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The Regulatory Failure of Spatial Planning in Bali and its Environmental and Social Impact: A Case Study of Hotel Projects

I Gusti Ngurah Parikesit Widiatedja

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ABSTRACT

This thesis argues that spatial planning laws in Bali fail to achieve their regulatory objectives, finding that inter-related legal and non-legal factors contribute to this. Although the hotel industry offers Bali, and Indonesia more broadly, significant economic and social benefits, the failure of spatial planning laws has meant that these developments are not being sustainably managed. Drawing on original field research and case study analysis, the thesis proposes some possible means of addressing these failures.

DECLARATION

This is to certify that:

1. the thesis comprises only my original work towards the PhD;
2. due acknowledgement has been made in the text to all other material used; and
3. the thesis is less than 100,000 words in length exclusive of tables, figures, bibliography and appendices.

I Gusti Ngurah Parikesit Widiatedja

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PART I
INTRODUCTION

Chapter 1

Introduction

I SPATIAL PLANNING IN INDONESIA

A *The Concept of Spatial Planning*

This thesis is about the importance of spatial planning laws in Bali, Indonesia, and their failure. The European Conference of Ministers Responsible for Regional and Spatial Planning defines spatial planning in *The Torremolinos Charter* in the following way:

Regional/spatial planning gives geographical expression to the economic, social, cultural and ecological policies of society. It is at the same time a scientific discipline, an administrative technique and a policy developed as an interdisciplinary and comprehensive approach directed towards a balanced regional development and the physical organisation of space according to an overall strategy.¹

Spatial planning is often conceived in practical terms by reference to the technical activities of experts, professionals and government in designing spaces² to anticipate and mitigate adverse consequences from economic and political pressures.³ By planning how spaces within a city, a province or an entire country are used and protected, societies can improve the quality of life of people, protect and create livelihoods, promote sustainable economic growth, and protect the environment.⁴ To work effectively, spatial planning relies on an interdisciplinary collection of professions, including lawyers, engineers, architects, planners, and public policymakers. Even, within a single discipline such as law, spatial planning traverses various fields, including constitutional, administrative, environmental, construction and planning law. The discipline is also associated with international law regimes such as trade and investment, but as a regulatory field, spatial planning regulation mainly focuses on national laws rather than international initiatives. That said, it is important to note that spatial planning may cover foreign elements, such as foreign direct investment ('FDI') or international environmental law programs. This thesis is concerned with the legal and regulatory aspects of spatial planning in Indonesia, and Bali in particular. The thesis demonstrates that spatial planning is failing in Bali, and, as a result, a range of economic and political pressures are damaging Bali's human and natural environments.

¹ European Conference of Ministers Responsible for Regional/Spatial Planning, *Chartre Européenne de l'Aménagement du Territoire (Chartre de Torremolinos)*, adopted 20/05/1983 <www.siseministerium.ee/public/terr.harta.ingrtf.rtf>. See also Robbert Biesbroek, Rob Swart, and Wim van der Knaap, 'The Mitigation-Adaptation Dichotomy and the Role of Spatial Planning' (2009) 33(3) *Habitat International* 230, 234.

² Henry Lefebvre, *The Production of Space* (Blackwell, 1991) 99.

³ Angela Hull, 'Spatial planning: The Development Plan as a Vehicle to Unlock Development Potential?' (1998) 15(5) *Cities* 327-335.

⁴ Patsy Healey, 'Collaborative Planning in a Stakeholder Society' (1998) 69(1) *The Town Planning Review* 1. See also Arnold van der Valk, 'The Dutch Planning Experience' (2002) 58(2-4) *Landscape and Urban Planning* 201, 202.

B *Spatial Planning as a Regulatory Measure*

Spatial planning regulation has been differently labelled in the practice of different countries, depending on cultural traditions, legal system models, and local politics. Israel uses the term ‘Planning and Building Law’⁵ while Russia prefers ‘Urban Planning Law’.⁶ Some African countries employ ‘Town and Country Planning Law’, while China has introduced the ‘City Master Plan’.⁷ Most European countries, including the Netherlands,⁸ Poland, and Slovenia⁹ refer to ‘Spatial Planning Laws’. Indonesia follows the European tradition, and this thesis will do the same.

Spatial planning in Indonesia involves a hierarchy of laws and governmental policies from the national level, down to the provincial and district levels.¹⁰ However, Indonesia is not a federation. In many countries with federal constitutions, spatial planning is a state or local matter rather than a federal matter. As we will see, this is not the case in Indonesia, which is a unitary state in the form of a republic. In Indonesia, the central government delegates law making authority to subnational units, which are also expected to implement central policy decisions at the local level.

Generally speaking, as a regulatory measure, spatial planning involves deliberate government action at all levels¹¹ to allocate, form, and harmonise space for various uses.¹² McAuslan elaborates the main legal issues discussed in spatial planning to include: boundaries and area jurisdiction; the ‘who-does-what’ question (conflicts between authorities); the land question (who has authority over the land and who allocates plots for development); planning procedures; and housing conditions and their enforcement.¹³ In this respect, contemporary spatial planning has transformed traditional ideas of planning, focused on land use distribution and design and prioritising restraint and control, toward more positive and holistic concerns, requiring multi-sectoral and multi-scalar views.¹⁴ Hence, spatial planning regulation covers not only land use, but also social, economic, and environmental considerations¹⁵ by integrating government policies concerned with, among other areas, agriculture, transport, and energy production.¹⁶ Brackhahn and Kärkkäinen view spatial planning as a regulatory tool to balance socio-economic development by avoiding environmental damage and, at the same

⁵ Nurit Alfasi, ‘Planning Just-in-Time Versus Planning Just-in-Case’ (2004) 21(1) *Cities* 29, 31.

⁶ Oleg Golubchikov, ‘Urban planning in Russia: Towards the Market’ (2004) 12(2) *European Planning Studies* 229.

⁷ Kadmiel H Wekwete, ‘Planning Law in Sub-Saharan Africa: A Focus on the Experiences in Southern and Eastern Africa’ (1995) 19(1) *Habitat International* 13, 16. See also Ben C Arimah and Demola Adeagbo, ‘Compliance with Urban Development and Planning Regulations in Ibadan, Nigeria’ (2000) 24(3) *Habitat International* 279.

⁸ van der Valk (n 4).

⁹ Małgorzata Krajewska, Sabina Żróbek and Maruška Šubic Kovač, ‘The Role of Spatial Planning in the Investment Process in Poland and Slovenia’ (2014) 22(2) *Real Estate Management and Valuation* 52, 53.

¹⁰ Nigel Taylor, ‘What Is This Thing Called Spatial Planning? An Analysis of the British Government’s View’ (2010) 81(2) *The Town Planning Review* 193, 201.

¹¹ Wekwete (n 7).

¹² Louis Albrechts, ‘Shifts in Strategic Spatial Planning? Some Evidence from Europe and Australia’ (2006) 38(6) *Environment and Planning* 1149, 1170.

¹³ Patrick McAuslan, ‘The legal Environment of Planned Urban Growth’ (1981) 1 *Public Administration and Development* 301, 317.

¹⁴ Alister J Scott et al, ‘Disintegrated Development at the Rural–Urban Fringe: Re-connecting Spatial Planning Theory and Practice’ (2013) 83 *Progress in Planning* 1, 4.

¹⁵ Taylor (n 10).

¹⁶ Ibid.

time, securing the natural and cultural environments.¹⁷ More specifically, spatial planning regulation can ensure the effective use of restricted spatial resources, balancing industrial and commercial business development with the available resources, encompassing natural resources, water, air and soil.¹⁸ Spatial planning regulation has, therefore, become vital to ensure sustainable development by preventing development from which present and future generations will not be able to recover, or could only recover at a very high cost.¹⁹

Like many fields of law that aim to protect species, animals and nature as well as human beings, spatial planning laws are arguably preferable to²⁰ private law claims for compensation, which are unreliable and limited in effect.²¹ Jones, for example, views spatial planning regulation as a method of licensing nature, and prioritising development control objectives.²² Tromans elucidates this development control goal of spatial planning by saying that spatial planning can either promote development or prevent development, depending on potential environmental problems in a particular area.²³

The sustainable development aims of spatial planning laws are particularly important for a country such as Indonesia, which tends to place greater emphasis on the economic growth dimensions of human development. Unfortunately, as this thesis demonstrates, spatial planning in Indonesia tends to be viewed as crucial to the provision of a stable and predictable environment for investment and development, and for encouraging effective use of land and natural resources for development.²⁴ Spatial planning laws are also crucial for a country such as Indonesia because it is an archipelago prone to natural disasters. Spatial planning laws should provide guidance for the development of commercial, residential, industrial and tourism areas so they are not located in identified high-risk areas.²⁵ However, the economic aim of spatial planning in Indonesia often trumps the aim of sustainability in this respect as well. If, the United Nations Economic Commission for Europe ('UNECE') states, spatial planning regulation seeks to harmonise different relevant socio-economic objectives and to reconcile competing policy goals,²⁶ then it is failing in Indonesia. As the case studies in this thesis of hotel developments in Bali indicate, Indonesian spatial planning laws are yet to achieve these kinds of harmonising effects.

¹⁷ Bernhard Brackhahn and Risto Kärkkäinen (eds), *Spatial Planning as an Instrument for Promoting Sustainable Development in the Nordic countries: Action Programme for 2001–2004* (Nordic Swan Label, 2001) 7.

¹⁸ Ibid.

¹⁹ Bronwen Morgan and KarenYeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 1sted, 2017) 35.

²⁰ Ibid.

²¹ Ibid 22.

²² Gregory Jones, 'The Impact of Environmental Law on Planning Decision-Making' (2012) 40 *Journal of Planning and Environment Law* OP 22.

²³ Stephen Tromans, 'Planning and Environmental Law: Uneasy Bedfellows?' (2012) 40 *Journal of Planning and Environment Law* OP 73.

²⁴ Ibid 2.

²⁵ Kalliopi Sapountzaki et al, 'Disconnected Policies and Actors and the Missing Role of Spatial Planning throughout the Risk Management Cycle' (2011) 59(3) *Nat Hazards* 1445, 1447.

²⁶ United Nation Economic Commission for Europe, *Spatial Planning Key Instrument for Development and Effective Governance with Special Reference to Countries in Transition* (United Nations, 2008) 1. See also Biesbroek, Swart, and van der Knaap (n 1) 234.

II SPATIAL PLANNING AND TOURISM DEVELOPMENT

A *Tourism Development and its Contribution to Economic Development*

Since the late 1960s, many developing countries have turned their reliance on primary product exports to international tourism as a means of supporting economic development.²⁷ Tourism is considered to be an effective means of alleviating poverty through the increase of earnings and wages of tourism workers.²⁸ It is more labour-intensive than other non-agricultural fields,²⁹ and it tends to attract otherwise underemployed workers, such as low-skilled, female, and younger workers.³⁰ Tourism is also a great source of income for governments. For example, the existence of hotel room taxes, departure taxes, custom duties, and income tax have significantly enhanced Indonesia's tax revenues.³¹ International hotel chains have also become a tool of human development by transferring and increasing the skills of hotel workers and management through integrated in-house training programs.³² Furthermore, the United Nations Conference on Trade and Development ('UNCTAD') reveals how revenue generated by tourism is useful to finance infrastructure development and support small and medium enterprises ('SMEs').³³

In a recent study, Danish and Wang show how the increase of tourism receipts by one per cent increases economic growth by 0.1594 per cent.³⁴ Referring to Ricardo's comparative advantage,³⁵ when a country specialises in tourism businesses, tourism growth can increase the positive net tourism returns, leading to more economic growth.³⁶ In Bahia State, Brazil, for example, hotel projects in Ilha de Cajaíba, are estimated to have provided US\$1.6 billion to the local economy and created 10,710 jobs.³⁷ In Brazil, Russia, India, China and South Africa ('BRICS'), the increase of tourism investment by one per cent is shown to have increased economic growth by 0.41 per cent.³⁸ The increase of tourism investment by one per cent apparently also decreases CO2 emissions by

²⁷ Mark P Hampton and Julia Jeyacheya, 'Power, Ownership and Tourism in Small Islands: Evidence from Indonesia' (2015) *70 World Development* 481.

²⁸ Jonathan Mitchell and Caroline Ashley, *Pathways to Prosperity – How Can Tourism Reduce Poverty: A Review of Pathways, Evidence and Methods* (World Bank, 2007) 49.

²⁹ Ibid.

³⁰ United Nations Conference on Trade and Development, 'The Contribution of Tourism to Trade and Development' (Trade and Development Board, 10 February 2010) <http://unctad.org/en/Docs/cid8_en.pdf>.

³¹ Evridiki Tsounta, 'What Attracts Tourists to Paradise?' (IMF Working Paper, December, 2008) <<https://www.imf.org/external/pubs/ft/wp/2008/wp08277.pdf>>.

³² Peter Forsyth and Larry Dwyer, 'Foreign Investment in Australian Tourism: A Framework for Analysis' (2003) 14 *The Journal of Tourism Studies* 71.

³³ United Nations Conference on Trade and Development, 'Sustainable tourism: Contribution to Economic Growth and Sustainable Development' (Trade and Development Board, 28 January 2013) <http://unctad.org/meetings/en/SessionalDocuments/ciem5d2_en.pdf>.

³⁴ Danish and Zhaohua Wang, 'Dynamic Relationship between Tourism, Economic Growth, and Environmental Quality' (2018) 26(11) *Journal of Sustainable Tourism* 1928, 1936.

³⁵ See David Ricardo, *On the Principles of Political Economy and Taxation* (Cambridge University Press, 1951) 135. Generally speaking, international trade, according to this theory, has provided benefit by allowing firms in a particular country to specialize in production, resulting in cheaper products, and enabling lower income consumers to purchase a greater variety of those products.

³⁶ Ibid.

³⁷ Fernanda de Vasconcellos Pegas, David Weaver and Guy Castley, 'Domestic Tourism and Sustainability in an Emerging Economy: Brazil's Littoral Pleasure Periphery' (2015) 23(5) *Journal of Sustainable Tourism* 748, 758.

³⁸ Danish and Wang (n 34).

0.5771 per cent,³⁹ indicating that tourism can have positive effects on the environment. This trend can also be seen in China, where tourism investment significantly enhances tourism revenue.⁴⁰ A study by Paramati, Alam and Lau likewise explains that a one per cent increase in tourism investment increased tourism income by 0.197 per cent in the European Union ('EU') countries.⁴¹ The study also reveals that a one per cent increase in trade openness and per capita income enhances tourism income by 0.222 per cent and 0.502 per cent, respectively.⁴² For these reasons, the increase of tourism investment has made a significant contribution to economic growth in Brazil, Russia, India, China, and South Africa ('BRICS') and EU countries.

Similar data indicates that the same trends are evident in Indonesia. Bali offers a prime example of this. As the most popular tourist destination in Indonesia, Bali relies on tourism as its primary engine of development.⁴³ In 2015, 31 per cent of businesses in Bali were involved in the tourism industry.⁴⁴ Tourism contributed 68.17 per cent of Bali's Gross Regional Domestic Product ('GRDP') in 2015, increasing from 66.43 per cent in 2011,⁴⁵ meaning that the economic growth of Bali exceeded national economic growth during the same period.⁴⁶

A study by Prastyadewi reveals that GDP growth also had a positive effect on employment in the trade, hotel, and restaurant sector in Bali for the period 2006-2012, with a confidence level of 95 per cent.⁴⁷ This means that an increase in the GRDP value of the hotel and restaurant sector will significantly increase the employment rate in Bali. In contrast, when the value of the GRDP of the trade, hotel and restaurant sectors declines, labour absorption also declines.⁴⁸ Widiana and Sudiana also explain that the number of tourist visits, and taxes from hotel and restaurant sectors directly influences Bali's regional revenue.⁴⁹

Similarly, Khresna Putra et al note that the arrival of foreign tourists, economic stability and foreign investment simultaneously has had a significant effect on employment in the period 1994-2014.⁵⁰ Concerning the importance of taxes and regional levies for Bali's regional revenue, Kusuma and

³⁹ Ibid.

⁴⁰ Min Zhou et al, 'Effect of Tourism Building Investments on Tourist Revenues in China: A Spatial Panel Econometric Analysis' (2017) 53(9) *Emerging Markets Finance and Trade* 1973, 1981.

⁴¹ Sudharshan Reddy Paramati, Md Samsul Alam and Chi Keung Marco Lau, 'The Effect of Tourism Investment on Tourism Development and CO2 Emissions: Empirical Evidence from the EU Nations' (2018) 26(9) *Journal of Sustainable Tourism* 1587, 1601.

⁴² Ibid.

⁴³ Biro Pusat Statistik, *Provinsi Bali dalam Angka 2017* [Bali in Figures 2017] (BPS, 2017) 347.

⁴⁴ Bank Indonesia, *Kajian Ekonomi dan Keuangan Regional Provinsi Bali Triwulan IV 2015* [A Study of Regional Economy and Finance of Bali in 4th Term 2015] (Bank Indonesia, 2015) 22.

⁴⁵ Biro Pusat Statistik, *Produk Domestik Regional Bruto Provinsi Bali Menurut Lapangan Usaha 2011-2015* [The Gross Regional Domestic Product of Bali According to Business Filed 2011-2015] (BPS, 2016) 14.

⁴⁶ Biro Pusat Statistik, *Provinsi Bali dalam Angka 2017* [Bali in Figures 2017] (BPS, 2017) 116.

⁴⁷ Made Ika Prastyadewi, 'Penyerapan Tenaga Kerja Sektor Perdagangan Hotel dan Restoran di Provinsi Bali' [The Absorption of Labor in Trade, Tourism, and Restaurant Sector in Bali] (2014) 4(2) *Juima* 114.

⁴⁸ Ibid.

⁴⁹ I Nyoman Wahyu Widiana and I Ketut Sudiana, 'Pengaruh Jumlah Kunjungan Wisatawan, Pajak Hotel Restoran dan Pendapatan Asli Daerah Terhadap Belanja Modal Kabupaten/kota di Provinsi Bali' [Effect of Number of Tourist Visits, Restaurant and Hotel Taxes and Regional Revenues Against Capital Expenditures in Regencies / Cities in Bali Province] (2015) 4(11) *E-Jurnal EP Unud* 1357-1390.

⁵⁰ Putu Bayu Khresna Putra, Made Suyana Utama and I Ketut Sudiana, 'Analisis Faktor-Faktor yang Mempengaruhi Penyerapan Tenaga Kerja di Provinsi Bali' [An Analysis of Factors that Influence the Absorption of Labor in the Province of Bali] (2016) 5(11) *E-Jurnal EP Unud* 1219-1240.

Wirawati explain that the contribution of taxes and levies is vital in increasing Bali's regional revenue.⁵¹ Specifically, taxes contributed to an increase of revenue by up to 84.9 per cent while regional levies only contributed 16.6 per cent.⁵²

In Badung District, in the South of Bali, the trade, hotel, and restaurant sectors are the most dominant sector in terms of economic growth.⁵³ Employing the regression equation to explain the contribution of these sectors, trade, hotel, and restaurant sectors have a regression coefficient 0.751, meaning that if the contribution of these sectors increases by one per cent, then the economic growth of Badung will increase by 0.751 per cent.⁵⁴ The Secretary of the Badung District Government acknowledges the fact that tourism and its related sectors are the leading sectors and the driving force of the economy of Bali, particularly Badung.⁵⁵

During field research for the case studies discussed below, hotel managers also confirmed in interviews with me their belief that their hotels have contributed to government revenue and local communities. Human Resources Manager of Prama Sanur Beach Bali states that every year, the hotel pays hotel and restaurant tax, entertainment tax, and income tax.⁵⁶ Furthermore, it provides monthly support IDR 5.000.000 (AUD 500) for the local community.⁵⁷ Regarding employment, the hotel has 419 employees, and 49 come from the local community (Intaran village). In terms of corporate social responsibility ('CSR'), the hotel has annual activities, such as beach and coastal cleaning, blood donations, orphanage support, and a turtle conservation program.⁵⁸ Similarly, the Human Resources Manager of Nusa Dua Beach Hotel explains that the hotel spent IDR 104.000.000 (10,400 AUD) on corporate social responsibility programs in 2017, such as blood donations and funding for orphanages and Badung's conservation program.⁵⁹ The hotel has 530 employees, and 147 came from the local community (Benoa village).⁶⁰

B *Spatial Planning Problems and Tourism Development*

However, across the world the news is not all good. There are studies that show how tourism development has led to environmental and social damage because of spatial planning problems in particular locations. In Valencia, Spain, for example, Yepes and Medina argue that although the existing planning does not directly cause beach erosion, it is indirectly responsible for damage from

⁵¹ Made Krisna Arta Anggar Kusuma and Ni Gusti Putu Wirawati, 'Analisis Pengaruh Penerimaan Pajak Daerah dan Retribusi Daerah Terhadap Peningkatan PAD Sekabupaten/kota di Provinsi Bali [An Analysis of the Effect of Local Tax Revenue and Regional Retribution on the Increase of Governmental Income in Districts / Cities in the Province of Bali (2013) 5(3) *E-Jurnal Akuntansi Universitas Udayana* 574-585.

⁵² Ibid.

⁵³ Desak Ayu Sriary Bhegawati, 'Analisis Pengaruh Kontribusi Tiga Sektor Utama Ekonomi Terhadap Pertumbuhan Ekonomi Kabupaten Badung' [An Analysis of the Influence of the Contribution of Three Main Sectors for Economic Growth in Badung District] (2017) 7(1) *Juara* 54.

⁵⁴ Ibid.

⁵⁵ 'Perekonomian Bali Berkembang Karena Pariwisata' [The Economy of Bali Improves Because of Tourism], *Antara* (Online, 22 May 2017) <<https://bali.antaranews.com/berita/106556/sekda-badung-perekonomian-bali-berkembang-karena-pariwisata>>.

⁵⁶ Interview with Anak Agung Arinata, Human Resources Manager of Prama Sanur Beach Bali (I Gusti Ngurah Parikesit Widiatedja, Prama Sanur Beach, Denpasar, 26 January 2018).

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Interview with Ni Made Sukerti, Human Resources Manager of Nusa Dua Beach Hotel (I Gusti Ngurah Parikesit Widiatedja, Nusa Dua Beach Hotel, Denpasar, 28 January 2018).

⁶⁰ Ibid.

erosion.⁶¹ The government prioritises short-term economic profits and the demand for tourism and residential homes.⁶² In this region, the approved urban plans for coastal areas could accommodate three times more population than the current population of four million, neglecting analysis of the environmental and social impact of this increase.⁶³ The case studies in this thesis suggest that these priorities are causing similar harm in Bali.

In Thailand, Churugsa, McIntosh and Simmons found that the lack of tourism planning led to the degradation of socio-cultural and environmental resources at popular tourist areas throughout the country.⁶⁴ Tourist activities are mainly located within local communities and some are in remote areas with a lack of public facilities and services.⁶⁵ Therefore, they can have adverse impacts on local communities, their culture and the environment.⁶⁶ In Macau, Wan and Pinheiro point out that this region does not have developmental plans that clearly specify its future development objectives.⁶⁷ From 2002 to 2009, the density of population in this region has sharply increased from 16,436/km² to 18,636/km², making it one of the most densely populated areas in the world.⁶⁸ Because of the limited land available (29.2 km²), the development of casinos and other leisure activities has taken many public facilities and much land.⁶⁹ The loss of green and leisure zone areas in Macau is now undeniable.⁷⁰ The case studies in this thesis indicate that the challenge for government in Bali is not merely to ensure existing hotels operate sustainably, but to acknowledge that there is a limit on how many hotels can be built in Bali. Destroying conservation areas or reclaiming land from the sea is not an answer to this challenge.

Although providing economic benefits, tourism activities in Bali are also adversely affecting the environment by damaging natural resources,⁷¹ causing biodiversity problems,⁷² and requiring excessive use of energy.⁷³ In this respect, the experience of Bali is no different from the experience of Indonesia as a whole. The presence of hotels, in particular, has increased the consumption of energy, water, and waste production.⁷⁴ Hotel projects have led to the loss of coastal areas across the

⁶¹ V Yepes and JR Medina, 'Land Use Tourism Models in Spanish Coastal Areas: A Case Study of the Valencia Region' (2005) SI 49 *Journal of Coastal Research (Proceedings of the 2nd Meeting in Marine Sciences)* 83, 87.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Watcharee Churugsa, Alison J McIntosh and David Simmons, 'Sustainable Tourism Planning and Development: Understanding the Capacity of Local Government' (2007) 31(2) *Leisure/Loisir* 453, 454.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Penny Yim King Wan and Francisco Vizeu Pinheiro, 'Macau's Tourism Planning Approach and Its Shortcomings: A Case Study' (2014) 15(1) *International Journal of Hospitality & Tourism Administration* 78, 84.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Kalidas Sawkar et al., *Tourism and Environmental: Case Studies on Goa, India and the Maldives* (The International Bank for Reconstruction and Development/The World Bank, 1998) 9.

⁷² World Tourism Organization, *Tourism and Biodiversity – Achieving Common Goals Towards Sustainability* (United Nations, 2010) 1.

⁷³ United Nations Environment Programme and World Tourism Organization, *Tourism in the Green Economy – Background Report* (UNWTO, 2012) 5.

⁷⁴ Ministry of Tourism and Creative Economy of the Republic of Indonesia in cooperation with the International Labour Organization, *Strategic Plan Sustainable Tourism and Green Jobs for Indonesia* (ILO, 2012) 23.

country, including Jakarta⁷⁵ and, in particular, Bali, because it is Indonesia's major tourist destination. One of the major contributing factors to these losses is the failure of spatial planning laws.⁷⁶

A study by the Ministry of the Environment and Forestry stated that in 2015, 44 per cent (181,3 km) of the total length of beach in Bali (430 km) experienced erosion, with almost 20 per cent (87 km) being severely damaged because of tourism activities.⁷⁷ This study explains that high rating hotels contributed almost 61 per cent to this erosion, which mostly occurs in the two most popular tourist areas in Bali: Kuta and Nusa Dua.⁷⁸ Similarly, rice fields have been converted into sites for hotels and other tourism facilities, leading to a decrease in food availability and the greater potential for flooding.⁷⁹

In recent times, hotels have been built in Bali in what are supposedly conservation or protection areas, such as on the edges of cliffs, coastal areas, rivers and sacred sites.⁸⁰ For example, at least 70 per cent of 353 guesthouses in Klungkung District, mostly in the Nusa Penida islands, have operated without completing the required permits.⁸¹ Some have been built too close to the beach and cliffs.⁸² Similarly, the river border construction of the Impiana Kedewatan Hotel in Ubud, Gianyar District violates the existing Gianyar District Spatial Plan.⁸³ Likewise, in August 2019, Conservation Indonesia, a national environmental NGO, revealed that Bali's coasts are becoming increasingly eroded, and its mainland is now reduced by almost 4,500 hectares, due to abrasion of various coastal areas.⁸⁴ This is the result of many violations of the spatial management of coastal areas.⁸⁵

Concerning local communities, the People's Coalition for Fisheries Justice or *Koalisi Rakyat untuk Keadilan Perikanan* ('KIARA'), a leading national NGO working on fisheries, explains that a reclamation project around Benoa Bay in southern Bali forced 107,361 households, mostly fisher

⁷⁵ Khrisnamurti, Heryanti Utami, and Rahmat Darmawan, 'Dampak Pariwisata terhadap Lingkungan di Pulau Tidung Kepulauan Seribu' [The Impacts of Tourism Activities on the Environment in Tidung Island, Kepulauan Seribu] (2016) 21(3) *Kajian* 257, 269.

⁷⁶ Ibid.

⁷⁷ Kementerian Lingkungan Hidup dan Kehutanan, 'Inventarisasi Sumber Pencemar Lingkungan Pesisir dan Laut Yang Berasal Dari Non Point Sources di Tanjung Benoa' [The Inventory of Coastal and Marine Environment Pollutant Sources from Non Point Sources in Tanjung Benoa] (2015) 4-11.

⁷⁸ Ibid.

⁷⁹ Gregory Stuart Parker, 'Living in Two Worlds: How Tourism Has Influenced the Balinese World View of Tri Hita Karana' (Master Thesis, Massey University, 2011) 72.

⁸⁰ Tjokorda Istri Praganingrum, 'Kajian terhadap Mekanisme Perizinan Pemanfaatan Lahan Tebing Tukad Ayung Kedewatan, Ubud, Gianyar' [Study on the Procedure of Issuing License to Utilise Tukad Ayung's Cliffs in Kedewatan, Ubud, Gianyar] (2013) 2(1) *Jurnal Ilmiah Kurva Teknik* 50, 66.

⁸¹ 'SatPol PP Belum Bergerak, 70 Persen Penginapan di Nusa Penida Tak Berizin' [Civil Service Police Unit Does not React, 70 Per Cent Tourism Accommodation in Nusa Penida Do Not Have Permits], *Bali Berkarya* (Online, 18 March 2019) <<https://baliberkarya.com/index.php/read/2019/03/18/201903180007/SatPol-PP-Belum-Bergerak-70-Persen-Penginapan-di-Nusa-Penida-Tak-Berizin.html>>.

⁸² Ibid.

⁸³ 'Investor Impiana Hotel Melanggar, Langkah BWS Bali Penida' [Impiana Hotel's Investor Violates, Neglecting the Bali-Penida River Basin Centre], *Delik News* (Online, 21 August 2019) <<https://www.deliknews.com/2019/08/21/investor-impiana-hotel-melanggar-langkahi-bws-bali-penida/>>.

⁸⁴ 'Pelanggaran Tata Kelola Wilayah Pesisir Sebabkan Luas Daratan Bali Berkurang Hingga 4.500 Hektar' [Violations of Coastal Areas Lead to the Reduction of 4500 hectares of Bali's Mainland Area], *Bali Tribun* (Online, 20 August 2019) <<https://bali.tribunnews.com/2019/08/20/pelanggaran-tata-kelola-wilayah-pesisir-sebabkan-luas-daratan-bali-berkurang-hingga-4500-hektar>>.

⁸⁵ Ibid.

families, to leave their homes.⁸⁶ Moreover, they cannot continue their traditional work as fishers around Benoa Bay.⁸⁷ Other hotel projects have blocked local communities' access to local temples, impeding religious activities.⁸⁸ Hotels have also closed off coastal areas around their hotels, to make them private areas.⁸⁹

The immense impact tourism has had, and continues to have, on Balinese society and the environment provides an ideal site to study the operation and effect of spatial planning laws in Indonesia. From a tourism perspective, the importance of spatial planning regulation is to ensure tourism developments are sustainable. This should include respect for, and the protection of, both the environment and local communities. However, the case studies in this thesis suggest that spatial planning laws in Bali are failing to achieve these objectives. Spatial planning regulation ought to assist governments to develop and improve tourism, including its facilities and infrastructure so that it better respects the distinctive features of the location, safeguards urban and natural environments and promotes local employment.⁹⁰ However, the case studies in this thesis indicate that spatial planning laws are having little effect on the policies underpinning tourism facilities and infrastructure, for a range of legal and non-legal reasons. Vulnerable natural resources, such as beaches and mountain areas, are particularly threatened by increasing tourism.⁹¹ By using three major hotel projects as case studies, this thesis shows how spatial planning regulation in Bali is failing to protect vulnerable communities and natural resources from being damaged as a result of tourism developments.⁹²

III RESEARCH QUESTIONS

The thesis asks two central questions to try and understand why this environmental damage has happened as a result of tourism developments. First, what effect have spatial planning laws played in the development of hotels in Bali, particularly as regards environmental damage? Second, what are the factors that have caused spatial planning to fail to prevent environmental damage? This will be divided into legal and non-legal factors. Responding to these factors, this thesis proposes reforms to make spatial planning regulations more effective, particularly in preventing environmental damage as a result of tourism

⁸⁶ 'Data KIARA, 107.361 Kepala Keluarga Nelayan Terusir Akibat Reklamasi' [The Data of KIARA, 107.361 Fisher Households Are Expelled Due to Reclamation], *Property Kompas* (Online, 16 January 2016) <<https://properti.kompas.com/read/2017/01/16/214941121/data.kiara.107.361.kk.nelayan.terusir.akibat.reklamasi>>.

⁸⁷ Ibid.

⁸⁸ 'Terkait Proyek Hotel Canggü Intercontinental' [Concerning Canggü International Hotel Project] *Denpasar Post* (Online, 13 April 2015) <<https://denpostnews.com/2015/04/13/terkait-proyek-hotel-canggü-intercontinental/>>.

⁸⁹ 'Ancaman Sempadan dan Pesisir Bali' [Coastal Areas Threats of Bali], *Bali Post* (Online, 15 January 2019) <<http://www.balipost.com/news/2019/01/15/66092/Ancaman-Sempadan-dan-Pesisir-Bali.html>>.

⁹⁰ Brackhahn and Kärkkäinen (n 17) 13.

⁹¹ Ibid.

⁹² Ibid 7.

IV THESIS OVERVIEW

A *The Significance of Study*

As discussed, spatial planning laws regulate the use of space partly by attempting to anticipate and mitigate adverse consequences arising from economic and political pressures.⁹³ The increase in tourism development in Indonesia demonstrates just how important effective spatial planning laws are, and what the consequences might be if they fail in their objectives. These include: the loss of coastal areas; damage to cultural heritage and sacred sites; the loss of livelihood and community; marine degradation, poor disaster management, and the loss of biodiversity. This kind of damage will endure if spatial planning laws continue to fail communities as tourism develops.

Property research institute, Colliers International Indonesia, predicts that from 2019 to 2020, 919 new hotel rooms in six hotel projects will be built in Bali.⁹⁴ Luxury class hotels will dominate the supply of hotels, consisting of 387 five-star hotels rooms opened at the end of 2018, 342 rooms at the end of 2019, and 170 rooms at the end of 2020.⁹⁵ Four-star hotels will have a new supply of 684 rooms by the end of 2018 and 269 rooms in 2019.⁹⁶ Similarly, an official from the Central Bank of Indonesia states that the supply and demand for hotels in Bali will increase every year.⁹⁷ In 2019, the supply of hotel rooms was dominated by four-star hotels (45.64 per cent), followed by five-star hotels (37.89 per cent) and three-star hotels (16.47 per cent).⁹⁸ Even Donald Trump has also applied to build a luxurious tourist resort (equal to a six-star hotel) in Tanah Lot, Tabanan District,⁹⁹ which is expected to cause environmental damage, particularly to groundwater sources.¹⁰⁰

As regards its impact on the environment, a study by UNEP and UNWTO analyses how hotel sectors are one of the most energy and water-intensive sectors in the tourism industry.¹⁰¹ The more luxurious the hotel, the more water and energy will be used.¹⁰² The usage of energy in hotels is necessary for lighting, cooking, heating and cooling, cleaning, pools and the purification of seawater.¹⁰³ In Bali, an estimated 60 per cent of water is consumed by the tourism industry, mostly hotels, which will cause Bali to face a water crisis in less than four years.¹⁰⁴ A study by Deng and

⁹³ Hull (n 3).

⁹⁴ 'Tingkat Okupansi Hotel di Bali Masih Positif' [The Occupancy Rate of Hotels in Bali is Still Positive], *Real Estate Indonesia* (Online, 18 February 2019) <<http://www.rei.or.id/newrei/berita-tingkat-okupansi-hotel-di-bali-masih-positif.html>>.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ 'Tahun Ini Permintaan Hotel di Bali Diprediksi Meningkat' [This Year, The Demand of Hotel in Bali is Predicted to Increase], *Cendananews* (online, 18 March 2019) <<https://www.cendananews.com/2019/03/tahun-ini-permintaan-hotel-di-bali-diprediksi-meningkat.html>>.

⁹⁸ Ibid.

⁹⁹ 'IMB Hotel Milik Donald Trump di Tanah Lot Tembus Angka Rp 7 Miliar' [The Cost of the Building Permit of Donald Trump's Hotel Reached IDR 7 Billion], *Warta Bali* (Online, 5 December 2018) <<https://wartabalionline.com/index.php/2018/12/05/imb-hotel-milik-donald-trump-di-tanah-lot-tembus-angka-rp-7-milyar/>>.

¹⁰⁰ Ibid.

¹⁰¹ UNEP and UNWTO (n 73) 5.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ 'Beneath the Surface of Tourism in Bali, A Water Crisis Looms', *The Sydney Morning Herald* (Online, 9 September 2016) <<https://www.smh.com.au/world/beneath-the-surface-of-tourism-in-bali-a-water-crisis-looms-20160908-grc1or.html>>.

Burnett points out that, in Hongkong, 32 per cent of total energy is used for air conditioning, 12 per cent for lighting, 5 per cent for lifts and escalators, and 28 per cent for cooking and water heating.¹⁰⁵ Trung and Kumar then show that Vietnamese hotels use 46–53 per cent of energy air conditioning and/or ventilation, 13–26 per cent for lighting, and 17–27 per cent for water heating.¹⁰⁶ Beccali et al analyses the energy use of hotels in Sicily, suggesting that four and five stars consumed up to 35 per cent for heating and air conditioning, lighting (35 per cent), cooking and food refrigeration (15 per cent), and hotel services (10 per cent).¹⁰⁷

Spatial planning guides proper development and the capacity to respond to infrastructure pressure due to increased tourism demand.¹⁰⁸ A lack of spatial planning would lead to excessive development, damaging essential elements of sustainable development.¹⁰⁹ Papageorgiou explains that the failure of existing planning to prevent massive coastal tourism developments, including second-home developments and seaside resorts has increased the vulnerability of tourist destinations and the loss of biodiversity.¹¹⁰ Furthermore, Buckley emphasises that planning legislation is crucial to preclude high-impact development, including tourism in high conservation areas.¹¹¹ For these reasons, effective spatial planning laws are crucial to ensure the sustainability of tourism development in Bali.

B Research Methodology

This thesis is based on both fieldwork and library research, and a broadly socio-legal approach is adopted. Fieldwork was undertaken in Jakarta and Bali from October 2017 to January 2018, which generated a body of qualitative data. The core of this data is in-depth interviews conducted by the researcher with central and local government officials, non-governmental organisations, investors in the hotel industry, and academics to explore their experience, perspectives and ideas in relation to the relationship between the tourism sector and any relevant regulatory failures of spatial planning. Interviews were conducted using a semi-structured approach, guided by a set of questions, but, at the same time, spontaneous questions were also asked in response to answers given by the participants. The questions were open-ended, enabling participants to explore the issues in a greater depth. The case studies chapter will further explain how fieldwork, including the interview process, was conducted.

The data generated through interviews was supplemented by data from library research, including journals, periodicals, books, newspapers, legal instruments and documents, government publications

¹⁰⁵ Shi-Ming Deng and John Burnett, 'A Study of Energy Performance of Hotel Buildings in Hong Kong' (2000) 31 *Energy and Buildings* 7, 8.

¹⁰⁶ Do Nam Trung and S Kumar, 'Resource Use and Waste Management in Vietnam Hotels' (2004) 13 *Journal of Cleaner Production* 109,110.

¹⁰⁷ Marco Beccali et al, 'An Empirical Approach for Ranking Environmental and Energy Saving Measures in the Hotel Sector' (2009) 34 *Renewable Energy* 82, 85.

¹⁰⁸ Joanne Connell, Stephen J Page and Tim Bentley, 'Towards Sustainable Tourism Planning in New Zealand: Monitoring Local Government Planning Under the Resource Management Act' (2009) 30 *Tourism Management* 867, 868.

¹⁰⁹ Ibid.

¹¹⁰ Marilena Papageorgiou, 'Coastal and Marine Tourism: A Challenging Factor in Marine Spatial Planning' (2016) 129 *Ocean & Coastal Management* 44, 47.

¹¹¹ Ralf Buckley, 'Tourism and Biodiversity: Land-use, Planning and Impact Assessment' (1999) 10(2) *The Journal of Tourism Studies* 47, 53.

and reports, the Internet, and other assorted secondary materials, as cited in the bibliography. The legal sources were considered within a socio-cultural context of lack of enforcement, corruption, and ineffective administration. This context, and the shifting ‘gaps’ between law and practice, also became apparent through interviews and library research.

This thesis uses three major hotel projects as case studies, namely the Mulia Hotel, the Tahura Project, and the Benoa Bay Reclamation Project. These three case studies reflect the regulatory failures of spatial planning in law-making, ineffective administration, and lack of enforcement. Showing a fragmented approach to spatial planning, these case studies reveal major failures that have occurred in land management, forestry and coastal areas. Chapter 3 explains why these three hotel projects have been chosen, how they are linked to spatial planning governance, and why they are broadly representative of the regulatory failures of spatial planning in Bali, and Indonesia more broadly.

A number of reasons explain why this thesis focuses on hotel projects as a means of analysing the regulatory failures of spatial planning. In Bali, the most common and popular type of tourism business is hotels. In the 1950s, only three local hotels were established. The first foreign hotel, the Bali Beach Hotel, was established in 1961 by a Japanese company.¹¹² An international franchise (Intercontinental Hotels Cooperation) managed the operation of this hotel until 1979.¹¹³ Since that time, data from the government of Badung in 2015 reveals that of 497 new tourism licenses, 264 licenses, or 53 per cent, have been issued for the establishment of new hotels or the expansion of hotels.¹¹⁴ The Chief of the Bali Statistics Agency or *Biro Pusat Statistik* (‘BPS’) reveals that the number of hotels in Bali has drastically increased even further in recent years, from 1,635 in 2006 to 2,079 in 2015. Sixty-five per cent or 1,352 hotels, are located in Badung District.¹¹⁵ Hotel developments are therefore a good means of analysing spatial planning laws because of their huge significance for Bali’s tourism industry and the Indonesian economy more broadly.

C Thesis Outline

This thesis is organised into four parts and eight chapters. Part I comprises this introductory chapter and Chapter 2. Chapter 2 discusses the current spatial planning laws and regulations in Indonesia, particularly in Bali, covering a number of interrelated laws and implementing regulations. This detailed explanation of spatial planning laws in Indonesia presents an original contribution to the English literature on spatial planning in Indonesia.

Part II consists of three chapters, describing the three tourism projects chosen as case studies for this thesis. Every chapter offers: a brief overview of the project; the legal basis of the project; and violations of spatial planning laws and regulations and the resulting damage to the environment and local communities caused by the project. Chapter 3 deals with the Mulia Project, demonstrating the

¹¹² Adrian Vickers, *Bali: A Paradise Created* (Tuttle, 2013) 252.

¹¹³ Ibid.

¹¹⁴ Badan Pelayanan Perizinan Terpadu Kabupaten Badung, Laporan Akuntabilitas Kinerja Instansi Pemerintah [The Accountability Report of Governmental Institution] (2015) 19.

¹¹⁵ ‘Jumlah Hotel di Bali Naik Jadi 2.079, Disparda dan PHRI Usulkan Moratorium’ [The Number of Hotel Increases to 2079 hotels, the Bali Tourism Agency and the Association of Hotel and Restaurant Propose a Moratorium], *Bali Tribun* (Online, 20 April 2017 <<https://bali.tribunnews.com/2017/04/20/jumlah-hotel-di-bali-naik-jadi-2079disparda-dan-phri-usulkan-moratorium?page=all>>).

regulatory failures of spatial planning in land management, particularly because of ineffective law-making decisions and a lack of enforcement. Chapter 4 discusses the Tahura Project, focussing on the regulatory failures of spatial planning in forestry areas due to ineffective administration and enforcement. Finally, Chapter 5 uses the Benoa Bay Reclamation Project as a case study to show how a tourism project has damaged coastal areas and neglected local communities because of failures of the spatial planning regulations themselves.

Data from these three chapters is then analysed in Part III in order to identify and analyse the reasons behind the regulatory failures of spatial planning in Bali. Chapter 6 first analyses the legal factors that contribute to these failures, including the lack of a district-level detailed plan and conflicting regulations on the review and amendment of spatial plans. Chapter 7 then examines the non-legal factors behind these failures, including the pursuance of economic enrichment and lack of coordination between the provincial government and the district government. Although some of those factors may seem obvious, the contribution of these case studies is to demonstrate that they are exacerbated and made more challenging because of their interrelationship with legal factors.

Part IV consists of one chapter only: Chapter 8. This offers a conclusion and proposes regulatory reforms. These reforms respond specifically to the legal and non-legal problems identified in the thesis that impede spatial planning laws and regulations, leading to environmental and social damage in Bali. Lastly, a section on directions for future research addresses a number of issues that could be explored in prospective research.

V FINAL CONCLUSION

This thesis presents the reader with a critical analysis of the legal and regulatory aspects of spatial planning in Indonesia, and Bali in particular. The thesis demonstrates that spatial planning laws are failing in Bali as a result of a range of legal and non-legal economic and political pressures. These failings have damaged Bali's human and natural environments, and they threaten to exacerbate the effects of future natural disasters.

