to create a comprehensive and integrated land use planning system. As the continuing dispute about how to best manage the North Bandung Area has demonstrated, there is no ready legal solution to solve the issue who get to regulate conservation areas straddling more than one district. There is also at the moment no clarity on the question which government (at what level and which agency) should be authorized to manage river basins, springs, artificial and natural lakes, and other protected areas. The mis-management of those areas will certainly diminish the carrying capacity and threatens the sustainability of not only one district but two or more adjacent ones.

The fact that the SPL 2007 has further reinforced, rather than diminished, central and provincial government power to carve out considerable areas from under the districts administrative jurisdiction. Unfortunately this system is more driven by economic concerns, i.e. the need to establish centers of economic growth that are centrally controlled, rather than ecological considerations. It allows for the continuation of the previous practice of the central government to promulgate overlapping and competing spatial plans.

The SPL 1992 (and 2007) also continue to allow for the continuation of sectoral/silo-ism in natural resource management. This is demonstrated by the Ministry of Forestry's sustained refusal to acknowledge the provincial power to determine land use planning for the whole provincial area. Conversely, the Minister of Forestry had been and shall continue to be able to force the Provincial Government to recognize its exclusive authority in areas declared as state forest by way of a *padu serasi* agreement. The Minister of Mining has also retained its exclusive authority to issue mining concessions even in forest declared as protected forest (*hutan lindung*) without having to bother about provincial or even district spatial plans.[804]

All of the above shows the erroneous basis the spatial planning system builds upon. Distribution and re-distribution of authorities according to administrative borders and scope of government tasks is considered more important in spatial management than treating land

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[804] Presiden Jual Hutan Lindung Seharga Pisang Goreng, Siaran Pers JATAM, WALHI, Huma, Sawit Watch -16 Februari 2008, http://genenetto.blogspot.com/2008/02/presiden-jual-hutan-lindung-seharga.html, (last accessed February 20, 2008). According to Walhi currently 158 mining companies are in possession of mining concessions within protected forest, amounting to 11.4 million hectares. It was granted in accordance with GR 2/2008: "non tax tariff stemming from the use of forested areas for non-forestry use" (*jenis dan tarif atas jenis penerimaan negara bukan pajak yang berasal dari penggunaan kawasan hutan untuk kepentingan pembangunan di luar kegiatan kehutanan yang berlaku pada departemen kehutanan).*

as one ecological continuum. It shows also the fragmented nature of state power in regard to spatial management which is distributed and redistributed not only between different government levels but also between competing ministries.

(b) Legal instruments to implement spatial planning

Another important flaw in the spatial management system as envisaged by both the SPL 1992 and 1997 has been that, paradoxically, it fails to address the salient widespread practice of formal-informal land use by society in general which does not necessarily conform to existing spatial plans (should they exist). Investors (house construction companies), (rural and peri-urban) communities as well as individuals have continued to appropriate land and utilized it as they deemed fit without bothering much about the government's official land use policy, whether in the form of spatial plans or general prohibitions such as not to convert irrigated rice fields or develop conservation zones or other protected areas.

To better understand the above situation we should take cognizance of a number of interlinking facts. The first is that we cannot hold on to the assumption that the state is at all times powerful (able to wield its attributed authority) and therefore communities are powerless.[805] The failure at establishing a viable spatial planning system enabling the district to effectively control land use at the ground level proves the first point. The second is that in practice access to land has been determined more by the power relationship between the government and investors, influenced by how the licensing system or land acquisition system have been implemented in practice. This, again, is not to say that at all times land occupants (individual or communities) are powerless. The Punclut and Jatigede land acquisition case demonstrate the difficulties in appropriating and developing land against the wishes of land owners. Re-empowering the central and provincial government to control and monitor the drafting of district spatial plans may be seen as an inappropriate legislative response to unsustainable and uncontrolled land use patterns and impedes rather thatnimproves district government power to control land use in the public interest. The third refers to how the district bureaucracy utilizes the licensing and recommendation system regulating access to land.