As a regulatory measure, spatial planning involves deliberate government action at all levels to allocate, form, and harmonise space for various uses. Spatial planning in Indonesia involves a hierarchy of laws and governmental policies from the national level, down to the provincial and district levels. Each of these levels of government are to blame for the regulatory failings of spatial planning in Indonesia. More generally, the sustainable development aims of spatial planning laws have failed to counter the social reality of power and money in Indonesia. Unfortunately, as this thesis demonstrates, spatial planning in Indonesia either tends to be viewed as a means of providing a stable and predictable environment for investment and development, and for encouraging effective use of land and natural resources for development, or it is simply ignored. As the case studies in this thesis of hotel developments in Bali indicate, Indonesian spatial planning laws are yet to achieve sustainable outcomes for Indonesian society.

Spatial planning regulation ought to assist governments to develop and improve tourism, including its facilities and infrastructure so that it better respects the distinctive features of the location, safeguards urban and natural environments and promote local employment. However, as the case studies in this thesis have also shown, spatial planning laws are having little effect on the policies

underpinning tourism facilities and infrastructure, for a range of legal and non-legal reasons. These factors include the lack of district-level detailed plans, conflicting regulations on the review and amendment of spatial plans, and a lack of enforcement, together with a lack of coordination between the provincial government and the district government, the pursuance of economic enrichment and an unsustainable approach to economic development. Although some or even all of these factors may have seemed obvious from the start, because they are common causes of regulatory failure, this thesis demonstrates empirically that they are exacerbated and made more challenging because of the interrelationship between legal and non-legal factors, or as Roscoe Pound famously wrote: between law in books and law in action.¹¹⁶ In response to these findings, I have suggested how Indonesian ‘law in books’ might be reformed to address the legal factors behind the regulatory failure of spatial planning in Indonesia. However, if law in the books in Indonesia is to be harmonised with law in action, then a great deal more research, law and social reform and change is required. I conclude the thesis above by suggesting where we may begin to further our research of these matters.

¹¹⁶ Roscoe Pound, ‘Law in Books and Law in Action’ (1910) 44 *American Law Review* 12.

Chapter 2

Current Spatial Planning Regulations in Bali

I INTRODUCTION

As stated in the previous chapter, there is no universal definition of ‘spatial planning’ but it usually refers to technical activities for designing spaces. As a regulatory measure, these activities are formalised by government or other officials allocating and harmonising space for various uses and policy aims. Although spatial planning regulation has been differently labelled in the practice of different countries, its content will provide, among other things, guidance about which areas are opened, or prohibited to, commercial or non-commercial development. One goal of spatial planning regulation is, therefore, to balance economic growth against other dimensions of human development, such as environmental protection, human heritage, and community. From the perspective of environmental protection, spatial planning regulation ensures the protection of species, animals and nature from further damage as a result of human socio-economic development. From a tourism perspective, the value of spatial planning regulation is to ensure tourism developments respect and protect the environment and local heritage and communities, and are, in that sense, sustainable. The central argument of this thesis is that spatial planning laws in Indonesia are failing to achieve their stated objectives, and that this is most clearly evidenced by recent hotel developments in Bali, Indonesia.

Certainly, tourism has promised economic benefits for the development of Bali, as explained in the previous chapter. However, this has not been without consequences for local communities and the environment. To understand why spatial planning laws are failing in Bali, it is necessary to first understand current spatial planning regulations in Bali, and what effect have spatial planning laws played in the development of hotels in Bali. They are the aim of this chapter.

As stated in Chapter I, Indonesia is a unitary state in the form of a republic. In order to explain how this system of government affects spatial planning regulation in Indonesia, it is necessary to begin with a brief overview of the Constitution of 1945, ‘regional government’ and the national hierarchy of laws in Indonesia’s unitary system in section III (A). In section III (B), I describe the history of spatial planning regulation in Indonesia from Soekarno’s administration (1945-1966), under Soeharto’s administration (1966-1998), and in the Post-Suharto or *Reformasi* era, before describing central government Law No.26 of 2007 on Spatial Management (‘SPL 2007’), including associated laws and implementing regulations. Finally, I set out the specific spatial planning regulations in Bali, both at the provincial level and at the lesser district level in Badung, including critiques on spatial planning in relation to tourism projects in Bali. The explanation of laws in this chapter should assist the reader to understand the three case studies investigated in later chapters, as well as providing a clear explanation of these couples laws for scholars interested in undertaking further research within the area.

II SPATIAL PLANNING REGULATIONS IN BALI

Indonesia has adopted a form of decentralised ‘regional government’, recognising the rights of the local governments to manage their affairs, including by issuing regulations. However, the

regulations of local governments may not deviate from, or contradict, regulations of the central government. This is important, because in spatial planning regulation in Indonesia, the central government has enacted a series of regulations (which this thesis will explain in the next section) that impose binding standards on local governments when they issue spatial planning regulations at the provincial and district levels. For this reason, spatial planning regulations at the provincial and district levels need to be understood as the implementation and elaboration of Indonesia's wider spatial planning regime at the central level.

A Indonesian Legal System: Brief Overview

1 The Constitution of 1945, 'Regional Government' and the Hierarchy of Laws

The Constitution of 1945 is the principal source of the Indonesian legal system. As mentioned, Indonesia is a unitary state, in the form of a republic¹¹⁷ based on the rule of law.¹¹⁸ Due to its diversity in culture, language, and regions, one could plausibly argue that Indonesia could have been formed as a federal state, to allow for a more decentralised form of governance.¹¹⁹ After Baharudin Jusuf Habibie took over as president from Soeharto in 1998, some Indonesian scholars and politicians proposed re-creating Indonesia as a federal state, arguing that would fit better with the prevailing values of the people and the wider political predicament of Indonesia at the time.¹²⁰ However, the People's Consultative Assembly or *Majelis Permusyawaratan Rakyat* ('MPR') agreed not to adopt a federal system, fearing it would lead to social and regional disintegration in Indonesia.

Nevertheless, the amendments of the Constitution of 1945 over the period 1999 to 2002 revised the whole structure of the state from a system of highly centralised governance to a system based on extensive regional autonomy. Scholars argue that Indonesia now combines aspects of federal and decentralised forms of governance,¹²¹ with the central government delegating broad autonomy to district governments instead of allowing provincial governments to be states under a federal arrangement.¹²² The former President of Indonesia, Abdurahman Wahid agreed to this combined approach by saying that the term 'federalism' was a 'dirty word' in Indonesian political history as it related to the Dutch colonial era and the failure of the Dutch-created federal United States of Indonesia or *Republik Indonesia Serikat* ('RIS').¹²³ He acknowledged that the idea of granting autonomy to regional governments was not very different from the federal arrangement, arguing that Indonesia needed a federal system in nature, but not in word.¹²⁴

¹¹⁷ *Undang-Undang Dasar 1945* [The Constitution of 1945] (Indonesia) art 1(1) ('*The Constitution of 1945*').

¹¹⁸ *Ibid* art 1(3).

¹¹⁹ Tristram Pascal Moeliono, 'Spatial Management in Indonesia: From Planning to Implementation, Cases from West Java and Bandung, A Socio-Legal Study' (PhD Thesis, Universiteit Leiden, 2011) 46.

¹²⁰ Denny Indrayana, *Amandemen UUD 1945: Antara Mitos dan Pembongkaran* [The Amendment of the Constitution 1945: Between a Myth and Revelation] (Mizan, 2007) 209. See also Anhar Gonggong, *Amandemen Konstitusi, Otonomi Daerah dan Federalisme: Solusi untuk Masa Depan* [Constitutional Amendment, Regional Autonomy and Federalism: A Solution for the Future] (Yogyakarta: Media Pressindo, 2001) 95.

¹²¹ Moeliono (n 119) 49.

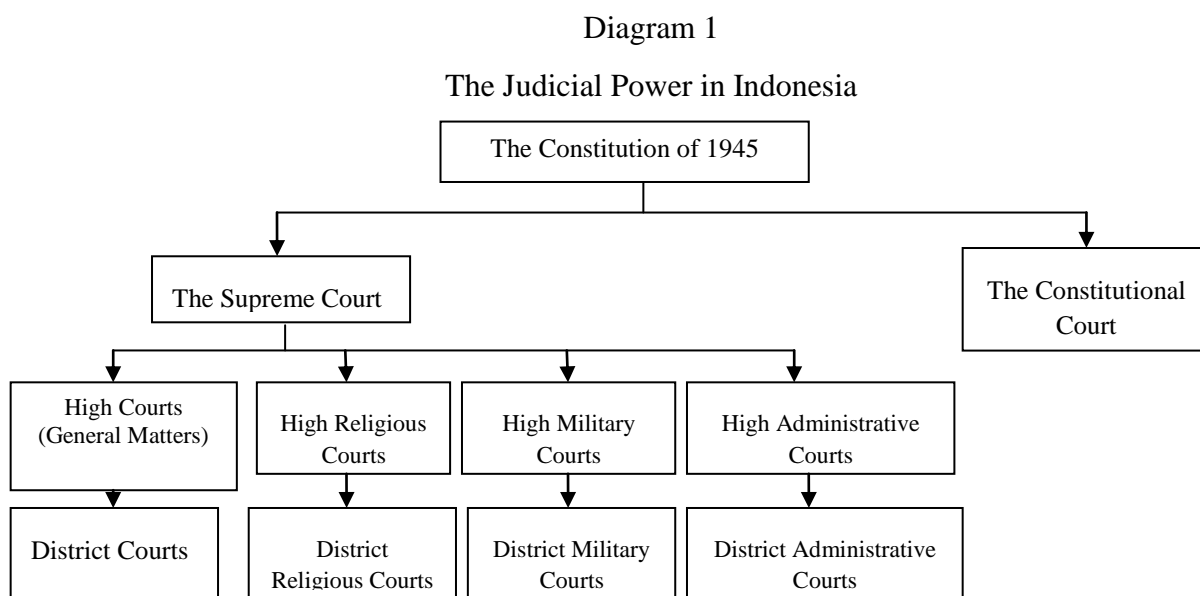
¹²² *Ibid*.

¹²³ See Gabriele Ferrazzi, 'Using the "F" Word: Federalism in Indonesia's Decentralization Discourse', (2000) 30(2) *Publius: The Journal of Federalism* 63, 79.

¹²⁴ *Ibid*.

Under the Constitution, the President holds executive power¹²⁵ as well as being entitled to submit bills to the House of Representatives or *Dewan Perwakilan Rakyat* ('DPR')¹²⁶ and issue government regulations.¹²⁷ The DPR has the power to enact laws in the form of statutes (*Undang-Undang*).¹²⁸ Each bill is debated by the DPR and the President to reach a joint agreement.¹²⁹ The President signs into law a bill reached by joint agreement. If the President declines to sign it, it becomes law anyway after 30 days.¹³⁰ Besides enacting laws, the DPR has also extensive budgeting and supervisory functions.¹³¹

The judicial power is independent, with the authority to organise the judicature in order to enforce law and justice.¹³² It comprises a Supreme Court and subordinate judicatory bodies dealing with general, military, religious, and state administrative jurisdictions, and an independent Constitutional Court.¹³³ The decision to adopt 'regional autonomy' rather than a formal federal system means that the Constitutional Court cannot play as great a role here as it might if Indonesia had been constituted formally - rather than ad hoc - as a federation. The following diagram shows the hierarchy of judicial power in Indonesia.



Source: Compiled by the author

The Constitution of 1945 divides Indonesia into provinces, and a province (eg Bali) is divided into districts (*Kabupaten*) and municipalities (*Kota*), with each province, district and municipality having its regional administration regulated by statute.¹³⁴ Districts and municipalities are roughly equivalent

¹²⁵ The Constitution of 1945 (n 117) art 4(1).

¹²⁶ *Ibid* art 5(1).

¹²⁷ *Ibid* art 5(2).

¹²⁸ *Ibid* art 20(1).

¹²⁹ *Ibid* art 20(2).

¹³⁰ *Ibid* art 20(4).

¹³¹ *Ibid* art 20A (1).

¹³² *Ibid* art 24 (1).

¹³³ *Ibid* art 24 (2).

¹³⁴ *Ibid* art 18.

in status, but districts are generally rural and municipalities urban in nature. Central government Law No. 23 of 2014 on Regional Government states that the head of a provincial area is called a Governor, heads of districts are called Regents, and heads of municipalities are called Mayors.¹³⁵ Regents and Mayors have some authority to submit draft regional regulations and to issue them after receiving approval from the District/City House of Representatives or *Dewan Perwakilan Rakyat Daerah Kabupaten/Kota* ('DPRD').¹³⁶



Figure 2.1 Map of Bali¹³⁷

An understanding of spatial planning regulation in Indonesia also requires knowledge of central government Law No. 12 of 2011 on the Establishment of Legislation. The purpose of this statute is

¹³⁵ Undang- Undang Republik Indonesia Nomor 23 Tahun 2014 Tentang Pemerintahan Daerah [Law No 23 of 2014 on Regional Government] (Indonesia) art 59 (2) ('Regional Autonomy Law').

¹³⁶ Ibid art 65(2).

¹³⁷ Maps of World (Web Page) <<https://www.mapsofworld.com/indonesia/provinces/bali.html>>.

to provide guidance on how to enact legislation, particularly for authorised government institutions at central, provincial and district levels.¹³⁸ This statute relies on the state ideology of Indonesia (*Pancasila*). *Pancasila* plays a crucial role in Indonesian legal systems as the source of all state law.¹³⁹ It consists of five core principles: belief in almighty God; humanitarianism; national unity; representative democracy by consensus; and social justice. Putting Pancasila as the source of all state law means that the content of laws and regulations in Indonesia must not conflict with the values contained in it, although, in fact, they sometimes do.¹⁴⁰

This Law also places all laws into a hierarchical order,¹⁴¹ meaning that lower regulations should be based on, and not contrary to, higher regulations. For example, the contents of provincial and district regulations must not conflict with the 1945 Constitution, Statutes, and Government Regulations.¹⁴² The following table shows the hierarchy of laws in Indonesia.

Table 1
The Hierarchy of Laws in Indonesia

1	The (Amended) 1945 Constitution	<i>Undang-Undang Dasar (Amandemen)</i>
2	People’s Consultative Assembly Decree	<i>Ketetapan Majelis Permusyawaratan Rakyat</i>
3	Law (statute)/ Government Regulation in Lieu of Law	<i>Undang-Undang/ Peraturan Pemerintah Pengganti Undang-Undang</i>
4	Government Regulation	<i>Peraturan Pemerintah</i>
5	Presidential Regulation	<i>Peraturan Presiden</i>
6	Provincial Regulation	<i>Peraturan Daerah Provinsi</i>
7	District/Municipality Regulation	<i>Peraturan Daerah Kabupaten/Kota</i>

Source: Article 7 the Central Government Law No. 12 of 2011 on the Establishment of Legislation

Central government Law No. 12 of 2011 also requires the existence of an academic paper in the process of drafting legislation. Simply speaking, every bill (draft statute) must be accompanied by an academic paper.¹⁴³ The law defines ‘academic paper’ as an authoritative paper (from a research or legal perspective) created in order to explain the background, importance and objectives of a particular bill.¹⁴⁴ For example, the academic paper to central government Law No. 26 of 2007 on Spatial Management (‘SPL 2007’) explains a key weakness of the previous law (central government

¹³⁸ *Undang-Undang Republik Indonesia Nomor 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-Undangan* [Law No 12 of 2011 on the Establishment of Legislation] (Indonesia) the Preamble (‘*Legislation Law*’).

¹³⁹ *Ibid* art 2.

¹⁴⁰ *Ibid* the elucidation of art 2.

¹⁴¹ *Ibid* art 7.

¹⁴² *Ibid* art 14.

¹⁴³ *Ibid* art 43(3).

¹⁴⁴ *Ibid* art 1(11).

Law No. 24 of 1992), namely that it lacked criminal sanctions for violations of spatial planning, arguing that it is, therefore, crucial to enact a new spatial planning law in Indonesia.¹⁴⁵ This paper also identified the balance between investment and sustainable development as one of its objectives.¹⁴⁶

Article 8(2) of central government Law No.12 of 2011 admits the existence of additional types of regulation that do not appear in the hierarchy but may be authorised by higher-level laws or are otherwise enacted under ‘legitimate authority’ – meaning the authority provided by law to execute particular government functions.¹⁴⁷ Officials, and public agencies at all levels, can issue binding regulations on this basis. For instance, they may enact ministerial regulations, governor’s regulations, mayor’s regulations, circular letters, directives or guidance, and these can have the same binding effect¹⁴⁸ as the sources of law mentioned above, even though they do not appear in the hierarchy. Asshiddiqie explains that all forms of internal memos (such as circular letters) are considered binding in order to assist the central government strengthen coordination in regional and local public agencies.¹⁴⁹ Similarly, Moeliono states that internal rules and regulations can help the government to implement law through, for example, operating manuals, or to fill legal lacunae.¹⁵⁰

For these reasons, determining what legal norms exist in Indonesia depends not just on what has been regulated formally – as a law recognised in the hierarchy described above – it also depends on current implementing regulations and internal rules that may exist at ministerial, provincial and district levels.¹⁵¹ In spatial planning, the content of these regulations and rules does not always comply with spatial planning law in Indonesia, leading to inconsistent and dysfunctional spatial planning regulations, as will be discussed at length in Chapter 5 (concerning legal factors behind regulatory failures).

These ‘implied regulations’ should not be confused with guidelines or policy in common law jurisdictions, which are not binding, but are generally followed unless they are inconsistent with, or disproportionate to, the primary legislation to which they refer. As the case studies below will show, implementing regulations and internal rules in Indonesia are often followed, even if they conflict with laws recognised in the hierarchy (Table 1). As will be explained below, this is largely because of an absence of settled law regarding their status.

¹⁴⁵ *Naskah Akademik Undang-Undang Republik Indonesia Nomor 26 Tahun 2007 Tentang Penataan Ruang* [Academic Paper of Law No 26 of 2007 on Spatial Planning] 2 (*Academic Paper of the SPL 2007*).

¹⁴⁶ *Ibid.*

¹⁴⁷ Legislation Law (n 138) art 8(2).

¹⁴⁸ Moeliono (n 119) 61.

¹⁴⁹ Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia: Pasca Reformasi* [The Core of Indonesian State Law] (Bhuana Ilmu Populer, 2007) 263.

¹⁵⁰ Moeliono (n 119) 62.

¹⁵¹ Asshiddiqie (n 149) 263.

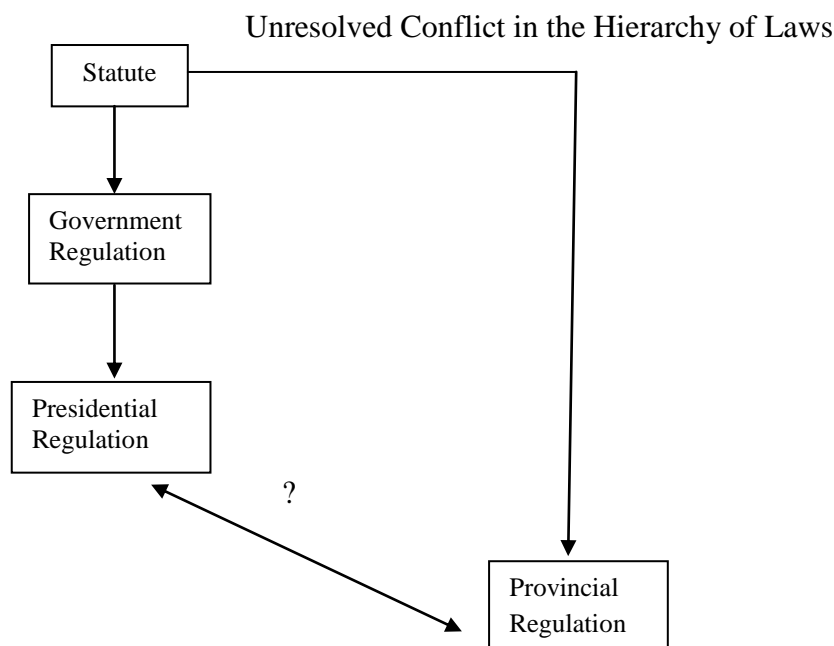
Table 2
Laws Not Listed in the Hierarchy of Laws

No	Name of Laws	Indonesian Name	Issued by
1	Presidential Decision	<i>Keputusan Presiden</i>	President (The Central Government)
2	Presidential Instruction	<i>Instruksi Presiden</i>	President (The Central Government)
3	Ministerial Regulation	<i>Peraturan Menteri</i>	Minister (The Central Government)
4	Ministerial Instruction	<i>Instruksi Menteri</i>	Minister (The Central Government)
5	Ministerial Decision	<i>Keputusan Menteri</i>	Minister (The Central Government)
6	Joint Ministerial Letter	<i>Surat Keputusan Bersama</i>	Minister (The Central Government)
7	Circular Letter of Minister	<i>Surat Edaran Menteri</i>	Minister (The Central Government)
8	Governor Regulation	<i>Peraturan Gubernur</i>	Governor (The Provincial Government)
9	Governor Decision	<i>Keputusan Gubernur</i>	Governor (The Provincial Government)
10	Circular Letter of Governor	<i>Surat Edaran Gubernur</i>	Governor (The Provincial Government)
11	Mayor/Regent Regulation	<i>Peraturan Bupati/Walikota</i>	Mayor/Regent (The District Government)
12	Mayor/Regent Decision	<i>Keputusan Bupati/Walikota</i>	Mayor/Regent (The District Government)
13	Circular Letter of Mayor/Regent	<i>Surat Edaran Bupati/Walikota</i>	Mayor/Regent (The District Government)
14	Technical Directive	<i>Petunjuk Teknis</i>	Minister, Governor, and Mayor/Regent based on their designated authorities

Source: Compiled by the author

There have been critiques of the operation of the hierarchy of laws in Indonesia, the relevance of which will be borne out in the case studies. Butt and Lindsey, for example, state that central government Law No. 12 of 2011 has no provisions to explain what type of laws should prevail over others when a contradiction occurs.¹⁵² This leads to considerable problems, as Indonesia is notorious for contradictory laws enacted by different agencies and officeholders, making it unclear which law should be followed.¹⁵³ For example, consider a presidential regulation and a regional regulation (see diagram 2), which both deal with the borders of a local conservation area in Bali. Central government Law No. 12 of 2011 suggests that the presidential regulation should prevail in the event of any inconsistency. However, if the presidential regulation were enacted under direct delegation from a central government regulation, and the regional regulation is a provincial regulation delegated from a law (statute) (see table 2), would the presidential regulation still triumph?¹⁵⁴ Following the hierarchy, it is arguable that the provincial regulation authorised by statute has a higher position than the presidential regulation, which was authorised by a central government regulation.¹⁵⁵ Unfortunately, there is no authoritative answer to this problem. This fact has significant consequences in the context of spatial planning regulation, as the case studies on the status of Benoa Bay will show (in chapter 5). In that case, there was a contradiction between presidential regulations and provincial regulations regarding the status of Benoa Bay, leading to controversy over the planning of massive tourism projects in this area.

Diagram 2



In theory, there is a method for resolving conflicts between: (i) laws of different levels; and (ii) between statutes. The Supreme Court and the Constitutional Court execute these functions. Under the hierarchy of courts, the Supreme Court and the Constitutional Court are in an equal position.

¹⁵² Simon Butt and Tim Lindsey, *Indonesian Law* (Oxford University Press, 2018) 81.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

Both are executors of an independent judicial power¹⁵⁶ and separate from other branches of power, namely the government (executive) and legislature. However, the function of these two judicial organs is different from each other.

(a) Relevant functions of the Supreme Court

For resolving conflicts between laws of different levels the Supreme Court has the authority to review lower-level laws (such as government regulations, presidential regulations, and provincial/district regulations), ensuring their conformity with higher-level laws, that is, statutes (table 1).

(b) Relevant functions of the Constitutional Court

The Constitutional Court has the authority to review statutes, to ensure their compliance with the constitution (the highest level of law).¹⁵⁷ For example, this Court might review central government Law No. 7 of 2004 on Water Resources to determine whether this statute conflicts with the Constitution of 1945. In doing so, the court would apply relevant principles of constitutional interpretation. The Constitutional Court also has the jurisdiction to determine conflicts between laws of a similar type. *Lex specialis derogat lex generalis* explains that if two contradictory laws occur, the more specific of the two revokes the broader law. Another is *lex posteriori derogat lex priori*, meaning that if two laws contradict each other, then the more recently-promulgated law triumphs.¹⁵⁸ However, according to Butt and Lindsey:

These two principles are not consistently applied, and they appear to function only to assist in resolving disputes over laws that come from the national legislature [] ... It is vague whether these principles can be implemented to settle contradictions between laws enacted by other agencies or levels of government ...[] If, for instance, different ministries enact conflicting laws, could the later revoke the previous one? Would the more specific of the two triumph?

As stated, the hierarchy in central government Law No.12 of 2011 has no answer to these issues.¹⁵⁹ Equally, there is no authoritative answer to the question of whether regional regulations issued by the legislature of one region will prevail over those enacted by the executive government of the same region.¹⁶⁰ For example, it is not clear whether a district regulation (table 1)¹⁶¹ will prevail over a governor's regulation (table 2).¹⁶² It should be clear by now, that a significant legal factor hampering the operation of spatial planning laws in Indonesia is the legal system itself. More specific details are discussed in the next section.

¹⁵⁶ The Constitution of 1945 (n 117) art 24(2).

¹⁵⁷ Butt and Lindsey (n 152) 81.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Table 1, *The Hierarchy of Laws in Indonesia* 18.

¹⁶² Table 2, *Laws Not Listed in the Hierarchy of Laws* 19.

2 *The Role of Regional Governments in Law-Making*

(a) *The Division of Authority*

The discussion so far should indicate that Indonesia is still transitioning from a highly centralised economic and political system. President Soeharto, who was supported by the political elite, the army, and powerful tycoons, dominated the life of Indonesia's politics for three decades, from 1966 to 1998.¹⁶³ His central government monopolised governmental affairs, leading to what has been called an authoritarian regime.¹⁶⁴ The fall of the Soeharto administration triggered efforts to transform Indonesia from authoritarianism to a more democratic system of government.¹⁶⁵ The introduction of more autonomous regional government encouraged a balancing of roles and responsibilities between the central government and the local governments.

Concerning the legislative process, local governments have, as mentioned, been granted authority to enact local regulations as long as they do not contradict with higher laws issued by the central government according to central government Law No.12 of 2011.

Since 1998, the central government has enacted three successive laws on local governments, namely:

1. central government Law No. 22 of 1999;
2. central government Law No. 32 of 2004; and
3. central government Law No. 23 of 2014.

An understanding of the operation of these three laws on regional government is essential to an understanding of the operation of the spatial planning system in Indonesia.¹⁶⁶

Central government Law No. 22 of 1999

As mentioned, the fall of the Soeharto Administration created momentum to change the centralised system of government to be a more democratic government, enabling district autonomy. The outcome of this process was the issuance of central government Law No. 22 of 1999 on Regional Government ('RGL 1999'). Unfortunately, this law existed for only three years after it came into force in 2001. RGL 1999 expressly granted residual authority belonging to the central government to district or city governments, instead of provincial governments.¹⁶⁷ This authority covered all sectors of government except authority concerning defence and security, foreign affairs, monetary and fiscal, the administration of justice, and religion.¹⁶⁸

¹⁶³ Stefan Eklof, *Indonesian Politics in Crisis: the Long fall of Suharto 1996–98* (Nias, 1999) 2.

¹⁶⁴ Ibid 4.

¹⁶⁵ Denny Indrayana, 'Indonesian Constitutional Reform 1999-2002: An Evaluation of Constitution-Making in Transition' (PhD Thesis, the University of Melbourne, 2005) 161.

¹⁶⁶ Deden Rukmana, 'The Change and Transformation of Indonesian Spatial Planning after Suharto's New Order Regime: The Case of the Jakarta Metropolitan Area' (2015) 20(4) *International Planning Studies* 350-370.

¹⁶⁷ *Undang- Undang Republik Indonesia Nomor 22 Tahun 1999 Tentang Pemerintahan Daerah* [Law No 22 of 1999 on Regional Government] (Indonesia) art 11 ('RGL 1999').

¹⁶⁸ Ibid art 7.

Concerning the hierarchy of laws, RGL 1999 also granted authority to provincial and district/city governments to issue regional regulations as a means of realising their autonomy.¹⁶⁹ There were two requirements of these regulations. First, the authority to enact regional regulations was limited to particular issues explicitly delegated by the central government.¹⁷⁰ Secondly, regional regulations must not contradict public interest and higher laws.¹⁷¹

The decision to grant autonomy to district-level governments was debatable. Scholars argued that the provincial government should enjoy this autonomy.¹⁷² In 1999, Indonesia had more than 360 districts/cities so that it would have been far more efficient to grant autonomy to the provincial government, which are fewer in number.¹⁷³ The fear of political disintegration seems to have been the reason not to grant autonomy to provincial governments, which are generally larger, state-like entities. It is thought that the central government wanted to close off any possibility of provincial governments separating from Indonesia if granted autonomy.

RGL 1999 was implemented by means of central government Regulation No. 25 of 2000 on the Authority of Central Government and the Provincial Government as an Autonomous Region. This regulation required that the national spatial plan should be created based on district and provincial spatial plans.¹⁷⁴ Interestingly, this regulation stipulated that provincial spatial plans had to be established based on agreements with district governments.¹⁷⁵ There was no clarification as to how such agreements should be set into law or how the provincial spatial plan had to be drafted. As a result, central government Regulation No. 25 of 2000 provided district governments with a broad discretion, enabling them to enact spatial plans free of the intervention of the central and provincial governments.¹⁷⁶

Central government Law No.32 of 2004

The difficulty faced by the central government in controlling and monitoring district-level governments was one of the main reasons for repealing RGL 1999. The central government then enacted Law No. 32 of 2004 on Regional Government ('RGL 2004').¹⁷⁷ As under RGL 1999, the central government retained exclusive jurisdiction in foreign affairs, defence and security, religion, monetary and fiscal affairs.¹⁷⁸ Nevertheless, it could delegate its jurisdiction over these matters to regional governments.¹⁷⁹ This law also introduced various compulsory matters or *urusan wajib* on

¹⁶⁹ Ibid art 18(1).

¹⁷⁰ RGL 1999 (n 167) art 69.

¹⁷¹ Ibid art 70.

¹⁷² Richard Seymour and Sarah Turner, 'Otonomi Daerah: Indonesia's Decentralization Experiment' (2002) 4(2) *New Zealand Journal of Asian Studies* 33, 40.

¹⁷³ Gary F Bell, 'The New Indonesian Laws Relating to Regional Autonomy: Good Intentions, Confusing Laws' (2001) 2(1) *Asian-Pacific Law & Policy Journal* 1, 16.

¹⁷⁴ *Peraturan Pemerintah No. 25 Tahun 2000 Tentang Kewenangan Pemerintah Dan Kewenangan Propinsi Sebagai Otonom* [Government Regulation No. 25 of 2000 on the Authority of Central Government and the Provincial Government as an Autonomous Region] (Indonesia) art 2(3).

¹⁷⁵ Ibid art 3(5).

¹⁷⁶ See Tommy Firman, 'Indonesian Cities in the Early Reform Era' in Peter JM Nas (ed), *The Indonesian Town Revisited* (Institute of Southeast Asian Studies, 2002) 100-112.

¹⁷⁷ *Undang- Undang Republik Indonesia Nomor 32 Tahun 2004 Tentang Pemerintahan Daerah* [Law No 32 of 2004 on Regional Government] (Indonesia) ('RGL 2004').

¹⁷⁸ Ibid art 10(3).

¹⁷⁹ Ibid art 10(4).

provincial and district governments including the following: public infrastructure, health, education, the environment, land affairs, investment, and small and medium enterprises ('SMEs').¹⁸⁰

RGL 2004 offered a more detailed explanation of the existence of regional regulations. It explained regional regulations as the implementation of higher ranking laws. Regional regulations could regulate 'local uniqueness',¹⁸¹ as long as this did not conflict with the public interest and higher-ranking laws and regulations.¹⁸² Violations of this provision would enable the president to cancel regional regulations through presidential regulation,¹⁸³ and any objections to such regulation had to be addressed to the Supreme Court.¹⁸⁴ RGL 2004 revoked central government Regulation No. 25 of 2000, which had provided full autonomy to district governments in spatial planning matters. The issuance of SPL 2007 then re-established the supremacy of national spatial planning as a means of sustaining Indonesia as a unitary state.¹⁸⁵

Central government Law No. 23 of 2014

The latest regional government law is central government Law No. 23 of 2014 ('RGL 2014'). This divides government affairs into 'absolute affairs', 'concurrent affairs' and 'general affairs'.¹⁸⁶ The central government holds authority over absolute affairs,¹⁸⁷ consisting of foreign policy, defence and security, the judiciary, national monetary and fiscal and religion.¹⁸⁸ Meanwhile, the central government, the provincial governments and district/municipality governments share what have been classified as 'concurrent affairs'.¹⁸⁹ These are divided into 'mandatory affairs' and 'elective affairs'.¹⁹⁰ Mandatory affairs are government affairs that must be dealt with by all regions, while elective affairs are government affairs that are implemented by the region based on the capacity of the region.¹⁹¹ Mandatory affairs are then sub-divided into basic services and non-basic service affairs.¹⁹² Basic Services are public services to fulfil the basic needs of citizens.¹⁹³ The categories of basic services include, among other things: education, health, housing, public works and spatial planning.¹⁹⁴ Hence, spatial planning *must* be regulated concurrently by all three levels of government.

RGL 2014 mostly distributes governmental functions between the central and provincial governments. For example, in forestry matters, the central government delegates its authority only to the provincial government. Concerning spatial planning, there is no substantial change in the division of authority among the three layers of governments. The district government retains

¹⁸⁰ Ibid art 13(1) and 14(1).

¹⁸¹ Ibid art 136(3).

¹⁸² Ibid art 136 (4).

¹⁸³ Ibid art 145 (3).

¹⁸⁴ Ibid art 145 (5).

¹⁸⁵ Moeliono (n 119) 160.

¹⁸⁶ Regional Autonomy Law (n 135) art 9.

¹⁸⁷ Ibid art 9(2).

¹⁸⁸ Ibid art 10(1).

¹⁸⁹ Ibid art 9(3).

¹⁹⁰ Ibid art 11(1).

¹⁹¹ Ibid art 1(15).

¹⁹² Ibid art 11(2).

¹⁹³ Ibid art 1(16).

¹⁹⁴ Ibid art 12(1).

authority to issue building and nuisance permits. The only difference between RGL 2004 and RGL 2014 is that the central government delegates authority in marine, coastal, and small islands only to the provincial government, with no authority in these areas allowed for district governments. The following table shows the division of concurrent affairs among planning-related authorities under central government Law No. 23 of 2014 on Regional Autonomy.

Table 3
The Division of Authority in Planning-related Authorities

Authorities Sectors	Central Government	Provincial Government	District/Municipality Government
Management of Natural Resources and Coastal Protection	Cross-border province river areas, cross-country river areas and national strategic river areas.	Cross-border district river areas.	River within District's territory.
Building Requirements (Establishment and Implementation)	Areas classified as of 'national strategic' importance.	Areas classified as of 'provincial strategic importance'.	1. Areas classified as of 'district strategic importance'. 2. Authority to issue building permits (<i>ijin mendirikan bangunan</i>) and certificate of building functions (<i>sertifikat laik fungsi</i>)
Spatial Planning	Implementation of national spatial arrangements and international cooperation of spatial planning.	Implementation of provincial spatial arrangements.	Implementation of district spatial arrangements.
Marine, Coastal, and Small Islands	Management of marine over 12 miles and strategically national areas.	Management of marine space up to 12 miles and the issuance of utilisation permits for sea space below 12 miles other than oil and gas.	No Authority

Source: Elucidation to central government Law No. 23 of 2014 on Regional Autonomy

(b) *Problems of Regional Government*

One of the most important outcomes of the regional government reforms in the post-Soeharto era is the division of regions into smaller autonomous regions. Indonesia had 336 districts and 30

provinces in 2001, and 434 districts and 32 provinces in 2004.¹⁹⁵ Currently, Indonesia has 542 autonomous regions consisting of 34 provinces, 398 districts, 93 municipalities, five administrative municipalities and one administrative district.¹⁹⁶

International organisations and scholars have criticised the drastic shift from a centralised to a decentralised country achieved by regional autonomy.¹⁹⁷ Aspinall and Fealy indicate that some elements of regional autonomy have degraded the quality of governance, pointing out the lack of capacity at the regional level, inequality between the rich and poor regions and massive corruption.¹⁹⁸ Furthermore, the World Bank argues that the process of regional autonomy is far from complete because of overlapping responsibilities between central and local governments, and a lack of transparency.¹⁹⁹ Bünte notes that the real goals of regional autonomy are sometimes related to aspirations for increasing the political power of local elites and money politics.²⁰⁰ Butt has shown how regional autonomy has resulted in contradictory laws and policies between the central and regional governments,²⁰¹ due to the confusing nature of the hierarchy of laws. In investment governance, according to Ewing-Chow and Losari, foreign investors have to acquire permits from agencies at both the central and local levels, which have overlapping roles and responsibilities concerning the issuance of these permits.²⁰² As a result, there are many cases where local governments reject an application for a license, even though the foreign investor involved had secured permit-in-principle consent from the central government.²⁰³ As the case studies in this thesis demonstrate, this decentralisation has also had an adverse effect on spatial planning regulation.

B *Spatial Planning Regulation in Indonesia*

This section provides an explanation of spatial planning regulation in Indonesia at the central level before turning to a description of the more specific regulation of spatial planning in Bali.

1 *The History of Spatial Planning Regulation*

This discussion is relevant to indicate the longstanding failure of current spatial planning regulations, particularly to clearly divide authority between the central, provincial, and district governments. This unresolved problem has led to, among other things, conflicting regulations issued by the central and district governments, and the lack of coordination between them in implementing spatial planning regulations in Indonesia.

¹⁹⁵ Moeliono (n 119) 57.

¹⁹⁶ 'The Establishment of Autonomous Region in Indonesia', *Ministry of Home Affairs* (Web Page) <http://otda.kemendagri.go.id/CMS/Images/SubMenu/total_daerah_otonom.pdf>.

¹⁹⁷ Edward Aspinall and Greag Fealy, 'Introduction: Decentralisation, Democratisation and the Rise of the Local' in Edward Aspinall and Greag Fealy (eds), *Local Power and Politics in Indonesia: Decentralization and Democratization* (ISEAS, 2003) 2.

¹⁹⁸ *Ibid.*

¹⁹⁹ World Bank, *Indonesia Development Policy Review: Enhancing Government Effectiveness in a Democratic and Decentralized Indonesia* (The World Bank, 2009) xvii.

²⁰⁰ Marco Bünte, 'Indonesia's Protracted Decentralization: Contested Reforms and Their Unintended Consequences' in Marco Bünte and Andreas Ufen (eds), *Democratization in Post-Suharto Indonesia* (Routledge, 2009) 102, 204.

²⁰¹ Simon Butt, 'Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia' (Legal Studies Research Paper No. 10/71, Sydney Law School, July 2010) 6.

²⁰² Michael Ewing-Chow and Junianto James Losari, 'Multiple Authorisation: the Legal Complexity of Desentralisasi in Indonesia and the Potential Contribution of IIAs in Reducing Confusion' (2015) 5(3) *Indonesia Law Review* 241, 247.

²⁰³ *Ibid.*

(a) *Soekarno's administration (1945-1966)*

Although Indonesia had declared its independence in 1945, the Dutch were not expelled from Indonesian territory until 1949. Following the Renville Agreement of 17 January 1948, Soekarno's administration was given *de facto* control over Central Java, Yogyakarta, and Sumatra.²⁰⁴ The Dutch maintained sovereignty over the remaining parts of Indonesia. During this period, in 1948, the Dutch government issued a Town Planning Ordinance or *Staadsvorming Ordonatie* ('SVO') followed by its implementing regulation, the *Stadsvormings Verordening* ('SVV'), in 1949.²⁰⁵ The goal of the SVO was to authorise local government to secure the development of towns while complying with social and geographical features and estimated growth.²⁰⁶ The SVV set out in detail the obligations of local governments to provide general and detailed spatial planning,²⁰⁷ especially related to technical rules about road and building construction.²⁰⁸ At this time, the SVO and SVV enabled local governments to actively participate in the planning process as a reflection of a federal system being pushed forward by the Dutch.²⁰⁹

After Indonesia was fully independent in 1949, the administration of the first president, Soekarno (1945-1966), was reluctant to incorporate the SVO and the SVV into national law. The government argued that they were a part of Dutch land law and only fitted within Dutch colonial municipal (*gemeente*) governance.²¹⁰ Equally, it was thought that the SVO and the SVV had created western enclaves by segregating space on racial lines.²¹¹ Despite this, the SVO and the SVV remained on the books, but were not implemented.

The central government did enact Law No. 5 of 1960 on the Basic Agrarian Law, which is still binding for land administration and allocation in Indonesia. This Law introduced 'rights controlled by the State', meaning that the State is granted authority to regulate and implement the utilisation and reservation of earth, water and air space, including natural resources in it.²¹² This law covers land administration as well as forestry and mining. Soekarno had the opportunity to use this law to integrate spatial management in Indonesia, but never did so. Instead, Soekarno appointed different ministers to manage different natural resources, such as gas, oil, mining, and forestry sectors.²¹³

²⁰⁴ Australian Government, Department of Foreign Affairs and Trade, 'Renville Agreement' <<https://dfat.gov.au/about-us/publications/historical-documents/Pages/volume-13/22-renville-agreement.aspx>>.

²⁰⁵ Delik Hudalah and Johan Woltjer, 'Spatial Planning System in Transitional Indonesia' (2007) 12(3) *International Planning Studies* 291, 303.

²⁰⁶ Pauline KM van Roosmalen, 'Expanding Grounds: The Roots of Spatial Planning in Indonesia' in Freek Colombijn et al (eds), *Kota Lama Kota Baru, Sejarah Kota-Kota di Indonesia* [Old and New Cities, the History of Cities in Indonesia] (Penerbit Ombak, 2005) 75, 117.

²⁰⁷ Johan Silas, 'Perjalanan Panjang Perumahan di Indonesia dalam dan Sekitar Abad XX' [The Long History of Housing in Indonesia in the Twentieth Century] (PhD Thesis, the Institute of Technology Bandung, 1989) 34.

²⁰⁸ Ibid.

²⁰⁹ Moeliono (n 119) 73.

²¹⁰ JM Otto and Ateng Syafrudin, 'Hukum Tata Ruang di Indonesia dan Belanda' [Spatial Planning Law in Indonesia and the Netherlands] (1990) 8(2) *Pro Justitia* 5, 28.

²¹¹ Ibid.

²¹² *Undang-Undang No. 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria* [Law No. 5 of 1960 on the Basic Agrarian Law] (Indonesia) art 2.

²¹³ Moeliono (n 119) 79.

(b) *Soeharto's administration (1966-1998)*

Under Soeharto's administration (1966-1998), the SVO was implemented in 1976 when the government issued a Presidential Instruction requiring local governments to enact regulations for city plans.²¹⁴

Although local governments could issue spatial planning regulations, the process of issuing these regulations was strictly supervised and authorised by the central government, reflecting a very top-down and centralised approach to spatial planning.²¹⁵ When drafting the district spatial plan, the district government was required to consult the Provincial Development Planning Board or *Badan Perencanaan dan Pembangunan Daerah (Bappeda)* and Urban Development Board or *Badan Pengembangan Kota (Bangkota)* to check whether the draft had complied with the spatial plan at the provincial and national levels.²¹⁶ Next, the draft was sent to the Directorate General of Public Administration and Regional Autonomy of the Ministry of Home Affairs. If this ministry agreed, the draft was adopted by regional regulation and then submitted to the Minister of Home Affairs for validation.²¹⁷

In 1987, the central government enacted Government Regulation No 14 of 1987 on the Delegation of Parts of Central Government Authority in Public Works to the Regions.²¹⁸ However, this still reflected the dominant role of the central government because the Ministry of Home Affairs would analyse the financial and technical capacity of regions before receiving spatial planning authority from the central government.²¹⁹ Furthermore, the Ministry of Public Works had authority to formulate district spatial planning,²²⁰ and the discretion to decide how and when spatial planning authority would be delegated to the regions.²²¹

As regards access to land for commercial development, the central government introduced regulations regarding site permits and the permit-in-principle. The Ministry of Home Affairs created site permits for land acquisition for domestic and foreign investment, including tourism.²²² In 1990, the National Land Agency or *Badan Pertanahan Nasional* ('BPN') took over this role, explaining that it had the power to control access to land through the application of the site permit.²²³ Next, the Investment Coordinating Board or (*Badan Koordinasi Penanaman Modal* ('BKPM')) took over the

²¹⁴ *Instruksi Presiden Republik Indonesia Nomor 1 Tahun 1976 Tentang Sinkronisasi Pelaksanaan Tugas Keagrarian Bidang Kehutanan, Pertambangan, Transmigrasi dan Pekerjaan Umum* [Presidential Instruction No 1 of 1976 on the Synchronization of Task and Responsibilities Between Agrarian Issues, Forestry, Mining, Transmigration and Public Works] (Indonesia) point 25(ii).

²¹⁵ Henk Schulte Nordholt and Gerry van Klinken, 'Introduction' in Henk Schulte Nordholt and Gerry van Klinken (eds), *Renegotiating Boundaries: Local Politics in post-Soeharto Indonesia* (KITLV Press, 2007) 21.

²¹⁶ Moeliono (n 119) 73.

²¹⁷ *Ibid.*

²¹⁸ *Peraturan Pemerintah Republik Indonesia Nomor 14 Tahun 1987 Tentang Penyerahan Sebagian Urusan Pemerintahan di Bidang Pekerjaan Umum kepada Daerah* [Governmental Regulation No 14 of 1987 on the Delegation of Parts of Central Government Authority in Public Works to the Regions] (Indonesia).

²¹⁹ *Ibid.*

²²⁰ *Ibid* art 4C.

²²¹ *Ibid* art 5.

²²² *Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 5 tahun 1974 tentang Ketentuan-Ketentuan Mengenai Penyediaan dan Pemberian Tanah untuk Keperluan Perusahaan* [The Ministry of Home Affairs Decree No 5 of 1974 on the Land Reservation and Allocation for Private Companies] (Indonesia).

²²³ Moeliono (n 119) 125.

regulation of the permit-in-principle.²²⁴ Through this, an investor in the tourism sector could obtain a temporary permit to embark on tourism business activities, including the commencement of preparatory measures stipulated for the formation of the business.²²⁵ Hence, an investor had to acquire the permit-in-principle before applying for the site permit.

The existence of a site permit, or a permit-in-principle, had no connection with broader spatial planning principles, and district governments had no power to control land use. As long as the investor had been issued with a permit-in-principle and a site permit by the central government, the investor could start operating the business, even if the location violated spatial planning regulation at the district level.

In 1992, the Soeharto government enacted the first statute made by the central government concerning spatial planning. Law No. 24 of 1992 on Spatial Planning ('SPL 1992') officially replaced the SVO and the SVV.²²⁶ SPL 1992 divided spatial planning into the following categories:

- the national spatial plan;
- provincial spatial plans; and
- municipal/district spatial plans.²²⁷

Each spatial plan had to determine cultivation areas and protected areas; the norms and criteria of spatial use; and guidelines for controlling space utilisation.²²⁸ As regards permits for spatial utilisation, the new law allowed the Governor or head of each district to declare void any permit in relation to spatial utilisation if it contradicted the district spatial plan.²²⁹ Equally, the district spatial plan became the basis for assessing any application for development location permits, proposed by government agencies or private companies.²³⁰ However, the central government still had a dominant role in spatial planning governance. As in the previous period, the central government did not allow district governments to autonomously regulate spatial plans. Through the Ministry of Home Affairs, it strictly supervised the creation and the implementation of district spatial plans.²³¹ For these reasons, this period continued the centralised approach of spatial planning that had existed since Soekarno's administration.

As regards investment, the Law indicated which business sectors were prohibited or open to investment.²³² If a sector was not prohibited, an investor might request a confirmation letter from the Governor on the future site of the project.²³³ After receiving this letter, the investor could seek a

²²⁴ Ibid 118.

²²⁵ Ibid 125.

²²⁶ *Undang-Undang Republik Indonesia Nomor 24 Tahun 1992 Tentang Penataan Ruang* [Law No 24 of 1992 on Spatial Planning] (Indonesia) ('SPL 1992').

²²⁷ Ibid art 19.

²²⁸ Ibid art 20(2).

²²⁹ Ibid art 26.

²³⁰ Ibid art 22(4).

²³¹ Moeliono (n 119) 67.

²³² *Keputusan Presiden Republik Indonesia Nomor 33 Tahun 1992 tentang Tata Cara Penanaman Modal* [The Presidential Decree No 33 of 1992 on the Procedures of Investment] (Indonesia) art 1(1).

²³³ Ibid art 1(2).

permit-in-principle from the BKPM.²³⁴ The Governor might then issue the site permit, allowing the investor to start the land acquisition process.²³⁵ Before issuing the permit, the Governor was required to refer to the existing district plan. Hence, there was a connection between the permit-in-principle, the site permit and spatial planning.

Soeharto continued the established fragmented approach to spatial management in Indonesia. He was reluctant to integrate spatial arrangements, as the exploitation of natural resources through this approach became the central government's main source of income.²³⁶ If spatial management was integrated, the central government would be forced to renegotiate existing production contract sharing agreements in mining, gas and oil, and existing concessions in forestry management, and this would adversely affect the public-private business network, the pillar of the Soeharto regime.²³⁷

(c) *The Post-Soeharto or Reformasi era*

Following the fall of Soeharto in 1998, Indonesia began a period of transition known as *Reformasi*. The reforms of this era, and the openness they created, led to criticism of SPL 1992 as no longer suitable for an Indonesia that was transitioning to a more democratic model. In this era, it became clear that a regulatory adjustment was needed to divide spatial planning powers differently between the Central and regional governments.²³⁸ A further critique of SPL 1992 was that it did not contain controlling and enforcement mechanisms. As a result, spatial use often did not follow the requirement of spatial plans.²³⁹ The following section will further explain all spatial planning laws and regulations in this era as they try to respond to the drawbacks of previous spatial planning regulations in Indonesia.

2 *National Regulation of Spatial Planning*

(a) *The Spatial Planning Law 2007(SPL 2007)*

(i) *Basic Features of SPL 2007*

The most important features of SPL 2007 included: the sharing of responsibility for spatial planning between the Central, provincial, and district governments; the enhancement of controls over spatial planning; public participation; and the introduction of administrative and criminal sanctions for violations of the law.

This law defines spatial planning as ‘a system for the process of spatial planning, space utilisation and control over space utilisation’.²⁴⁰ The State is obliged to manage the spatial use ‘for the greatest benefit of people’s welfare’.²⁴¹ Regulating the use of space, this law divides spatial use into ‘spatial structure’ or *struktur ruang* and ‘spatial design’ or *pola ruang*.²⁴² ‘Spatial structure’ is defined as ‘an arrangement of residential centres and infrastructure network systems that function as a support for

²³⁴ Ibid art 1(3).

²³⁵ Moeliono (n 119) 124.

²³⁶ See Richard Robison, *Indonesia: The Rise of Capital* (Equinox, 2009) 239.

²³⁷ Ibid 244.

²³⁸ Academic Paper of the SPL 2007 (n 145) 3.

²³⁹ Ibid.

²⁴⁰ Ibid art 1(5).

²⁴¹ Ibid art 7(1).

²⁴² Ibid art 1(2).

the society's social and economic activity'.²⁴³ Meanwhile, 'spatial designs' are defined as 'the spatial allocation that divides areas into conservation and cultivation areas'.²⁴⁴

This Law then defines 'an area' as 'a region that functions mainly for conservation or utilisation'.²⁴⁵ '**Conservation areas**' are areas that have the primary function of ensuring environmental sustainability of natural and human-made resources (such as a residential area).²⁴⁶ A '**utilisation area**' is 'a region whose primary function is utilised because of the existence of natural resource potential, human resources, and human-made resources'.²⁴⁷

There are also national, provincial and district 'strategic areas'. A '**nationally strategic area**' is a 'region that has a priority in spatial planning due to its important influence for state sovereignty, defence, and security, the economy, society, culture, and the environment, including regions classified as a part of world heritage'.²⁴⁸ A '**provincial strategic area**' is a region that has priority due to its economic, social, cultural and/or environmental importance to a province.²⁴⁹ A '**district strategic area**' is a 'region that is prioritised because of its economic, social, cultural and/or environmental importance to a district'.²⁵⁰ The existence of strategic areas reflects the application of 'growth poles', where the national, provincial, and district governments focus on the development of a specific pole (or region) due to economic, social, and environmental considerations.²⁵¹

(ii) SPL 2007 and Regionalism

Given the implementation of regional government, scholars might expect that Indonesia would follow the typical nature of spatial planning in most developed countries, where it operates principally at regional or at the state level rather than centrally. However, SPL 2007 has maintained the centralised character of the previous spatial planning laws in Indonesia. In fact, this Law expressly states that 'national, provincial and district spatial planning governance shall be performed in a hierarchical and complementary manner'.²⁵² As a means of integrating national development, the central and provincial governments have authority to issue general guidance and binding directives in relation to spatial plans.²⁵³ The district governments must follow all of these guidances and directives, particularly when drafting spatial plans.²⁵⁴ The draft district spatial plan must also refer to national and provincial spatial plans.²⁵⁵ Once it has the Governor's recommendation, this draft must acquire prior approval from the Minister of Agrarian and Spatial Planning.²⁵⁶

²⁴³ Ibid art 1(3).

²⁴⁴ Ibid art 1(4).

²⁴⁵ Ibid art 1(20).

²⁴⁶ Ibid art 1(21).

²⁴⁷ Ibid art 1(22).

²⁴⁸ Ibid art 1 (28).

²⁴⁹ Ibid art 1(29).

²⁵⁰ Ibid art 1(30).

²⁵¹ See John B Parr, 'Growth poles, Regional Development, and Central Place Theory' (1973) 31 (1) *Papers of the Regional Science Association* 173, 174.

²⁵² *Undang-Undang Nomor 26 Tahun 2007 Tentang Penataan Ruang* [Law No.26 of 2007 on Spatial Management] (Indonesia) art 6(2) ('SPL 2007').

²⁵³ Ibid art 10.

²⁵⁴ Ibid art 11(4).

²⁵⁵ Ibid art 25.

²⁵⁶ Ibid art 18(2).

The only new authority granted to district governments is to control land acquisition for commercial activities. SPL 2007 expressly states that the **district spatial plan** is a legal basis for issuing site/location permits and land administration.²⁵⁷ This provision allows the district government to reject an application for a permit if it violates the existing district spatial plan, even if the applicant has been granted a permit-in-principle from the BKPM.²⁵⁸ However, this new authority has caused problems on regionalism and the hierarchy of laws. As discussed further in Chapter 7, district governments issue location permits even if these permits conflict with their spatial plans.

There is also a lack of coordination where district governments do not involve the provincial government in the issuance of location permits. In addition, the provincial government has no power to revoke the location permit if it contradicts the provincial spatial plan. Moreover, as a result of a 2015 Constitutional Court or *Mahkamah Konstitusi* ('MK') decision, the central government, through the Ministry of Home Affairs, is now no longer able to cancel regional regulations.²⁵⁹

SPL 2007 grants authority to the national, provincial, and district governments to issue spatial plans, both general and detailed plans, and strategic areas.²⁶⁰ **'General plans'** comprise national spatial plans, provincial spatial plans, and district spatial plans.²⁶¹ Meanwhile, **'detailed plans'** cover the following issues: 'island spatial plans/archipelago and national strategic area spatial plans; provincial strategic area spatial plans; and district detailed spatial plans.'²⁶² Detailed plans are an operational tool to arrange spatial plans. They include a detailed explanation of the blocks, zones, and areas in a particular district, identifying which areas are opened or closed for particular projects.²⁶³ After five years, governments can re-evaluate general plans.²⁶⁴ Any general plans shall 'retain any forest areas to, at least 30 per cent of the total watershed area' within national/provincial/district areas in order to protect the environment.²⁶⁵ For example, the Head of the East Java Provincial Agency states that East Java has forest areas of 2.25 Million Ha, that is, 41 per cent, so it has complied with SPL 2007 and Forestry Law.²⁶⁶ As the case studies chapter will further explain, only 22 per cent of Bali is forest area.

(b) *Enforcement Mechanism in SPL 2007*

SPL 2007 tried to solve problems in SPL 1992 related to the fact that it had no enforcement procedures in its provisions. It introduced enforcement mechanisms to control spatial utilisation by imposing zoning regulations, permit systems, incentive and disincentives, and sanctions.²⁶⁷ In addition to securing the fulfilment of spatial planning, there must be a mechanism to monitor,

²⁵⁷ Ibid art 26(3).

²⁵⁸ Moeliono (n 119) 210.

²⁵⁹ *Keputusan Mahkamah Konstitusi No 137/PUU-XIII/2015* [The Constitutional Court Decision No 137/PUU-XIII/2015].

²⁶⁰ SPL 2007 (n 252) art 8, 10, 11.

²⁶¹ Ibid art 14(2).

²⁶² Ibid art 14(3).

²⁶³ Ibid art 14(4).

²⁶⁴ Ibid art 16(1).

²⁶⁵ Ibid art 17(5).

²⁶⁶ '40 Persen Wilayah di Jatim Adalah Hutan' [40 Per cent Area in East Java is Forest], *Berita Jatim* (Online, 26 March 2019) <<https://beritajatim.com/ekbis/40-persen-wilayah-di-jatim-adalah-hutan/>>.

²⁶⁷ SPL 2007 (n 252) art 35.

evaluate and report on the implementation of the spatial plan.²⁶⁸ This process involves the public, who can submit reports and complaints to the government.²⁶⁹ Should the outcome of the monitoring and evaluation show administrative misconduct, the Minister, Governor and Mayor must undertake necessary administrative measures to stop such misconduct.²⁷⁰ The case studies chapters will show that this mechanism is not effective.

There are administrative and criminal sanctions in SPL 2007. Anyone who violates the regulation will receive an administrative sanction,²⁷¹ which could be ‘written reprimands; temporary suspension of activities; temporary suspension of public services; closure of (business or development) site; revocation and cancellation of license; demolition of constructions; rehabilitation of land; and/or fines.’²⁷² Criminal sanctions can be imposed on various stakeholders, including state officials. Specifically, ‘those who fail to abide by the prevailing spatial plan and cause a change of spatial function, will be punished with a maximum imprisonment of 3 years and a maximum fine of Rp 500.000.000’.²⁷³ A government official who is in charge of issuing permits and issues a permit contradicting a spatial plan, ‘will be punished with a maximum imprisonment of 5 years and a maximum fine of Rp 500,000,000’.²⁷⁴ Beside criminal sanctions, the official will receive the additional sanction of dishonourable dismissal from his position.²⁷⁵

A former Minister of Agrarian and Spatial Planning, Ferry Mursyidan Baldan, admits the criminal and administrative sanctions under SPL 2007 are not really effective. He concedes they have no deterrent effect because they are not enforced.²⁷⁶ In fact, as the case studies in the next chapter demonstrate, the number of violations has consistently increased since SPL 2007 entered into force.

(c) *Governmental Regulation on the Implementation of SPL 2007 and the Importance of Detailed Plans*

Central government Regulation No. 15 of 2010 underpins the importance of detailed plans for district governments.²⁷⁷ Every district spatial plan shall determine which area of the district needs to be the subject of a detailed plan.²⁷⁸ Detailed plans are required to be established no later than 36 months from the date of the district spatial plan.²⁷⁹ The development of the draft detailed plan must involve public participation and relevant stakeholders.²⁸⁰ There must be data collection and data analysis to specified minimum levels while preparing the detailed plan. The district government

²⁶⁸ Ibid art 55(2).

²⁶⁹ Ibid art 55(4).

²⁷⁰ Ibid art 56(2).

²⁷¹ Ibid art 62.

²⁷² Ibid art 63.

²⁷³ Ibid art 69.

²⁷⁴ Ibid art 73(1).

²⁷⁵ Ibid art 73(2).

²⁷⁶ ‘Pemerintah Minta DPR Revisi UU Penataan Ruang’ [Government Asked House of Representatives to Revise SPL], *RMOL.Co* (online, 6 October 2015) <<http://politik.rmol.co/read/2015/10/06/219961/Pemerintah-Minta-DPR-Revisi-UU-Penataan-Ruang->>.

²⁷⁷ *Peraturan Pemerintah Republik Indonesia Nomor 15 Tahun 2010 Tentang Penyelenggaraan Penataan Ruang* [Government Regulation No 15 of 2010 on the Management of Spatial Planning] (Indonesia) art 59(4) (‘*SPGR 2010*’).

²⁷⁸ Ibid art 59 (1).

²⁷⁹ Ibid art 59 (4).

²⁸⁰ Ibid art 61(1).

should collect data about: the administrative area; physiography; the population; economy and finance; availability of basic infrastructure and facilities; space design; land use and utilisation; building intensity; and basic earth maps and thematic maps.²⁸¹ Meanwhile, data analysis should include, among other things: technical and environmental analysis of the district's carrying capacity; technical analysis of inter-district linkage; and technical analysis of the district's spatial component.²⁸²

Finally, SPL 2007 states that a spatial plan (national, provincial and district) may be reviewed or amended only once every five years.²⁸³ There are only two situations that enable this process to be done more than once in that period: (1) large-scale disasters; and (2) a change of boundary in state or regions regulated by law.²⁸⁴

The above spatial planning regime is not the only set of laws that regulate spatial planning in Indonesia. The following section considers other Laws or related regulations relevant to spatial planning regulation in Indonesia, including spatial planning in relation to coastal management and forestry areas as well as spatial planning regulation at provincial and district levels.

(d) Fragmented Approach to Spatial Management in Indonesia

This section explains the involvement of a number of government institutions that have overlapping authority concerning spatial management in Indonesia. As the case studies will also show, at the central government level, three ministries are involved in this: the Ministry of Agrarian and the Head of National Land Agency; the Ministry of Forestry; and the Ministry of Marine and Fisheries. The following diagram shows how spatial management is managed and interrelated in three different ministries in Indonesia, and how it links to the three case studies in this thesis.

²⁸¹ Ibid art 61(2).

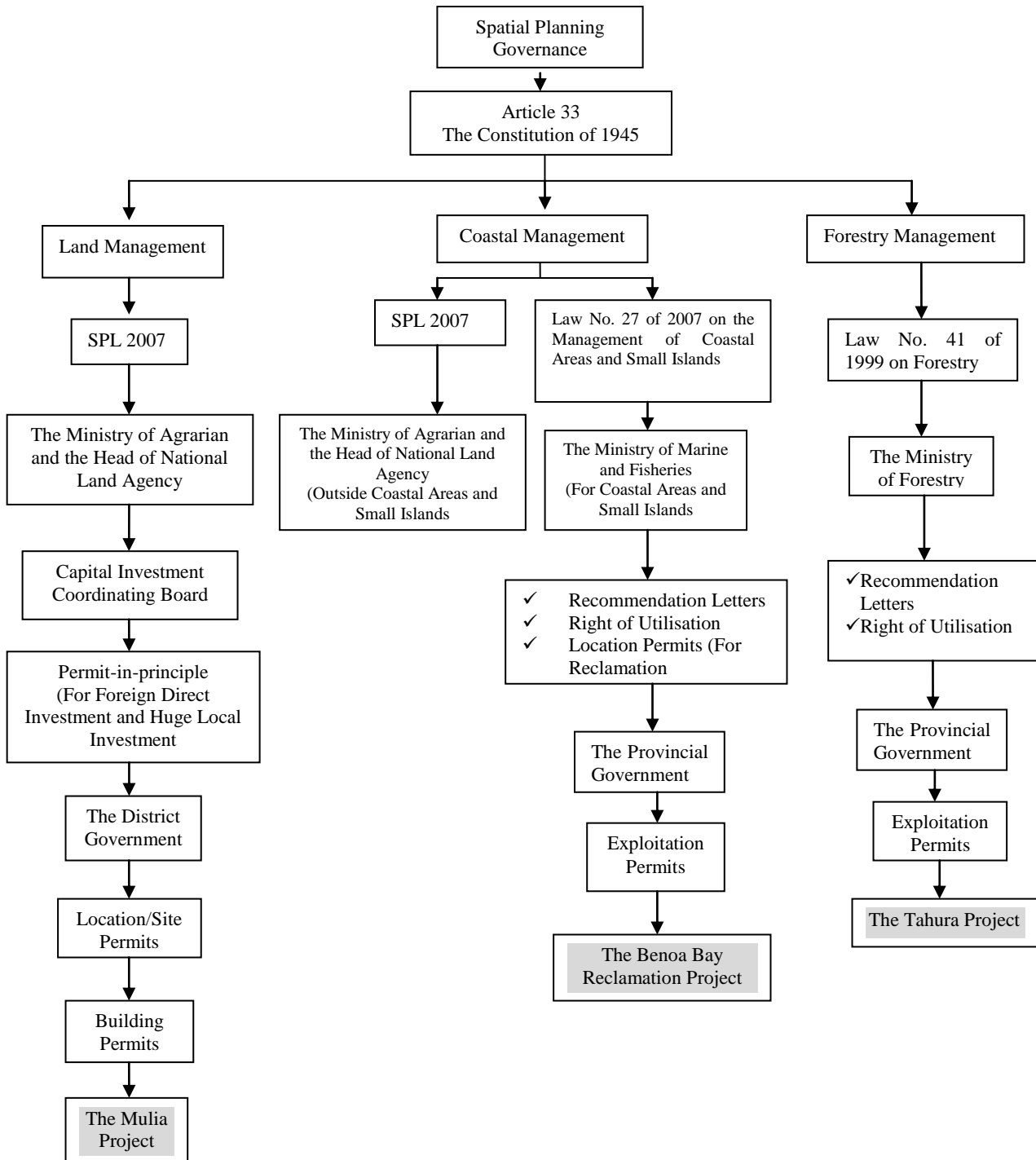
²⁸² Ibid art 61(3).

²⁸³ SPL 2007 (n 252) art 20(4).

²⁸⁴ Ibid art 20(5).

Diagram 3

The Relationship between Spatial Planning, Forestry, and Coastal Management



The issuance of SPL 1992 should be the legal basis to integrate spatial management in Indonesia. Specifically, the preamble to this law expressly stated that ‘the management of many varieties of natural resources and land, sea and air, must be coordinated and integrated by developing a spatial policy...’.²⁸⁵ However, as the above task indicates, the central government has stated that SPL 1992

²⁸⁵ SPL 1992 (n 226) the Preamble.

is only applied to land management, excluding land that was classified as forest by the Ministry of Forestry.²⁸⁶ Likewise, in the mining, oil, and gas sectors, the central government grants exploitation permits to private companies through production sharing contracts.

In consequence, in the Reformation era, the fragmented approach to spatial planning is thriving. The newly enacted SPL 2007 does not apply to forest areas. Instead, the central government has declared Law No. 41 of 1999 on Forestry as the legal basis for forestry management in Indonesia,²⁸⁷ granting monopolistic authority to the Ministry of Forestry to plan, use, and control forest areas in Indonesia.²⁸⁸ Hence, this ministry has authority to grant a utilisation permit in a forest area for tourist development. Likewise, the Ministry of Marine and Fisheries, through the issuance of central government Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands, now has authority to issue the ‘right of utilisation’ or *Hak Pengusahaan Perairan Pesisir* (‘HP-3’) in areas that are classified as ‘coastal areas’.²⁸⁹ The following sections explain these laws in more detail.

(i) *Spatial Planning in relation to Tourism Activities in Nature Conservation Areas*

Central government Regulation No. 36 of 2010, which implements central government Law No. 41 of 1999 on Forestry, explains how ecotourism can be undertaken in nature conservation areas,²⁹⁰ including wildlife reserves, national parks, forest parks and nature parks.²⁹¹ There are two types of tourism business recognised by this regulation: ecotourism services and ecotourism facilities.²⁹² As regards ecotourism facilities, these include tourism businesses that provide accommodation and adventure tourism facilities.²⁹³ Ecotourism businesses may only be started after obtaining a utilisation permit,²⁹⁴ which is only granted in respect of national parks, forest parks and nature parks.²⁹⁵ The utilisation permit is granted for 55 years and may be extended for another 20 years.²⁹⁶

The government (that is, a Minister, Governor or Mayor/Regent) will grant a utilisation permit subject to the following conditions:

- the permit is not a title of ownership or control over the national park area, forest park, or nature park;
- the permit cannot be used as collateral;

²⁸⁶ See *Keputusan Menteri Kehutanan No. 399/Kpts-II/1990 tentang Pedoman Pengukuhan Hutan* [The Minister of Forestry Decision No. 399/Kpts-II/1990 on the Guidance of the Gazettement of Forest] (Indonesia) art 2.

²⁸⁷ *Undang-Undang Republik Indonesia Nomor 41 Tahun 1999 Tentang Kehutanan* [Law No 41 of 1999 on Forestry] (Indonesia) art 6 (‘Forestry Law’).

²⁸⁸ Moeliono (n 119) 180.

²⁸⁹ *Undang-Undang Republik Indonesia Nomor 27 Tahun 2007 Tentang Pengelolaan Wilayah Pesisir dan Pulau-Pulau Kecil* [Law No 27 of 2007 on the Management of Coastal Area and Small Islands] (Indonesia) (‘Coastal Area and Small Islands Law’) art 16(1).

²⁹⁰ *Peraturan Pemerintah Republik Indonesia Nomor 36 tahun 2010 tentang Pengusahaan Pariwisata Alam di Suaka Margasatwa, Taman Nasional, Taman Hutan Raya, dan Taman Wisata Alam* [Government Regulation No 36 of 2010 on the Cultivation of Nature Tourism in Wildlife Reserves, National Parks, Forest Parks, and Nature Parks] (Indonesia) (‘Government Regulation on the Cultivation of Nature Tourism’).

²⁹¹ *Ibid* art 1(8).

²⁹² *Ibid* art 7.

²⁹³ *Ibid* art 7(3).

²⁹⁴ *Ibid* art 8.

²⁹⁵ *Ibid* art 9(3).

²⁹⁶ *Ibid* art 16.

- the permit may only be transferred with the written approval of the Minister, Governor or Regent/Mayor following their respective powers;
- the area permitted for the development of natural tourism facilities shall be, at most, 10 per cent of the total area specified in the permit;
- ecotourism facilities that are built for tourism accommodation shall be semi-permanent and their styles shall be in accordance with the local architecture; and
- the development of ecotourism facilities shall follow natural conditions and maintain the existing landscape.²⁹⁷

(ii) *Spatial Planning in relation to Forestry Areas*

Central government Law No. 41 of 1999 on Forestry and its implementing regulations regulate forest management in Indonesia. Forest areas have three important functions, namely conservation, protected function, and production.²⁹⁸ Provincial and district governments must retain forest areas of at least 30 per cent of the total watershed area within provincial and district areas.²⁹⁹ Furthermore, the government must divide forest areas into utilisation and protection blocks.³⁰⁰

Central government Regulation No. 28 of 2011 explains the forest utilisation plan in nature conservation areas.³⁰¹ The regulation defines ‘a nature conservation area’ as ‘a region with certain characteristics, both in land and in waters that have the main function of the protection of life support systems, preservation of the diversity of plant and animal species, and sustainable utilisation of natural resources and ecosystems.’³⁰² This area consists of national parks, forest parks and nature parks, that are managed based on zoning and block systems.³⁰³ The block system divides the nature conservation area into protection blocks, utilisation blocks and other blocks.³⁰⁴

(iii) *Spatial Planning in relation to Coastal Areas*

There are other related laws and regulations at the central level that emphasise the importance of coastal areas. Central government Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands defines the ‘coastal area’ as ‘a transitional area between terrestrial and marine ecosystems that are affected by a change in land and sea’.³⁰⁵ Meanwhile, ‘coastal waters’ are ‘the sea bordering land covering waters as far as 12 nautical miles measured from shorelines, waters connecting beaches and islands, estuaries, bays, shallow waters, swampy swamps, and lagoons.’³⁰⁶

²⁹⁷ Ibid art 18.

²⁹⁸ Forestry Law (n 287).

²⁹⁹ Ibid art 18.

³⁰⁰ Ibid art 22.

³⁰¹ *Peraturan Pemerintah Republik Indonesia Nomor 28 Tahun 2011 Tentang Pengelolaan Kawasan Suaka Alam dan Kawasan Pelestarian Alam* [Government Regulation No 28 of 2011 on the Management of Natural Regions and Natural Conservation Areas] (Indonesia) (‘*Government Regulation on Natural Conservation Areas*’).

³⁰² Ibid art 1(2).

³⁰³ Ibid art 14(1).

³⁰⁴ Ibid art 19(1).

³⁰⁵ Ibid art 1(1).

³⁰⁶ Ibid art 1(2).

The right to utilisation of coastal waters is given in the form of the ‘right of cultivation’ or HP-3,³⁰⁷ taking into account the sustainability of coastal ecosystems and small islands, indigenous peoples, national interests, and the right of innocent passage for foreign vessels.³⁰⁸ This right is valid for 20 years³⁰⁹ and can be given to Indonesian citizens, legal entities that are established under Indonesian law, and indigenous peoples.³¹⁰ The utilisation of small islands and adjacent waters is prioritised for one or more of the following interests: conservation; education and training; research and development; marine aquaculture; and tourism.³¹¹

Under this Law, the regional government must set limits on coastal borders adapted to topographic, biophysical, coastal hydro-oceanography, economic and cultural needs.³¹² The determination of coastal borders should take into account: protection against earthquake and tsunami; coastal protection from erosion or abrasion; protection of artificial resources on the coast from storms, floods and other natural disasters; protection of coastal ecosystems, such as wetlands, mangroves, coral reefs, seagrass beds, sand dunes, estuaries, and deltas; setting public access; and making arrangements for drains and waste.³¹³

The government may regulate how reclamation is to be done in coastal areas and small islands. Reclamation shall be done to increase the benefits and added value of coastal areas and small islands in terms of their technical, environmental and socioeconomic aspects.³¹⁴ Reclamation should carefully consider: the sustainability of life and livelihood of the community; the balance between the interests of utilisation and the interests of environmental preservation of coastal and small islands; and the technical requirements for the collection, dredging and stockpiling of materials.³¹⁵

There are some important prohibitions on the use of coastal areas and small islands. These include:

- mining coral reefs, which cause damage to coral reef ecosystems;
- mining coral reefs in conservation areas;
- using explosives, toxic materials, and other materials that damage coral reef ecosystems;
- felling mangroves in conservation areas for industrial activities and settlements;
- sand mining that technically, ecologically, socially or culturally damages the environment; and
- undertaking physical development that causes damage to the environment and harms the surrounding community.³¹⁶

³⁰⁷ Ibid art 16(1).

³⁰⁸ Ibid art 17(3).

³⁰⁹ Ibid art 19.

³¹⁰ Ibid art 18.

³¹¹ Ibid art 23.

³¹² Ibid art 31(1).

³¹³ Ibid art 31(2).

³¹⁴ Ibid art 34(1).

³¹⁵ Ibid art 34(2).

³¹⁶ Ibid art 35.

To sum up, the presence of three different ministries with interrelated authority in managing land, forest and coastal areas in Indonesia reflects how SPL 2007, forestry and coastal laws are directly and indirectly linked.

(e) *The Relationship between Environmental Governance and Spatial Planning*

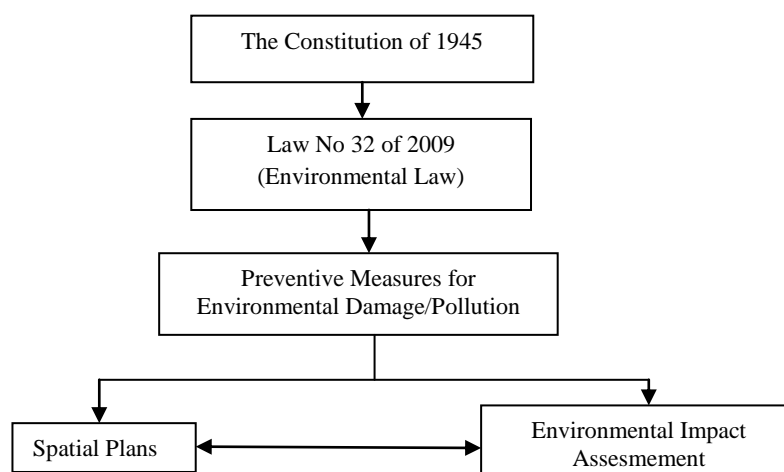
Protection and management of the environment in Indonesia is based on Articles 28H (1) and 33(3) of the Constitution of 1945. Article 28H (1) expressly states that ‘Every person shall have the right to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment’.³¹⁷ Article 33 (3) explains that ‘The land, the waters and the natural resources within shall be under the power of the State and shall be used to the greatest benefit of the people’.³¹⁸

In pursuit of these aspirations, the central government enacted Law No. 32 of 2009 on the Protection and Management of Environment (‘the Environmental Law’). One of the important characteristics of this Law is the distinction it makes between ‘environmental pollution’ and ‘environmental damage’. It defines ‘environmental pollution’ as ‘the inclusion of living creatures, substances, energy, and other components naturally or intentionally into the environment because of human activities, which exceeds the environmental quality standard’.³¹⁹ Meanwhile, ‘environmental damage’ is defined as ‘a direct or indirect change of physical, chemical and biological condition of the environment that goes beyond the standardised criteria of environmental damage’.³²⁰

Environmental governance has a close relationship with the governance of spatial planning. The following diagram shows how they are related.

Diagram 4

The Relationship between Environmental Governance and Spatial Planning



³¹⁷ The Constitution of 1945 (n 117) art 28H (1).

³¹⁸ Ibid art 33 (3).

³¹⁹ *Undang-Undang Nomor 32 Tahun 2009 Tentang Perlindungan dan Pengelolaan Lingkungan Hidup* [Law No.32 of 2009 on Environmental Protection and Management] (Indonesia) art 1 (14).

³²⁰ Ibid art 1(17).

According to environmental law, two important instruments to prevent ‘environmental pollution’ and ‘environmental damage’ are spatial plans and the Environmental Impact Assessment (‘EIA’).³²¹ Governments at all levels should prepare spatial plans by taking into account the carrying capacity of the environment.³²² As regards the EIA, activities that have ‘significant impacts’ on the environment are subject to the preparation of an EIA.³²³ ‘Significant impacts’ are decided on the basis of the following criteria:

(a) the large number of occupants who will be affected by those activities; (b) the size of area of impact; (c) the intensity and duration of impact; (d) many of other environmental components that will be affected; (e) the cumulative nature of effects; (f) the reversibility or irreversibility of the impact; and (g) other criteria following the advancement of science and technology.³²⁴

Government at all levels is required to conduct public participation in the EIA process,³²⁵ meaning that the process must be based on transparency by providing complete information and notification to the public prior to the implementation of projects.³²⁶

When investors plan to start tourism projects, spatial plans and the EIA will be the two crucial instruments that can prevent such projects from damaging the environment. The location of projects must follow the existing spatial plan. If they conflict with the existing spatial plan, Regents or Mayors have the power to stop projects by not issuing a recommendation letter. Without this letter, investors are prohibited from continuing their projects. A recommendation letter also links to the EIA as this letter should only be issued after the project (if classified as having ‘significant impacts’ on the environment)³²⁷ has passed the EIA. If projects do not conflict with the spatial plan, and they pass the EIA, Regents or Mayors can then issue a recommendation letter. This letter will become the legal basis for issuing a building permit. Once this permit is granted, investors can legally commence their projects. For example, as will be shown later in the case studies section of this thesis, the investor in the Mulia Hotel Project started the project because the Regent of Badung had granted a recommendation letter, and the project had passed the EIA.

3 *Bali’s Spatial Planning Regulation*

(a) *Spatial Planning at the Provincial Level: Bali Province*

The Bali Provincial government acknowledges that the rapid development of tourism has contributed to the creation of employment, leading to high migration to the southern part of Bali. As a result of this development, cultural and social values and environmental quality in Bali have been adversely affected. Similar concerns were expressed in the academic paper accompanying Bali’s spatial plan.³²⁸ The report notes that the proportion of Bali’s forest area in 2008 was only 23 per cent - less than the 30 per cent required under Forestry Law. This may potentially hamper the balance of

³²¹ Ibid art 15.

³²² Ibid art 19(2).

³²³ Ibid art 22(1).

³²⁴ Ibid art 22(2).

³²⁵ Ibid art 26(1).

³²⁶ Ibid art 26(2).

³²⁷ Ibid art 36.

³²⁸ *Naskah Akademis Peraturan Daerah Provinsi Bali Nomor 16 Tahun 2009 Tentang Rencana Tata Ruang Wilayah Provinsi Bali 2009-2029* [Academic Paper of Provincial Regulation of Bali No 16 of 2009 on Spatial Plan of Bali 2009-2029] (Indonesia) I-2.

the microclimate and sustainable water resources on the island.³²⁹ In fact, environmental damage has taken place in some areas due to both natural disasters and excessive exploitation, so that the proportion of barren land now reaches 9.81 per cent of Bali's area and potentially barren land 44.3 per cent.³³⁰ There has been a rice field conversion of 661 Ha/year to accommodate spatial needs for settlement and tourism activities.³³¹ Additionally, high erosion now threatens almost all beaches in Bali.³³²

To address these concerns, the Bali Provincial government enacted a provincial regulation in accordance with SPL 2007: Provincial Regulation No.16 of 2009 on Spatial Planning in Bali 2009-2029 ('Bali Provincial SPL'). Almost all provisions refer to SPL 2007 but some important characteristics need to be explained. This regulation divides Bali into conservation and utilisation areas.³³³ Conservation areas are divided into:

- areas serving to protect adjacent areas;
- local conserved areas;
- nature reserve areas, Nature preservation, and cultural preservation;
- areas prone to natural disasters;
- geological conservation areas; and
- other conservation areas.³³⁴

Conservation areas in Bali currently comprise 175,577 hectares or 31.2 per cent.³³⁵ The regulations of the spatial plan set out what shall be included under 'local conserved areas', namely:

- sacred areas;
- coastal border areas;
- river border areas;
- cliff border areas;
- areas around lakes or reservoirs; and
- green open space in the city.³³⁶

Concerning the coastal border areas, referring to SPL 2007 and Law No. 27 of 2007, the Bali Provincial SPL defines a 'coastal border area' as 'land along the edge of the sea at a distance of at

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ *Peraturan Daerah Provinsi Bali Nomor 16 Tahun 2009 Tentang Rencana Tata Ruang Wilayah Provinsi Bali 2009-2029* [Provincial Regulation of Bali No 16 of 2009 on Spatial Plan of Bali 2009-2029] (Indonesia) art 41 ('*Bali Provincial SPL*').

³³⁴ Ibid art 42(1).

³³⁵ Ibid art 42(2).

³³⁶ Ibid art 44(1).

least 100 meters from the highest sea tide point to the land'.³³⁷ Meanwhile, for the 'river border areas': 3 meters under rivers; 10 meters for river depth of 3 to 10 meters; 15 meters for a depth of 10 to 20 meters; and 30 meters for depth more than 20 meters.³³⁸ As regards the 'cliff border areas', this regulation states that 'cliff border area' is land on the edge of a ravine that has: a gradient of at least 45 per cent; a depth of at least five meters; and an upper flat area of at least 11 meters.³³⁹ The Bali Provincial SPL also defines 'areas around lakes or reservoirs' as 'land with a distance of 50 meters up to 100 meters from the highest tide point of lake or reservoir'.³⁴⁰

(b) *Bali's Zoning Regulation*

Under spatial planning governance, the existence of the detailed plan is, as mentioned, crucial, as it acts as an operational tool to support the spatial plan.³⁴¹ One of the most important parts of the detailed plan is the zoning regulations. SPL 2007 defines 'zoning regulations' as 'provisions that regulate the requirement of the spatial utilisation and its controlling mechanism in each block or zone'.³⁴² The allocation of a block/zone must be regulated by a detailed plan at the district government level.

The Bali Provincial government issued Provincial Regulation No. 8 of 2015 on the Direction of Zoning Provincial System.³⁴³ This zoning regulation is very important as it contains provisions allowing or prohibiting development in spatial utilisation zones,³⁴⁴ including zoning rules for spatial structure and spatial designs.³⁴⁵ Zoning rules for spatial designs are then divided into zoning rules for protected areas and zoning rules for cultivation areas.³⁴⁶ Zoning rules for protected areas are, in turn, divided into:

- areas serving to protect adjacent areas;
- areas conserved to protect important natural features;
- conservation and cultural heritage areas;
- areas prone to natural disasters;
- geological protected areas; and
- other protected areas.³⁴⁷

The Law then elaborates zoning rules for areas serving to protect adjacent areas, covering protected forest areas and water catchment areas.³⁴⁸ For protected areas, allowable activities include natural

³³⁷ Ibid art 50(4).

³³⁸ Ibid art 50(5).

³³⁹ Ibid art 50(6).

³⁴⁰ Ibid art 50(7).

³⁴¹ SPL 2007 (n 252) art 14(4).

³⁴² Ibid the elucidation no 6.

³⁴³ *Peraturan Daerah Provinsi Bali Nomor 8 Tahun 2015 tentang Arahan Peraturan Zonasi Sistem Provinsi* [Provincial Regulation of Bali No 8 of 2015 on the Direction of Zonation Provincial System] (Indonesia) ('*Bali Zoning Regulation*').

³⁴⁴ Ibid art 1(27).

³⁴⁵ Ibid art 5(1).

³⁴⁶ Ibid art 5(3).

³⁴⁷ Ibid art 6(1).

tourism, using existing natural conditions as a tourist attraction, and limited development activities, requiring a path for tourists that does not disturb the forest's protected function.³⁴⁹ Next, the use of forest on a utilisation block is allowed for: the cultivation of medicinal plants (herbs), ornamental plants; beekeeping; wildlife breeding; and environmental services such as nature tours, water utilisation and carbon trading.³⁵⁰ There are prohibited activities in protected forest areas. Spatial utilisation for natural tourism, which destroys or burns forests and ecosystem components, cuts wood or forest vegetation, leaves or disposal of garbage or other items that interfere with the preservation of forests, is prohibited.³⁵¹ So is forest use involving mechanical and heavy equipment, construction of permanent facilities, disruption of the function of the area, the felling of trees, or the use of pesticides and insecticides.³⁵²

Zoning rules also cover local protected areas, including:

- sacred areas;
- holy sites;
- coastal border areas;
- river border areas;
- cliff border areas;
- areas around a lake or reservoir; and
- green open space areas.³⁵³

For coastal border areas, there are three classifications of activities: allowable activities; allowable activities with conditions; and prohibited activities. Allowable activities include: beach recreation; beach parks; coastal disaster mitigation, research activities; protection of maritime cultivation; and ceremonial and religious ceremonies.³⁵⁴ The following activities are allowed with some conditions: beach recreation support facilities; tourism accommodation; road infrastructure; boat fishing; boat tour activities; and buildings and activities in relation to culture and religion.³⁵⁵ Finally, prohibited activities cover activities that can degrade the quality of or damage, natural resources and coastal ecosystems.³⁵⁶ The following figure shows the spatial design of the province of Bali.

³⁴⁸ Ibid art 32.
³⁴⁹ Ibid art 33(2).
³⁵⁰ Ibid.
³⁵¹ Ibid.
³⁵² Ibid.
³⁵³ Ibid art 35.
³⁵⁴ Ibid art 49.
³⁵⁵ Ibid.
³⁵⁶ Ibid.