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[805] As pointed out by Aswini Chhatre when discussing the extent to which communities may articulate their political choices and districts accountability. See Aswini Chhatre, "Political Articulation and Accountability in Decentralization: Theory and Evidence from India", (working paper no. 22, November 2007, Center for International Development at Harvard University, USA), p. 1.

Both the SPL 1992 and SPL 2007 regard permits (spatial utilization permits: *izin pemanfaatan ruang*) and permits for development sites: *perizinan lokasi pembangunan*) as the main instrument to control access to land. As the names of the permit indicated the permits mentioned in the SPL 1992 and 2007 are concerned with how to secure access to land and control its use in the name of development. The SPL 2007 differs with the SPL 1992 in that it provide for the criminalization of the use of permits granted not according to well-established rules. Bad governance, to the extent it relates to the processing of permits, is currently considered a criminal offence. While this development is laudable, implementation and enforcement is a problem.

First of all, there is no clarity whether those permits have any relation at all with existing permits and recommendations regulating access to land and its use. They are not the same at all. It suggests that a deep chasm or fault line exist between spatial plans and existing permits (and recommendations). What in practice exists are other permits (permits-in-principle, site permits and other related permits and recommendations) utilized by various government agencies (at different levels) not directly related to the spatial plans but which should be regarded as instruments to implement other laws (for instance the building permit as a tool to implement the building regulations). Reference to spatial plans are made but usually only symbolically.

Those permits and recommendations while habitually used to regulate access to land have been utilized more in the light of accommodating private investment initiatives or in general implementing contentious infra-structure projects. How those permits are used has been driven more by government concern over how to sustain continued economic growth and support industrialization. Additionally it is difficult to see how criminalization of deviant bureaucratic behavior in the processing of permits will help secure good governance or increase government official's accountability certainly in light of the above failure to establish viable spatial plans and their complementarity to development planning. Secondly, these permits, even if related to spatial planning, play only a marginal role in controlling land acquisition in the public interest. The exposition of the changing land acquisition rules and regulation performed in the public interest and the way those rules were implemented in the Jatigede case explicitly demonstrate the marginalization of spatial planning (including permits as a tool to control access to land). Likewise, as the Punclut case indicated, enforcement of criminal sanctions will also be extremely difficult considering that the bureaucracy processes permits behind closed doors, far removed from the prying eyes of the parliament or the public.

The above also underscores the dangers of the non-transparency of the permit application and approval mechanisms which affects government accountability in regard to land acquisition practices, in particular considering the way permits and recommendations regulating access to land have been used to secure a private-public partnership to bring development in the public interest. It is this network of permits and recommendations which in practice determine and influence the way government officials understand and protect the public interest. The legal imbalance between the government and private commercial enterprises in this regard influences the way government officials understand and protect the public interest. Private commercial enterprises generally determine how and when 'the public interest' will play a role in making and actuating development plans since they are the ones who typically make and finance the plans in the first place, which result in the district government becoming accountable to the private sector and not in the first place to the local population.

(c) Permits and 'public accountability'

Considering the network of permits and recommendations, rent seeking practices may well have been a hidden and inseparable part of the process. The process of requesting and acquiring permits certainly allows for an increased level of contact between the company and various government officials. The personal interaction between government officials (monopolizing the permits and recommendations) and the business community to smoothen the process of bringing development to the people (or infrastructure development) becomes breeding ground for informal dealings and corruption. Here, as de Sardan reminds us, one has to treat everyday corruption as a social activity regulated de facto and in accordance with complex rules, tightly controlled by a series of tacit codes and practical norms.[806] Spatial planning implementation seen from the use of permits in legal practice blurs the division between state and society and market, and certainly requires us to look at spatial management from a different angle. Permits related to land access and its use can appropriately be perceived as an important legal instrument enabling government units

[806] G. Blundo and J.-P. Olivier de Sardan, "Why should we study everyday corruption and how should we go about it?" in G. Blundo and J.-P. Olivier de Sardan (ed), Everyday Corruption and the State: citizens and public officials in Africa (London: Zed Books Ltd, 2006). Here, corruption is defined (p.5-6) as all practices involving the use of public office that are improper – in other words, illegal and/or illegitimate from the perspective of the regulations in force or from that of users – and give rise to undue personal gain.