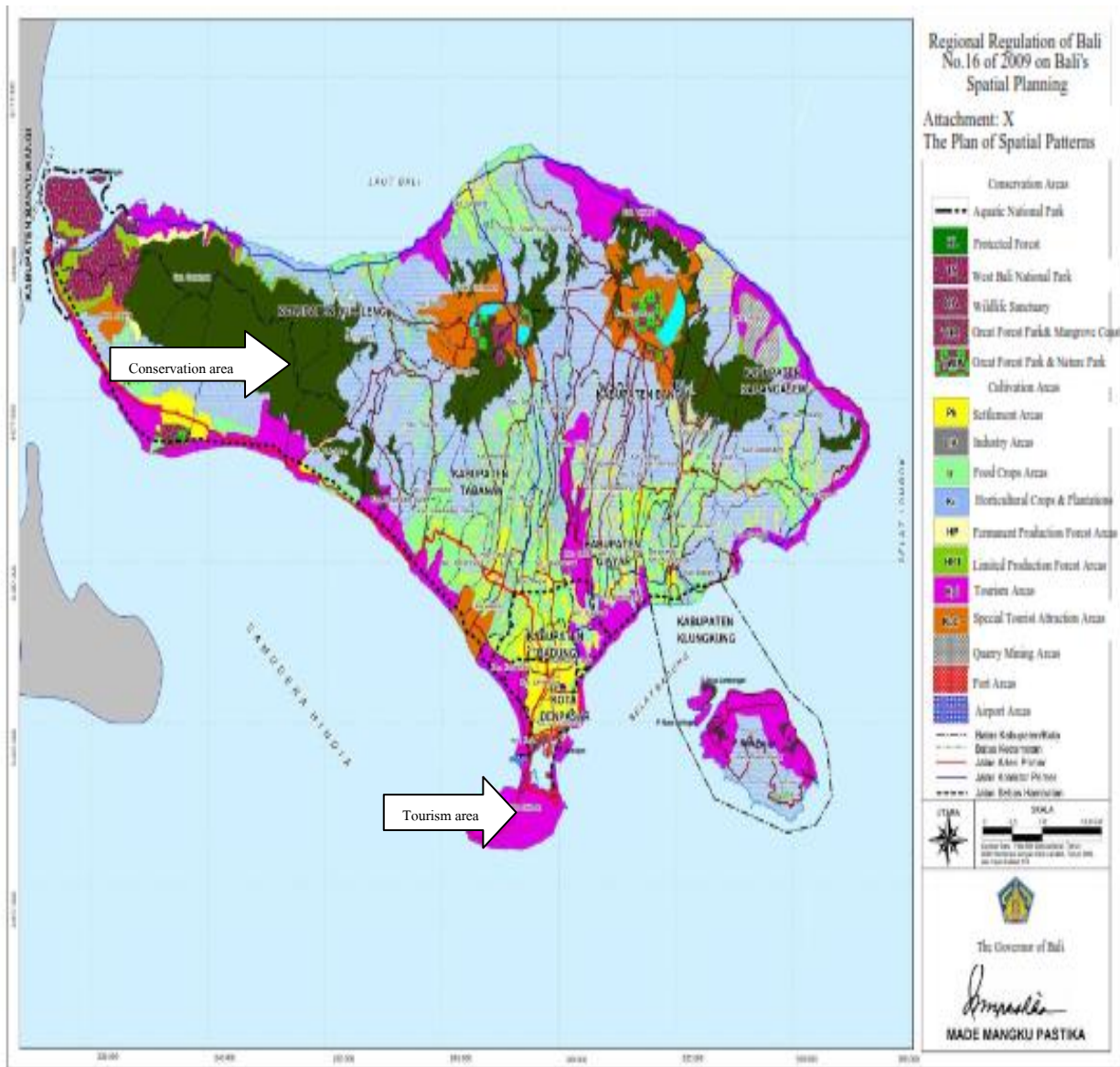


Figure 2.2 Plan of spatial designs in Bali according to the Bali Provincial SPL. Conservation areas are marked with dark green and tourism areas are marked with pink.

(c) *Planning at the District Level: Badung District*

Badung District is the richest region in Bali. It is where most tourism activities, including hotels, are located, especially in three popular locations: Kuta, Jimbaran, and Nusa Dua. Spatial planning problems are pervasive in Badung, as a result of the rapid development of tourism there. The three case studies discussed in the next chapter are all located in Badung, and for that reason, it is crucial to consider how spatial planning regulation has evolved in the Badung District.

The Badung District government issued its spatial planning regulation in 2013, as District Regulation No. 26 of 2013 (Badung District SPL). In the preamble to this regulation, the Badung District government recognised the rapid growth of the population due to various development activities. The spatial planning regulation was said to be critical to ensure the achievement of

sustainable development in Badung.³⁵⁷ The goal of the regulation was therefore to realise Badung District as a national centre of tourism activities and international tourism destinations by synergising the development of North Badung, Central Badung and South Badung in a sustainable way, based on a mix of agricultural activities, services and tourism.³⁵⁸ The Badung District government divides the district into three areas, comprising:

- North Badung, as a conservation and integrated agriculture area;
- Central Badung, as a sustainable agriculture, capital city district and regional civic centre area; and
- South Badung, which has the main function of tourism.³⁵⁹

In South Badung, the Badung District government has committed to intensifying spatial utilisation in Nusa Dua, Jimbaran and Kuta as it has been supported by international standard infrastructure.³⁶⁰ In addition, it will develop an integrated transportation network system to improve accessibility to tourism activity centres.³⁶¹ It also plans to develop shopping areas equipped with tourism infrastructure and shopping centres.³⁶² From an environmental perspective, the Badung District government acknowledges the importance of conserving protected areas and controlling development in disaster-prone areas, based on mitigating current impacts.³⁶³ Finally, it intends to improve coastal and marine areas in an integrated manner as the main asset of sustainable tourism.³⁶⁴

As in the Case of the Bali Provincial SPL, the Badung District SPL also consists of ‘protected areas’ and ‘utilisation areas’.³⁶⁵ ‘Protected areas’ cover approximately 2882.57 Ha or 6.89 per cent of Badung’s total area, and include: areas for protecting adjacent areas; local protected areas; nature conservation and cultural heritage areas; areas prone to natural disasters; geological protected areas; and other protected areas.³⁶⁶ For ‘local protected areas’, the plan covers approximately 1113.31 Ha or 2.66 per cent of Badung’s area, and encompasses: holy areas; sacred sites; coastal borders; river borders; cliff borders; and the areas around lakes and reservoirs.³⁶⁷

The regulation then describes ‘coastal border areas’ covering all coastal areas, reaching a total of 82 kilometres.³⁶⁸ In Mengwi sub-district, it covers, among other things: Mengening Beach, Munggu Beach, and Pererenan Beach.³⁶⁹ In North Kuta, it includes Batu Mejan Beach, Batu Bolong Beach,

³⁵⁷ *Peraturan Daerah Kabupaten Badung Nomor 26 Tahun 2013 Tentang Rencana Tata Ruang Wilayah Kabupaten Badung 2013-2033* [Badung District Regulation No 26 of 2013 on Spatial Plan of Badung 2013-2033] (Indonesia) the Preamble (‘*Badung District SPL*’).

³⁵⁸ *Ibid* art 3.

³⁵⁹ *Ibid* art 4.

³⁶⁰ *Ibid* art 5.

³⁶¹ *Ibid*.

³⁶² *Ibid*.

³⁶³ *Ibid*.

³⁶⁴ *Ibid*.

³⁶⁵ *Ibid* art 23.

³⁶⁶ *Ibid*.

³⁶⁷ *Ibid* art 25.

³⁶⁸ *Ibid* art 28.

³⁶⁹ *Ibid*.

and Berawa Beach.³⁷⁰ Next, Oberoi Beach, Seminyak Beach, Legian Beach and Kuta Beach are included in Kuta District.³⁷¹ Finally, in South Kuta, it covers, among others: Jimbaran Beach, Dreamland Beach, Green Bowl Beach, Nusa Dua Beach, and Tanjung Bena Beach.³⁷²

The regulation also covers: ‘forest park areas’; ‘natural parks’; ‘coastal and small island conservation areas’; and ‘cultural heritage areas’.³⁷³ ‘Forest park areas’ cover Tahura Ngurah Rai located in part of the Kuta and Kuta Selatan sub-districts, with an area of 1374 Ha.³⁷⁴ Meanwhile, ‘coastal and small islands conservation area’ includes: the Pudut Island conservation area in Tanjung Bena sub-district; ‘coastal ecosystem conservation and protection areas’, including ‘mangrove forest areas’ in the Tahura Ngurah Rai area; ‘reef protection areas’; and the waters of Bena Bay Beach.³⁷⁵

Unlike the provincial regulation, which separately regulates the spatial plan and zoning systems, this district regulation covers only zoning issues. Following SPL 2007 and Law No. 27 of 2007, zoning rules on coastal border areas are defined as ‘land along the sea edge at a distance of at least 100 m (one hundred meters) from the highest tide point of the sea to the land’.³⁷⁶ This type of area is open to the public. Buildings are allowed in this area only: to support non-permanent and temporary tourism activities; social and religious functions/events; traditional fishery; coastal supervision; and disaster evacuation.³⁷⁷ The Badung District government allows cultivation in this area as long as it does not harm protected functions, including:

- attractions such as beach recreation and beach sports;
- special fishing docks at Kedonganan Beach and Tanjung Bena Beach;
- a special tourist dock at Tanjung Bena Beach;
- seaweed cultivation activities;
- mangrove crabs;
- traditional salt making and fishery activities; and
- religious activities.³⁷⁸

The following figure shows the spatial design of the District of Badung.

³⁷⁰ Ibid.
³⁷¹ Ibid.
³⁷² Ibid.
³⁷³ Ibid art 32(1).
³⁷⁴ Ibid art 32(2).
³⁷⁵ Ibid art 32(4).
³⁷⁶ Ibid art 74.
³⁷⁷ Ibid.
³⁷⁸ Ibid.

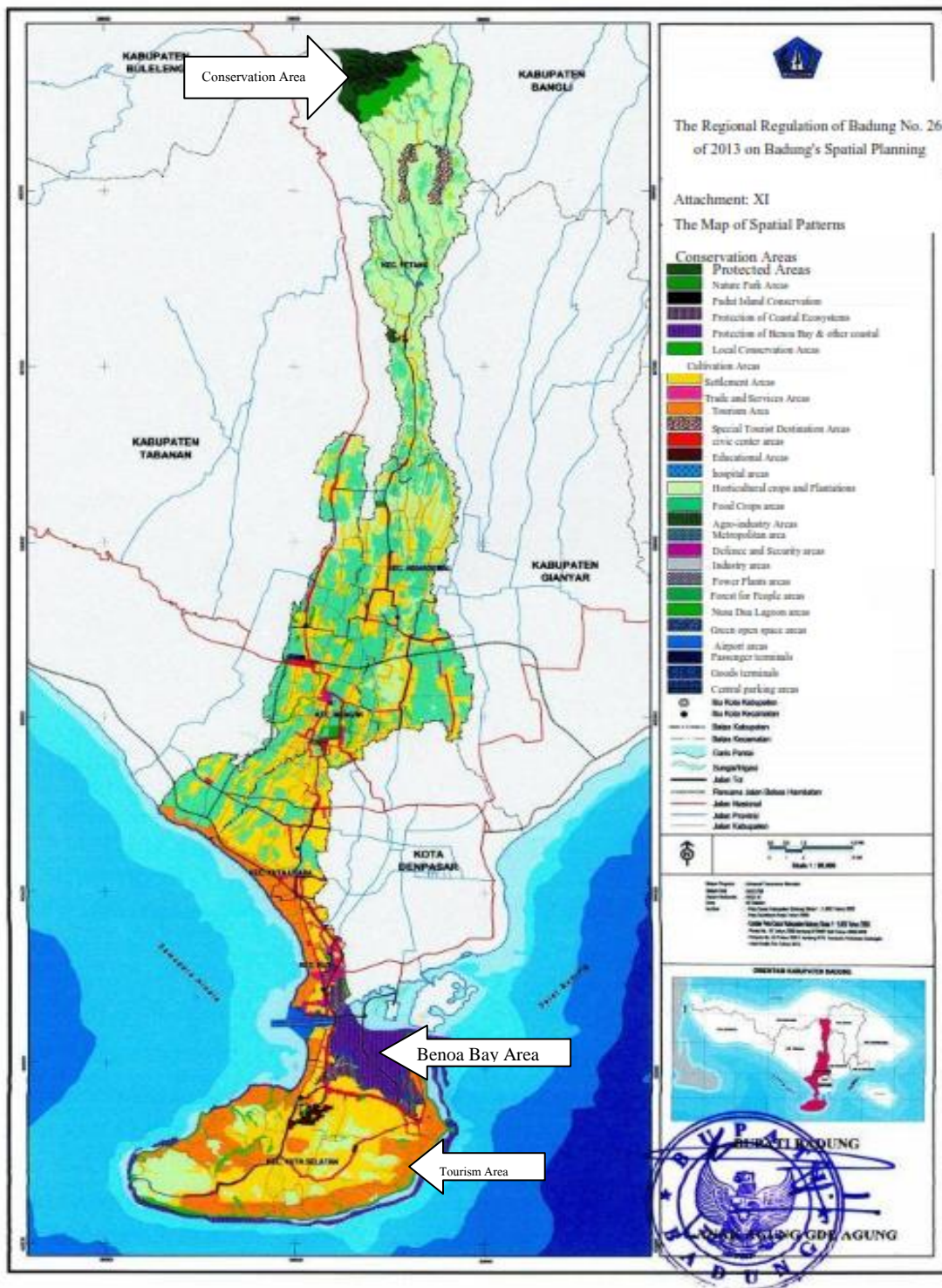


Figure 2.3 A map of the plan of spatial patterns of Badung according to the Badung District SPL. Conservation areas are marked with dark green; tourism areas are marked with orange; and conservation areas for Benoa Bay are marked with dark purple.

4 *Spatial Planning and Investment in Hotels*

There are a number of requirements for foreign and local investors who intend to establish tourism businesses in Indonesia. They must establish a limited liability company or *perseroan terbatas* ('PT') under Indonesian law, domiciled within the territory of Indonesia.³⁷⁹ They must then carefully check what has been called the 'negative investment list' to ensure their businesses are not classified as prohibited sectors for investment.³⁸⁰ The existing spatial plan is the next consideration, particularly choosing the right location for the investor's business. For example, when investors intend to build a hotel in a particular location, the existing spatial plan will ensure that the proposed location is suitable for hotel developments. Thereafter, investors must apply for a permit-in-principle from the Investment Coordinating Board or *Badan Koordinasi Penanaman Modal* ('BKPM') for foreign investors and the Governor or Regent/Mayor for Indonesian investors.³⁸¹ Because investments are under the authority of the district government, the necessary permits are issued by the district government. These include building permits and nuisance permits.³⁸² After investors have obtained these permits, they can apply for a business permit to operate their business in the designated location.

Central government Regulation No. 36 of 2005 requires that anyone who intends to establish a building must have a building permit.³⁸³ The Regent of the district has authority to issue that permit.³⁸⁴ According to Article 18 of this regulation, every project to develop a building must comply with the existing district spatial plan,³⁸⁵ and must not disturb the environmental balance in the surrounding location.³⁸⁶ Also, any building construction must not violate the minimum stipulation of the building-free spaces specified in the district spatial plan; this particularly relates to the border of buildings with roads, riverside, coastal, railroad and high-voltage networks.³⁸⁷ In

³⁷⁹ *Undang-Undang Republik Indonesia Nomor 25 Tahun 2007 tentang Penanaman Modal* [Law No 25 of 2007 on the Capital Investment] (Indonesia) art 5 ('*Capital Investment Law*').

³⁸⁰ *Peraturan Presiden Republik Indonesia Nomor 39 tahun 2014 tentang Daftar Bidang Usaha yang Tertutup dan Bidang Usaha yang Terbuka dengan Persyaratan di Bidang Penanaman Modal* [Presidential Regulation No 39 of 2014 on the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment] (Indonesia) ('*Negative Investment List*').

³⁸¹ *Peraturan Kepala Badan Koordinasi Penanaman Modal Republik Indonesia Nomor 5 Tahun 2013 Tentang Pedoman dan Tata Cara Perizinan dan Nonperizinan Penanaman Modal* [The Regulation of the Head of the Investment Coordinating Board No 5 of 2013 on the Guidelines and Procedures of License and Non-license of Investment] (Indonesia) art 23(2) ('*Guidelines and Procedures of Investment*').

³⁸² A nuisance permit or commonly referred to as *Hinder Ordonnantie* ('HO') or *Izin Gangguan* is a district-level permit stating that there is no objection and complaint from the surrounding community to the location of the commercial projects proposed. See also *Peraturan Daerah Kabupaten Badung Nomor 9 Tahun 2010 tentang Ijin Gangguan* [The Badung District Regulation No. 9 of 2010 on the Nuisance Permit] (Indonesia) art 1(11).

³⁸³ *Peraturan Pemerintah Republik Indonesia No. 36 tahun 2005 tentang Peraturan Pelaksanaan Undang-Undang Republik Indonesia No.28 tahun 2002 tentang Bangunan Gedung* [Governmental Regulation No. 36 of 2005 on the Regulation of Implementation of Law of No. 28 of 2002 on Building] (Indonesia) art 14 (1) ('*Buildings Regulation*').

³⁸⁴ *Ibid* art 14(2).

³⁸⁵ *Ibid* art 18 (1).

³⁸⁶ *Ibid* art 18(2).

³⁸⁷ *Ibid* art 21(1).

addition, Badung District Regulation No. 27 of 2013 requires the refusal of a building permit if, among other things, the buildings to be established:³⁸⁸

- a. do not meet administrative and technical requirements;
- b. contradict the district spatial plan;
- c. disrupt or damage the surrounding environment;
- d. disrupt traffic, water flow and existing building; or
- e. contradict the prevailing laws and regulations at the central and provincial level.

Concerning tourism development, the Bali Provincial SPL classifies some areas as ‘tourism regions’, ‘special tourism areas’ or ‘tourism attractions’. It defines a ‘tourism region’ as a strategic area of tourism located within the geographic or administrative areas of the village in which there is the potential for tourist attraction, supported by high accessibility and the availability of public facilities, tourism facilities, and socio-cultural activities.³⁸⁹ ‘Special tourism area’ has a similar definition but the emphasis is directed to efforts for cultural and environmental conservation.³⁹⁰ Finally, ‘tourism attractions’ are defined as anything that has uniqueness, beauty and value in the form of the diversity of natural wealth, culture, human-made products and socio-cultural activities of the people that are targeted or visited by tourists. They may be a region, a village or a building located in the district or city.³⁹¹ Sanur, Kuta, Nusa Dua and Ubud are examples of tourism regions.³⁹² Meanwhile, Tanah Lot, Kintamani, and Gilimanuk are examples of special tourism areas.³⁹³ Of my three case studies, only the **Mulia Project** is located in a tourism region, namely Nusa Dua, while the **Tahura Project** in Tahura Ngurah Rai and the **Benoa Bay Reclamation Project** in Benoa Bay are located in conservation areas. Nusa Dua is classified as a tourism region as many tourist attractions are available in this region, and they are supported by the existence of luxurious hotels and adequate public infrastructure.³⁹⁴

Bali Provincial Regulation No. 2 of 2012 on Cultural Tourism expressly requires that the development of tourism must be based on the spatial plan at the provincial level.³⁹⁵ The establishment of tourism facilities and infrastructure (such as hotels) outside tourism regions are only possible by traditional villages or traditional institutions.³⁹⁶ It is clear that foreign investors in tourism are allowed to establish businesses only in areas that are classified as ‘tourism regions’ under provincial spatial plans.³⁹⁷

³⁸⁸ *Peraturan Daerah Kabupaten Badung No. 27 Tahun 2013 tentang Penyelenggaraan Ijin Mendirikan Bangunan* [The Badung District Regulation No. 27 of 2013 on the Implementation of the Building Permit] (Indonesia) art 16.

³⁸⁹ Bali Provincial SPL (n 333) art 1(55).

³⁹⁰ *Ibid* art 1(56).

³⁹¹ *Ibid* art 1(57).

³⁹² *Ibid* art 66.

³⁹³ *Ibid* art 66.

³⁹⁴ *Ibid* art 1(55).

³⁹⁵ *Peraturan Daerah Provinsi Bali No.2 tahun 2012 tentang Kepariwisata Budaya Bali* [The Regional Regulation of Bali No 2 of 2012 on the Cultural Tourism of Bali] art 5.

³⁹⁶ *Ibid*.

³⁹⁷ *Ibid*.

The Badung District government has issued a regulation regarding business permits for tourism accommodation services. This type of permit is crucial, as investors are prohibited from running a tourism business unless the district government grants one. Requirements include: the identity of the applicant; the copy of the permit-in-principle; the building permit; the nuisance permit; data on the number of rooms and facilities; a list of employees; an environmental impact assessment; and a site plan.³⁹⁸

5 *Critiques of Spatial Planning in relation to Tourism Projects in Bali*

A study by Sukeni identifies violations of the Bali Provincial SPL in relation to the development of tourism accommodation.³⁹⁹ They include: the establishment of new accommodation projects without a building permit; the expansion of buildings without a permit; and violations pertaining to height of buildings, architecture, and the distance of buildings from the road, beach or hill.⁴⁰⁰ In responding to these violations, local governments often take measures that are not always what is stated in the law.⁴⁰¹ For example, the Badung District government often only reprimands offenders for violations and asks them to obey the existing applicable law or complete outstanding requirements.⁴⁰² So far, the Badung District government has never yet instructed an offender to dismantle a building, although the Bali Provincial SPL and the Badung District SPL specifically require the government to do so.⁴⁰³ One of the common reasons given for this is economic, given the role of investors in the economic development of Bali, and the fear of offending them.⁴⁰⁴

Praganingrum agrees that although the current licensing process complies with the Bali SPL and the Badung SPL, its enforcement has been inconsistent, especially in relation to the boundary limit for cliffs and ravines in Bali.⁴⁰⁵ Hence, the establishment of hotels on the edges of cliffs and rivers (supposedly prohibited) continues, and infringing hotels eventually start operating.⁴⁰⁶ The following table shows how hotel projects in Bali have apparently violated the regulation on spatial planning but have been able to operate their businesses regardless.

³⁹⁸ *Peraturan Bupati Badung Nomor 22 Tahun 2007 tentang Penataan Sarana Akomodasi Pariwisata di Kabupaten Badung* [The Decree of the Regent of Badung No 22 of 2007 on the Arrangement of Tourism Accommodation Services in Badung] (Indonesia) art 8.

³⁹⁹ Ni Nyoman Sukeni, 'Pelanggaran terhadap Peraturan Tentang Tata Ruang Wilayah Propinsi Bali Pada Pembangunan Hotel dan Restoran di Kabupaten Badung' [The Violation of Bali's Spatial Planning Regulation in the Establishment of Hotels and Restaurants in Badung] (2011) 36(2) *Kertha Patrika* 35, 40.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Ibid.

⁴⁰⁴ Ibid.

⁴⁰⁵ Tjokorda Istri Praganingrum, 'Kajian terhadap Mekanisme Perizinan Pemanfaatan Lahan Tebing Tukad Ayung Kedewatan, Ubud, Gianyar' [Study on the Procedure of Issuing License to Utilise Tukad Ayung's Cliffs in Kedewatan, Ubud, Gianyar] (2013) 2(1) *Jurnal Ilmiah Kurva Teknik* 50, 66.

⁴⁰⁶ Ibid.

Table 4

Violations by Hotel Projects in Bali

No	Year	Projects	Location	Indicated Violation
1	2012	Holiday Inn Hotel	Badung	➤ Violation of coastal border and 16000 m ³ of sand dumped into the sea, affecting the existing ecosystem. ⁴⁰⁷
2	2012	Mulia Hotel	Badung	<ul style="list-style-type: none"> ➤ Violation of coastal border ➤ Violation of borderline cliffs ➤ Violation of sacred site border, as the hotel was built near a Hindu temple.
3	2015	Ritz Carlton Hotel	Badung	➤ Violation of coastal and cliff border ⁴⁰⁸
4	2015	Hotel Kempinsky	Badung	➤ Violation of coastal and cliff border ⁴⁰⁹
5	2016	Hotel Cangu Intercontinental	Badung	➤ The foundation of the building is very close to the beach, preventing public access especially for religious ceremonies of the local community. ⁴¹⁰
6	2016	Rock Bar Ayana Resort & Spa Bali	Badung	➤ Violation of coastal border, and the balcony of the restaurant was established over the cliff/reef, violating cliff/reef border requirements. ⁴¹¹

Sources: Compiled by the author from media reports

⁴⁰⁷ 'Banyak Investor Rusak Lingkungan Bali' [Many Investors Harmed the Environment in Bali], *Okezone Economy* (online, 10 June 2012) <<https://economy.okezone.com/read/2012/06/10/320/644509/banyak-investor-rusak-lingkungan-bali>>.

⁴⁰⁸ 'Bupati Diminta Cek Pembangunan Hotel' [The Regent of Badung is Asked to Check the Development of Hotel], *kabarnusa* (online, 20 August 2015) <https://www.kabarnusa.com/2015/08/bupati-diminta-cek-pembangunan-hotel_20.html>.

⁴⁰⁹ 'DPRD dan PJ Bupati Badung akan Cek Hotel Kempinsky' [The Badung Legislature and the Acting Regent of Badung Will Check Kempinsky Hotel], *Denpasar Post* (online, 12 August 2015) <<http://denpostnews.com/2015/08/12/dprd-dan-pj-bupati-badung-akan-cek-hotel-kempinsky/>>.

⁴¹⁰ Investor Dinilai Ingkar Janji' [Investor is Assumed to Breach of Commitment], *Denpasar Post* (online, 21 March 2016) <<http://denpostnews.com/2016/03/21/investor-dinilai-ingkar-janji/>>.

⁴¹¹ 'Rock Bar Ayana Langgar Sempadan Pantai' [Rock Bar Ayana Violates the Coastal Border], *Bali Tribune* (online, 13 June 2016) <<http://balitribune.co.id/content/rock-bar-ayana-langgar-sempadan-pantai>>.

Although the existing literature has shown violations of spatial planning in Bali, there is no comprehensive analysis to explain why this has happened, and how legal and non-legal factors are contributing to the failure of spatial planning regulation in Bali.

There has been action from several districts in Bali, proposing revision of the Bali SPL. Interestingly, this began in 2011, meaning that the Bali Provincial SPL, which was enacted in 2009, had only been in place for one and a half years.⁴¹² Some districts considered the regulation could not be implemented at the district level, specifically, its provisions in relation to coastal, lake and river borders.⁴¹³ For instance, Badung needed to revise the provision of the coastal border from 100 m to 50 m, to accommodate existing hotels already established in the coastal area.⁴¹⁴ While the Badung District government seems ready to compromise on spatial planning violations by investors, it is rigorous in enforcing violations by local people. No exceptions are made: they are prosecuted and buildings dismantled. The City of Denpasar alone has dismantled 15 illegal buildings in Padanggalak Beach.⁴¹⁵ Similarly, the Civil Service Police Unit of Bali dismantled illegal buildings that had violated the coastal border in Canggu Beach.⁴¹⁶ It seems clear that both the Bali Provincial and Badung District governments enforce spatial planning law more strictly against people who have no economic power than those people who have economic power, such as investors.

III CONCLUSION

This thesis argues that the most significant factor behind environmental and social damage in Bali is the regulatory failure of spatial planning there. Spatial planning laws, sometimes referred to as urban, town or land use planning or environmental planning, regulate the location and distribution of land use activities. Indonesian law prioritises regional autonomy. Accordingly, spatial planning regulations at the provincial and district levels in Indonesia need to be understood as the implementation and elaboration of that country's wider spatial planning regime at the central level.

Although spatial planning regulation has existed in Indonesia since the colonial period, SPL 2007 is the most comprehensive regulation on spatial planning yet. It establishes a three-tier hierarchy of statutory planning at national, provincial, and district levels of planning. These laws and regulations provide a mechanism for delivering sustainable development by addressing social, environmental and economic issues and relating them to the use of land. They are also ostensibly participative in so far as they introduce mechanisms for community involvement to consider the needs of communities and stakeholders at the provincial and district levels. They are also ostensibly norm-producing in the

⁴¹² 'Revisi Perda RTRW Bali Perlu Persyaratan' [The Revision of Bali's Spatial Planning Need to Comply with Requirements], *Antara* (online, 11 March 2011) <<https://bali.antaranews.com/berita/9999/revisi-perda-rtrw-bali-perlu-persyaratan>>.

⁴¹³ Ibid.

⁴¹⁴ 'DPD RI Kawal Penolakan Revisi Perda RTRW Bali' [Regional Representatives Council Will Guard the Refusal of the Revision of Bali's Spatial Plan], *detiknews* (online, 24 April 2012) <<https://news.detik.com/berita/d-1900539/dpd-ri-kawal-penolakan-revisi-perda-rtrw-bali>>.

⁴¹⁵ 'Tim Yustisi Denpasar Bongkar 15 Bangunan Liar' [The City of Denpasar Dismantles 15 Illegal Buildings], *Antaranews* (online, 5 July 2017) <<https://bali.antaranews.com/berita/108199/tim-yustisi-denpasar-bongkar-15-bangunan-liar>>.

⁴¹⁶ 'Satpol PP Provinsi Bali Bongkar Bangunan Ilegal di Pantai Canggu' [The Civil Service Police Unit of Bali Dismantles Illegal Building in Canggu Beach], *Nusa Bali* (online, 28 March 2018) <https://www.nusabali.com/berita/27963/satpol-pp-provinsi-bali-bongkar-bangunan-ilegal-di-pantai-canggu?utm_source=rss_feed>.

sense that they apply both administrative and criminal sanctions to breaches of the plan. They also aim to integrate other spatial planning-related laws and regulations at the central level, which focus on the protection of coastal and forestry areas as well as environmental protection, defining which areas are opened or closed for commercial activities, including tourism projects.

There are criticisms of the insufficiency of spatial planning regulation in Indonesia, covering both its implementation and enforcement. It is said that SPL 2007 is ineffective because it has not been supported with proper implementing regulations. Another criticism concerns a lack of synergy between the regional spatial plans and national development plans because districts and provinces seem reluctant to use the national spatial plan as the basis for their regional development plans. Spatial planning regulation also does not sufficiently involve public participation. Public involvement is still limited to providing feedback on the draft spatial plan, instead of actively participating in its preparation.

Additionally, criticism is directed towards the lack of detailed plans among district governments in Indonesia, making it difficult to determine whether activities constitute a violation of spatial planning. Further, implementing regulations contain contradictory provisions regarding the review and amendment of spatial plans. Finally, the criminal and administrative sanctions under the SPL 2007 are not really effective, as they have no deterrent effect

The Bali Provincial government has enacted a provincial regulation in accordance with SPL 2007: Provincial Regulation No.16 of 2009 on Spatial Planning in Bali 2009-2029. Almost all provisions refer to SPL 2007, dividing Bali's area into conservation areas and cultivation areas. One of the important considerations is the rapid development of tourism that adversely affects the environment. The Bali Provincial government has also issued Provincial Regulation No. 8 of 2015 on the Direction of Zoning Provincial System, containing provisions to allow or to prohibit development in spatial utilisation zones. As the richest region in Bali, where most tourism activities, including hotels, are located, the Badung District government issued its spatial plan regulation as District Regulation No. 26 of 2013. According to the preamble to this regulation, the spatial plan regulation is critical to ensure the achievement of sustainable development in Badung. In reality, however, there are no proper enforcement mechanisms for projects that violate the existing spatial plan. Moreover, no district in Bali has yet issued a detailed spatial plan, leading to obvious difficulties in enforcing spatial planning regulation.

The next part illustrates these points with a discussion of three case studies of tourism projects, namely the Mulia Hotel Project, Tahura Project and Benoa Bay Reclamation Project. These studies will investigate why spatial planning regulation has been so ineffective in preventing environmental and social damage by tourism projects in Bali.

Part II

CASE STUDIES ON REGULATORY FAILURES IN SPATIAL PLANNING

I INTRODUCTION

In Part I, I provided a detailed account of the laws relevant to spatial planning regulation in Indonesia. The three case studies in this part provide concrete, empirical evidence of the ways in which these laws operate. While the Mulia Hotel Project ('Mulia Project') was formally opened in 2013, the other two projects have not been completed for various reasons. The Tahura Mangrove Forest Project ('Tahura Project') has completed all necessary legal procedures. The delays to the project are due to technical issues relate to the requirements of the buildings proposed, not spatial planning issues. The Benoa Bay Reclamation Project ('Reclamation Project') seems to have halted because in 2019, there is a ministerial decision that designates Benoa Bay as a maritime conservation zone, prohibiting reclamation projects.

These three case studies support the main argument of this thesis: that spatial planning laws in Indonesia are failing to achieve their stated objectives even though the Reclamation Project has not proceeded, and, as a consequence, tourism projects in Bali are causing environmental and social damage. All three case studies are located in Badung, Bali, all are tourism accommodation developments, and all involve powerful investors associated with national-level political leaders in Indonesia. The Mulia Project involves a five-star hotel, resorts and villas, while the Tahura Project plans to develop guest houses and other tourism facilities. The Reclamation Project plans to develop integrated tourism facilities, including hotels. All faced public protest. Protests against the Mulia Project involved local communities in Benoa Village and seaweed farmers around Geger Beach. There were massive public protests against the Tahura Project, especially from local communities where the Tahura Project is located. The Reclamation Project has led to the biggest and longest public protest in Bali for a decade, with protests almost weekly for years in different parts of Bali, coordinated by The Bali Forum against Reclamation or *Forum Rakyat Bali Tolak Reklamasi* ('Forbali').

To begin, this part explains why the case studies were chosen, how they relate to the context of spatial planning, and why they are broadly representative of the regulatory failure of spatial planning in Bali. It also explains the research methodology. I then turn to the three case studies, beginning with the Mulia Project in Chapter 3, the Tahura Project in Chapter 4, and the Reclamation Project in Chapter 5.

In short, these three case studies were chosen because they each involve typical violations of spatial planning laws. The Mulia Project violated Bali Provincial Regulation No.16 of 2009 on Spatial Planning ('Bali Provincial SPL') in relation to a minimum distance between buildings and coastal borders. There was no political will to enforce violations committed by this project. In the Tahura Project, the Governor of Bali granted a nature tourism permit. The project gave rise to controversy, as its scope would cover not only a utilisation block but also a protected block, on which commercial projects were prohibited according to central government Law No. 41 of 1999 on Forestry. Meanwhile, in the Reclamation Project, the Governor of Bali allowed the reclamation of

Benoa Bay to develop integrated tourism areas. Interestingly, according to a pre-existing central government regulation (Presidential Regulation No. 45 of 2011 on the Spatial Plan for Denpasar, Badung, Gianyar and Tabanan) ('Sarbagita'), the implementing regulation for central government Law No. 26 of 2007 on the Spatial Plan ('SPL 2007'), Benoa Bay was classified as a conservation and environmental buffer area, meaning that commercial developments were prohibited in this strategic bay. However, in a new regulation, Presidential Regulation No. 51 of 2014 on the Amendment of Presidential Regulation No. 45 of 2011, the central government retrospectively authorised the decision of the Governor of Bali to reclassify Benoa Bay as a 'utilisation area', enabling a maximum of 700 Ha to be reclaimed. Fortunately, a ministerial decision in 2019 designating the area a maritime conservation zone seems to have prevented the project from proceeding further.

These three case studies show how spatial planning regulations have failed, and, as a consequence, led to, or are likely to lead to, environmental and social damage in surrounding areas. In the Mulia Project, the project adversely affected the coastal area and marine biota in Geger Beach, impacting upon the local community in Sawangan, Nusa Dua. The Tahura Project endangered the function of Tahura as the last bastion of coastal areas from coastal abrasion, tsunami disaster and seawater intrusion. Meanwhile, the Reclamation Project would have endangered the function of Benoa Bay as an estuary for five big rivers. In addition, if 50 per cent of the water in the Bay is turned to land, the surrounding area, including local communities, would be in danger, as there would be no protection in the event of a natural disaster.

The case studies demonstrate that all levels of government are failing to respect the objects of spatial planning laws. The main actor contributing to the regulatory failures associated with the Mulia Project was the Badung District government, which allowed the project to continue even though it violated the spatial plan. There was no action from the Badung District government to prevent this violation. In the Tahura Project, the main actor was the Bali Provincial government and, in particular, the Governor, who approved the project even though it was partly located on a protection block prohibited from development. Unlike the other case studies, there are also court decisions of the Administrative, Supreme and Appellate Courts regarding this project and the government decisions to permit it. Ultimately, these judicial rulings supported the Governor's decision. In the Reclamation Project, the main actor was the central government, as it enacted a new regulation changing the status of Benoa Bay from a 'conservation area' to a 'utilisation area' in order to legitimise the decision of the Governor of Bali.

The only substantial difference between these case studies is their location and context. In the case of the Mulia Project, the spatial planning regulations are related to land use and the coastal border. The Tahura Project was predominantly concerned with the spatial planning regulation of forestry management. The Reclamation Project raises spatial planning issues in coastal management. The cases therefore illustrate the failure of spatial planning regulation in relation to various different land-use contexts.

II RESEARCH METHODOLOGY

The three case studies are based on field research conducted in Bali and Jakarta from October 2017 to January 2018. Application of socio-legal method involved a combination of doctrinal research and empirical legal method. This thesis employed this method because it scrutinised not only the legal articulation of the relevant rules and processes in spatial plans but also the meaning and effects of those rules and processes as interpreted, implemented and enforced.⁴¹⁷ The doctrinal component analysed problems that were derived from the regulations themselves, particularly the absence or vagueness of regulations. The empirical component involved the discussion of non-legal factors, which reflect problems external to spatial planning regulations. It applied a qualitative approach to identify the thinking, reasons and motives of the lawmakers and implementers of spatial planning laws. This method mostly relied on in-depth individual interviews with relevant government officials from the Ministry of Environment and Forestry, the Ministry of Agrarian and Spatial Planning, the Bali Provincial government, and the Badung District government. The researcher then employed a triangulation method to verify the basis of findings⁴¹⁸ by interviewing the relevant experts from universities and non-governmental organisations ('NGOs') to test the responses of government officials.

Participants in this research were all adult, over 21 years of age and residents of Indonesia. They were chosen based on their job description, expertise and experience in relation to spatial planning governance in Indonesia, particularly Bali. In all, there were 32 participants comprising:

1. Central government officials (6 interviewees) of: the Ministry of Environment and Forestry (1); and the Ministry of Agrarian and Spatial Planning (5).
2. Bali Provincial government officials (9 interviewees) of: the Public Works Agency of Bali (3); the Environmental Agency of Bali (2); the Forestry Agency of Bali (3); and the Investment Agency of Bali (1).
3. Badung District government officials (7 interviewees) of: the Public Works Agency of Badung (4); the Environmental Agency of Badung (2); and the Investment Agency of Badung (1).
4. Non-governmental organisation members (5 interviewees) from: the Indonesian Forum for Environment or *Wahana Lingkungan Hidup* ('WALHI') (4); and the Wisnu Foundation (1).
5. Academics (5 interviewees) from the University of Udayana, Bali (4); and the University of Indonesia (1).

Participants were recruited to combine both those who were experts on how the laws should operate (the law in the books) and how they are actually implemented and enforced (law in action), reflecting socio-legal approaches to legal research. Furthermore, I have worked at the Faculty of Law Udayana University for the last nine years. Five years prior to commencing my PhD

⁴¹⁷ Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social & Legal Studies* 131, 132. See also David N Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39(3) *Modern Law Review* 287, 288.

⁴¹⁸ William John Tibben, 'Theory Building for ICT4D: Systemizing Case Study Research Using Theory Triangulation' (2015) 21(4) *Information Technology for Development* 628, 638.

candidature at Melbourne Law School, I was involved in several research projects in relation to spatial planning and tourism in cooperation with both the central Indonesian government and local Bali government. This experience gave me the opportunity to identify and contact participants for my research in government and NGOs. In addition, the 'snowball technique' was employed to identify and recruit other relevant participants.⁴¹⁹ Participants are requested to meet the researcher and answer a series of open-ended questions provided by the researcher. The average time for an interview was 60 minutes. Interviews were conducted in Bahasa Indonesia.

These 'in-depth interviews' are the main data collection technique used. Intensive individual interviews with participants from the categories listed above enabled me to explore experience, perspectives and ideas in relation to the regulatory failures in spatial planning and its consequences. Participants were interviewed using a semi-structured approach. The interviews were guided by a set of questions, but at the same time, I allowed for the spontaneous generation of questions in response to answers given by the participants. The questions were open-ended, enabling participants to explore the issues with greater depth conducted at participants' offices either in Jakarta or Bali.

The interview transcripts were analysed thematically, to detect and categorise examples, themes and statements of fact and opinion in the narratives provided by the interviewees. Once categorised, these responses assisted the researcher to understand the range of official and unofficial attitudes to the strengths and weakness of spatial planning governance in Bali.

⁴¹⁹ Snowball sampling emerged as a nonprobability approach to sampling design and inference in hard-to-reach, or equivalently, hidden populations, where existing study subjects recruit future subjects from among their acquaintances. The sample group is therefore said to grow like a rolling snowball. See Douglas D. Heckathorn, 'Comment: Snowball Versus Respondent-driven Sampling' (2011) 41 *Sociological Methodology* 355, 356.

Chapter 3

The Regulatory Failures of Spatial Planning: A Case Study of the Mulia Project

I INTRODUCTION

This chapter is the first of three, each of which describes one of the case studies addressed in this thesis. This chapter deals with the Mulia Project, which demonstrates how spatial planning regulations fail due to the lack of enforcement when spatial planning regulations are violated, leading to damage to coastal areas, marine biota, and the local community. A number of spatial planning laws were violated when the Mulia Hotel was built at a distance from the shoreline that contradicts spatial planning regulations. To begin, section II of this Chapter describes the Mulia Bali as one of the best five-star tourism accommodation venues in Bali. Section III examines spatial planning laws and the Mulia Project. In this section, I discuss the issuance of a building permit, including controversy over the issuance of the permit. Thereafter, I explain the construction of the Mulia Project, along with spatial planning controversies and consequential environmental and social damage. The factors contributing to the regulatory failures will be analysed in Part III.

II THE PERFORMANCE OF THE MULIA BALI

The Mulia Project was announced in 1994. Building commenced in 2011 and took two years to complete before the hotel opened in February 2013. The Mulia Bali is located in Nusa Dua, which is an elite zone in the south-eastern part of Bali Island, about 40 kilometres from downtown Denpasar. This area is often a destination for international conventions due to the completeness of its infrastructure. Nusa Dua also has a wealth of tourism attractions, ranging from dozens of exotic beaches, family recreation places, restaurants, bars, and shops. For accommodation, Nusa Dua is also the home of five-star hotels that provide comprehensive leisure and business facilities.⁴²⁰

The management of the Mulia Bali claims that the Mulia is an eco-friendly form of accommodation. Adhiyanto Wongso, Director of Communications of the Mulia Bali, has stated that the construction of the building follows the direction of the wind, providing a lot of open space and wide ventilation so that the building can maximise air circulation.⁴²¹ In addition, employees of the Mulia Bali clean Geger Beach regularly, maintaining the cleanliness and beauty of the entire coastal area.⁴²² Adhiyanto has also asserted that the management of the Mulia Bali maintains the preservation of fauna in their natural habitat.⁴²³

According to its official website, the Mulia Bali brings together hotels, resorts and villas in an area of 32 Ha on Nusa Dua Beach.⁴²⁴ The interior of this accommodation is very luxurious, inspired by

⁴²⁰ 'Tiga Hotel Bintang Lima Terbaik di Nusa Dua Bali' [The Top Three Five-Star Hotels in Nusa Dua, Bali], *Antaraneews* (online, 13 July 2015) <<https://www.antaraneews.com/berita/506783/3-hotel-bintang-5-terbaik-di-nusa-dua-bali>>.

⁴²¹ Munaya Nasiri, 'Hotel Berpantai Indah di Bali Masuk Daftar Terbaik Dunia' [Beautiful Beach Hotels in Bali is in the World's Best List], *CNN Indonesia* (online, 28 September 2016) <<https://www.cnnindonesia.com/gaya-hidup/20160928103117-269-161709/hotel-berpantai-indah-di-bali-masuk-daftar-terbaik-dunia>>.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ *The Mulia* (Web Page) <<https://www.themulia.com/mulia-bali/>>.

Greek architecture with a touch of local styles.⁴²⁵ Furthermore, the Mulia Bali provides leisure facilities, including a spa, a fitness centre, children-only facilities, nine restaurants and bars, lounges, and swimming pools.⁴²⁶

The performance of the Mulia Bali has been outstanding. Only one year after its establishment, the Mulia Bali was recognised as one of the world's best hotels in a prestigious publication by Condé Nast International.⁴²⁷ Specifically, the Mulia Bali was recognised as the 'number one Beach Resort in the world'.⁴²⁸ Condé Nast also granted six other awards to the Mulia Bali, which ranked third for Top World Hotels and Resorts as well as winning: Best Newcomer, Luxury Spa: Asia & Australasia at the Condé Nast Johannesburg 2015 Awards; Best 20 Hotels in Asia and India from Condé Nast in the United Kingdom; Best New Hotel in the World from Condé Nast of the USA; and Best Family Hotel from Condé Nast Russia.⁴²⁹ Similarly, in 2016, CNN listed the Mulia Bali among 21 hotels that have the most beautiful beaches in the world.⁴³⁰ Finally, in 2018, the Mulia Bali was on the list of the top recommended hotels according to Forbes Travel Guide 2018.⁴³¹ As we will see, however, the Mulia Bali wins no awards in the context of spatial planning regulation.



Figure 3.1 Examples of rooms in the Mulia Hotel

Source: The Mulia website⁴³²

⁴²⁵ 'Introducing the Mulia, Mulia Resorts & Villas – Nusa Dua, Bali', *Luxuria Lifestyle* (Online, 27 March 2014) <<https://www.luxurialifestyle.com/introducing-the-mulia-mulia-resorts-villas-nusa-dua-bali/>>.

⁴²⁶ Ibid.

⁴²⁷ Lesthia Kertopati, 'Hotel Mulia Nusa Dua Jadi Terbaik di Dunia' [Mulia Hotel Becomes the Best in the World], *Viva* (Online, 26 December 2014) <<https://www.viva.co.id/gaya-hidup/travel/572070-hotel-mulia-nusa-dua-jadi-terbaik-di-dunia>>.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Nasiri (n 421).

⁴³¹ 'Award Winners 2018', *Forbes Travel Guide* (Web Page) <<https://www.forbestravelguide.com/award-winners?mapQuery=Bali>>.

⁴³² The Mulia (n 424).



Figure 3.2 Examples of rooms in the Mulia Resort

Sources: The Mulia website⁴³³



Figure 3.3 Examples of rooms in the Mulia Villas

Source: The Mulia website⁴³⁴

III SPATIAL PLANNING LAWS AND THE MULIA PROJECT

A *The Issuance of the Building Permit*

The Mulia Project is located in the Badung District of the Province of Bali. As mentioned in Chapter 2, each province, district and municipality in Indonesia has its own regional administration.⁴³⁵ A Governor leads a Province, while Regents and Mayors lead districts and municipalities respectively. The regional autonomy laws explain that central, provincial and district/municipal governments share authority over spatial planning laws.⁴³⁶ In the Province of Bali, the Badung District

⁴³³ Ibid.

⁴³⁴ Ibid.

⁴³⁵ The Constitution of 1945 (n 117) art 18.

⁴³⁶ Ibid art 9(3).

government has authority to implement the district spatial plan and issue building permits while the Bali Provincial government has authority to implement the provincial spatial plan.⁴³⁷

There is a close relationship between the existence of a building permit and the spatial plan. As mentioned in chapter 2, central government Regulation No. 36 of 2005 stipulates that those who intend to establish buildings must obtain a building permit.⁴³⁸ In order to obtain a building permit, proposed buildings: must comply with the existing district spatial plan;⁴³⁹ must not harm the environment;⁴⁴⁰ and must not violate the minimum border of buildings with road, coastal, and riverside as specified in the existing district spatial plan.⁴⁴¹ If these requirements fail to be completed, the relevant district governments, through their regents or mayors, must refuse the building permit application.⁴⁴² In the case of the Mulia Project, the Regent of Badung issued a building permit on the basis that the project met all relevant legal criteria. There are doubts, however, whether the decision was made in good faith.

Controversy about the Mulia Project began as soon as the plan for this project was announced to local communities in 1994.⁴⁴³ They strongly opposed the project on the basis that it would adversely affect the environment, particularly the existence of marine biota and the life of seaweed farmers. Seeking to quell this protest, PT Mulia Graha Tatalestari ('MGT'), a limited liability company based in Jakarta, and the key investor in this project, entered into an agreement with seaweed farmers. Before the project was started, there were 58 farmers belonging to Geger Samudra Indah Seaweed Farmer Group and 85 storage huts established around the coast.⁴⁴⁴ As soon as the project began, this group agreed to release or to clean the coastal area from seaweed activities and all forms of huts, buildings and other supporting facilities.⁴⁴⁵ MGT then agreed to provide compensation amounting to IDR 75 million, that is AUD 7,500.⁴⁴⁶

After concluding the agreement, MGT sought approval for its project from the Badung Investment Agency. This agency issued a letter of approval for domestic investment No. 129 / I / P / PMDN / 1997 of 20 March 1997, subsequently modified by Letter No. 130 / III / PMDN / 2004 of 29 September 2004. This letter indicated that the project was not on the negative investment list.⁴⁴⁷ Unfortunately, a massive financial crisis along with political turmoil caused by the fall of Soeharto in 1998 forced the investor to delay the project. MGT did not file a formal application with the Badung District government until 2008. No: 004 / MGTL / VS / X-2008 of 16 October 2008 enabled

⁴³⁷ Regional Autonomy Law (n 135) art 9.

⁴³⁸ Building Regulations (n 388).

⁴³⁹ Ibid art 18 (1).

⁴⁴⁰ Ibid Art 18(2).

⁴⁴¹ Ibid art 21(1).

⁴⁴² In the Badung District, this is regulated by the Badung District Regulation on Building Permits (n 387) art 16.

⁴⁴³ Interview with I Wayan Suardana, Board of Directors of The Indonesian Forum for Environment/Wahana Lingkungan Hidup Indonesia (WALHI) (I Gusti Ngurah Parikesit Widiatedja, WALHI, 09 November 2017).

⁴⁴⁴ The Agreement between PT Mulia Graha Tatalestari and Geger Samudra Indah Seaweed Farmer Group, 3 August 1994.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

⁴⁴⁷ *Surat Bupati Badung No. 556.5/261/Diparda tentang Rekomendasi Pembangunan Jasa Akomodasi* [A Letter of the Regent of Badung No. 556.5/261/Diparda on the Recommendation of the Development of Accommodation Services] (Indonesia) ('The Recommendation Letter of The Regent of Badung').

the development of an integrated tourism accommodation, consisting of a hotel, resort, and villas at Geger Beach, Sawangan Village, Benoa Sub-district.⁴⁴⁸

The Badung Regional Development Planning Agency was then required to analyse the location of the project, to ensure it would not contradict the District Spatial Plan.⁴⁴⁹ This agency issued Letter No. 640/5213 / Bappeda Litbang on 31 December 2008, stating that the project did not contradict the District Spatial Plan.⁴⁵⁰ On 2 February 2009, based on these two letters, the Regent of Badung District, by Letter No.556.5 /261/ Diparda, issued a recommendation letter certifying that the project was not in the negative investment list and did not contradict the existing district spatial plan.⁴⁵¹ With this letter, MGT then applied for a building permit.

In the building permit application, the provision of the Regent's recommendation letter was only one of several requirements to be fulfilled by MGT. The Badung District government checked other documents submitted by MGT including the following:⁴⁵²

1. Deed of the company registration of PT MGT No. 10 of 6 August 2008.
2. Permit-in-Principle of Investment No. 20/1 / IP / III / PMDN / 2010 of 3 March 2010.
3. Environmental Impact Analysis (EIA) of the Regent of Badung No. 2460/02 / HK / 2010 of 14 December 2010.
4. Results of a technical inspection of 12 March 2011 undertaken by the Badung District government.

In 2010, before the building permit was issued but after the application had been submitted, local communities from Peminge or Sawangan Village protested against the Mulia Project, as it would block their access to a local temple and the Geger Beach. MGT then entered into a second agreement with these communities to allow the development of the Mulia within their areas.⁴⁵³ MGT agreed to maintain the existing road, connecting the Geger Temple and the Geger Beach.⁴⁵⁴ MGT also agreed to allow local communities to access what had been an existing road for special religious ceremonies.⁴⁵⁵ Furthermore, MGT agreed to provide an opportunity for local people in Peminge or Sawangan Village to work at the Mulia Hotel.⁴⁵⁶

On 29 March 2011, the Badung District government issued the building permit, arguing that the Mulia Project had submitted all the required documents and there was no longer protest from local communities, such that it had no option but to grant the building permit. Since the site plan attached to the building permit did not clearly mention the distance of proposed buildings from the coastal area, the building permit was issued with an explicit requirement that any buildings be constructed at

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² *Ijin Mendirikan bangunan Nomor 441 Tahun 2011* [The Building Permit No. 441 of 2011] (Indonesia) ('*The Building Permit of the Mulia Project*').

⁴⁵³ The Agreement between PT Mulia Graha Tatalestari and Local Communities in Peminge/Sawangan Village, 18 June 2010.

⁴⁵⁴ Ibid art. 2.

⁴⁵⁵ Ibid art. 3.

⁴⁵⁶ Ibid art. 4.

a minimum 100 metres distance from the coastal border. According to central government Law No.26 of 2007 on Spatial Management ('SPL 2007'), and central government Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands and Bali Provincial SPL, the coastal border is a protected area along the coast that has important benefits for maintaining coastal sustainability and sanctity, building safety, and space available for public purposes.⁴⁵⁷ The radius of this area is 100 metres from the beach, meaning that any development is prohibited within this area. An implementing regulation issued under central government Law No. 27 of 2007 explains why the coastal border must be 100 metres.⁴⁵⁸ According to this regulation, this boundary is required to protect:⁴⁵⁹

- a. the sustainability of ecosystem function and all resources in coastal areas and small islands;
- b. the community life in coastal areas and small islands from the threat of natural disasters;
- c. the allocation of space for public access; and
- d. the allocation of space for sewage and water tunnels.

Although the inclusion of this condition suggests that some care was taken in the decision to issue the permit, there is no publicly available information concerning how the EIA and technical inspection were undertaken. Since these concerns have never been addressed, the lawfulness of the decision, and the basis upon which it rests, remains questionable, all the more so, because the owner of MGT at the time was Soegiarto Tjandra, also known as Djoko Tjandra ('Djoko').

Djoko is a fugitive, sought by the Indonesian Police and international police for his alleged involvement in 2001 in bank fraud related to liquidity assistance from the Central Bank of Indonesia, or *Bantuan Likuiditas Bank Indonesia* ('BLBI'), as it is more commonly known. Specifically, it is alleged he assisted in recovering loans owed by the Bank Restructuring Agency, an agency controlling a group of banks all later liquidated by the Central Bank of Indonesia, in return for payment of a US\$ 70 million 'commission' to one of Djoko's corporations, Era Giat Prima ('EGP').⁴⁶⁰ This corporation had a close connection to the Golkar political party, the ruling party in Indonesia at that time.⁴⁶¹ Golkar allegedly used this money to fund the campaign of President BJ Habibie for re-election for a second term.⁴⁶² As this case involved people from his inner circle, President BJ Habibie seemed unwilling to allow the case to be investigated.⁴⁶³ In court proceedings, the South Jakarta District Court, High Court and Supreme Court acquitted Djoko. Prosecutors found new evidence, however, and on appeal, the Supreme Court sentenced Djoko to two years

⁴⁵⁷ Bali Provincial SPL (n 333) art 1(44).

⁴⁵⁸ *Peraturan Presiden Republik Indonesia No. 51 tahun 2016 tentang Batas Sempadan Pantai* [The Presidential Regulation No.51 of 2016 on Limits of Coastal Areas] (Indonesia) art 1 ('*Coastal Areas Regulation*').

⁴⁵⁹ Ibid art 4.

⁴⁶⁰ 'Bali Hotel Scandal Backs Case for Law to Strip Convicts of Assets: ICW', *Jakarta Globe* (online, 9 October 2011) <<http://jakartaglobe.id/archive/bali-hotel-scandal-backs-case-for-law-to-strip-convicts-of-assets-icw/>>.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Deborah Cassrels, 'Paradise Lost as Once Beautiful Bali Buckles under Forklifts and Fallacies', *The Australian* (online, 29 September 2012) <<https://www.theaustralian.com.au/news/inquirer/paradise-lost-as-once-beautiful-bali-buckles-under-forklifts-and-fallacies/story-e6frg6z6-1226483633044?sv=35030f6c6d00446100eebe7f867ce42>>.

imprisonment and fined him IDR 15 Million in 2009.⁴⁶⁴ However, a day before the decision, Djoko escaped to Papua New Guinea and later became a citizen of that country.⁴⁶⁵ There is no extradition treaty between Indonesia and Papua New Guinea.

The involvement of a fugitive in the Mulia Project sparked a controversy in the Bali Legislative Council, although only after the building permit was issued in 2011. Its members wrote a formal letter to the Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* ('KPK'), the National Police, the Attorney General's Office and the House of Representatives of Indonesia or *Dewan Perwakilan Rakyat* ('DPR'), explaining the involvement of Djoko in the Mulia Project.⁴⁶⁶ Kardani, the Project Manager of MGT, admitted that the Mulia belonged to Djoko and his family.⁴⁶⁷ The involvement of Djoko could also be traced through the building permit issued by the Badung District government. There was a statement explaining the transfer of the ownership of the Mulia's building permit from Djoko Soegiarto Tjandra, as the owner of MGT, to Viady Sutojo, the General Director of MGT on 29 March 2011, the same date as the issuance of the building permit.⁴⁶⁸ This is highly irregular: how can a building permit and a transfer of ownership be issued simultaneously?

The members of the Bali Legislative Council criticised this transfer of ownership. The Chair of Commission One, I Made Arjaya, said the first deed of the company showed Djoko as the owner of the Mulia, but that it had since been transferred to another name.⁴⁶⁹ The Chair then questioned how Djoko could transfer his ownership while being actively sought by the Police.⁴⁷⁰ He alleged the involvement of government officials in direct contact with Djoko.⁴⁷¹ Moreover, he found a letter signed by the Regent of Badung on a public holiday to accelerate the process of the transfer of ownership.⁴⁷² Another member of Commission One, Cokorda Gede Budi Suryawan, expressed similar thoughts. He wondered how a fugitive could so easily visit Bali and obtain a permit for a luxury hotel development.⁴⁷³

Responding to the controversy over the issuance of the building permit, the Regent of Badung insisted that the building permit was appropriately issued under the name of Viady Sutojo instead of Djoko Tjandra.⁴⁷⁴ Similarly, the Deputy Attorney General, Darmono, explained that Djoko Tjandra was no longer linked to the Mulia Project as the ownership had been transferred to another name.⁴⁷⁵

⁴⁶⁴ Rangga Prakoso, 'AGO Clarifies Bali Hotel-Fugitive Ties', *Jakarta Globe* (online, 12 October 2011) <<http://jakartaglobe.id/archive/ago-clarifies-bali-hotel-fugitive-ties/>>.

⁴⁶⁵ Ibid.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ The Building Permit of the Mulia Project (n 452).

⁴⁶⁹ 'Pembangunan Hotel Mulia: Ada Pejabat Bawakan Izin Joko Tjandra' [The Development of Mulia Hotel: There is An Official Brings a Permit to Joko Tjandra], *Propinsi Bali* (online, 1 Oktober 2011) <<http://www.propinsibali.com/2011/09/pembangunan-hotel-mulia-ada-pejabat.html>>.

⁴⁷⁰ 'Rising Indignation over Mulia Hotel Project', *The Bali Update* (online, 10 July 2011) <<http://www.balidiscovery.com/messages/message.asp?Id=7472>>.

⁴⁷¹ Ibid.

⁴⁷² 'IMB Balik Nama Saat Hari Libur, Mahasiswa Tolak Hotel Mulia, DPRD Bali Diteror' [The Transfer of Ownership of the Building Permit is Conducted on the Public Holidays, University Students Refuse Mulia Project, and the Teror for Bali's House of Representatives], *Propinsi Bali* (online, 17 October 2011) <<http://www.propinsibali.com/2011/10/imb-balik-nama-saat-hari-libur.html>>.

⁴⁷³ Pembangunan Hotel Mulia (n 469).

⁴⁷⁴ Prakoso (n 464).

⁴⁷⁵ Ibid.

However, he admitted that the transfer of ownership of this project could be controversial, as Djoko might still be able control the project even though it had been legally transferred.⁴⁷⁶ Although perhaps not strictly unlawful (Djoko's ownership certainly was not a violation of any specific provision of the spatial planning laws of Indonesia), the incident and the timing of the ownership transfer indicates the corrupt environment in which decisions to issue permits are often made. And, as mentioned, there is still no explanation regarding the processes underpinning the approval of the EIA or the technical inspection. These issues are all relevant to the discussion of 'non-legal factors' behind the regulatory failures of spatial planning in Chapter 7.

Controversy did not end with the ownership scandal and the lack of transparency around the EIA and inspection reports. The following section shows how the Mulia Project has violated spatial planning regulation, leading to environmental and social damage.

B *The Construction of the Mulia Project, Spatial Planning Controversies and the Resulting Damage*

The Mulia Project violated SPL 2007, central government Law No.27 of 2007, the Bali Provincial SPL and its building permit because when this project had been completed, it became clear that the coastal border from the shoreline to the outermost building was only 75 metres. These spatial planning regulations required 100 metres as the minimum distance of buildings from the coastal border. It is likely that the Regent of Badung knew that the project was in violation of the 100 metres limit before the project had been completed. Even now, nothing has been done by the Badung district government to rectify the violation, even though it is responsible for enforcing the violation. This is arguably because many tourism projects prior to the Mulia Project had been approved with a minimum distance of 50 metres, before national and provincial regulations on spatial planning were enacted.⁴⁷⁷ Instead of adjusting its requirements, Badung, like almost all districts in Bali in 2011, published a joint statement seeking the revision of the Bali Provincial SPL to match what was already stated in their district spatial planning regulations.⁴⁷⁸ However, this measure had no impact on Bali Provincial SPL; all districts in Bali must follow this regulation.

Besides violating spatial planning laws in relation to the coastal border, this project also violated the 'radius of purity' for Balinese Hindu temples. According to the Bali Provincial SPL, the minimum distance of any commercial building from a sacred site is five kilometres.⁴⁷⁹ However, the location of this project is only two kilometres from Geger Temple, a building that falls within the category of 'sacred site'. This violation first came to light in 2011 before the project had been completed, and led to the public protests mentioned above, especially from local communities in Sawangan, Bena, who argued the Mulia Project would disrupt their spiritual and religious activities. These protests led to the agreement between MGT and local communities in Sawangan in 2010. This process reflects the absence of enforcement of spatial planning laws, so that the investor could resolve this problem privately.

⁴⁷⁶ 'Dozens of Corruptors Still in Limbo', *Tempo* (online, 22 October 2013) <<https://kolom.tempo.co/read/523710/dozens-of-corruptors-still-in-limbo>>.

⁴⁷⁷ Suardana (n 443).

⁴⁷⁸ Ibid.

⁴⁷⁹ Bali Provincial SPL (n 333) art 50(2).

The Mulia Project also potentially violated its building permit. When the building permit was applied for, foreseeable activities that were potentially harmful to the environment were not reported. The public, however, identified these activities very early on during construction. In October 2011, seven months after the building permit was issued, and although the agreement had been concluded, massive protests concerning the Mulia Project started due to the adverse effect the project was having on the environment. Care Forum for Bali or *Forum Peduli Gumi Bali* ('FPGB'), an environmental NGO, was established to object to the Mulia Project. This forum was an affiliation of several organisations across Bali, including: WALHI; Democracy of the People's Struggle Front ('Frontier'); the Student Executive Board of Udayana University; the Hindu Student Association of Indonesia; the National Student Front; the Brotherhood of Hindu students; the Consortium of the Agricultural Renewal; the Wisnu Foundation; and Mitra Bali.

After conducting a series of street protests, FPGB submitted a formal complaint to the Bali Legislative Council on 10 October 2011. Important points made in this letter were that 'cut and fill activities' had led to massive cuts to the existing limestone structure, making terraces and a steep cliff around the surrounding area.⁴⁸⁰ Thereafter, the project conducted the compaction of the coastal border by dredging the beach and then placing soil and limestone into the hole created by the dredge, which was further compacted.⁴⁸¹ All materials used to seal and compact the shore were by-products from the cutting of limestone in the project area.⁴⁸² None of these activities were allowed according the building permit for the Mulia Project.

The next complaint was related to the decrease in public space that is yet another spatial planning violation. According to central government Regulation No. 15 of 2010 on the Management of Spatial Planning (the implementing regulation of the SPL 2007), a decrease in, or even loss of, public space is classified as space utilisation that conflicts with the permit requirements granted by authorised officers. The conflict is a result of breaking the prescribed coastal border,⁴⁸³ and/or not providing social facilities or public facilities in accordance with the space utilisation permit.⁴⁸⁴ It also falls within the category of a 'measure that can block access to areas declared by laws and regulations as public property'.⁴⁸⁵ According to the regulation, these measures include: closing access to coastal areas, rivers, lakes and public infrastructure; water sources; parks and green open spaces; pedestrian facilities; disaster evacuation sites and routes; and public roads without authorised officer permission.⁴⁸⁶

The Mulia Project placed limestone material along the coastal area in large quantities, to an average height of four metres.⁴⁸⁷ The project then installed a zinc fence on the right and left sides of this material.⁴⁸⁸ The presence of limestone material and installation of the zinc fence significantly

⁴⁸⁰ Forum Peduli Gumi Bali, 'Surat Pengaduan Dugaan Pelanggaran oleh Mulia Resort' [A Complaint Letter on the Alleged Violation of the Mulia Resort], 10 October 2011 ('*The Complaint Letter*').

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ SPGR 2010 (n 277) art 185 (a).

⁴⁸⁴ Ibid art 185 (f).

⁴⁸⁵ Ibid art 186.

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

reduced public space, leaving only about four metres between the water line and the fence for public activities.⁴⁸⁹ However, the Badung District government has done nothing to respond to this violation.



Figure 3.4 Example of a street protest coordinated by the Care Forum of Bali (Forum Peduli Gumi Bali). Source: WALHI Bali

This project also breached requirements for building projects according to central government Regulation No. 36 of 2005. This regulation states that besides taking into account the existing spatial plan,⁴⁹⁰ any project that plans to develop buildings must not disturb the environmental balance in the surrounding location.⁴⁹¹

Experts have explained how this project had damaged the environment. Michael O'Leary, a former Gold Coast surfer and founder of the environmental centre Rivers, Oceans, Lands and Ecology ('ROLE'), explained that the Mulia Project had been the cause of some of the biggest environmental damage in Nusa Dua.⁴⁹² He said:

Virtually every day you paddle through sewage. Every night when the swell's down the locals are cyanide fishing. There used to be 500 families involved in seaweed farming in front of the Mulia and they've been paid a pittance to stop doing it. Jobs have been replaced in the hotel industry, but most of them will come from Java and other parts of Bali.⁴⁹³

Sand dredging that was conducted during the Mulia Project also has adversely affected coastal conditions. A member of the expert environmental team of the Badung Legislative Council, Nyoman Gelebet, asserted that beach sand dredging in large quantities, required to clean the area for the hotel's construction, could cause the collapse of coral reefs, leading to coastal abrasion.⁴⁹⁴

⁴⁸⁹ Ibid.

⁴⁹⁰ Buildings Regulation (n 383) art 18 (1).

⁴⁹¹ Ibid art 18(2).

⁴⁹² Cassrels (n 463).

⁴⁹³ Ibid.

⁴⁹⁴ Wahana Lingkungan Hidup Indonesia, 'Pengerukan Pasir di Pantai Geger Berpotensi Memperluas Abrasi di Pesisir Selatan' [Sand Dredging at Geger Beach Potentially Expand the Abrasion in the Southern Coast], *Walhibali blogspot* (online, 8 September 2008) <<http://walhibali.blogspot.com/2008/09/pengerukan-pasir-di-pantai-geger.html>>.

Thereafter, the destruction of these coral reefs will also limit the availability of the nutrients consumed by seaweed.⁴⁹⁵ Consequently, seaweed would lose its food source, and that would certainly be detrimental to the local farmers who rely on seaweed for their living.⁴⁹⁶

R Suyarto, an expert from the Environmental Management Centre of the University of Udayana, explained that sand moves dynamically, so that the flow that generated parallel coastal waves moved the sand in a particular pattern and would return that sand to its original place over a certain period.⁴⁹⁷ The dynamic nature of this beach sand was the main guard protecting the island from abrasion.⁴⁹⁸ Abrasion would occur if the sand did not return to its place.⁴⁹⁹ Coastal abrasion in Bali becomes more severe if sand is dredged for development because that sand can no longer be returned.⁵⁰⁰ Volcanoes in Bali had long ceased to produce sand, and the existing sand is continuously dredged for development.⁵⁰¹

Breakwater construction as a means of preventing abrasion in the Mulia Project also created controversy.⁵⁰² WALHI contended that the construction would endanger the Geger Temple, which is located two kilometres from the project.⁵⁰³ Similarly, the Chairman of Commission III of the Bali Legislative Council, I Gusti Made Suryanta Putra, revealed that the breakwater construction had established new and destructive wave and tidal patterns.⁵⁰⁴ Before this project, waves were always split when heading towards the Geger Temple. However, the breakwater construction now causes the wave to directly hit the wall of the temple, gradually eroding it.⁵⁰⁵

The local leader of Pemingge Village, where the Mulia Project is located, Wayan Luwir Wiana, described how sand dredging on Geger Beach had severely damaged the environment through coastal abrasion and the destruction of marine biota.⁵⁰⁶ ‘Although a representative of MGT offered compensation for allowing the sand dredging’, he said, ‘we still refused because no matter how big the compensation, it would not be comparable to the environmental damage created’.⁵⁰⁷

The fact that the Mulia Project conducted a series of activities that were harmful to the environment says much about the permit application process. The investor could not have told the truth about the project because if these activities had been reported, the government would have had to have denied the original application. The building permit could never have been issued unless the investor bribed

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Veroze Waworuntu Saad, ‘Pasir Kian Dikeruk, Abrasi Kian Mengancam Bali?’ [Sand is Dredged, Does Abrasion Threat Bali?], *Kompasiana* (online, 9 November 2011) <https://www.kompasiana.com/veroze/pasir-kian-dikeruk-abrasi-kian-mengancam-bali_55095556813311775db1e1c5>.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid.

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid.

⁵⁰² ‘Mulia Bali Resort Questioned over Breakwater Construction’, *The Bali Update* (online, 1 June 2013) <<https://balidiscovery.com/messages/message.asp?Id=8988>>.

⁵⁰³ Ibid.

⁵⁰⁴ ‘Konstruksi Anti- abrasi Hotel Mulia Bali Ancam Rusak Pura’ [The Construction of Anti-abrasion of Mulia Hotel Bali Threats to Damage Temple], *Merdeka* (online, 4 January 2013) <<https://www.merdeka.com/peristiwa/konstruksi-anti-abrasi-hotel-mulia-bali-ancam-rusak-pura.html>>.

⁵⁰⁵ Ibid.

⁵⁰⁶ Gede Adi Yuliantara, ‘Takut Terkena Abrasi Lebih Parah’ [The Fear of more severe abrasion], *Pos Bali* (online, 17 June 2016) <<https://www.posbali.id/takut-terkena-abrasi-lebih-parah/>>.

⁵⁰⁷ Ibid.

the district government or there was pure incompetence. As mentioned in Chapter 2, according to Badung District Regulation No. 27 of 2013, the Regent of Badung must refuse an application of a building permit if, among other things, the buildings to be established disrupt or damage the surrounding environment.⁵⁰⁸

There are two ways the Regent of Badung could have prevented this project from continuing. First, if the Regent foresaw these violations in the pre-establishment phase, he could have refused to issue a building recommendation letter, because the plan contradicted the existing district spatial plan. This would have prevented investors from proceeding, because investors are prohibited from starting a project without a building permit. If, in fact, the Regent of Badung did not know the project would violate the law because the investor hid some details of the project, and he only became aware of the problems when there were public protests publicised by national and local media, that does not reflect well on the regent. In fact, it is shameful as it reflects a lack of monitoring by the Regent, even though SPL 2007 requires him to undertake it.⁵⁰⁹ Secondly, in the post-establishment phase, the Bali Provincial SPL and the building permit expressly stated that the minimum distance of buildings from the coastal border was 100 metres, which was patently false. The Badung District government should have taken action to sanction this violation, stopping this project and requiring the developer to follow coastal border proximity rules. Again, this did not happen.

⁵⁰⁸ The Badung District Regulation on Building Permit (n 388) art 16.

⁵⁰⁹ SPL 2007 (n 252) art 55.



Figure 3.5 These images show the cut and fill activities, the proximity of the project to the local temple (marked with a blue arrow), the huge stack of limestone, and the installation of a zinc fence around the Mulia Project. Source: WALHI Bali.



Figure 3.6 These images show the controversy over the minimum coastal border of the Mulia Project being less than the required 100 metres. The image on the left shows the situation when the project was being constructed and the right image shows the situation when the project was completed. Source: WALHI Bali.

IV CONCLUSION

In summary, the Mulia Project is a case study about failures in the decision making process for authorising building projects of this kind and the lack of enforcement of spatial planning laws in Bali. Despite its international, award-winning reputation, this project has triggered massive protests from both the Bali Legislative Council and local communities. A series of violations of spatial planning law are at the heart of these protests. When the project was first proposed, there was unlawful decision-making in relation to the preliminary requirements for the building permit application, over the issuance of the building permit itself, particularly because of the involvement of a fugitive, irregularities in the transfer of ownership, and in the way in which the Badung District government eventually issued the permit. As regards spatial planning, there are obvious violations of the rules relating to the coastal border, in particular, the distance from the shoreline to the outermost building contradicts spatial planning regulations. This project also violates the ‘radius of purity’ of a sacred site, as the location of this project is too close to a Balinese Hindu temple. Before the project was finished and the Mulia Bali formally opened in 2013, there were no serious measures taken by any level of government to prevent these violations by monitoring, regular review of the application, or sanctions being imposed for violations. There were, however, some attempts by the project owner to settle and counter potential disputes privately by means of monetary compensation. The lack of enforcement has led to severe damage to the coastal area, marine biota, and local communities. The monetary compensation has done nothing to create a sustainable outcome.

The following chapter will discuss the next case study, the Tahura Project and describes other types of failures in spatial planning regulations in Bali. While the Mulia Project mostly shows failures at the decision-making and enforcement levels, the Tahura Project case study focuses on failures at the implementation and enforcement levels. The last case study, that of the Reclamation Project, will focus on the failures at the law-making level.

Chapter 4

The Regulatory Failures of Spatial Planning: A Case Study of the Tahura Project

I INTRODUCTION

The Tahura Project demonstrates how tourism projects cause damage to forest areas and local communities because of the regulatory failures of spatial planning in Bali, mostly failures of administrative decision-making and enforcement. To begin, section II offers a brief overview of the Tahura mangrove forest, covering the location and the character of this forest, the existence of flora and fauna and its significance for local communities in Bali. Section III examines spatial planning laws in the Tahura Project. In this section, I discuss the issuance of the exploitation permit by governmental agencies, at both the provincial and central levels. Controversies over spatial planning laws and the resulting damage are considered next, focussing on how the project covers not only a utilisation block but also a protected block, leading to environmental and social damage. Finally, the Chapter explains the decision of the Administrative Court in this matter; describing how the judges dismissed claims of environmental damage as a result of violations of spatial planning regulations in the Tahura Project.

II BRIEF OVERVIEW OF THE TAHURA MANGROVE FOREST

Tahura is an acronym for *Taman Hutan Raya* ('Tahura') or Great Forest Park, a huge mangrove forest, which is also known as Tahura Ngurah Rai.⁵¹⁰ Tahura is the largest mangrove forest in Bali and is located near the centres of tourism in Bali: Nusa Dua, Sanur, and Kuta.⁵¹¹ The flora in this forest is dominated by the species *Sonneratia alba*, *Duabanga moluccana*, *Aegiceras corniculatum*, *Rhizophora mucronata* and other plants, such as *Derris heterophylla* and *Acanthus ilicifolius*, *Rhizophora mucronata* and *Avicennia maria*.⁵¹² The diverse fauna includes various species of birds such as *Fregeta minor*, *Sula leucogaster*, *Sterna hirundo*, *Halcyon chloris*, *Geopelia striata*, *Streptopelia chinensis* and *Ducula*, Green Turtles (*Chelonia mydas*), Hawksbill turtles (*Eretmochelys imbricate*), and sea cucumbers (*Echinodermata*).⁵¹³

Tahura performs social, economic, cultural and ecological roles for local communities in Bali. Those who live around this forest use the mangroves either as individuals or in groups – generally fisher groups operating under the customary laws of each village.⁵¹⁴ The three largest fisher communities are first, the Segara Guna Batu Lumbang fishers, who rely considerably on this forest, as 60 per cent of community members fish for their livelihood.⁵¹⁵ The second group comprises the Deluang Sari

⁵¹⁰ 'Informasi Tahura Ngurah Rai' [Information of Tahura Ngurah Rai], *Balai Pemantapan Kawasan Hutan Wilayah VII Denpasar* (Web Page) <http://bpkh8.menlhk.go.id/pdf/karya_tulis_mandiri/buklet_tahura.pdf>.

⁵¹¹ Ibid.

⁵¹² Dinas Kehutanan Pemerintah Provinsi Bali, 'UPT Tahura Ngurah Rai' [Technical Implementing Unit Tahura Ngurah Rai], *Baliprov* (online, 14 November 2012) <<http://www.dishut.baliprov.go.id/id/UPT-TAHURA-Ngurah-Rai>>.

⁵¹³ Ibid.

⁵¹⁴ Mega Lugina et al, 'Strategi Keberlanjutan Pengelolaan Hutan Mangrove di Tahura Ngurah Rai Bali' [Strategy of Mangrove Management in Ngurah Rai Grand Forest Park], 2017 14 (1) *Jurnal Analisis Kebijakan Kehutanan* 61, 68.

⁵¹⁵ Ibid.

fishers, who are turtle breeders around Tanjung Bena, Bali.⁵¹⁶ The third group are the Wanasari fishers, consisting of 90 fishers, who use mangrove forest around the traditional village of Tuban as their source of livelihood.⁵¹⁷ This group has a crab cultivation program.⁵¹⁸

The creation of Tahura Ngurah Rai, with an area of 1,373.50 Ha, was declared by the central government through Minister of Forestry Decree No. 544 / Kpts-II / 1993 of 25 September 1993. The Tahura area covers six villages in Denpasar, namely Sanur Kauh, Sidakarya, Sesetan, Serangan, Pedungan and Pemogan, and six villages in Badung, namely Kuta, Kedongan, Tuban, Jimbaran, Bena, and Tanjung Bena. The Tahura management is under the authority of a Technical Implementing Unit, coordinated by the Bali Provincial Forestry Agency. This decree divided Tahura's area into three main activity blocks: protection, utilisation, and other (religious, cultural, and historical, rehabilitation and traditional) blocks. The following images show the current condition of the Tahura Mangrove Forest.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

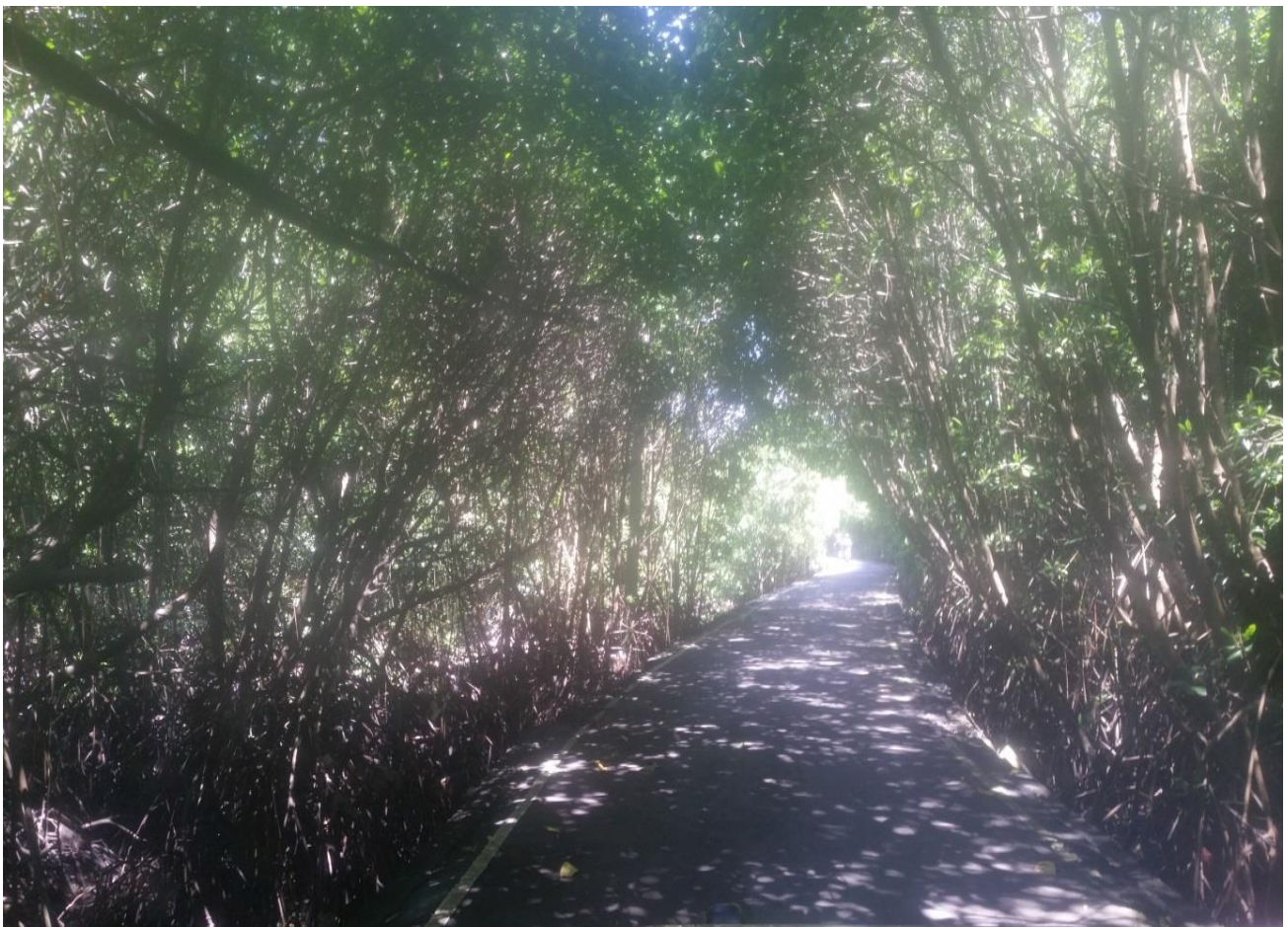


Figure 4.1 The Tahura Mangrove Forest

Sources: Author's Documentation

III SPATIAL PLANNING LAWS AND THE TAHURA PROJECT

A *The Issuance of the Exploitation Permit*

This case began when the President Director of PT Tirta Rahmat Bahari ('TRB') submitted letter No. 001 / TRB / Dps / IV / 2011 of 27 April 2011, applying for a permit for nature tourism exploitation in Tahura Ngurah Rai, Bali. According to the site plan, TRB would build 75 guest houses, eight restaurants, two spas, five cafes, five stalls, two offices, one swimming pool, and a multipurpose building. Only very little information has been publicly available regarding TRB. In 2013, an administrative court decision regarding the validity of the exploitation permit issued by the Governor of Bali revealed that a Balinese man, I Nyoman Wianta, was the Director of TRB, which was located on Kediri Sub-district, Tabanan District.⁵¹⁹ Interestingly, TRB later claimed that the Tahura Project could not damage the environment because TRB was owned by Balinese. This claim is easily disputable because there is, of course, no guarantee that Balinese who become investors will not damage the environment of Bali.⁵²⁰

In 2011, several governmental agencies issued recommendations to grant TRB an exploitation permit. Specifically, the Technical Implementing Unit of Tahura issued a permit supporting the TRB's application for the following reasons. The first is that, according to the 2007 Tahura Map, TRB's proposed project was located on a utilisation block, although the exact location and size of the requested area needed to be checked.⁵²¹ Hence, it complied with central government Law No. 5 of 1990, which states that the utilisation block of Tahura Ngurah Rai was allowed to be used for tourism and recreation.⁵²² The Bali Provincial Tourism Agency also issued a technical recommendation, stating that the location of the project complied with the existing spatial plan.⁵²³ It stated that the requested location fell into the category of tourism attractions 'outside a tourism area and of special attractions located in the city of Denpasar'.⁵²⁴

The central government, through the Bali Natural Resources Conservation Centre, also supported the Tahura Project by issuing a recommendation letter.⁵²⁵ It stated that natural tourism facilities

⁵¹⁹ *Keputusan Pengadilan Tata Usaha Negara Denpasar No. 01/G/2013/PTUN.Dps*. [The Decision of the State Administrative Court of Denpasar No. 01/G/2013/PTUN.Dps] 4 (*Denpasar Administrative Court Decision*).

⁵²⁰ 'Tanggapan Komite Kerja Advokasi Lingkungan Hidup (KEKAL) Bali atas Broadcast Message PT. TRB' [Statement of the Bali Environmental Advocacy Committee on the Broadcast Message of PT. TRB] *Walhi Bali* (online, 16 November 2012) <https://walhibali.org/tanggapan-komite-kerja-advokasi-lingkungan-hidup-kekal-bali-atas-broadcast-message-pt-trb/> (*Kekal Statement*).

⁵²¹ *Surat Direktur UPT Tahura Ngurah Rai Bali No. 522.11/031/THR.NR, 7 Juni 2011 tentang Ijin Pengusahaan Pariwisata Alam* [The letter of the Director of Technical Implementing Unit of Tahura Ngurah Rai No. 001 / TRB / DPS / IV / 2011 of 27 April 2011 concerning Permit for Natural Tourism Exploitation Agreement] (Indonesia).

⁵²² *Ibid.*

⁵²³ *Surat Kepala Dinas Pariwisata Bali No. 556/963/I/Dispar, 14 Juni 2011, tentang Pertimbangan Teknis atas Ijin Pengusahaan Pariwisata Alam* [The Letter of the Head of the Bali Provincial Tourism Agency No.556/963/I/Dispar, of 14 June 2011 on the Technical Recommendation of the Business Permit of Natural Tourism].

⁵²⁴ *Ibid.*

⁵²⁵ *Surat Balai Konservasi Sumber Daya Alam Bali, Direktorat Jenderal Perlindungan Hutan dan Konservasi Alam, Kementerian Kehutanan No. s. 759/IV-K. 17/PPA-4/2011, 7 Juni 2011 tentang Rekomendasi Teknis Ijin Usaha Penyediaan Sarana Wisata Alam pada Taman Hutan Raya Ngurah Rai* [The Letter of The Bali Natural Resources Conservation Center of the Directorate General of Forest Protection and Nature Conservation, the

could be developed in a utilisation block, and according to the site plan, this project was located on a utilisation block, not a protected block.⁵²⁶ Nevertheless, there were conditions imposed by the central government, including the following:⁵²⁷

- a. The project had to maintain the preservation of biological natural resources, and the balance of ecosystems so as to support the improvement of the welfare and the quality of life of the surrounding community.
- b. The construction of infrastructure facilities must not exceed 10 per cent of the area requested and must refer to the traditional architecture of the local area.
- c. The project must not make changes to the landscape and authenticity of the activities of natural tourism exploitation.
- d. The activities developed and their supporting facilities should refer to the principles of ecotourism, that is, the activities of the entrepreneur should actively involve the participation of the community, emphasise support of the surrounding community including regional economic empowerment, and provide conservation education to the visitors.

The recommendations of these three agencies led the Governor of Bali to issue a permit-in-principle for a nature tourism business in Tahura Ngurah Rai Bali in 2011 that was valid for a year.⁵²⁸ This permit imposed requirements that include the following:⁵²⁹

- a. Nature tourism is the only allowable activity in Tahura.
- b. TRB must create a Business Plan Map with a maximum scale of 1:5000 and a minimum scale of 1:25000.
- c. TRB must conduct border marking on the requested area.
- d. TRB must pass the environmental impact assessment.
- e. The project must not harm the environment.

Finally, in 2012, the Governor of Bali granted a permit for the exploitation of nature tourism on the utilisation block of Tahura Ngurah Rai that covered 102 Ha, for 55 years, from 2012 to 2067.⁵³⁰ Anticipating adverse impacts from this project, this permit imposed the following requirements on TRB, including:⁵³¹

Ministry of Forestry. s. 759 / IV-K. 17 / PPA-4/2011, 7 June 2011 on Technical Recommendation of Business Permit for the Development of Natural Tourism Facility at Tahura Ngurah Rai].

⁵²⁶ Ibid.

⁵²⁷ Ibid.

⁵²⁸ *Surat Gubernur Bali No. 523.33/973/Dishut-4, 29 Juli 2011 tentang Pemberian Ijin Prinsip Usaha Penyediaan sarana Wisata Alam di Tahura Ngurah Rai Bali* [The Letter of the Governor of Bali No. 523.33 / 973 / Dishut-4, 29 July 2011 on the Issuance of Permit-in-principle of Natural Tourism Business in Tahura Ngurah Rai].

⁵²⁹ Ibid.

⁵³⁰ *Keputusan Gubernur Bali No.1.051/03-L/HK/2012, 27 Juni 2012 tentang Pemberian Izin Pengusahaan Pariwisata ALam pada blok pemanfaatan kawasan Tahura Ngurah Rai Seluas 102,22 Ha kepada PT. Tirta Rahmat Bahari* [The Decision of Governor of Bali No.151 / 03-L / HK / 2012, 27 June 2012 on the Granting of Tourism Business Permit on the utilization block of Tahura Ngurah Rai for 102.22 Hectares to PT. Tirta Rahmat Bahari].

⁵³¹ Ibid art 3.

- a. prepare and submit a plan for nature tourism exploitation activities approved by the Director General of Forest Protection and Nature Conservation of the Ministry of Forestry;
- b. conduct exploitation activities in the field within 12 months of the issuance of the permit;
- c. develop facilities and infrastructure for nature tourism activities following the site plan;
- d. employ the surrounding local communities and help to improve the living standards of people who live around Tahura Ngurah Rai;
- e. rehabilitate damage caused by business activities; and
- f. prepare and submit periodical reports on business activities to the Director General of Forest Protection and Nature Conservation in the Ministry of Environment and Forestry.

The permit also prohibited the transfer of the business permit to any other party without the written approval of the Governor.⁵³² Equally, nature tourism activities must not contradict the principles of conservation, religious values, national culture, morality and public order.⁵³³ The permit was valid for a period of 55 years and could be extended on the basis of an evaluation conducted by the Bali Provincial government.⁵³⁴ In addition, activities of nature tourism exploitation were to be evaluated every five years, and if the result of evaluation did not comply with the technical requirements, the permit would be reviewed.⁵³⁵

⁵³² Ibid art 4.