(acting on behalf of the state) to join with business enterprises to exploit Indonesian natural resources.[807]

Likewise, Rakodi, for instance, suggests that on the basis of the failure of traditional land use planning, we should forget (urban spatial) planning and pay more attention to governance arrangements, politics and the process of decision making.[808] These issues are certainly vital and there is truth in the assertion that law-making and in particular its spatial-development planning variant with regard to control over land has and continues to be the product of competition and contest among the different government levels and agencies[809]. As such law relating to spatial management understood as the product of political processes lacks objectivity and neutrality[810] and puts to doubt the ability of the government to represent the public interest.

Accordingly we must accept that law including spatial management law has been and shall continue to be the result of political processes and compromises. Lastly we also cannot but accept that the notion of the public interest is and will always be problematic, even more so in the light of the shift from the ideal of government to governance captured in the notion of good governance. None the less, referring to the goal of decentralization of bringing government closer to people, the solution may well be to open up the possibility of involving local people in all stages of spatial planning and land use management. In any case, district governments should again be empowered to make their own democratically accountable spatial planning. But, at the same time, they should be forced to leave more room for the promotion and support of dialogue and negotiation among land users, which includes people and government from adjacent districts. Spatial management and other land use regulations

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[807] Henk Schulte Nordholt and Hanneman Samuel in their introduction, "Indonesia After Soeharto: Rethinking Analytical Categories" to a book they edited, Indonesia in Transition: Rethinking Civil Society, Region and Crisis, (Jakarta: Pustaka Pelajar, 2004), pp.1-15.

[808] Carole Rakodi, "Forget planning, put politics first? Priorities for urban management in developing countries", (Jag Volume 2, issue 3, 2001), pp. 209-223.

[809] See inter alia, Denny Zulkaidi, "Kepentingan Nasional dan Kepentingan Propinsi dalam Penataan Ruang" in Haryo Winarso, Pradono, Denny Zulkaidi and Miming Mihardja (eds.). Pemikiran dan Praktek Perencanaan dalam Era Transformasi di Indonesia, (Bandung: Departemen Teknik Planologi-ITB, 2002), pp. 77-93. Cf, in the same book, an article written by Andi Oetomo, "Transisi Otonomi Daerah di Indonesia: Dilema bagi Penataan Ruang Berkelanjutan", pp.95-101, and Aca Sugandhy, "Peran Penataan Ruang Bagi Keterpaduan Pembangunan Berkelanjutan di Era Otonomi dan Globalisasi", pp. 103-111.

[810] Patrick McAuslan, The Ideologies of Planning Law (Oxford: Pergamon Press, 1980). Cf. Jane Hobson, op.cit, p. 2 & 7.

should thus set the principles and procedures of accountable, transparent and inclusive negotiation and dialogue.[811]

In terms of implementation, a more transparent and inclusive permit system (directly related to spatial plans) should also be put into place, allowing the general public to monitor and influence future land use plans whether initiated by private investors or the government in the name of the public interest. Consequently, we should reject the way the socialization process has been understood and implemented, i.e. a way to inform the local population most affected about existing land use plans (initiated by private or public agencies) approved prior by the government (as evidenced by the permits and recommendation system). How the "socialization process" should be implemented must be radically altered. It should, instead, become an open invitation for dialogue in regard to the best alternative to use land in a sustainable way. But this again rests on the requirement that local government shall fulfill its role as a capable mediator and enforcer.[812]

[811] That such an approach is possible can be demonstrated by anecdotal examples of the district government of Surabaya and Solo. Both districts developed a more inclusive and humanistic approach to spatial planning. See: Airlangga Pribadi, "Terjebak di Labirin Transisi" (Kompas, 2 March 2011).

[812] See Melanie Wiber and Chris Milley, "Introduction, Seeking Clarity, Legitimacy and Respect: The Struggle to Implement Special Rights" (Journal of Legal Pluralism and Unofficial Law, no. 55/2007), pp.1-10. Cf. Esther Mwangi and Stephan Dohrn, "Bitting the Bullet: How to Secure Access to Dryland Resources for Multiple Users. CAPRi Working Paper, Washington DC: IFRI, 2006.

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