⁵³³ Ibid.

⁵³⁴ Ibid art 6.

⁵³⁵ Ibid

B *The Construction of the Tahura Project, Spatial Planning Controversies and the Resulting Damage*

The Tahura Project became a source of controversy from the moment the central government opened the opportunity for the provincial government and investors to conduct commercial activities within mangrove forest areas. Central government Law No. 5 of 1990 on the Conservation of Biological Resources and its Ecosystem defines all of Tahura as ‘a natural conservation area for the purpose of collecting natural or artificial plants and/or animals, original and non-native species, used for research, education, cultivation support, culture, tourism and recreation’.⁵³⁶ A ‘natural conservation area’ is defined as ‘a region with certain characteristics, both on land and in water, that function to protect the life buffer system; preserve the diversity of plant and animal species; and maintain sustainable utilisation of biological natural resources and its ecosystem’.⁵³⁷ Generally speaking, this law prohibits commercial activity within mangrove forests or Tahura as they are classified as a ‘natural conservation area’.

Interestingly, the central government through the Minister of Forestry Decree No. 544 / Kpts-II / 1993 of 25 September 1993 divided Tahura Ngurah Rai area into three main activity blocks: protection, utilisation and other (religious, cultural, and historical, rehabilitation and traditional) blocks. Therefore, opportunity was created to conduct commercial activities in utilisation blocks in Tahura Ngurah Rai. The 1993 law contradicts central government Law No. 5 of 1990, which only allows activities in relation to environmental protection. As mentioned in Chapter Two, lower regulations should be based on, and not contrary to, higher regulations. However, the 1993 law conflicted with a higher regulation, that is, a statute (central government Law No. 5 of 1990). If the Supreme Court had reviewed this decree, the Supreme Court would therefore have likely declared it as invalid.

There were other controversies over the issuance of the exploitation permit. This process seemed rushed because application to approval took only a year. TRB, which was established in 2009, had no track record of managing nature tourism. Indeed, it was only registered as a limited liability company in August 2011, meaning that it was just a year old when it won the permit to exploit Tahura Ngurah Rai, Bali.⁵³⁸ Unfortunately, no regulation requires a permit holder to have sufficient experience of managing nature tourism, so there was no legal obstacle to TRB being given the permit, although there seemed obvious commonsense reasons not to do so.

The content of this permit also seemed to contradict central government Regulation No. 36 of 2010, which states that a permit for nature tourism business:⁵³⁹

- a. is not a title of ownership or control over national park areas and great forest parks;
- b. cannot be used as collateral;
- c. is only transferable upon receipt of written consent of the Minister, Governor, or Regents/Mayors;

⁵³⁶ *Undang-Undang Republik Indonesia No. 5 Tahun 1990 Tentang Konservasi Sumber Daya Alam Hayati dan Ekosistemnya* [Law No. 5 of 1990 on the Conservation of Biological Resources and its Ecosystem] (Indonesia) art 1(15).

⁵³⁷ *Ibid* art 1(13).

⁵³⁸ Suardana (n 443).

⁵³⁹ Government Regulation on the Cultivation of Nature Tourism (n 290) art 18.

- d. must provide that the area that is allowed to be built for nature tourism facilities is, at most, 10 per cent of the area specified in the permit; and
- e. must require the project to adapt to natural conditions without changing the landscape.

The approval issued by the Governor did not, however, meet these requirements. This permit did not include a provision that the permit was not a title of ownership or control over a forest park, and that it could not be used as collateral. The permit also neglected Presidential Instruction No. 10 of 2011, discussed in Chapter 2, which instructed Ministers, Governors and Mayors to delay the granting of new permits for primary natural forest and peatland in the indicative map area for two years.⁵⁴⁰ The map was issued by the Ministry of Forestry in 2011. From 2011 to 2012, it was revised three times but Tahura Ngurah Rai was always included as a forest area in respect of which any new permit must be postponed.⁵⁴¹

The exploitation permit for Tahura also violated central government Law No. 41 of 1999 on Forestry. According to Article 18, the central, provincial and district governments must have forest areas of at least 30 per cent within their territories.⁵⁴² Bali, however, only had 22 per cent of forest area within its territory, far from the minimum. If the project proceeded as agreed, then the percentage of forestry area would be significantly further decreased.

The Governor of Bali also ignored his own previous decree in relation to a moratorium policy. Specifically, on 27 December 2010, he issued a moratorium on the development of tourism accommodation services in the South Bali area, namely Denpasar, Badung, and Gianyar.⁵⁴³ This policy came into effect on 5 January 2011, and was valid until a detailed study on the feasibility of the needs of accommodation services in Bali was provided.⁵⁴⁴ The main impetus of this policy was to address an oversupply of hotel rooms in the southern part of Bali, which had 9800 rooms, according to a study by the Ministry of Tourism and the University of Udayana in 2010.⁵⁴⁵

The most flagrant violation related to this project was that the site plan included a protection block in Tahura Ngurah Rai. After checking and comparing the site plan of this project with the 2007 Tahura Zoning Map, it became clear that the project, particularly 75 guest houses, would be located not only in the utilisation block but in the protection block, where commercial projects were

⁵⁴⁰ *Instruksi Presiden No. 10 tahun 2011 tentang Penundaan Pemberian Izin Baru dan Penyempurnaan Tata Kelola Hutan Alam Primer dan Lahan Gambut* [Presidential Instruction No. 10 of 2011 on the Delay of Granting a New Permit for Primary Natural Forest and Peatland] (Indonesia) Instruction No 3 (*'the Delay of Granting a New Permit'*).

⁵⁴¹ *Surat Keputusan Menteri Kehutanan RI No. SK 323/Menhut-II/2011 tentang Penetapan Peta Indikatif Penundaan Pemberian Izin baru Pemanfaatan Hutan, Penggunaan Kawasan Hutan dan Perubahan Peruntukan Kawasan Hutan dan Areal Penggunaan Lain dengan skala 1:250.000* [The Decision of the Ministry of Forestry No. SK 323/Menhut-II/2011 on the Delays of Indicative Map Assignment on Permitting New Utilisation of Forests, Use of Forest Areas and Changes of Allocation of Forest Areas and Other Areas of Use on a scale of 1: 250,000] (Indonesia) (*'the Delays of Indicative Map Assignment'*).

⁵⁴² Forestry Law (n 287) art 18.

⁵⁴³ *Surat Gubernur Bali No. 570/1665/BPM tentang Penghentian Sementara Pendaftaran Penanaman Modal untuk Bidang Usaha Jasa Akomodasi Pariwisata* [The Letter of Governor Bali on the Moratorium of the Registration of Investment in Tourism Accommodation Services] (Indonesia) (*'Moratorium Letter'*).

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

prohibited.⁵⁴⁶ Equally, there would be huge scale mangrove logging because the plan of this project was mostly located in dense vegetation area, not in empty land or non-mangrove land.⁵⁴⁷

The project is particularly controversial because the Bali Provincial government, particularly the Forestry Agency, modified the existing zoning map by issuing a new map in 2012, that is, after the permit was granted to TRB. In the 2012 map, the location of 75 guesthouses was on the utilisation block, while the 2007 map showed that the guesthouses were on the protection block.⁵⁴⁸ There was no explanation from the Bali Provincial government as to why and how this process was undertaken. The only hint was a letter from the Regent of Badung, asking for a change to the status of Pudut Island (part of Tahura Ngurah Rai) from conservation to utilisation, as the Badung District government intended to develop Pudut Island into a major tourism attraction.⁵⁴⁹

Central government Regulation No. 10 of 2010 states that changes in the allocation and function of forest areas are carried out to fulfil the demands of the dynamics of national development and the aspirations of society, taking into account the optimisation of the distribution of functions; sustainable benefits of the forest; and the existence of forest with a sufficient area and a proportional distribution.⁵⁵⁰ To obtain approval for such a process, the Governor has to have technical consultations with the Minister.⁵⁵¹ The Minister then must conduct a technical review⁵⁵² in the form of integrated research with relevant government agencies.⁵⁵³ When the approval is granted, the Governor must integrate the change of allocation and function of forest area by revision of the provincial spatial plan.⁵⁵⁴ In the Tahura case, there was no information publicly available to assess whether the Bali Provincial government had properly conducted this procedure. Moreover, when the Tahura Zoning Map was modified, the Bali Provincial SPL should also have been revised to integrate this change. However, the Bali Provincial government did not conduct any such revision, nor was it requested to do so.

⁵⁴⁶ Interview with Suriadi Darmoko, Executive Director of the Indonesian Forum for Environment/Wahana Lingkungan Hidup Indonesia (WALHI) Chapter Bali (I Gusti Ngurah Parikesit Widiatedja, WALHI, 10 November 2017).

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid.

⁵⁴⁹ *Surat Bupati Badung No.556/556B/Disparda, 27 Desember 2011 tentang Usulan Perubahan Zonasi Tahura Ngurah Rai* [A Letter of the Regent of Badung No.556/556B/Disparda, Dated 27 December 2011 on the Request of the Change of Zoning System in Tahura Ngurah Rai] ('*Regent of Badung's Request*').

⁵⁵⁰ *Peraturan Pemerintah No. 10 Tahun 2010 tentang Tata Cara Perubahan Peruntukan dan Fungsi Kawasan Hutan* [Government Regulation No. 10 of 2010 on Changes of Allocation and Function of Forest Zones] (Indonesia) art 2.

⁵⁵¹ Ibid art 30(3).

⁵⁵² Ibid art 31.

⁵⁵³ Ibid.

⁵⁵⁴ Ibid art 32.

Tahura: before and after

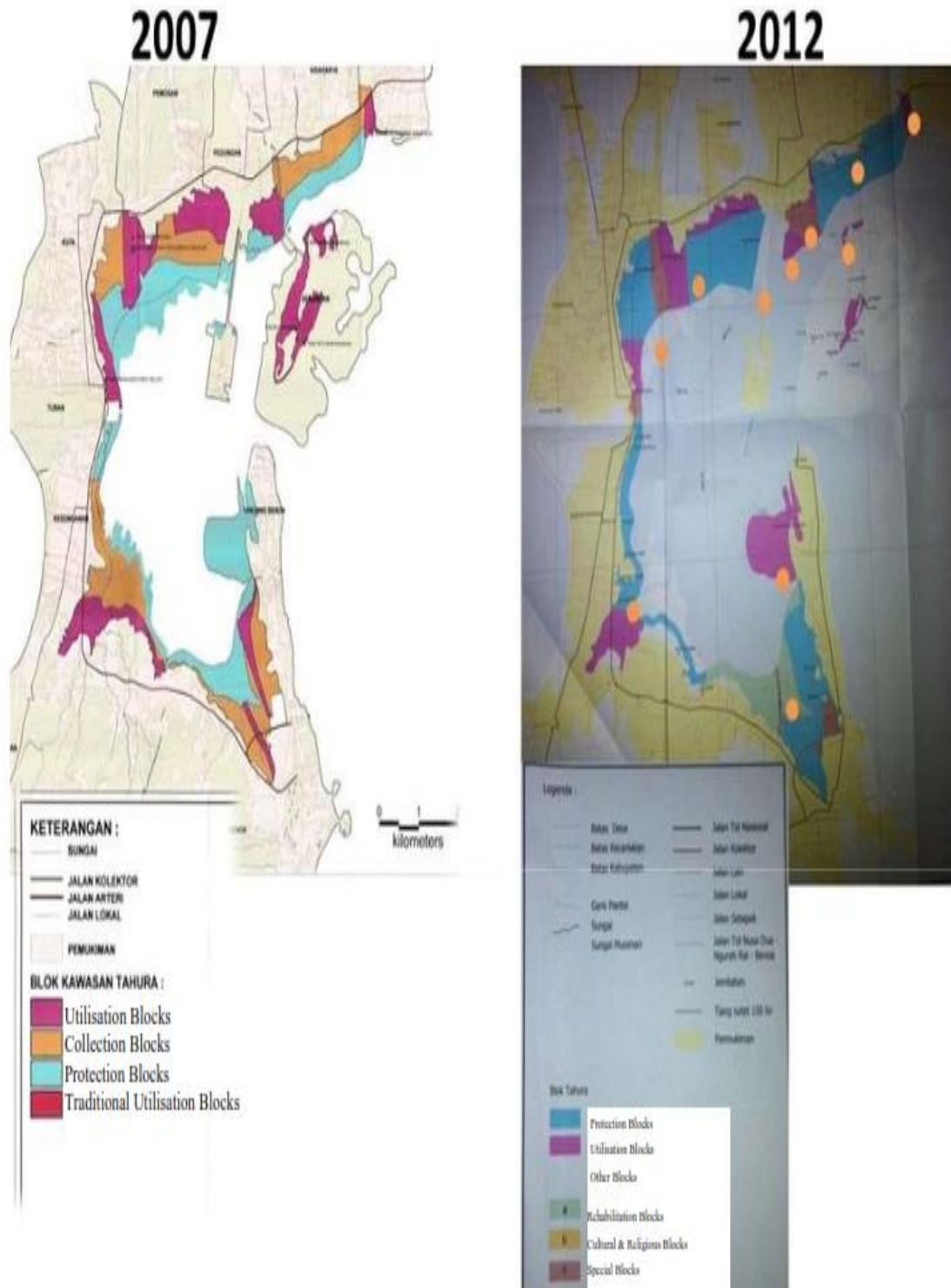


Figure 4.3 Comparison of the 2007 and the 2012 Tahura Zoning Map. Source: WALHI Bali.

The 2012 Tahura Zoning Map shows the reduction in the size of the protection blocks (marked with blue) compared to the 2007 Tahura Zoning Map. The yellow spot on the 2012 Tahura Zoning Map denotes the decreased area of protection in the Tahura Mangrove Forest.

Responding to the controversies above, the Governor of Bali said that issuing the permit to TRB was a long and complex process, involving many ministries in Jakarta and governmental agencies in Bali.⁵⁵⁵ He said that he had agreed to grant the permit only after a meticulous assessment. Hence, it was not as simple as the public may have imagined.⁵⁵⁶ The Governor of Bali had refused two other permits in relation to nature tourism businesses in Dasong Forest and Buyan Lake as they violated the ‘radius of purity’ of sacred sites, even though the Ministry of Forestry had given approvals.⁵⁵⁷

The Governor of Bali, along with other provincial agencies, also claimed that the goal of the exploitation permit was to ‘save the environment’ in Tahura. The problem of plastic waste required a prompt solution involving cooperation with a third party as the Bali Provincial government was unable to handle the accumulation of plastic waste in Tahura due to limited personnel and budget.⁵⁵⁸ The Bali Provincial government had only allocated IDR 400 million a year for forest management in Bali.⁵⁵⁹ It was believed that TRB could help manage these environmental problems.

The Secretary of the Bali Forestry Agency also explained that mangrove forests in Bali were already under considerable pressure due to waste and human pressure.⁵⁶⁰ The most severe pressure was in Tahura Ngurah Rai⁵⁶¹ and would take 25 years to restore mangroves ecologically.⁵⁶² Hence, Tahura should be managed professionally and privately to balance development and conservation in this area.⁵⁶³

The Head of the Technical Implementing Unit of Tahura added that Tahura Ngurah Rai land had been used by unscrupulous persons to dispose of and burn garbage.⁵⁶⁴ Moreover, since 2012, a budget for administering this forest park was no longer allocated, so that it was difficult to repair things once damage occurred.⁵⁶⁵ Similarly, the Mangrove Care Forum, an environmental NGO, stated that the amount of waste in Tahura had reached 300 tonnes, dominated by household and hospital waste.⁵⁶⁶ It was argued by this NGO that the participation of a third party would assist the

⁵⁵⁵ ‘Pro Kontra Pengelolaan Tahura Ngurah Rai’ [Pro and con on the Management of Tahura Ngurah Rai], *Antara* (online, 22 Desember 2012) <<https://bali.antaranews.com/berita/31995/pro-kontra-pengelolaan-tahura-ngurah-rai>>.

⁵⁵⁶ Ibid.

⁵⁵⁷ ‘Tahura Denpasar Tetap Milik Negara’ [Tahura Denpasar is still under the State Ownership], *Baliprov* (online, 11 Oktober 2012) <<http://www.baliprov.go.id/Tahura-Denpasar-Tetap-Milik-Negara->>.

⁵⁵⁸ Manik Priyo Prabowo, ‘Pantauan Menteri Susi dari Udara, 70 Persen Mangrove Bali Rusak’ [Observations of Minister Susi from Air: 70 Percent Bali Mangrove Damaged], *Bali Tribun* (online, 5 August 2015) <<http://bali.tribunnews.com/2015/08/05/pantauan-menteri-susi-dari-udara-70-persen-mangrove-bali-rusak>>.

⁵⁵⁹ Ni Komang Erviani, ‘Mangrove Tahura Ngurah Rai Bali, Nasibmu Kini’ [Tahura Ngurah Rai Mangrove, Your fate Today], *Mongabay* (online, 4 December 2012) <<http://www.mongabay.co.id/2012/12/04/mangrove-tahura-ngurah-rai-bali-nasibmu-kini/>>.

⁵⁶⁰ Interview with Putu Susantini, The Secretary of Forestry Agency of Bali (I Gusti Ngurah Parikesit Widiatedja, Forestry Agency of Bali, 5 December 2017).

⁵⁶¹ Ibid.

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ Interview with Nyoman Serakat, the Head of Technical Implementation Unit of Tahura Bali (I Gusti Ngurah Parikesit Widiatedja, Technical Implementation Unit of Tahura Bali, 5 December 2017).

⁵⁶⁵ Ibid.

⁵⁶⁶ Pariwisata Bali Terancam Tumpukan Sampah di Hutan Mangrove, [Bali Tourism Threatened with Waste Piles in Mangrove Forest], *Merdeka* (online, 15 Maret 2016) <<https://www.merdeka.com/uang/pariwisata-bali-terancam-tumpukan-sampah-di-hutan-mangrove.html>>.

Bali Provincial government to manage and supervise Tahura with the ultimate goal of rectification of the existing environmental problems.⁵⁶⁷

The Director of TRB also stated that the first step after the project formally started was to clean up plastic waste and begin replanting, assisting the Bali Provincial government, which annually spent only IDR 400 million on mangrove maintenance in that area.⁵⁶⁸ He admitted TRB had built 12 gazebos (2 x 2 meters) as visitors' resting places and eight restaurants, but they were all semi-permanent buildings made from wood.⁵⁶⁹ There was no clarification as to whether the location of gazebos was in the protection block, which would contradict the existing spatial plan. The Director also said there would be sophisticated technology to process wastewater into clean water.⁵⁷⁰ The areas without mangroves would be used for fishing activities and water vehicle attractions.⁵⁷¹ Finally, he denied that this project would establish guest houses, stating that it would be impossible for tourists to stay in a guest house located adjacent to Ngurah Rai Airport, as the sound of aeroplanes would disrupt tourists' rest.⁵⁷²

All these claims by governmental officials and the investor have been contested, leading to massive public protests, especially from environmental NGOs across Bali in 2012.⁵⁷³ WALHI Bali, a leading environmental NGO in Bali, argued that the exploitation permit was merely business-oriented and sacrificed the environment.⁵⁷⁴ If the Bali Provincial government stated that the reason behind the issuance of the permit was to resolve the accumulation of plastic trash in Tahura, why then was the investor only responsible for conducting mangrove conservation in 102.22 out of 1373.5 hectares? Who should be responsible for the rest?⁵⁷⁵ Equally, the Governor seemed to be inconsistent in promoting the 'Bali Clean and Green' program, given the mangrove forest was contracted to an investor to build tourism facilities, and the location of these facilities violated existing spatial planning for forestry management.⁵⁷⁶

If TRB was worried about the condition of the mangrove forest and intended to maintain its sustainability, why were there no Corporate Social Responsibility ('CSR') programs in place?⁵⁷⁷ Historically, CSR programs in Bali have had some success in the environmental context. In the 1980s, for example, the Japan International Cooperation Agency ('JICA') conducted elective environmental restoration in Tahura Mangrove Forest.⁵⁷⁸ Hence, it did not make sense for TRB to address the sustainability of the Tahura Mangrove Forest by building 75 guest houses in the protected block. Moreover, the claim that this project would not result in the cutting of existing

⁵⁶⁷ Ibid.

⁵⁶⁸ Investor Tahura Janji Jaga Hutan Bakau [Tahura's Investor Promised to Maintain Mangrove Forest], *Antara* (online, 22 October 2012) <<https://bali.antaraneews.com/berita/29280/investor-tahura-janji-jaga-hutan-bakau>>.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ 'Aktivis Lingkungan Tantang Gubernur Bali' [Environmental Activists Challenged the Governor of Bali], *Suara Pembaharuan* (online, 25 October 2012) <<http://sp.beritasatu.com/home/aktivis-lingkungan-tantang-gubernur-bali/26177>>.

⁵⁷⁴ Suardana (n 443).

⁵⁷⁵ Ibid.

⁵⁷⁶ Ibid.

⁵⁷⁷ Kekal Statement (n 520).

⁵⁷⁸ Ibid.

mangroves was extremely unlikely, because the Governor's permit clearly allowed TRB to cut mangroves as long as it had permission from the Bali Provincial Forestry Agency.⁵⁷⁹

The Director of TRB always stated that the Tahura Project would only build 12 semi-permanent gazebos for tourists to rest in, and refused to admit to the development of 75 guest houses. However, from its development plan and the court proceedings (discussed in the next section), the development of 75 guest houses was definitely a part of the Tahura Project. It seems clear that TRB tried to cover up the development of the guest houses, to keep them from public scrutiny.

In response, the House of Representatives of Bali in Recommendation Letter No. 593/3630 /DPRD, requested the Governor of Bali to cease cooperation between the Bali Provincial government and TRB.⁵⁸⁰ The Vice Governor of Bali supported this recommendation, asking the Governor of Bali to revoke TRB's permit.⁵⁸¹ However, reflecting the problems in the administration and decision-making processes with respect to spatial planning laws, more generally, the Governor did not comply, and simply allowed TRB to continue its project in Tahura.



Figure 4.4 Public Protest over the Tahura Project. Source: WALHI Bali

As regards potential environmental damage, the Forest Area Conservation Centre under the Ministry of Forestry warned that commercial activities in the Tahura Ngurah Rai could lead to changed habitat conditions in a mangrove forest, including coastal reclamation, sedimentation, pollution-generating activities, tourist activity adjacent to the area, deforestation, and material acquisition.⁵⁸² For instance, the reclamation of Serangan Island caused a change in the patterns of seawater flow into the bay area of Benoa so that the erosion, abrasion and precipitation at some points resulted in the loss of forest vegetation.⁵⁸³

⁵⁷⁹ Suardana (n 443).

⁵⁸⁰ *Surat rekomendasi DPRD Bali no. 593/3630 / DPRD, 7 November 2012 tentang Pembatalan Kerjasama Antara Pemerintah Daerah Bali dengan PT. Tirta Rahmat Bahari* [A Recommendation Letter of the Bali Legislative Council no. 593/3630/DPRD, 7 November 2012 on the Cancellation of Cooperation Between the Bali Provincial Government and PT. Tirta Rahmat Bahari].

⁵⁸¹ 'Wagub Puspayoga Tolak Tahura dikelola Investor' [Vice Governor Puspayoga Refused Tahura to be Managed by Investor], *wn* (online, 18 October 2012) <https://wn.com/wagub_puspayoga_tolak_tahura_dikelola_investor>.

⁵⁸² Information of Tahura Ngurah Rai (n 510).

⁵⁸³ *Ibid.*

Scholars also pointed out that Tahura Ngurah Rai was the last bastion for coastal areas against coastal abrasion, tsunami disaster and seawater intrusion.⁵⁸⁴ In addition, mangrove forests also become a place of life for a number of animals and marine biota, and can absorb five times more carbon dioxide than other forest types.⁵⁸⁵ The exploitation of Tahura Ngurah Rai would therefore likely endanger its basic environmental role and function.

The Minister of Marine and Fisheries has emphasised the importance of mangrove forests in Bali. This forest has been the backbone of the Balinese ecosystem, and if the mangrove forest was damaged, Bali would be threatened by floods, like Jakarta.⁵⁸⁶ In fact, mangrove forests protect the forefront of coastline and shield it from erosion or abrasion caused by waves or wind.⁵⁸⁷ Equally, mangrove forests serve as a provider of organic materials that maintain the stability of fish production, shrimp, crabs, and others.⁵⁸⁸

Concerning social damage, there are, as mentioned, at least three huge fisher communities who rely on the Tahura Mangrove Forest for their livelihood. Damage to this forest will adversely affect their existence as traditional fishers. Moreover, they have not been involved in any decision-making process since the Tahura Project began planning. This issue will be further discussed in Chapter 6, where I argue that a lack of public participation has been a factor behind the regulatory failures of spatial planning in Bali.

C *Administrative Court Decisions*

The Tahura Project became the first environmental lawsuit in Bali. Prior to suing the Governor, an environmental NGO, WALHI, submitted two letters of summons or *somasi*.⁵⁸⁹ The summons insisted the Governor revoke the licence issued to TRB.⁵⁹⁰ The Governor made no official response.

WALHI then filed a lawsuit at the Denpasar District Administrative Court against the Governor of Bali (No.01/G/2013/PTUN.Dps), accusing him of illegally issuing a licence to exploit 102.2 hectares of Tahura mangrove forest to a private company for 55 years. The aim here was to force the Governor to revoke the licence issued to TRB.

In 2013, the Denpasar District Administrative Court (Decision No. 01/G/2013/PTUN.Dps.) decided:

To grant the Plaintiff's claim and declare void the Governor of Bali decree No. 1051 / 03-L / HK / 2012 on the granting of nature tourism exploitation permit on the utilisation block of Tahura Ngurah Rai area of 102.22 hectares to PT Tirta Rahmat Bahari, and order the Defendant to immediately revoke the decree.⁵⁹¹

⁵⁸⁴ Interview with Cokorda Dalem Dahana, Environmental Law Expert from Faculty of Law Udayana University (I Gusti Ngurah Parikesit Widiatedja, Udayana University, 8 November 2017).

⁵⁸⁵ Daniel C Donato et al., 'Mangroves among the Most Carbon-rich Forests in the Tropics' (2011) 4 *Nature Geoscience* 293.

⁵⁸⁶ Prabowo (n 558).

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid.

⁵⁸⁹ 'Walhi Sues Bali Governor Issuing Mangrove Permit', *The Jakarta Post* (online, 24 December 2012) <<http://www.thejakartapost.com/news/2012/12/24/walhi-sue-bali-governor-issuing-mangrove-permit.html>>.

⁵⁹⁰ Ibid.

⁵⁹¹ Denpasar Administrative Court Decision (n 519) 21.

In its judgment, the panel of judges explained that the decree issued by the Governor of Bali was contrary to the Governor's own policy, which imposed a moratorium on tourism accommodation permits in Southern Bali. This TRB Project established 75 guest houses and eight restaurants.⁵⁹² Further, the Governor, in issuing the decree, did not comply with Law No. 14 of 2008 on Disclosure of Public Information as he had not acted transparently while issuing this decree.⁵⁹³

As regards the site plan of guest houses alleged to be on the protection block, the judges conducted a site inspection and invited expert witnesses. From inspection, the judges stated that when they stood in the southernmost tip of a gazebo, they saw the sea and the toll road on the southern side.⁵⁹⁴ When the judges asked the defendant where guest houses would be built, the defendant pointed in the direction of the sea.⁵⁹⁵ The judges then matched the 2007 Tahura Zoning Map with the site plan.⁵⁹⁶ The judges found that the development plan of the tourism facilities, especially the construction of 75 guest houses, assuming any such construction was lawful, was clearly in the protection block, not the utilisation block, so it violated the spatial plan for Tahura.⁵⁹⁷

The judges also questioned the explanations of an expert witness who argued that the guest houses were still in the utilisation block. The witness pointed to a protection block marked in blue in the 2007 Tahura Zoning Map,⁵⁹⁸ The witness insisted that the map had been wrongly coloured, stating that the 2012 Tahura Zoning Map was the right one.⁵⁹⁹ The judges then found that the 2012 Tahura Zoning Map was published after the Governor issued the exploitation permit to TRB.⁶⁰⁰

In the High Administrative Court, the situation changed drastically, as this Court did not consider the clear violations of spatial planning identified by the district court to be the main issue. In fact, the High Administrative Court annulled the decision of the Denpasar State Administrative Court in decision No. 183/B/2013/PT.TUN.SBY, stating that the exploitation permit was no longer invalid.⁶⁰¹ The main reason they gave was that WALHI had no legal standing, as no environmental damage had yet occurred. This meant that the High Administrative Court was treating the matter as if it were an environmental law case, not a matter concerned with spatial planning more generally. Its arguments could, therefore, be set aside. The panel of judges reasoned that:

Considering that the object of the dispute is the term 'potential' environmental damages, the Court takes the view that, 'potential' means 'later', while [the project] is now still only at the 'plan' stage. When does 'potential' become 'real'? The answer is when the infrastructure development is completed and the projects are running.⁶⁰²

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Ibid 418.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid.

⁶⁰¹ *Keputusan Pengadilan Tinggi Tata Usaha Negara No: 183/B/2013/PT.TUN.SBY* [The Decision of the High Administrative Court No: 183/B/2013/PT.TUN.SBY] 146 ('*High Administrative Court Decision*').

⁶⁰² Ibid 159.

Examining the meaning of ‘potential’ in ‘potential environmental damage’, the panel stated that ‘potential’ means ‘something that is still hidden, unreal and speculative’.⁶⁰³ Equally, ‘as long as the management of Environmental Impact Assessment (‘EIA’) is implemented properly, environmental damage could be prevented’.⁶⁰⁴ However, the object of the summons had not been environmental damage, although this may have been the outcome WALHI was trying to prevent. The object of the summons concerned the unlawful issue of a licence.

The Supreme Court of Indonesia in Decision No.151 K/TUN/2014, upheld the decision of the High Administrative Court, saying that:

The Court of Appeal's decision as *Judex Facti* is right and correct. It is because the object of the dispute, that is “potential’ environmental damage, is still at the planning stage, when the level of damages has not been accurately measured yet.⁶⁰⁵

The fact that both the High Administrative Court and the Supreme Court hold that the plaintiff has no existing interest in the matter is why community groups with an interest in the maintenance of spatial planning laws are unable to litigate to prevent violations of spatial planning laws that are yet to cause damage. This in turn indicates the difficulties involved in enforcing spatial planning laws and holding the administrators of these laws to account.

IV CONCLUSION

In summary, the Tahura Project demonstrates how tourism projects may damage forest areas and local communities because of the regulatory failures of spatial planning in Bali. In this case, the Bali Provincial government ignored existing regulations, both at central and provincial levels, when it granted a nature tourism exploitation permit for this project. The most obvious violation of this project was the plan for 75 guest houses on a protected block in Tahura Ngurah Rai, where commercial projects were prohibited. In response, the Bali Forestry Agency modified the Tahura map, issuing a new one in 2012, after the permit was granted to the investor. In the 2012 map, the location of 75 guest houses now appeared on a utilisation block rather than a protected block.

This case also demonstrates the failure of the judiciary to apply spatial planning laws by perceiving these laws only in term of environmental protection. The decisions of the High Administrative Court and the Supreme Court are highly controversial, because they find that community or public interest groups do not have standing to challenge a violation of spatial planning law that has the potential to cause environment or social damage. The courts have avoided the central legal issue, namely the public interest in ensuring that government decisions are lawful. In other words, they are unable to take legal action to prevent damage. They can only apply for judicial review after the damage is done, when it is too late.

The next chapter will discuss the Reclamation Project, to show how failures of spatial planning regulations have occurred at the level of formation of laws.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ *Keputusan Mahkamah Agung No.151 K/TUN/2014* [The Supreme Court Decision No. 151 K/TUN/2014] 94 (‘*Supreme Court Decision*’).

Chapter 5

The Regulatory Failures of Spatial Planning: A Case Study of the Benoa Bay Reclamation Project

I INTRODUCTION

This chapter demonstrates how tourism projects cause damage to coastal areas and local communities because of failures of the spatial planning regulations themselves. It begins in section II with a brief overview of Benoa Bay, covering its strategic position amid three popular tourism areas in Bali, and its ecological functions. Section III examines spatial planning laws and the Reclamation Project. In this section, I discuss the issuance of the controversial reclamation permit. Failures in the development of the Reclamation Project are the next focus, and I explain violations of spatial planning that took place in the issuance of the reclamation permit, and how the central government responded to them. Finally, environmental and social damage caused by the Reclamation Project are investigated by reference to studies that have analysed the adverse impact of reclamation in Benoa Bay on the environment and local communities, as well as Benoa Bay's past experiences of failed reclamation projects.

II A BRIEF OVERVIEW OF BENOA BAY

Benoa Bay is located in the middle of Bali's southern area amid its three most popular tourist areas: Sanur, Kuta and Nusa Dua. It is also located next to the Ngurah Rai International Airport, which is the only airport in Bali, and the second largest in Indonesia. Benoa Bay is a semi-enclosed estuary for several big rivers in Bali,⁶⁰⁶ including the Tukad Badung, the Tukad Balian, and the Tukad Mati.⁶⁰⁷ It is a shallow coastal ecosystem, creating different habitat typologies with other shallow coastal waters and habitats for strategic eco-communities, particularly mangrove, seagrass beds, and *macrozoobenthos*.⁶⁰⁸

The ecosystem of Benoa Bay is strategic as a feeding ground and nursery ground for important fishery commodities, such as shrimp, crab and snapper.⁶⁰⁹ In addition, it functions as a controller and catcher of sediment and waste, which is channelled through surface runoff and river flow, to mitigate the dangers of degradation, pollution, and destruction of coastal areas in Tanjung Benoa, Nusa Dua, Serangan and Sanur Beach.⁶¹⁰ Furthermore, Benoa Bay plays a crucial role in maintaining the stability of various ecosystems and hydrology. It is important from the socio-cultural perspective of local communities who live around it.⁶¹¹

⁶⁰⁶ Herlambang Aulia Rachman, I Gede Hendrawan, and I Dewa Nyoman Nurweda Putra, 'Studi Transpor Sedimen di Teluk Benoa Menggunakan Pemodelan Numerik [Study of Sediment Transport at Benoa Bay Using Numerical Modelling] (2016) 9(2) *Jurnal Kelautan* 144.

⁶⁰⁷ Lembaga Penelitian dan Pengabdian Kepada Masyarakat Universitas Udayana, *Studi Kelayakan Revitalisasi Teluk Benoa* [The Feasibility Study of the Revitalisation of the Benoa Bay] (Universitas Udayana, 2013) II-4 ('*The Feasibility Study of Benoa Bay*').

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid II-5.

⁶¹⁰ Ibid.

⁶¹¹ Ketut Sudiarta et al, *Kajian Modeling Dampak Perubahan Fungsi Teluk Benoa Untuk Sistem Pendukung Keputusan dalam Jejaring KKP Bali* [Study on Modeling of Function Change Impacts in Benoa Bay for Bali KKP Network's Decision Support System] (Conservation International Indonesia, 2013) 2.

In 2012, the International Union for Conservation of Nature (‘IUCN’) listed Benoa Bay as an important site or important bird area because it is a crucial site for feeding and resting migratory bird species along the East Asian-Australasian Flyway (‘EAAF’) between Australia and Siberia.⁶¹² The birds and habitats of the EAAF are seen by IUCN as the shared natural heritage of 22 countries.⁶¹³ IUCN also listed some globally threatened and near-threatened migratory birds species that rely on Benoa Bay, such as the Curlew Sandpiper.⁶¹⁴



Figure 5.1 Map of Bali and the Location of Benoa Bay. Source: The *Quora* Website.⁶¹⁵

⁶¹² John MacKinnon, Yvonne I Verkuil and Nicholas Murray, ‘IUCN Situation Analysis on East and Southeast Asian Intertidal Habitats, with Particular Reference to the Yellow Sea (including the Bohai Sea)’ (Occasional Paper of the IUCN Species Survival Commission No. 47, 2012) 38.

⁶¹³ IDEP Foundation, Save the Most Important Flyway of East Asia-Australasia from Commercial Mega-Project (Letter of Concern presented to East Asian-Australasian Flyway Partnership (EAAFP) Committee, the 8th Meeting of Partners (MOP8), Koshiro, Japan, 16 January 2015).

⁶¹⁴ MacKinnon (n 612) 38.

⁶¹⁵ ‘What are the Pros and Cons of Benoa Bali Reklamasi’, *Quora* (Web Page) <<https://www.quora.com/What-are-the-pros-and-cons-of-benoa-Bali-reklamasi>>.

III SPATIAL PLANNING LAWS AND THE RECLAMATION PROJECT

A *The Issuance of the Reclamation Permit*

A memorandum of understanding (‘MOU’) between the University of Udayana and a development company, Tirta Wahana Bali International (‘TWBI’) on 12 September 2012 triggered the plan for reclamation of Benoa Bay. On 20 September 2012, the Rector of the University of Udayana established an expert team to conduct a feasibility study. On 1 October 2012, the feasibility study formally began, funded by TWBI. Only a month later, the study concluded that reclamation was feasible, and could provide environmental benefits, including the following:⁶¹⁶

- a. it could reduce the impact of a tsunami disaster;
- b. it could repair the ecosystem damage in the mangrove forest, and preserve the existing seagrass beds; and
- c. the construction of tourism facilities could also reduce the physical damage to the beach due to abrasion.

There was no publication or open announcement of the results of the feasibility study. Ibrahim R, an administrative law expert, from Udayana University has criticised this process.⁶¹⁷ The results of the feasibility study, he said, were used as the basis for issuing the reclamation permit, so they should have been made widely available to the public, particularly affected communities.⁶¹⁸ In fact, central government Law No. 14 of 2008 on the Openness of Public Information requires public institutions to provide public information in relation to projects and agreements by public agencies with third parties.⁶¹⁹ Hence, the lack of public information regarding the process and results of the feasibility study could amount to a violation of the law.

On 5 November 2012, TWBI, through letter No.009/TWBI/L/XI/2012, requested an audience with the Governor of Bali, to explain its plan to reclaim Benoa Bay. On 12 November 2012 and 14 December 2012, the expert team involved in the feasibility study presented the results of this study to the Governor, the Bali Provincial Legislature, and other related provincial and district agencies. On 20 December 2012, the Bali Provincial Legislature issued Recommendation Letter No. 660.1/142781/DPRD, asking the Governor of Bali to follow up the result of this feasibility study,⁶²⁰ to support the Governor’s measures to protect Bali from tsunamis.⁶²¹

Six days later on 26 December 2012, the Governor of Bali issued Decree No. 2138/02-C/HK/2012, granting a permit to utilise, develop, and manage the Benoa Bay area (‘the first permit’).⁶²² There

⁶¹⁶ Ringkasan Hasil Penelitian UNUD tentang Teluk Benoa [The Summary of the Result of the Research of Udayana University on Benoa Bay], *Balebengong* (online, 11 July 2013) <<https://balebengong.id/kabar/ringkasan-hasil-penelitian-unud-tentang-teluk-benoa.html?lang=id>>.

⁶¹⁷ Interview with Raden Ibrahim, Administrative Law Expert from Faculty of Law Udayana University (I Gusti Ngurah Parikesit Widiatedja, Udayana University, 8 November 2017).

⁶¹⁸ Ibid.

⁶¹⁹ *Undang-Undang Nomor 14 Tahun 2008 tentang Keterbukaan Informasi Publik* [Law No.14 of 2008 on the Openness of Public Information] (Indonesia) art 11.

⁶²⁰ *Surat Rekomendasi DPRD Provinsi Bali Nomor 660/14278/DPRD, 20 Desember 2012* [A Recommendation Letter of the Bali Provincial Legislature No 660/14278/DPRD, 20 December 2012].

⁶²¹ Ibid.

⁶²² *Keputusan Gubernur Bali Nomor 2138/02-C/HK/2012, 26 Desember 2012 Tentang Pemberian Izin dan Hak Pemanfaatan, Pengembangan dan Pengelolaan Wilayah Perairan Teluk Benoa Provinsi Bali* [The Decree of the

was no publication or announcement of this permit. Some of the considerations mentioned in this decree, which the governor took into account when making his decision, include:⁶²³

- a. Bali is a world tourist destination that has limited natural carrying capacity and is a disaster-prone area, especially as regards tsunami disasters;
- b. Bali needed a breakthrough in utilising nature to support tourism in Bali without destroying nature itself; and
- c. the results of a feasibility study that supports the development of Benoa Bay.

This first permit allowed TWBI as a permit holder to utilise, develop, and manage 838 hectares of Benoa Bay for 30 years, extendable for another 20 years.⁶²⁴ TWBI was required to:⁶²⁵

- a. follow and comply with existing permit procedures in applicable laws and regulations;
- b. prepare and submit an activity plan to the Governor;
- d. carry out an environmental impact assessment following applicable environmental laws and regulations;
- e. employ members of the local community around Benoa Bay, and help improve the living standards of surrounding communities;
- f. rehabilitate damage caused by its business activities; and
- g. report every activity to the Governor every six months.

This first permit prohibited TWBI from transferring the permit and the right to use, develop and manage Benoa Bay to other parties without the written approval of the Governor. In addition, it prohibited TWBI from organising activities contrary to religious values, culture, morals, and public order.⁶²⁶ Interestingly, the development plan clearly indicates that commercial facilities are the dominant aims, not environmental objectives. Specifically, the result of this project would be an integrated tourism development across 12 new islands, including villas and apartments, restaurants, a golf course, a marina, a retail district, and a cultural theme park.⁶²⁷ TWBI promoted Benoa Bay as an entirely new destination that would bring additional jobs, clear and clean waste, cause minimal impact to the environment, and prevent tsunamis.⁶²⁸ The following figure explains the overall development plan.

Governor of Bali No 2138/02-C/HK/2012, 26 December 2012 on the Permit to Utilise, Develop, and Manage Benoa Bay Area].

⁶²³ Ibid.

⁶²⁴ Ibid.

⁶²⁵ Ibid.

⁶²⁶ Ibid.

⁶²⁷ 'Konsep Pengembangan Teluk Benoa' [The Concept of the Revitalisation of Benoa Bay], *Tirta Wahana Bali International* (Web Page) <<http://twbi.co.id/index.php?page=concept>>.

⁶²⁸ Ibid.

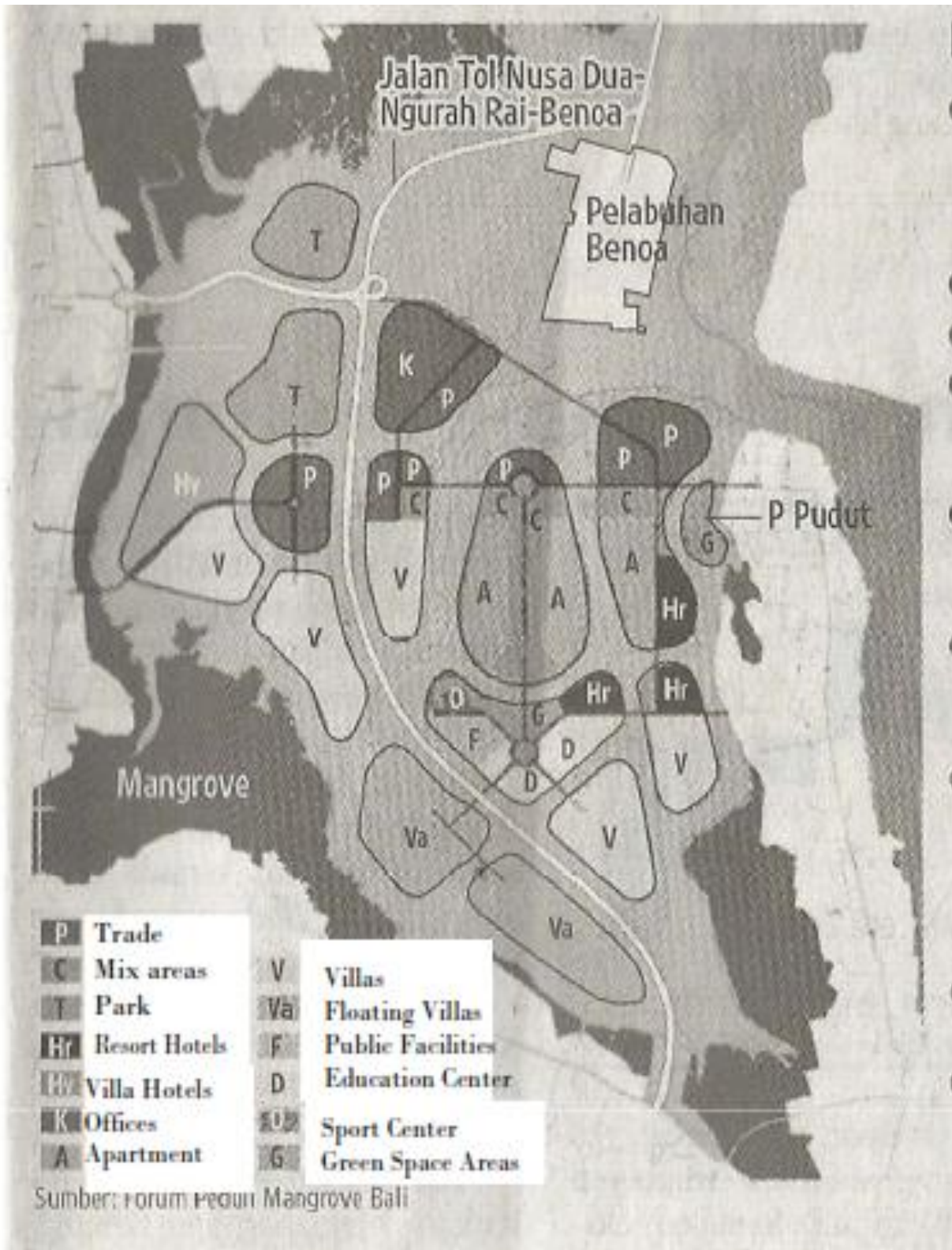


Figure 5.2 Development Plan for the Benoa Bay Reclamation Project. Source: Forum Peduli Mangrove Bali

Because of increasing public protests, the Bali Provincial Legislature issued a Recommendation Letter on 12 August 2013 asking the Governor to revise or withdraw the first permit.⁶²⁹ On 16 August 2013, the Governor of Bali responded by revoking the permit, but then issued another ('the second permit') to allow TWBI to conduct a new feasibility study for the Reclamation Project.⁶³⁰ This he justified by referring to the status of Tanjung Benoa as a local protection area; the status of the Benoa Bay as a conservation area; and citing the Recommendation Letter from the Bali Provincial Legislature.⁶³¹ The second permit required TWBI to, among other things:⁶³²

- a. follow and comply with permit procedures in applicable laws and regulations;
- b. conduct the feasibility study in cooperation with local universities;
- c. identify and accommodate the aspirations of local communities around Benoa Bay and surrounding areas within the plan for exploiting, developing and managing Benoa Bay;
- d. report activities to the Governor every six months; and
- e. prepare and submit the results of a feasibility study to the Governor.

TWBI was prohibited from transferring the second permit to other parties without the prior written consent of the Governor, and from organising activities that were contrary to religious values, culture, morals and public order.⁶³³

A Director of TWBI, Wisnu Tjandra claims that the Reclamation Project is an eco-friendly project.⁶³⁴ He says this project will not interfere with fishing activities, and 50 per cent of the area will be allocated to the area of trees and waterways.⁶³⁵ The project will carefully calculate the natural sea channels, and maintain a sufficient distance between the island and mangrove plants.⁶³⁶ Furthermore, the distance between islands or mangroves is 75 to 300 meters.⁶³⁷ Equally, the depth of the water will be returned to up to five meters when the sea water recedes.⁶³⁸ Hopefully, he says, the new islands created will therefore become possible for fishing boats and the area can be used as a water sports location.⁶³⁹ Moreover, the project can conserve the mangrove forest in Tahura Ngurah Rai, which is currently threatened by garbage and illegal land tenure, as discussed in the previous

⁶²⁹ *Surat Rekomendasi DPRD Provinsi Bali Nomor 900/2569/DPRD, tertanggal 12 Agustus 2013 tentang Peninjauan Ulang dan/atau Pencabutan SK Gubernur Bali nomor: 2138/02- C/HK/2012* [A Recommendation Letter of the Bali Provincial Legislature No 900/2569/DPRD, dated 12 August 2013 on the Review and/or Revocation of the Decree of the Governor of Bali No 2138/02- C/HK/2012].

⁶³⁰ *Keputusan Gubernur Bali Nomor 1727/01-B/HK/2013, tertanggal 16 Agustus 2013 tentang Izin Studi Kelayakan Rencana Pemanfaatan, Pengembangan dan Pengelolaan Wilayah Perairan Teluk Benoa* [The Decree of the Governor of Bali No 1727/01-B/HK/2013, 16 August 2013, on the Permit of the Feasibility Study of the Plan to Utilise, Develop, and Manage Benoa Bay].

⁶³¹ Ibid.

⁶³² Ibid.

⁶³³ Ibid.

⁶³⁴ 'Pulau-pulau Buatan untuk Tujuan Wisata' [Artificial Islands for Tourism Attractions], *Kompas* (Jakarta), 28 January 2014, 12.

⁶³⁵ Ibid.

⁶³⁶ Ibid.

⁶³⁷ Ibid.

⁶³⁸ Ibid.

⁶³⁹ Ibid.

case study.⁶⁴⁰ The following figure illustrates TWBI's argument that the Reclamation Project is eco-friendly.

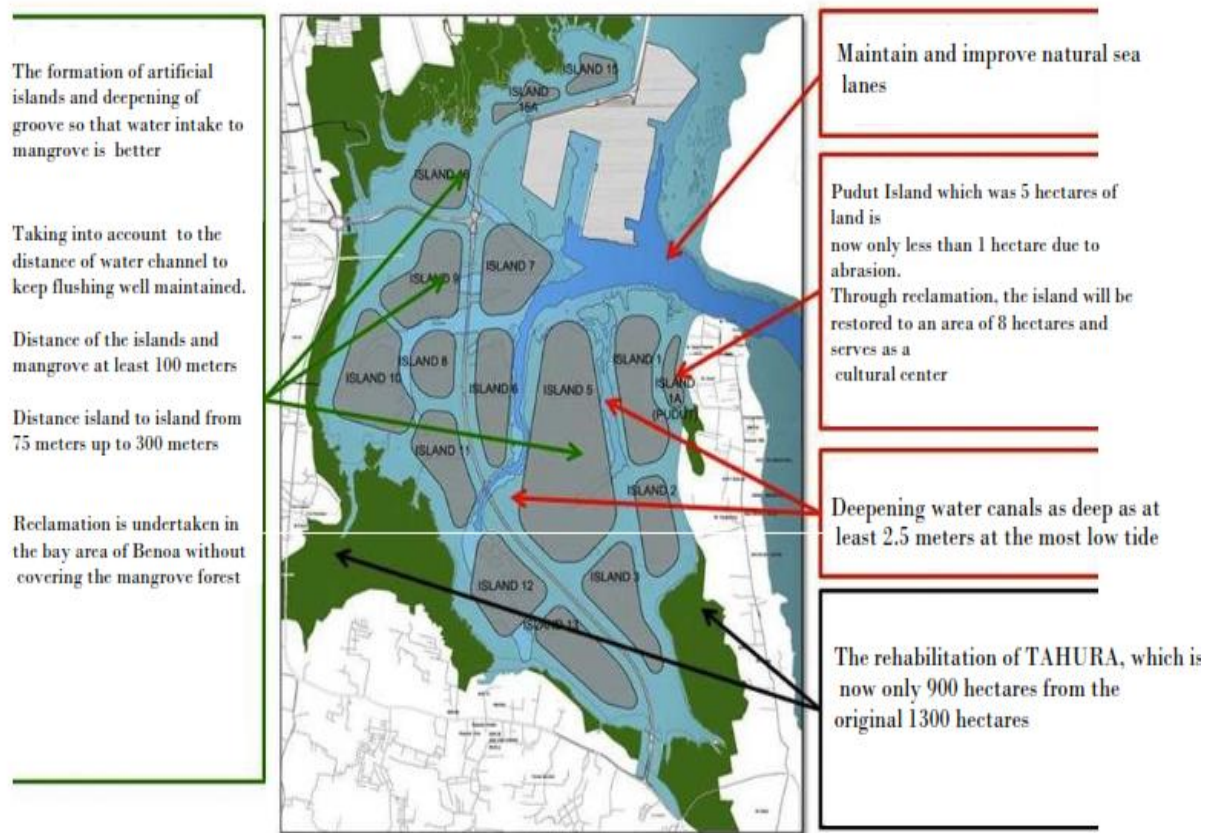


Figure 5.3 TWBI's 'Eco-friendly' Concept for the Bena Bay Reclamation. Source: WALHI Bali

B The Construction of the Reclamation Project, Spatial Planning Controversies and the Resulting Damage

The first and most blatant violation of the law in this project related to spatial planning governance. Presidential Regulation No. 45 of 2011 on the Spatial Plan for Denpasar, Badung, Gianyar and Tabanan ('Sarbagita'), the implementing regulation for central government Law No. 26 of 2007 on the Spatial Plan, explains that conservation areas in coastal areas and small islands in Sarbagita cover the following: Serangan Islands; Pudut Islands; the waters of the Sanur, Kuta, and Nusa Dua areas; and Bena Bay.⁶⁴¹ Classification as conservation and environmental buffer areas means there must be no commercial development in those areas, including Bena Bay. Presidential Regulation No. 122 of 2012 likewise expressly states that reclamation in coastal areas and small islands is

⁶⁴⁰ Ibid.

⁶⁴¹ Peraturan Presiden Nomor 45 Tahun 2011 tentang Rencana Tata Ruang Kawasan Perkotaan Denpasar, Badung, Gianyar, dan Tabanan [Presidential Regulation No 45 of 2011 on the Spatial Plan of City Areas of Denpasar, Badung, Gianyar, and Tabanan] art 55 (5b) ('Sarbagita Spatial Plan').

prohibited in conservation area and sea lanes.⁶⁴² For these reasons, the two permits issued by the Governor of Bali that granted rights to utilise, develop, and manage Benoa Bay clearly violated these two Presidential Regulations.

These two permits may also potentially be in violation of the Constitution because they contain the phrase ‘the right to utilise, develop, and manage Benoa Bay’, which is similar to the ‘right to coastal exploitation areas’ or *hak pengusaha perairan pesisir* (‘HP-3’), a right that had been available under central government Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands.⁶⁴³ HP-3s were declared illegal by the Constitutional Court. It held that if HP-3s over coastal areas and small islands were granted to the private sector, there was a potential the largest part of those areas would be controlled by individuals or private companies. This could cause a loss of access, freedom, and job loss to Indonesian fishers.⁶⁴⁴ Therefore, HP-3s led to privatisation of coastal areas contrary to Indonesia’s Constitution, which, it held, guaranteed such access, freedom and jobs.⁶⁴⁵ The Reclamation Project would potentially enable individuals or private companies to control Benoa Bay, negatively affecting the lives of local fishers.

Still determined to legalise his controversial permits, the Governor of Bali wrote a letter to the Coordinating Minister of the Economy as Chair of the National Spatial Planning Coordination Agency or *Badan Koordinasi Penataan Ruang Nasional* (‘BKPRN’) on 23 December 2013. In his letter, the Governor requested a review of the status of Benoa Bay as a conservation area, proposing a new status, namely as a utilisation area.⁶⁴⁶ On 13 January 2013, BKPRN agreed to this proposal and started processing a revision of Presidential Regulation No. 45 of 2011.⁶⁴⁷ This process is unusual because it began only two weeks after the Governor’s letter. There was also no open and official statement from BKPRN, explaining the reasons behind its consent to the Governor’s proposal. On 17 January 2014, the Director of Coastal and Marine in the Ministry of Marine and Fishery (as authority holder in the coastal area and small islands) explained that his ministry would change the status of Benoa Bay to a utilisation area.⁶⁴⁸ On 28 January 2014, one of the directors of TWBI explained in a leading national newspaper that the project would reclaim an area in Benoa Bay of 700 hectares with 50 per cent green and blue open space, to a value of USD 3 billion.⁶⁴⁹

On 14 April 2014, the Coordinating Ministry of Economic Affairs held public consultations on the amendment of the Presidential Regulation No. 45 of 2011, to follow-up the recommendations of the BKPRN on 13 January 2013. The meeting was held in the Bali Provincial Development Agency,

⁶⁴² *Peraturan Presiden Nomor 122 Tahun 2012 tentang Reklamasi di Wilayah Pesisir dan Pulau-pulau Kecil* [Presidential Regulation No 122 of 2012 on the Reclamation of Coastal Areas and Small Islands] art 2(3) (‘Regulation on the Reclamation of Coastal Areas’).

⁶⁴³ *Keputusan Mahkamah Konstitusi Nomor 3/PUU-VIII/2010* [The Decision of Constitutional Court No.3/PUU-VIII/2010].

⁶⁴⁴ *Ibid* [3.15.8] (i).

⁶⁴⁵ *Ibid*.

⁶⁴⁶ ‘Penjelasan Perpres Nomor 51 Tahun 2014 Yang Merevisi Tata Ruang Badung, Gianyar, dan Tabanan’ [The Explanation of Presidential Regulation No 51 of 2014 that Revises the Spatial Plan of Badung, Gianyar, and Tabanan], *Zona Bumi* (online, 3 Juli 2014) <<http://www.zonabmi.org/kutipan-media-tata-ruang-pesisir-pantai/729-penjelasan-perpres-no-51-2014-yang-merevisi-tata-ruang-badung-gianyar-dan-tabanan.html>>.

⁶⁴⁷ *Ibid*.

⁶⁴⁸ *Ibid*.

⁶⁴⁹ ‘Konsep Revitalisasi Kawasan Teluk Benoa’ [The Concept of the Revitalisation of Benoa Bay], *Kompas* (Jakarta), 28 January 2014, 12.

and representatives from the central government, the Badung District government, NGOs, Academics, and local communities were invited. At this consultation, most stakeholders agreed with BKPRN's plan to amend Presidential Regulation No. 45 of 2011.

On 30 May 2014, President Susilo Bambang Yudhoyono issued Presidential Regulation No. 51 of 2014 on the Amendment of Presidential Regulation No. 45 of 2011 - just three months before he left office. Article 63 of this regulation changed Benoa Bay from being a water conservation area to a potential area for general utilisation, including marine, fishery, transportation, tourism, economic development, settlement, social, cultural, and religious activities.⁶⁵⁰ Article 101 A(6) states that 'activities in the general utilisation area can be carried out through "revitalisation", including reclamation at maximum 700 hectares'.⁶⁵¹ Interestingly, this requirement was similar to the TWBI development plan, which had been published in the national newspaper on 28 January 2014. As a result, the two permits of the Governor of Bali that were previously illegal because they contradicted a higher law, that is, a presidential regulation, became legal the moment a new Presidential Regulation, No. 51 of 2014, came into force.

The preamble to Presidential Regulation No. 51 of 2014 reveals the economic reason behind the issuance of this regulation.⁶⁵² It considers the existence of the national strategic policy and internal dynamics in Denpasar, Badung, Gianyar, and Tabanan, especially relating to spatial utilisation in the Benoa Bay area.⁶⁵³ It then states that it is necessary to create an appropriate regional revitalisation policy for natural resources, tourism, environment, and society in Bali.⁶⁵⁴ It also says Benoa Bay can be developed as an economic area, while taking into account the preservation of the functions of the mangrove forest, and the conservation of surrounding ecosystems.⁶⁵⁵ Interestingly, while the Governor had used the environmental conservation project to justify the issue of a reclamation permit, the presidential regulation expressly cited economic considerations, reflecting the real purpose of the project the Governor had tried to conceal.

Presidential Regulation No. 51 of 2014 was also intended to change the objectives of national economic development, particularly those related to the plan to accelerate development in Bali.⁶⁵⁶ It is part of the Masterplan for Acceleration and Expansion of Indonesian Economic Development 2011-2025 or *Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia* ('MP3EI'),⁶⁵⁷ issued under Presidential Regulation No. 32 of 2011.⁶⁵⁸ As previously discussed in Chapter 2, MP3EI is a strategic plan for accelerating and expanding Indonesia's economic development for a period of 15 years from 2011 to 2025 in the framework of implementing the

⁶⁵⁰ *Peraturan Presiden Nomor 51 tahun 2014 tentang Perubahan Atas Peraturan Presiden Nomor 45 tahun 2011 Tentang Rencana Tata Ruang Kawasan Perkotaan Denpasar, Badung, Gianyar, dan Tabanan* [Presidential Regulation No 51 of 2014 on the Amendment of Presidential Regulation No 45 of 2011 on the Spatial Plan of City Areas of Denpasar, Badung, Gianyar, and Tabanan] art 63A ('*The Revision of Sarbagita Spatial Plan*').

⁶⁵¹ Ibid art 101a (6).

⁶⁵² Ibid the preamble.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid.

⁶⁵⁸ *Peraturan Presiden Nomor 32 tahun 2011 tentang Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia 2011-2025* [Presidential Regulation No 32 of 2011 on the Masterplan of Acceleration and Extension the Development of Indonesian Economy 2011-2025] ('*MP3EI*').

National Long Term Development Plan 2005-2025. It is a working document, containing directives for the development of major economic activities. The document is complete with infrastructure needs and recommendations for amendments to existing laws and regulations, and the creation of new laws and regulations, to encourage acceleration and expansion of investment.⁶⁵⁹ Lucky Eko Wuryanto, Deputy for Infrastructure and Regional Development of the Ministry of Marine and Fisheries, admitted that Presidential Regulation No. 45 of 2011 impeded the reclamation plan already contained in MP3EI, so it needed to be promptly revised.⁶⁶⁰

The Secretary of Cabinet, Dipo Alam, has explained other reasons for issuing the Presidential Regulation No. 51 of 2014. Specifically, the condition of Benoa Bay area is such that it is no longer eligible to be classified as a water conservation area.⁶⁶¹ This is because there have been physical changes, such as toll roads, oil and gas pipelines, and the building of the international port in Benoa.⁶⁶² In addition, he claimed, massive silting in Benoa Bay makes it is no longer appropriate to be categorised as a conservation area.⁶⁶³

On 11 June 2014, following the issuance of Presidential Regulation No. 51 of 2014, TWBI immediately submitted a letter to the Ministry of Marine and Fisheries requesting a location permit for the Benoa Bay Reclamation. On 25 August 2014, this ministry issued the permit, explaining it was given in respect of the villages of Kuta, Tuban, Kedonganan, Jimbaran, Benoa, Tanjung Benoa, Pemogan, Pedungan Kuta Selatan, and South Denpasar for the purposes for building ‘economic areas’, including tourism.⁶⁶⁴

On October 2019, the Ministry of Maritime Affairs and Fisheries issued a decision designating much of the bay, some 1,200 hectares (3,000 acres), as a maritime conservation zone.⁶⁶⁵ This allows religious and cultural activities, and sustainable and traditional fisheries, but prohibits reclamation projects.⁶⁶⁶ This is a positive development because it seems to have halted the Reclamation Project for now. However, it is by no means a full solution to the development threat to the bay. This is because, as mentioned earlier in Chapter 2, the hierarchy of Indonesian laws means that a presidential regulation overrules a ministerial decision. Presidential Regulation No. 51 of 2014, which allows reclamation, is still in force. Where there is a conflict between a ministerial regulation and a presidential regulation – as in this case - the latter will prevail. This means that Benoa Bay will only be completely safe from reclamation projects if a new presidential regulation is issued.

⁶⁵⁹ Ibid Elucidation.

⁶⁶⁰ ‘Bahas Revisi Perpres, Warga Ricuh’ [Discuss the Revision of Presidential Regulation, People Clamor], *Bali Express* (Denpasar), 15 April 2014, 2.

⁶⁶¹ ‘Penjelasan Perpres Nomor 51 Tahun 2014’ (n 646).

⁶⁶² Ibid.

⁶⁶³ Ibid.

⁶⁶⁴ *Kementerian Kelautan dan Perikanan Republik Indonesia, Izin Lokasi Reklamasi No.445/MEN-KP/VIII/2014* [Ministry of Marine Affairs and Fisheries of Indonesia, the Permit Location of Reclamation No.445 / MEN-KP / VIII / 2014] (‘Reclamation Location Permit’).

⁶⁶⁵ *Keputusan Menteri Kelautan dan Perikanan Republik Indonesia No. 46/kepmen-kp/2019 tentang Kawasan Konservasi Maritim Teluk Benoa di Perairan Provinsi Bali* [Ministry of Marine and Fishery Decree No. 46/kepmen-kp/2019 on A Maritime Conservation Zone of Benoa Bay in Bali] (Indonesia).

⁶⁶⁶ ‘Bali Mangrove Bay is Now a Conservation Zone, Nixing Reclamation Plan’, *Mongabay* (online, 11 October 2019) <<https://news.mongabay.com/2019/10/bali-benoa-bay-mangroves-conservation-reclamation/>>.

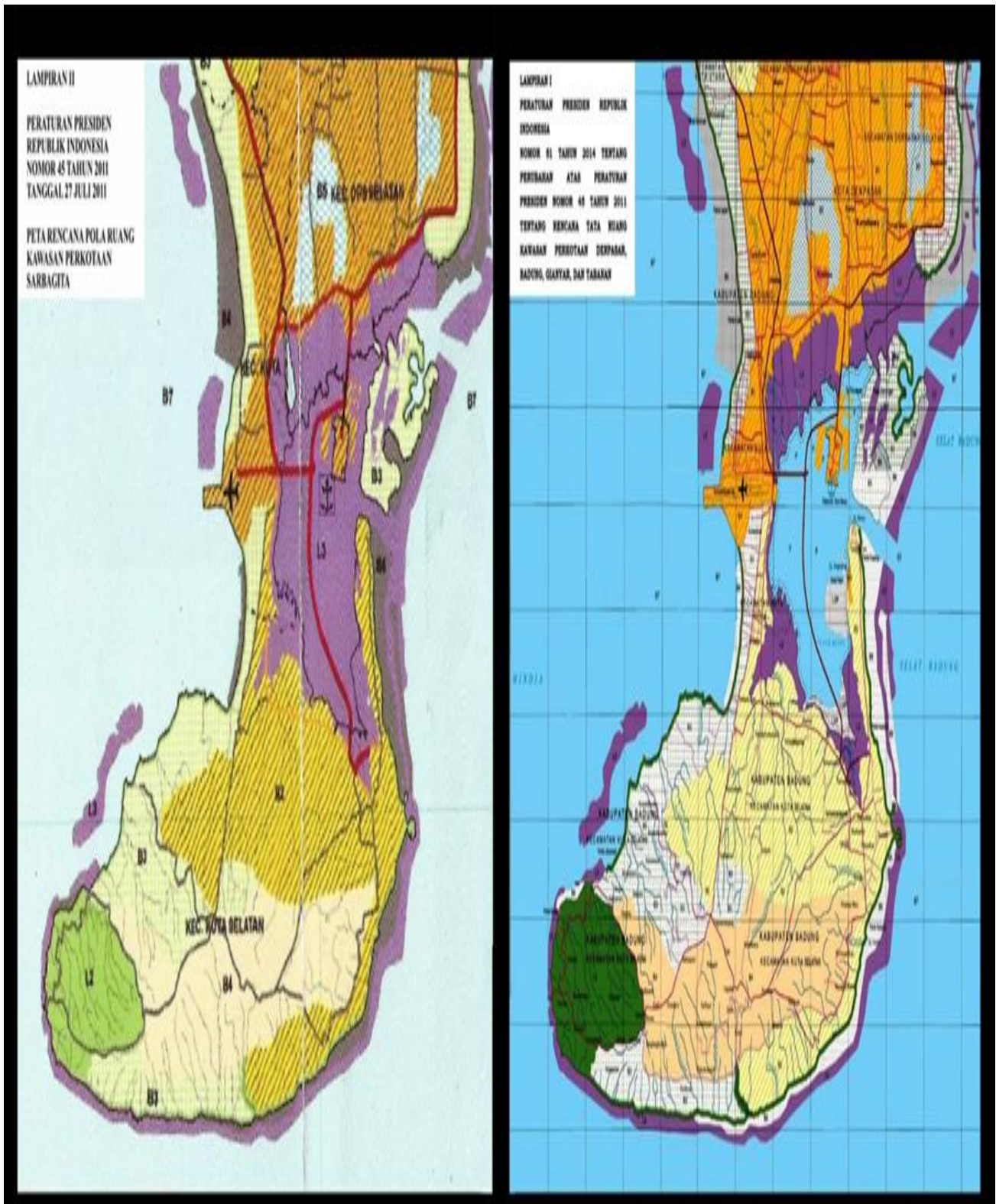


Figure 5.4 The Elucidation to Presidential Regulation No. 45 of 2011 (Left) identifies Benoa Bay as a Conservation Area (Marked with Purple). Meanwhile, the Elucidation to Presidential Regulation No. 51 of 2014 (right) identifies it as General Utilisation Area (Marked with Blue). Source: Walhi Bali.

As mentioned, the granting of the reclamation permit sparked one of the biggest and longest protest movements seen in Bali since the fall of Soeharto in 1998. From 2012 to late 2018, mass demonstrations occurred almost weekly in different parts of Bali. The Bali Forum against Reclamation or *Forum Rakyat Bali Tolak Reklamasi* ('Forbali') has united young people, politicians, rock stars, academic and religious institutions, environmentalists, and 28 villages. Specifically, almost all communities around Benoa Bay, including the local villages of Tanjung Benoa, Kelan, Kedonganan and Kuta, have rejected the Reclamation Project due to its adverse impact on the environment,⁶⁶⁷ Religious leaders have also shown their disagreement with the Reclamation Project, saying Benoa Bay area is classified as a sacred area and therefore should not be reclaimed.⁶⁶⁸

A number of studies support the public protests, analysing what has happened and what is likely to happen after the Reclamation Project gets underway. For example, the University of Udayana in 2013 conducted its own feasibility study to assess the technical and environmental aspects of the Reclamation Project.⁶⁶⁹ It found that the Reclamation Plan contradicted Bali Provincial SPL and central government Law No. 27 of 2007 on the Management of Coastal Areas and Small Islands because Benoa Bay was still a conservation area.⁶⁷⁰ From the aspect of hydrodynamics, sea backfill through reclamation would result in negative impacts, such as coastal erosion, the silting of river estuaries, disruption to aquatic ecosystems, and interruption to harbour activities.⁶⁷¹

The feasibility study also found that the mangrove ecosystem in Benoa Bay is a unique ecosystem, particularly for the coastal area of South Bali, which consists of, among others, dozens of types of mangrove, seagrass species and seaweeds, and bird species, some of which are protected.⁶⁷² The Reclamation Project will endanger the existence of those ecosystems.⁶⁷³ Furthermore, *nuftah plasma* resources (muddy water biota) with dozens of types of *macrozoobenthos* will be significantly reduced because of the vast area covered by the Reclamation project.⁶⁷⁴

Other studies have expressed similar views. A study from Conservation International Indonesia shows the hydrological impact on the waters of the Bay of Benoa as a result of reclamation.⁶⁷⁵ Reclamation will have an impact on the increase of sea surface of the bay.⁶⁷⁶ Although it does not show a significant elevation of the surface, it would be very worrying if any elevation is accompanied by land subsidence in Denpasar and Badung, resulting from uncontrolled groundwater extraction, and a rise in sea level due to global warming.⁶⁷⁷ In addition, the decrease in sea water volume that can enter Benoa Bay from 25 million cubic meters to 10 million cubic meters or a

⁶⁶⁷ 'Kuta Bergerak, Para Pimpinan Desa, Banjar Adat Dan Dinas Serta Pemuda Adat Serahkan Surat Penolakan Reklamasi Teluk Benoa' [Kuta Moves, Village Leaders, Customary and Service Village as well as Indigenous Youth Submit the Rejection Letter of the Reclamation of Benoa Bay], *Forbali* (online, 18 January 2016) <<https://www.forbali.org/en/kuta-bergerak-para-pimpinan-desa-banjar-adat-dan-dinas-serta-pemuda-adat-serahkan-surat-penolakan-reklamasi-teluk-benoa/>>.

⁶⁶⁸ Ibid.

⁶⁶⁹ The Feasibility Study of Benoa Bay (n 607) II-4.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

⁶⁷² Ibid V-2.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Sudiarta (n 611) 44-45.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid.

decrease of about 60 per cent will mean Benoa Bay experiences changes in water conditions such as salinity, temperature and limited nutrient input from outside the bay.⁶⁷⁸ This is certainly an important concern for Bali, considering there are mangrove forests that, as shown in the previous chapter, have significance for the sustainability of coastal and marine environments in Benoa Bay.⁶⁷⁹ From a sea hydrodynamics perspective, changes in the geometry of the bay will affect the pattern of ocean currents, and affect the transport pattern of the material carried by the water flow.⁶⁸⁰ Therefore, changes in the flow pattern of water in Benoa Bay can affect the surrounding area, for example, by creating a strong increase in currents outside the bay that can result in erosion or accretion in other places.⁶⁸¹

As mentioned above, the IDEP Foundation claims Benoa Bay is located on the East Asian-Australasian Flyway, and listed as an important bird area, particularly for resting and feeding the migratory birds.⁶⁸² Some species are listed as threatened and endangered, such as the Lesser Sand Plover.⁶⁸³ The Reclamation Project will significantly threaten the existence of these valuable species.⁶⁸⁴ Mega Amelia states that 15 per cent reclamation increased the sea level in the southern estuary of the Sama River and Bualu River.⁶⁸⁵ If reclamation ever reaches 80 per cent, the sea level will be increased significantly, covering most of the area around the Tukad Badung Watershed.⁶⁸⁶

There are other controversies related to the Reclamation Project, particularly the second permit and the lack of public participation. The Governor of Bali seemed to see the feasibility study as a legal basis to issue a reclamation permit. However, the legality of the feasibility study has been questioned. A spatial planning law expert from Udayana University, I Nyoman Suyatna said that if Benoa Bay was a conservation area, then the feasibility study was prohibited. It could only be conducted if the status of the Benoa Bay was revised to a utilisation area.⁶⁸⁷ Regarding public participation, the Reclamation Project does not involve affected communities in Benoa Bay, as it should, and it is built in an area sacred to local communities. This issue will be discussed further in Chapter 6 in the context of the lack of public participation as one of ‘legal factors’ behind the regulatory failure of spatial planning in Bali.

The controversy over the feasibility study also meant the Sepuluh November Institute of Technology refused to conduct the feasibility study, even though TWBI requested it to do so.⁶⁸⁸ It explained that

⁶⁷⁸ Ibid.

⁶⁷⁹ Ibid.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid.

⁶⁸² IDEP Foundation (n 613).

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

⁶⁸⁵ Mega Amelia et al, ‘Dampak Reklamasi Lingkungan Perairan: Studi Kasus Teluk Benoa, Bali, Indonesia’ [The Impact of Reclamation on Waters Area: Case Study of Benoa Bay] (Paper Presented in National Seminar, Faculty of Geology, Padjajaran University, Bandung 28 May 2016).

⁶⁸⁶ Ibid.

⁶⁸⁷ Interview with I Nyoman Suyatna, Spatial Planning Law Expert from Faculty of Law Udayana University (I Gusti Ngurah Parikesit Widiatedja, Udayana University, 8 November 2017).

⁶⁸⁸ *Surat Lembaga Penelitian dan Pengembangan Masyarakat Institut Teknologi Sepuluh November Surabaya No 04588/IT2.1.1/KS.00.01/2016 tentang Permohonan Penyusunan Dokumen Rencana Pelaksanaan Reklamasi Teluk benoa Bali* [Letter of Institute of Research and Community Development of Institute of Technology of

the Reclamation Project was not just an academic issue, but also involved social and cultural issues, and the beliefs of the people of Bali, so it was not willing to conduct the feasibility study.⁶⁸⁹

This Reclamation Project is not the first of its kind. Bali has had experience of failed reclamation projects before. In 1994, two sons of President Suharto, Tommy Suharto and Bambang Trihatmojo, quadrupled the size of an offshore island called Serangan (from 112 Ha to 491 Ha) for a proposed tourism development, called the Bali Turtle Island Development ('BTID').⁶⁹⁰ The purpose of the project was to increase Serangan Island, to build lagoons for water recreation facilities, resorts, golf course, villas, yacht club, marinas, and a pedestrian bridge to connect Bali Island to Serangan Island.⁶⁹¹ Promoting eco-friendly development, this project planned to develop mangrove and turtle research centres.⁶⁹²

Although the Governor of Bali approved the EIA for this project in 1995, environmental damage was undeniable. Due to dredging and hoarding for the project, changes in ocean currents occurred around Serangan Island, causing coastal abrasion in some locations, and the build-up of mud and garbage.⁶⁹³ In addition, the BTID project affected important ecosystems, such as mangrove forests, coral reefs, and seagrass lands, all of which were lost or in poor condition because of the BTID project.⁶⁹⁴ Most local communities in Serangan Island were not aware of the plan for reclamation, and there was no public consultation on this project.⁶⁹⁵ When the project started, some communities had only been informed the project would provide job opportunities and allow the completion of village facilities.⁶⁹⁶ Although the reclamation project was 60 per cent complete, the 1998 monetary crisis, along with the fall of Soeharto, brought it to an end.⁶⁹⁷ To date, no new investors have been interested in continuing the project, and the newly-reclaimed land sits abandoned.⁶⁹⁸ As Serangan Island and Benoa Bay are very close to one another, and affected communities are similar, the failure of this reclamation project haunts local communities and local NGOs. They fear the Benoa Bay Reclamation Project will have similar adverse results, particularly those related to the environment and the life of local communities, both of which are already damaged.⁶⁹⁹

Sepuluh November Surabaya No 04588 / IT2.1.1 / KS.00.01 / 2016 on the Application of Compilation of Document of the Implementation Plan of the Reclamation of Benoa Bay].

⁶⁸⁹

Ibid.

⁶⁹⁰

Lisa Woinarski, 'Laporan Studi Lapangan Pulau Serangan: Dampak Pembangunan pada Lingkungan dan Masyarakat'[A Report of Study on Serangan Island: The Impact of Development on Environment and Society] (University of Muhammadiyah Malang and Australian Consortium for In-Country Indonesian Studies, 2002) 8.

⁶⁹¹

Ibid 6.

⁶⁹²

Ibid.

⁶⁹³

Ibid.

⁶⁹⁴

Ibid 10.

⁶⁹⁵

Ibid.

⁶⁹⁶

Ibid.

⁶⁹⁷

Ibid.

⁶⁹⁸

Ibid 6.

⁶⁹⁹

Suardana (n 443).



Figure 5.5 Public Protest against the Reclamation project from Local Communities of Kuta and Seminyak. Source: Forbali.



Figure 5.6 Public Protest against the Reclamation Project by a Local Community of Denpasar Source: WALHI Bali.

IV CONCLUSION

The case of the Reclamation Project is essential to show failures in spatial planning regulation in Bali. While my analysis of the Mulia Project discussed land use and the coastal border, and my account of the Tahura Project focussed on forestry management, my investigation of the Reclamation Project demonstrates how tourism projects can cause damage to coastal areas and local communities because of the failure of spatial planning regulations, particularly because of the revision of laws. Specifically, when the Governor of Bali issued a reclamation permit, it obviously

violated Presidential Regulation No. 45 of 2011 which classified Benoa Bay as a conservation area. After massive public protests, the Governor revised the permit to allow a feasibility study, ostensibly to justify the reclamation project. This permit still violated the Presidential Regulation No. 45 of 2011, particularly because there should never have a feasibility study of a conservation area.

The surprising fact is that the central government supported the decision of the Governor of Bali even though it obviously violated Presidential Regulation No. 45 of 2011. It amended this regulation through Presidential Regulation No. 51 of 2014, changing the status of Benoa Bay from a conservation area to a general utilisation area. Hence, Benoa Bay may now legally be reclaimed, to a maximum of 700 hectares. Some studies have analysed how the Reclamation Project has already adversely affected the environment and the local community around Benoa Bay. Bali has had a gloomy history of failed reclamation projects in the past, and that does not bode well for this project. Although the Ministry of Maritime Affairs and Fisheries issued a decision that prohibits reclamation, that is not enough to make Benoa Bay completely safe from reclamation projects because the higher-ranked Presidential Regulation No.51 of 2014, which allows reclamation, is still in force.

While spatial planning regulation should be able to prevent environmental and social damage caused by reclamation projects, this case shows how spatial planning in Bali has failed to do so. The next chapter will discuss legal and non-legal factors behind the failures of spatial planning regulation in Indonesia, particularly in Bali.

PART III

THE REASONS BEHIND THE REGULATORY FAILURES OF SPATIAL PLANNING

I INTRODUCTION

The three case studies in the previous Part show that spatial planning laws in Bali fail to achieve their regulatory objectives. Although the hotel industry offers Bali, and Indonesia more broadly, significant economic and social benefits, the failure of spatial planning laws has meant that these developments are not being sustainably managed. In this Part, I analyse the case studies, finding that inter-related legal and non-legal factors contribute to this failure. I conclude the thesis by proposing some possible means of addressing these factors.

Chapter VI discusses the legal factors behind the regulatory failures of spatial planning, encompassing: the lack of a district-level detailed plan; conflicting regulations on the review and amendment of the spatial plan; the lack of public participation; the absence of criminal sanctions; and the findings of courts that violations of spatial planning laws do not give rise to the public interest necessary for applicants to seek judicial review remedies prohibiting potential environmental damage. Chapter VII analyses related non-legal factors behind the regulatory failures of spatial planning in Bali. These include: the pursuance of economic enrichment; a lack of coordination between the provincial government and the district government; a lack of human resources in preparing the district-level detailed plan; and the fact that economic development is too often given priority over the goal of spatial planning.

II THE COMPLEX INTERRELATIONSHIP BETWEEN LEGAL AND NON-LEGAL FACTORS

This section explains how the complexity and interrelationship between legal factors and non-legal factors contribute to the failure of spatial planning regulations in Bali. This thesis explains legal factors as problems that are derived from the regulations themselves, particularly the absence and the vagueness of regulations. For instance, this thesis has shown how the absence of a district-level detailed plan has led to the ineffectiveness of enforcement in spatial planning in Bali; and it has revealed the conflicts between presidential regulations and a circular letter from the Coordinating Minister of the Economy concerning review and amendment of spatial plans. As regards the vagueness of regulations, the case studies have also shown that spatial planning regulation fails to clearly explain at what stages of planning public participation should be sought. Other legal factors include a lack of implementation and enforcement of spatial planning regulations in Bali. The three case studies reveal that there is no enforcement of criminal sanctions for state officials who issue permits that contradict the spatial plan. Related to these legal factors are non-legal factors, which reflect problems that are external to spatial planning regulations. The case studies in this thesis have exposed the motive of economic enrichment of wealthy elites as a major contributor to the failure of spatial planning regulation. The absence of coordination between provincial and district governments under regional autonomy arrangements, and a lack of resources and capacity are other non-legal factors discussed in the next chapter.

Although legal and non-legal factors are somewhat distinct, they are undeniably interrelated and operate in complex ways in their contribution to the failure of spatial planning regulation in Bali.

For instance, the pursuance of economic development objectives contributes to conflicting regulations on the review and amendment of the spatial plan because it leads government at all levels to hastily revise the existing spatial plans that contravene other spatial planning regulations in order to allow hotel projects to continue. A lack of resources and training has also led to delay in the creation of district-level detailed plans, meaning that there are, in reality, few legal constraints at this level on hotel projects.

Chapter 6

Legal Factors behind the Regulatory Failures of Spatial Planning

I INTRODUCTION

This chapter is the first of two chapters that describe the reasons behind the regulatory failure of spatial planning in Bali. As just explained, this chapter focuses on the legal factors behind this failure, namely:

1. the lack of a district-level detailed plan;
2. conflicting regulations on the review and amendment of spatial plans;
3. a lack of public participation;
4. criminal sanctions not applied to spatial planning breaches; and
5. poor judicial decisions regarding the standing of public interest organisations to seek judicial review of spatial planning decisions.

II THE LACK OF A DISTRICT-LEVEL DETAILED PLAN

A *Why a District-level Detailed Plan is Important*

A general spatial plan ('general plan') and a detailed spatial plan ('detailed plan') are inseparable and complementary in managing spatial planning governance in Indonesia. As mentioned in Chapter Two, central government Regulation No. 15 of 2010 on the Management of Spatial Planning explains that spatial plans consist of national, provincial, and district spatial plans.⁷⁰⁰ A detailed plan covers areas that are classified as 'national and provincial strategic areas spatial plans, as well as district-level detailed plans'.⁷⁰¹ General plans apply at the macro-level, and detailed plans operate at the micro-level to further explain general plans.⁷⁰² District governments are required to complete a district-level detailed plan within three years from the issuance by the central government of the general plan.⁷⁰³

Government officials, from both central and district governments, admit the significance of a district-level detailed plan in supporting compliance by commercial projects with spatial planning laws. For example, Andi Renald, an official from the Ministry of Agrarian and Spatial Planning/National Land Agency, stated in an interview that the existence of detailed plans would significantly assist the enforcement of spatial planning by providing details of blocks, zones and areas in districts, pointing out what is allowed or prohibited in terms of particular projects.⁷⁰⁴ Without these detailed plans, it is difficult for district administrators to determine whether proposed

⁷⁰⁰ SPGR 2010 (n 277) art 14(2).

⁷⁰¹ Ibid art 14(3).

⁷⁰² Ibid art 14(4).

⁷⁰³ Ibid art 59(4).

⁷⁰⁴ Interview with Andi Renald, Head of Sub-Directorate of Space Utilization Control Area II (Java and Bali), Directorate General of Spatial and Land Use Control, Ministry of Agriculture and Spatial/ National Land Agency (I Gusti Ngurah Parikesit Widiatedja, Ministry of Agriculture and Spatial/ National Land Agency, 15 January 2018).

activities constitute a spatial planning violation.⁷⁰⁵ For investors, detailed plans would provide them with clearer guidance if they want to propose tourism projects in a particular area. These plans would also be beneficial for NGOs monitoring government enforcement of spatial planning laws. Detailed plans would provide them with stronger evidence to criticise a government if it does not enforce violations of spatial planning laws.

A government official from the Badung District government gave me an interesting illustration of the importance of the district-level detailed plan.⁷⁰⁶ When an investor plans to build a hotel in the South Kuta sub-districts of Badung district, an application must be lodged with the Badung Investment Agency.⁷⁰⁷ This agency will then review the application, ensuring it will be located in an area categorised as a ‘tourist area’ in the general plan.⁷⁰⁸ However, a detailed plan of South Kuta is needed to indicate which zones or areas are open for hotel projects, as not all tourist areas in South Kuta are open for hotels.⁷⁰⁹

An Investment Law expert from the University of Udayana, Tuny Cakabawa, explained that the existence of a district-level detailed plan could, in fact, support investment in tourism.⁷¹⁰ By having such a plan, districts can provide more transparent and accurate information to investors to ensure legal and economic certainty of their investment plans.⁷¹¹ The absence of a district-level detailed plan makes investors hesitant to invest, as the location of their investment might violate the existing general spatial plan, particularly in Badung and Denpasar, the two most popular districts for tourism in Bali.⁷¹² By knowing that they are complying with the detailed spatial plan, investors can be more confident they can avoid conflict with NGOs and local communities. The Mulia Project shows that violation of spatial planning by investors took place largely because the Badung District government failed to clarify whether a particular location was opened for investment because of the absence of the district-level detailed plan.⁷¹³ If this detailed plan is available, it would indicate the location of the project as prohibited areas for hotel, and the Badung District government has a strong legal basis to refuse the project. For these reasons the existence of a district-level detailed plan will ensure tourism projects are sustainable, including as regards respect for, and the protection of, both the environment and local communities.

In my view, the existence of a district-level detailed plan also strengthens the position of the district government. Some investment projects, particularly foreign investment, require ‘permit-in-principle’ consent from the central government, which is the Capital Investment Coordinating Board or *Badan Koordinasi Penanaman Modal* (‘BKPM’). Having a detailed plan provides a significant legal basis for the determination of whether investment projects should proceed. Conversely, if these projects

⁷⁰⁵ Ibid.

⁷⁰⁶ Interview with Larasati Adnyana, Head of Spatial Planning, Public Works and Spatial Planning Agency of Badung (I Gusti Ngurah Parikesit Widiatedja, Public Works and Spatial Planning Agency of Badung, 4 January 2018).

⁷⁰⁷ Ibid.

⁷⁰⁸ Ibid.

⁷⁰⁹ Ibid.

⁷¹⁰ Interview with Putu Tuni Cakabawa Landra, Investment Law Expert from the University of Udayana (I Gusti Ngurah Parikesit Widiatedja, Udayana University, 1 February 2018).

⁷¹¹ Ibid.

⁷¹² Ibid.

⁷¹³ Ibid.

contradict this detailed plan, the district government would be able to reject an investor's application, even if the investor has been given a permit from the central government. For example, it can refuse an application for a location permit as it does not comply with the district-level detailed plan. This would, in turn, achieve the objectives of spatial planning concerned with sustainable development.

Detailed plans are not only essential to encourage investment. They also assist governments to protect the environment and local communities. A detailed plan can clearly define which areas are open or closed to commercial projects, and significantly protect vulnerable communities and natural resources from being damaged as a result of tourism developments.

In my view, although the district-level detailed plan is crucial in enforcing spatial planning laws, their value varies between planned, ongoing and completed projects. Detailed plans are certainly useful for planned projects. If a planned project violates the spatial plan, the detailed plan will provide strong evidence for the government to enforce the law by refusing this project. However, for ongoing and completed projects, the detailed plan might not be necessary. As an illustration, if a hotel project is being built less than 100 meters from the coastline, this can be precisely measured. Therefore, a district government would not have to wait for the completion of a detailed plan to take action against this kind of violation.

B *How the Extent of the Failure*

As stated above, central government Regulation No. 36 of 2010 requires district governments to complete a district-level detailed plan within 36 months of the issuance of the general plan. However, government officials admit that only a few districts have followed this regulation. Coordinating Minister for Economic Affairs, Darmin Nasution, states that only 40 of the 514 districts in Indonesia have completed their detailed plans. Of the 40 districts, only seven have provided digital maps that investors can access.⁷¹⁴ An official from the Ministry of Agriculture and Spatial/ National Land Agency acknowledges this.⁷¹⁵ Bernardus R. Djonoputro, the Chief of the Indonesian Planning Experts Association, explains that there are still almost 5000 unfinished district-level detailed plans,⁷¹⁶ because each district in Indonesia may have eight to ten unfinished detailed plans, depending on how many sub-districts they have.⁷¹⁷ Bali has eight districts and one city, but not one of them has yet produced a district-level detailed plan.

C *Why the District-level Detailed Plans Have Not Been Issued*

In my view, the main reason for the delay in the creation of the district-level detailed plan is the burdensome requirements for issuing the plan, which district governments find are very difficult to satisfy. At least fourteen requirements or items must be completed according to the Decree of the

⁷¹⁴ 'Dari 514 Kabupaten di RI, Hanya 40 yang Punya Rencana Tata Ruang' [From 514 Districts in Indonesia, only 40 Have Spatial Plan], *Liputan 6* (online, 13 August 2018) <<https://www.liputan6.com/bisnis/read/3617468/dari-514-kabupaten-di-ri-hanya-40-yang-punya-rencana-tata-ruang>>.

⁷¹⁵ Renald (n 704).

⁷¹⁶ Tabita Diela, 'Masih Banyak Rencana Tata Ruang yang Belum Tuntas' [Many Spatial Plans Have Not Been Completed Yet], *Kompas* (online, 7 August 2014) <<https://properti.kompas.com/read/2014/08/07/163909421/Masih.Banyak.Rencana.Tata.Ruang.yang.Belum.Tuntas>>.

⁷¹⁷ Ibid.

Agrarian Minister and Spatial Planning No. 8 of 2017.⁷¹⁸ To begin, an official from the Bali Public Works and Spatial Planning Agency states that a single district detailed plan cannot cover a single city or regency: If a district has five sub-districts, there must be five district detailed plans as well.⁷¹⁹ The public works and spatial planning agency at the district government should initiate a draft of the district-level detailed plan. In this process, the agency may involve experts, such as planners and legal scholars.⁷²⁰ The draft should contain mandatory thematic and plan maps.⁷²¹

Once a district government has completed a draft of its detailed plan, it is submitted to the Bali provincial government for the Governor's approval.⁷²² Once this is obtained, the draft is then submitted to the Geospatial Information Agency or *Badan Informasi Geospasial* ('BIG') in Jakarta.⁷²³ All drafted maps must be validated according to standards set by this agency.⁷²⁴ After this process is completed, the draft is sent to the central government through the Ministry of Agrarian and Spatial Planning to obtain the Minister's approval.⁷²⁵ When the Minister agrees, the district government, along with the district legislative body, must finalise the draft, turning it into a district regulation. Regrettably, this process usually takes at least a couple of years. The Badung District government has six sub-districts, consisting of Abiansemal, Kuta, South Kuta, North Kuta, Mengwi, and Petang. In 2013, it submitted a complete draft of the detailed plan of South Kuta. Four years later, it is still waiting for approval from the central Ministry of Agrarian and Spatial Planning.

This process becomes more complicated because the central government may revise its regulations concerning the guidelines of the district-level spatial plan.⁷²⁶ An administrative law expert from the University of Udayana who has been involved in drafting the district-level detailed plan told me that by the time the Badung District government had prepared a draft of the detailed plan, there had been a revision to the relevant central government regulation, which has superior status in the hierarchy of

⁷¹⁸ *Peraturan Menteri Agraria dan Tata Ruang Nomor 8 tahun 2017 tentang Pedoman Pemberian Persetujuan Substansi Dalam Rangka Penetapan Peraturan Daerah tentang Rencana Tata Ruang Provinsi dan Rencana Tata Ruang Kabupaten/kota* [Decree of the Agrarian Minister and Spatial Planning Number 8 of 2017 on Guidelines for Substantive Approval for the Stipulation of Regional Regulations on Provincial Spatial Plan and District /City Spatial Plan] elucidation IV elaborates 14 requirements: 1) Substantive approval from the governor; 2) Minutes of the discussion of the Coordinating Board of Spatial Planning of the Provincial Region; 3) Agreement between the provincial government and the region's house of representatives for submitting the draft of the detailed spatial plan; 4) A letter explaining the delineation of the provincial strategic area by Governor; 5) Regional Regulatory Documents on Provincial Spatial Plans and appendices; 6) A draft of regulation; 7) An academic draft; 8) Technical material consisting of the plan and facts of analysis; 9) A map album consisting of a basic map, thematic map, and map plan; 10) A statement from the regional head, explaining responsibility for the quality of the draft Regulation on the detailed spatial plan; 11) Minutes of public consultation; 12) Agreement from adjacent provinces; 13) An official report issued by the Geospatial Information Agency, authorising the accuracy of the detailed spatial plan; and 14) A document of Strategic Environmental Study.

⁷¹⁹ Interview with Ngakan Putu Kirim, Head of Spatial Planning, Bali Public Works and Spatial Office (I Gusti Ngurah Parikesit Widiatedja, Bali Public Works and Spatial Office, 5 January 2018).

⁷²⁰ Ibid.

⁷²¹ Adnyana (n 706).

⁷²² Kirim (n 719).

⁷²³ Ibid.

⁷²⁴ Ibid.

⁷²⁵ Adnyana (n 706).

⁷²⁶ Dahana (n 584).

Indonesian laws than regional regulations.⁷²⁷ As a result, the draft required a revision to accommodate the new central government regulation.⁷²⁸

The lengthy process of completing the district-level detailed plan may also end up being useless. As an illustration, the district government, according to central government Law No. 26 of 2007 on Spatial Management ('SPL 2007'), may revise its general plan in five years. If the completion of the detailed plan takes four or even five years, it may be redundant if the district government eventually revises the existing spatial plan in that time, as is quite possible. This is because a revision of the general plan requires a revision of the detailed plan, and the district government then has to restart the lengthy procedure of completing the draft of the detailed plan, although not always from scratch.

Of the fourteen items needing to be completed according to the Decree of the Agrarian Minister and Spatial Planning No. 8 of 2017, the requirement of production of a map of the detailed plan is the most difficult one for district governments in Indonesia. Central government Law No. 4 of 2011 on Geospatial Information defines 'geospatial information' as 'geospatial data (such as geographic location) that has been processed so that it can be employed as a tool in policy formulation, decision making, and implementation of activities related to space in the earth'.⁷²⁹ One of the main elements of geospatial information is 'the basic map',⁷³⁰ consisting of Indonesia's 'earth map', 'coastal map', and 'marine map'.⁷³¹ The typical data in the basic map are, among other things, 'topographic names', 'coastline area', waters, transportation, and public facilities.⁷³² The Geospatial Information Agency is the only agency authorised to issue the basic map.⁷³³ Therefore, if district governments issue a spatial map such as a detailed plan, it must refer to this basic map to be legally recognised.⁷³⁴

The next requirement is in central government Regulation No. 8 of 2013 on the Accuracy of Spatial Plan Maps. This regulates the standard of accuracy of the detailed plan.⁷³⁵ Specifically, each plan has to fulfil a specific level of accuracy known as 'geometric precision'.⁷³⁶ Geometric precision covers a 'geospatial reference system, scale, and mapping unit'.⁷³⁷ While creating a map for their detailed plan, district governments must employ the geospatial reference system established by the Geospatial Information Agency,⁷³⁸ including a minimum scale of 1:50,000.⁷³⁹ According to one of the directors in the Ministry of Agriculture and Spatial Planning/ National Land Agency, in order to ensure 'geometric precision', the Geospatial Information Agency authorises every draft of the map

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ *Undang Undang Nomor 4 Tahun 2011 tentang Informasi Geospasial* [Law No. 4 of 2011 on Information of Geospatial] (Indonesia) art 1(4).

⁷³⁰ Ibid art 5.

⁷³¹ Ibid art 7.

⁷³² Ibid art 12.

⁷³³ Ibid art 22.

⁷³⁴ Ibid art 21.

⁷³⁵ *Peraturan Pemerintah Nomor 8 Tahun 2013 Tentang Ketelitian Peta Rencana Tata Ruang* [Government Regulation No 8 of 2013 on the Accuracy of Spatial Plan Maps] (Indonesia) art 10.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

⁷³⁸ Ibid art 11.

⁷³⁹ Ibid art 15.

of the detailed plan by means of a process called ‘orthorectification’.⁷⁴⁰ For the Badung District government, these map-making processes are burdensome because of the lack of trained human resources experienced in map-making. This is a significant ‘non-legal’ factor discussed in the next chapter.

The existence of these failures in spatial planning regulation are not uncommon, particularly in the Global South. Broader theoretical work on regulation demonstrates that burdensome, bureaucratic requirements are a significant cause of regulatory failure. For example, Cotterrell argues that the legal expectations of ‘law-government’ and the arena of social interaction it tries to control often creates regulation that is too ‘absolutist and inflexible’.⁷⁴¹

Alfasi and Portugali reveal that most cities in Israel either have no detailed plan at all or employ old, outdated ones.⁷⁴² Issuing a detailed plan is a complicated task. Like in Indonesia, completing a detailed plan takes years. In Israel, the average time for completing a detailed plan, starting from data collection and attending to the District Planning and Building Commission (‘DPBC’) decision to approve the plan, is 5.4 years.⁷⁴³ Another 3.6 years is stipulated to conduct public hearings and committees’ discussion until the plan is finally agreed.⁷⁴⁴ The lack of detailed plans has also led to illegal construction. The United Nations Economic Commission for Europe (‘UNECE’) states that the absence of an updated detailed plan in most districts in South-Eastern Europe countries has triggered illegal development.⁷⁴⁵ The existing detailed plans are out of date and unable to anticipate appropriate levels of growth and calculate sufficient land allocation for development.⁷⁴⁶ Moreover, projects have been undertaken in prohibited areas due to unclear planning regulations.⁷⁴⁷ In Skopje, for instance, there are 27 illegally constructed neighbourhoods; some 146,000 buildings have been illicitly built in Belgrade, while more than 45 per cent of Tirana’s population lives in informal settlements on the city’s border.⁷⁴⁸

To sum up, district-level detailed plans and the maps they require are not being completed. As a consequence, the government’s goal of protecting the environment through spatial planning regulations is defeated.

⁷⁴⁰ Interview with Wisnubroto Sarosa, Director of Space Utilisation Control, Directorate General of Spatial Use Control and Land Tenure, Ministry of Agriculture and Spatial/ National Land Agency (I Gusti Ngurah Parikesit Widiatedja, Ministry of Agriculture and Spatial/ National Land Agency, 15 January 2018). According to OSSIM, Orthorectification is defined as the mechanism to remove the effects of image perspective (tilt) and relief (terrain) effects for the goal of making a planimetrically correct image. The resultant orthorectified image has a constant scale wherein features are represented in their ‘true’ positions. This allows for the accurate direct measurement of distances, angles, and areas. See *OSSIM* (Web Page) <<https://trac.osgeo.org/ossim/wiki/orthorectification>>. See also Meika Sumarsono, Bangun Muljo Sukojo, and Husnul Hidayat, ‘Analisa Ketelitian Orthorektifikasi Citra Pleiades untuk Pembuatan Peta Rencana Detail Tata Ruang Terbuka Hijau (Studi Kasus: Kota Surabaya)’ [Analysis of Pleiades Image Orthorectification Accuracy for Map Creation Detailed Green Open Space Plan (Case Study: Surabaya)] (2016) 5(2) *Jurnal Teknik ITS* A842.

⁷⁴¹ Roger Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Oxford University Press, 1995) 308.

⁷⁴² Alfasi and Portugali (n 5) 33.

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

⁷⁴⁵ United Nation Economic Commission for Europe (n 26) 3.

⁷⁴⁶ *Ibid.*

⁷⁴⁷ *Ibid.*

⁷⁴⁸ *Ibid.*

III CONFLICTING REGULATIONS ON THE REVIEW AND AMENDMENT OF THE SPATIAL PLAN

A *How Conflicting Regulations Have Occurred*

Conflicting regulations exist on the review and amendment of spatial plans. SPL 2007 states that the spatial plan (national, province, and district) may be reviewed or amended only once every five years.⁷⁴⁹ Nevertheless, as discussed in Chapter Two, in the case of large-scale disasters and the change of boundaries of states or regions established by law, the spatial plan may be reviewed or amended more often.⁷⁵⁰ This provision created a debate at a district level as to its meaning. Specifically, it was unclear whether review and amendment must only be done once every five years, or if it must be done every 5 years but can also be revised more often, once a general plan is enacted.⁷⁵¹ To answer this issue, central government Regulation No. 15 of 2010 merely states that a ministry regulation will explain the procedure for reviewing and amending the general plan in more detail.⁷⁵²

Regulation of the Minister of Agrarian and Spatial Planning/Head of National Land Agency No. 6 of 2017 on the Procedures for Reviewing the Spatial Plan was not issued until 2017, meaning that implementing regulations on the review and amendment of the spatial plan were absent for almost seven years. Interestingly, all three case studies in this research occurred in this period (2010-2016). This ministerial regulation allows governments at all levels to conduct a review of the general plan in the fifth year after the spatial planning law is issued⁷⁵³ but it also allows them to conduct the review process more than once in five years in the case of: large scale natural disasters; and changes to national, territorial and regional boundaries.⁷⁵⁴ This review process aims to analyse the suitability of the existing spatial plan for the current and future development needs of the government.⁷⁵⁵ There are only two possible outcomes: the spatial plan needs revision or it does not.⁷⁵⁶

There are, however, other implementing central government regulations that contradict these abovementioned provisions. Presidential Regulation No. 3 of 2016 explains that the existing national and regional spatial plan should be the legal basis for implementing nationally strategic projects.⁷⁵⁷ However, this regulation states that there may be an amendment or revision to allow these projects to continue if the location of these projects conflicts with the existing spatial plan, and it is technically impossible to relocate them.⁷⁵⁸ Hence, governments, when conducting projects that are classified as nationally strategic, may ignore the existing spatial plan at any level. Given the

⁷⁴⁹ SPL 2007 (n 252) art 20(4).

⁷⁵⁰ Ibid art 20(5).

⁷⁵¹ Adnyana (n 706).

⁷⁵² SPGR 2010 (n 277).

⁷⁵³ *Peraturan Menteri Agraria dan Tata Ruang/Kepala Badan Pertanahan Nasional Nomor 6 Tahun 2017 Tentang Tata Cara Peninjauan Kembali Rencana Tata Ruang Wilayah* [Regulation of the Minister of Agrarian and Spatial Planning/Head of National Land Agency No 6 of 2017 on the Procedures for Reviewing Spatial Plan] (Indonesia) art 4(2) (*'Ministerial Regulation on Reviewing Spatial Plan'*).

⁷⁵⁴ Ibid art 5.

⁷⁵⁵ Ibid the preamble.

⁷⁵⁶ Ibid art 15.

⁷⁵⁷ *Peraturan Presiden Republik Indonesia Nomor 3 Tahun 2016 Tentang Percepatan Pelaksanaan Proyek Strategis Nasional* [Presidential Regulation No 3 of 2016 on the Acceleration of the Implementation of Nationally Strategic Projects] (Indonesia) art 19(1) (*'Presidential Regulation on the Implementation of Nationally Strategic Projects'*).

⁷⁵⁸ Ibid art 19(2).

presence of non legal factors, governments could even deliberately set up these projects to be technically impossible to be relocated, so they will have a legal justification to revise the existing spatial plan. For example, they could build a toll road amid a protected forest area. When this road has completed its basic construction, it will be impossible and inefficient to dismantle this although it does not comply with the existing spatial plan. Yet another regulation, a circular letter from the Coordinating Minister of the Economy, expressly allows for the review of the spatial plan without having to wait five years,⁷⁵⁹ in the case of large-scale disasters or current changes to national or regional boundaries, or where ‘the needs of economic development’ require it.⁷⁶⁰

The Former Minister of Agrarian Affairs and Spatial Planning/National Land Agency, Ferry Mursyidan Baldan, admits the inconsistency of the rules relating to review and amendment of spatial plans.⁷⁶¹ In fact, he says this inconsistency is one of the main reasons for the revision of the SPL 2007 proposed by this ministry.⁷⁶² He agrees that the spatial plan for each province or district in Indonesia should be maintained for five years, except following a disaster.⁷⁶³

As stated earlier, the Benoa Bay Reclamation Project occurred during the absence of the implementing regulations on review and amendment of the spatial plan from 2010 to 2016. Presidential Regulation No. 45 of 2011 (an implementing regulation under SPL 2007) on the Spatial Plan of Sarbagita provided that conservation areas in coastal areas and small islands in Sarbagita cover the following areas: Serangan Islands; Pudut Islands; the waters of Sanur, Kuta, and Nusa Dua area; and Benoa Bay.⁷⁶⁴ Hence, there could be no commercial projects in those areas, including Benoa Bay. Three years later, the central government issued Presidential Regulation No. 51 of 2014 on the Amendment of Presidential Regulation No. 45 of 2011, changing the status of the Benoa Bay from a water conservation area to a potential area for general utilisation, including marine, fishery, transportation, economic development, settlement, social, culture, religion, and tourism.⁷⁶⁵ The very point of SPL 2007 and its implementing regulations was therefore undermined.

B *Why Conflicting Regulations Have Occurred*

As the above discussion demonstrates, the main non-legal reason why conflicting regulations relating to the drafting of the conflicting regulations is the importance placed upon economic development and infrastructure projects by government decision-makers. As regards economic development, the content of the Circular Letter from the Coordinating Minister of the Economy expressly identified the importance of economic development as a reason for allowing the revision and amendment of spatial plans more than once in five years.⁷⁶⁶ Presidential Regulation No. 3 of

⁷⁵⁹ *Surat Edaran Menteri Koordinator Perekonomian Nomor: S-163/M.EKON/07/2015 tentang Peninjauan Kembali dan Revisi RTRW Provinsi dan Kabupaten/Kota* [The Circular Letter of Coordinating Minister of Economy No: S-163/M.EKON/07/2015 on the Review and Amendment of Provincial and District Spatial Plan] (Indonesia) Point 1 (*‘Circular Letter on the Review of Provincial and District Spatial Plans’*).

⁷⁶⁰ Ibid point 2c.

⁷⁶¹ ‘Menteri Ferry mau revisi UU No 26 Tahun 2007 Tentang Penataan Ruang’ [Minister Ferry Wants to Revise The 2007 Spatial Planning Law], *Merdeka* (online, 6 Oktober 2015) <<https://www.merdeka.com/peristiwa/menteri-ferry-mau-revisi-uu-no-26-tahun-2007-tentang-penataan-ruang.html>>.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Sarbagita Spatial Plan (n 641) art 55 (5b).

⁷⁶⁵ The Revision of Sarbagita Spatial Plan (n 650) art 63A.

⁷⁶⁶ Ibid point 2c.

2016 likewise said the importance of the nationally strategic projects was to allow the revision and amendment of the spatial plan at any time.⁷⁶⁷

In the Reclamation Project, the ‘consideration’ section of Presidential Regulation No. 51 of 2014 discloses the economic motive behind its issuance,⁷⁶⁸ explaining that the central government will develop Benoa Bay as an economic zone.⁷⁶⁹ Interestingly, the existence of the Masterplan of Acceleration and Extension the Development of Indonesian Economy or *Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia* (‘MP3EI’) became another reason to revise the Sarbagita spatial plan in order to accelerate economic development in Bali.⁷⁷⁰ As stated in the previous chapter, the central government used the MP3EI program as a comprehensive strategy to accelerate and expand Indonesia's economic development for a period of 15 years, from 2011 to 2025. It consists of detailed plans for revisions to laws and regulations to support infrastructure projects as a part of the strategy to accelerate economic development.⁷⁷¹ In this context, because Presidential Regulation No. 45 of 2011 was considered to impede the Reclamation project already planned in the MP3EI program, the central government needed to revise the regulation promptly.⁷⁷²

As to the importance of infrastructure projects, the former Minister of Agrarian and Spatial Planning, Sofyan Djalil, has said that revision of the national spatial plan should be conducted to accommodate some megaprojects that have not yet been incorporated into the list of nationally strategic projects, but which are nonetheless important.⁷⁷³ The list consists of 225 projects nationwide, comprising 47 highway projects, 12 railway projects, five non-toll roads, 11 airport revitalisation projects, four new airport projects, and 13 new ports.⁷⁷⁴ Provincial and district spatial plans are to be revised if they have not accommodated these projects.⁷⁷⁵

Minister of State-Owned Enterprises Rini Soemarno explains that the revision of the national spatial plan should be done promptly because delay in this process will negatively affect the process of land acquisition and disbursement of the loan.⁷⁷⁶ For example, the Jakarta-Badung high-speed train project will be built in areas that are not currently permitted by the national spatial plan.⁷⁷⁷ A delay in the land acquisition process will take place unless the central government can revise its plan to accommodate this project.⁷⁷⁸ Meanwhile, the Chinese Development Bank will not disburse its loan funds if the government cannot guarantee the location of this project in a revised national spatial

⁷⁶⁷ Presidential Regulation on the Acceleration of Nationally Strategic Projects (n 757) art 19(1).

⁷⁶⁸ The Revision of Sarbagita Spatial Plan (n 650), the Preamble.

⁷⁶⁹ Ibid.

⁷⁷⁰ MP3EI (n 658)

⁷⁷¹ Ibid elucidation.

⁷⁷² ‘Bahas Revisi Perpres, Warga Ricuh’ [Discuss the Revision of Presidential Regulation, People Clamor], *Bali Express* (Denpasar), 15 April 2014, 2.

⁷⁷³ ‘Spatial Planning Regulations Revised to Accommodate Megaprojects’, *The Jakarta Post* (online, 3 May 2017) <<http://www.thejakartapost.com/news/2017/05/03/spatial-planning-regulations-revised-to-accommodate-megaprojects.html>>.

⁷⁷⁴ Ibid.

⁷⁷⁵ Ibid.

⁷⁷⁶ ‘Pemerintah merilis revisi PP Tata Ruang’ [Government Lauches a Revision of Presidential Regulation on Spatial plan], *Kontan* (online, 3 Mei 2017) <<https://nasional.kontan.co.id/news/pemerintah-merilis-revisi-pp-tata-ruang>>.

⁷⁷⁷ Ibid.

⁷⁷⁸ Ibid.

plan.⁷⁷⁹ This reflects how the central government sees spatial planning as a bureaucratic impediment, neglecting its goal of protecting the environment, among other factors. This analysis will be further explained in the next chapter, where I discuss the reason why the economic development goal outweighs the spatial planning goal of sustainability.

This is not to say that spatial planning should not be capable of revision to accommodate economic development. The revision of spatial planning should, for example, enable development in remote areas of Indonesia. What is lacking is a set of proper procedures concerning any revision that maintain the objective of spatial planning, namely the informed consideration of all factors important to a society, including economic growth, social goals and the environment. Besides neglecting public participation (as the next section will explain), hasty change to a spatial plan reflects the centralised nature of planning, which overrides local concerns. The central government through its Presidential Regulation No. 32 of 2011 on the Masterplan of Acceleration and Extension the Development of Indonesian Economy 2011-2025, requires provinces and districts to revise their spatial plan to allow infrastructure projects to continue. It also reflects the fact that the central government does not have any clear development plan in the medium or long term, but simply responds as projects arise.

The importance of economic development and infrastructure projects to the Indonesian government reflects the presence of external factors, both political and economic, international and domestic, that lead to regulatory capture. Robert Kagan introduces this concept as ‘political environmental factors’, which he argues are a major contributing factor of regulatory capture, especially in the enforcement stage of development projects.⁷⁸⁰ For example, in urgent projects, political authorities place pressure on state agencies to relax regulatory limitations that might hamper projects that the politicians consider crucial to the economy.⁷⁸¹

In this context, the central government intervenes in provincial and district government affairs to revise existing spatial plans that hamper a project the central government considers economically crucial. Revising the spatial plan because of economic development and infrastructure projects is likely to hamper the environmental objectives of spatial planning, and cause damage the environment. For example, although projects are now legally conducted in locations that are classified as utilisation areas, many were previously categorised as conservation or protection areas for sound environmental reasons. Sooner or later, there will be adverse impact on the environment caused by these projects. At the very least, it seems clear that the central government is not consistent in protecting the environment, and that this is a key reason for the regulatory failure of spatial planning regulation.⁷⁸²

⁷⁷⁹ Ibid.

⁷⁸⁰ Robert A Kagan, ‘Understanding Regulatory Enforcement’ (1989) 11 *Law and Policy Quarterly* 89, 111.

⁷⁸¹ Ibid.

⁷⁸² For explaining eight criteria of regulatory failure, see Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd revised ed, 1969) 89.

IV LACK OF PUBLIC PARTICIPATION

A *How Lack of Public Participation Does not Occur*

In the current era of regional autonomy, public participation is crucial to realising the goal of development.⁷⁸³ Besides reflecting democratic principles, public participation improves the quality of regulation. Specifically, public participation (if it is done properly) represents the needs of society, which is an important goal of regulation, particularly with respect to spatial planning.⁷⁸⁴ SPL 2007 states that governments must carry out the implementation of spatial planning by involving the public. Public participation will significantly support the objectives of spatial planning, namely realising comfortable, safe, productive, and sustainable spaces.⁷⁸⁵

Central government Regulation No. 15 of 2010 stipulates that the procedures for preparing the spatial plan shall include public participation in the formulation of the spatial plan concept.⁷⁸⁶ Central government Regulation No. 68 of 2010 then explains how this public participation is to be undertaken.⁷⁸⁷ Specifically, the public may be involved in the following preparatory activities: preparation of the spatial plan; determining the direction of regional development; and identification of the potentials and problems of regional development.⁷⁸⁸ In spatial utilisation, the public may contribute by giving policy recommendations for spatial utilisation; and cooperating with other stakeholders in utilising space.⁷⁸⁹ In spatial control, the public may recommend the improvement of zoning regulation and sanctions; monitor and supervise the implementation of the spatial plan; report to authorised agencies in the event of violations; and make objections to decisions of the competent authority over developments considered incompatible with the spatial plan.⁷⁹⁰

However, in the implementation of those two regulations, community involvement in spatial planning is an aspect that is often overlooked. Even if implemented, the involvement of the community is often limited to the provision of information and consultation, that is, mere formalities. Suyatna shows there is a lack of clarity about when public participation should be undertaken.⁷⁹¹ The government mostly uses public participation in drafting a regulation, but in different ways. Specifically, the Bali Provincial government involves the public through the dissemination of draft regulations in all districts and municipalities in Bali.⁷⁹² The Badung District government has conducted public participation when the initiating agency submits a draft

⁷⁸³ Indra J Piliang et al, *Otonomi Daerah: Evaluasi dan Proyeksi* [Regional Autonomy: Evaluation and Peojection] (Jakarta, Yayasan Harkat Bangsa, 2003) 267-272. See also Joko Riskiyono, 'Partisipasi Masyarakat dalam Pembentukan Perundang-undangan untuk Mewujudkan Kesejahteraan' [Public Participation in the Formation of Legislation to Achieve Prosperity] (2015) 6(2) *Aspirasi* 159, 160.

⁷⁸⁴ Ibid.

⁷⁸⁵ SPL 2007 (n 252) art 3.

⁷⁸⁶ SPGR 2010 (n 277) art 20.

⁷⁸⁷ *Peraturan Pemerintah Nomor 68 Tahun 2010 tentang Bentuk dan Tata Cara Peran Masyarakat Dalam Penataan Ruang* [Government Regulation No.68 of 2010 on the Forms and Procedures of the Role of the Community in Spatial Planning] (Indonesia) art 5.

⁷⁸⁸ Ibid art 6.

⁷⁸⁹ Ibid art.8.

⁷⁹⁰ Ibid art. 9.

⁷⁹¹ I Nyoman Suyatna, 'Asas-asas Umum Pemerintahan yang Baik dalam Pembentukan Peraturan daerah' [Good Governance Principles in the Making of Regional Regulation] (PhD Thesis, University of Brawijaya, 2011) 159.

⁷⁹² Ibid.

regulation.⁷⁹³ The Tabanan District government invites public participation before the draft's submission to the legislative body.⁷⁹⁴ Meanwhile, the Bangli District government will invite the public when a special committee of the local legislative body discusses a draft regulation.⁷⁹⁵

Atu Dewi has examined the law-making process for Bali's Provincial Regulation and, specifically, the Badung District Regulation concerning the participation of traditional villages or *desa pakraman*.⁷⁹⁶ She found that traditional village participation is still limited, and tokenistic. The government held public participation only as a symbolic event by involving a small number of people from under-represented communities, merely to show an appearance of fairness.⁷⁹⁷

The link between the lack of public participation and regulatory failure is very evident in the Benoa Bay Reclamation Project. When the central government decided to amend the presidential regulation, the Coordinating Minister of Economic, the National Spatial Planning Coordinating Board, along with the Bali Provincial government held public consultations. The purpose of this event was to inform the public of their plan to revise Presidential Regulation No. 45 of 2011. They invited local communities in Bali who would be mostly affected by the revision of this regulation. Interestingly, the only parties invited were those that had already agreed to the Reclamation Project. WALHI Bali, a leading environmental NGO in Bali, and a member of the Bali Provincial Spatial Planning Coordination Board,⁷⁹⁸ was not invited, nor were local communities around Benoa Bay, such as Kuta, Kedonganan, and Kelan.⁷⁹⁹

As regards the environmental impact assessment ('EIA') in relation to the Benoa Bay Reclamation Project, lack of public participation again occurred when the Deputy Minister of Environment held a public consultation about the plan for the Benoa Bay Reclamation. Specifically, this event did not involve affected communities.⁸⁰⁰ It did not invite fisher groups, who depend for their livelihood on Benoa Bay.⁸⁰¹ In addition, local communities of Kelan and Sidakarya that had publicly rejected the Reclamation Project were also not invited,⁸⁰² neglecting the principle of equality of parties involved.⁸⁰³

⁷⁹³ Ibid.

⁷⁹⁴ Ibid.

⁷⁹⁵ Ibid.

⁷⁹⁶ Anak Agung Istri Ari Atu Dewi, 'Partisipasi Desa Pakraman dalam Pembentukan Peraturan Daerah' [The Participation of Local Community in the Law Making Process of Regional Regulation] (PhD Thesis, University Udayana, 2017) 24.

⁷⁹⁷ Ibid.

⁷⁹⁸ *Surat Undangan Kementerian Koordinator Perekonomian No.UND-50/D.VI.M.Ekon/04/2014 of 10 April 2014* [Invitation Letter of the Coordinating Ministry of Economy No.UND-50/D.VI.M.Ekon/04/2014 of 10 April 2014].

⁷⁹⁹ Ibid.

⁸⁰⁰ 'Pernyataan Sikap Tolak Reklamasi Teluk Benoa: Segera Batalkan Perpres 51 Tahun 2014' [A Statement of Attitude to Refuse the Reclamation of Benoa Bay: Promptly Annul the Presidential Regulation No 51 of 2014], *Forbali* (online, 24 March 2015) <<https://www.forbali.org/id/pernyataan-sikap-tolak-reklamasi-teluk-benoa-segera-batalkan-perpres-51-tahun-2014/>>.

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Ibid., After this thesis was submitted, the 2020 Omnibus Bill on Job Creation was submitted to Indonesia's national legislature, the DPR. Article 22 point 5 of the Bill would have the unfortunate effect of narrowing the possibilities for public participation in EIA even further than is already the case. This article states that only people from affected communities that have "direct impact" and are "relevant" to the business plan are able to

The lack of public participation also took place yet again in relation to the Tahura Project. The Governor of Bali decided to silently issue an exploitation permit for Tahura Ngurah Rai. When WALHI revealed the Governor's plan to issue the permit in the mass media in Bali, it triggered a massive response by local communities around Tahura Ngurah Rai, particularly Pemogan village.⁸⁰⁴ Although affected communities requested a public hearing, it did not happen, and the Governor proceeded to issue the permit.⁸⁰⁵ There was no announcement to the public at all regarding its issuance.⁸⁰⁶ Moreover, in the revision process of the Tahura Zoning Map, there was no explanation ever given of whether this process had involved the public, although it was clear enough that the whole revision process was not open to the public. It was unclear what actually was discussed and what decisions were reached. Only the result (the map revision) was made available to the public.

In the Mulia Project, the Badung District government involved the public by announcing the plan of the Mulia Project. However, that was the only and final public participation conducted as the process of the issuance of the building permit was never publicly revealed. In 2010, there were no regulations to oblige the government to conduct public participation in spatial planning governance. Two central government regulations (No. 15 of 2010 and No.68 of 2010) that regulated public participation in spatial planning had not yet entered into force. The investor involved the public by making two agreements with local communities in Sawangan, but the goal of these agreements was just to induce local communities to agree with the project by offering them monetary compensation. As mentioned in Chapter Three, this measure was not effective to pacify public protest as in October 2011, seven months after the building permit was issued, massive protests started to rise because of the detrimental impact the project was having on the environment.

The existence of two agreements reflects economic inducement where investors use their financial power to continue their projects. If they want to build a hotel, they simply pay people off. Moreover, there is no law to protect local communities from this situation, or constraint investors to use this power. As a result, investors are still in a dominant position, and what has been happening so far is that they can bribe government officials and induce local communities by offering them monetary compensation. This fact relates to the discussion of non-legal factors in the next chapter where the pursuance of economic enrichment contributes to the regulatory failures of spatial planning in Bali.

B *Why the Public is not Involved*

In my view, three reasons explain why the public is usually not involved in the creation, implementation, enforcement, and revision of spatial plans. The first is that although both central government Regulations No. 15 of 2010 and No. 68 of 2010 require public participation, there are no legal consequences or sanctions if this does not happen. In the Tahura Project, there was no public participation in the creation, implementation or revision of Tahura Zoning Map. Nevertheless, this project continued and no sanctions were ever imposed for lack of public participation.

provide suggestion or opinion on the issuance of the EIA. See Rancangan Undang-Undang Cipta Kerja [Omnibus Bill on Job Creation] (Indonesia), Art. 22 point 5.

⁸⁰⁴ High Administrative Court Decision (n 601) 73.

⁸⁰⁵ Ibid.

⁸⁰⁶ Ibid.

There is also a lack of clarity as to the stage at which public participation should take place. Specifically, there is no mention in either central government Regulation No. 15 of 2010 or No. 68 of 2010 of a requirement for governments to involve the public in all stages of the spatial plan process.⁸⁰⁷ As in the case of the Reclamation Project, public participation is only undertaken when the process is in the revision stage, that is, when the government wanted to revise the status of Benoa Bay from a conservation area to a general utilisation area. There is no public participation in the creation and implementation of the spatial plan. Finally, the regulations do not anticipate the typical situation in Indonesia where governments deliberately ‘rig’ the process by only inviting members of the public who are not opposed to the government’s viewpoint, as in the Reclamation Project case.

To sum up, in my view, the fact that the Tahura and Reclamation Projects did not adequately involve the public in the decision-making process demonstrates that spatial planning regulations do not offer or require fair, accessible, and open procedural processes. As a result, following broader regulatory theory introduced by Braithwaite, spatial planning regulations will not produce ‘responsive regulation’.⁸⁰⁸

V CRIMINAL SANCTIONS HAVE NOT BEEN APPLIED IN SPATIAL PLANNING

A *How Criminal Sanctions Have Not Been Applied*

SPL 2007 expressly provides for criminal sanctions for government officials in charge of issuing permits who issue a permit contradicting a spatial plan,⁸⁰⁹ and these include dishonourable dismissal.⁸¹⁰ In reality, however, these sanctions have never been applied to government officials in Bali, even though violations of the spatial plan are many and obvious. There is also a tendency that if Governors or Mayors issue a permit that has deviated from, or even violated, the spatial plan, the central government will amend the spatial plan by presidential regulation or ministerial decree to support the permit. As a result, a permit that was previously illegal becomes a legal measure.⁸¹¹

The former Minister of Agrarian and Spatial Planning acknowledges that criminal sanctions under SPL 2007 are pointless, as they are not enforced and, consequently, they have no deterrent effect.⁸¹² Indeed, after SPL 2007 entered into force, the number of violations increased.⁸¹³ This is borne out by the case studies in the previous chapter.

⁸⁰⁷ Article 23 of Law No. 32 of 2009 on Environmental Protection would be amended so that only businesses that have “a major impact on the environment, society, the economy and culture” will have to pass an EIA. Unfortunately, the bill does not define “major impact”, leaving it to the government to decide. The bill would also reduce sanctions for environmental offences and amend Law No. 26 of 2007 on Spatial Planning, allowing the central government to issue a presidential decree to sort out overlapping land and forest use permits. Both these provisions are likely to greatly assist unscrupulous plantation, logging and mining businesses. This bill has proved very controversial and so is unlikely to be passed in the near future.

⁸⁰⁸ John Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) 34(5) *World Development* 884, 885. See also Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 122.

⁸⁰⁹ SPL 2007 (n 252) art 73(1).

⁸¹⁰ *Ibid* art 73(2).

⁸¹¹ Suardana (n 443).

⁸¹² ‘Pemerintah Minta DPR Revisi UU Penataan Ruang’ (n 276).

⁸¹³ *Ibid*.

In the Tahura Project, the Governor of Bali could have been prosecuted as he granted a permit for the exploitation of nature tourism that covered not just the utilisation block, but also the protection block. Issuing a permit in a protection block is a violation of the Tahura spatial plan (Tahura Zoning Map). Avoiding criminal sanctions, the Bali Provincial government, specifically, the Forestry Agency, modified the map by issuing a new one in 2012, after the permit was given to the investor. The new map showed that the area of protection block, where the project would be undertaken, had become a utilisation block. Although some irregularities existed in the issuance of the new map, as mentioned in Chapter Four, central government Regulation No. 10 of 2010 does not categorise this government action as an offence that can be prosecuted.⁸¹⁴

A similar type of retrospective justification occurred in the case of Reclamation Project. The Governor of Bali issued a permit to allow the reclamation of the Benoa Bay. This permit contradicted the national spatial plan because Presidential Regulation No. 45 of 2011 classified Benoa Bay as a conservation and environmental buffer area, meaning that there could be no commercial development in this strategic area. Hence, according to criminal sanctions provisions under SPL 2007, the Governor of Bali could have been prosecuted for issuing the permit. However, he was not, as the central government supported the permit by issuing a new presidential regulation, changing the status of the Benoa Bay from a conservation area to a general utilisation area. Hence, the permit issued by the Governor of Bali was no longer illegal.

However, the law can not be applied retrospectively. The Governor's conduct should be assessed under the law as it was at the time of the offence, that is, Presidential Regulation No. 45 of 2011, not the amended regulation, that is, Presidential Regulation No. 51 of 2014. Therefore, the Governor of Bali could still be prosecuted for issuing the permit regardless of the revision of the status of Benoa Bay under the amended regulation. He was not, and it is unlikely that he will be.

B *Why Criminal Sanctions Have Not Been Applied*

One reason why criminal sanctions have not been applied, although some government officials allegedly violate spatial planning, is the absence of a district-level detailed plan. As central and district government officials have observed, it would be difficult to qualify a spatial planning permit as a crime if there is no district-level detailed plan that provides strong evidence that the violation has occurred.⁸¹⁵ In my view, however, this statement is debatable. In the Reclamation Project, there is 'strong evidence' that the Governor of Bali issued a reclamation permit in Benoa Bay that was classified as a conservation area. However, there has never been any criminal investigation of the Governor for this act.

Corruption is arguably the main motive behind the absence of criminal sanctions. Historically, the introduction of criminal sanctions for government officials, which is highly unusual in Indonesia, was intended to be an anti-corruption measure. An administrative law expert from the University of Udayana explains that criminal sanctions under spatial planning governance are relatively new for legal enforcers, such as police and public prosecutors,⁸¹⁶ and are, in fact, rare in the Indonesian legal

⁸¹⁴ The Regulation of Changes of Allocation and Function of Forest Zones (n 550).

⁸¹⁵ Renald (n 704) and Adnyana (n 706).

⁸¹⁶ Interview with I Gusti Ngurah Wairocana, Administrative Law Expert, Former Dean of Faculty of Law Udayana University (I Gusti Ngurah Parikesit Widiatedja, Udayana University, 24 January 2018).

system.⁸¹⁷ As a consequence, this anti-corruption measure has clearly failed, as not only Mayors and Regents, but also the Governor appear to behave corruptly, as in the case of the Reclamation Project. Likewise, as the Tahura Project has suggested, the courts are also corrupt and public interest litigation has also failed to ensure accountability.

The academic paper accompanying SPL 2007 stated that Mayors and Regents issue spatial planning permits as a means of pursuing economic benefit, including personal enrichment.⁸¹⁸ The issuance of permits that expressly contradict spatial planning generally means the land and other natural resources are often ‘sold’ for the sake of income generation.⁸¹⁹ Corruption also plays a significant role in the regular revision of spatial plans to retrospectively legitimise a Governor’s or Regent’s permit that contradicts it, as discussed in section A. This prevents a possible criminal investigation although it seems a very irregular way to legalise criminal conduct.

When Governors or Regents issue a spatial planning permit, they must know the existing spatial plan in their regions. Hence, it should be almost impossible for them to issue a permit that conflicts with the spatial plan. If Governors and Mayors issue a permit that contradicts the spatial plan, this can only be a sign of corruption, collusion, or nepotism. Anti-Corruption Law No. 31 of 1999 imposes powerful sanctions.⁸²⁰ If this law is applied, criminal sanctions can definitely be applied to ‘buyable’ Indonesian regulators, as the following three cases demonstrate.⁸²¹

The first is when the Jakarta Corruption Court sentenced Sanusi, a Member of the Jakarta Legislative Body, to seven years in prison after he received IDR 2 Billion (USD 147.000) from the President Director of a developer company, Agung Podomoro Land.⁸²² The investor bribed Sanusi to accelerate the enactment of the North Jakarta Spatial Planning Law that justified the Jakarta Bay Reclamation Project continuing.⁸²³

In October 2018, the KPK arrested nine people, including the Regent of the Bekasi District government and a director of the Lippo Group, a large conglomerate, in a bribery case over a real estate megaproject, Meikarta.⁸²⁴ Meikarta was the largest project of the Lippo Group: a centre for the electronic and automotive industries, encompassing five-star hotels, shopping malls, and universities.⁸²⁵ The Lippo Group director bribed officials of the Bekasi District government to obtain a property permit.⁸²⁶ The controversy about this project arose because the location of this project contradicted the existing spatial plan in the West Java Provincial government and the Bekasi District

⁸¹⁷ Ibid.

⁸¹⁸ Academic Paper of SPL 2007 (n 145) 2

⁸¹⁹ Ibid 13.

⁸²⁰ *Undang-Undang No. 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi* [Law No. 31 of 1999 on the Eradication of Corruption] (Indonesia) art 2 and 3.

⁸²¹ See eg, Ben Bowling, *Policing the Caribbean* (Oxford University Press, 2010) 5. See also John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Routledge, 1984) 16.

⁸²² ‘KPK Summons City Secretary over Jakarta Bay Bribery Case’, *The Jakarta Post* (online, 28 October 2017) <<https://www.thejakartapost.com/news/2017/10/28/kpk-summons-city-secretary-over-jakarta-bay-bribery-case.html>>.

⁸²³ Ibid.

⁸²⁴ ‘Indonesia Arrests Nine in Bribery Probe Linked to 21 Billion Lippo Group Project’, *Reuters* (online, 16 October 2018) <<https://www.reuters.com/article/us-indonesia-corruption-lippo/indonesia-arrests-nine-in-bribery-probe-linked-to-21-billion-lippo-group-project-idUSKCN1MQ1MJ>>.

⁸²⁵ Ibid.

⁸²⁶ Ibid.

government. The KPK ultimately confiscated IDR 513 million (USD 33,772) and USD 65,378 that had been planned for use as bribe money.⁸²⁷

Lastly, in July 2019, the KPK arrested six people, including the Governor of Riau Islands and the Head of the Riau Islands Marine and Fishery Agency, over a bribery case in relation to the issuance of a reclamation permit in Riau Islands.⁸²⁸ In this case, the investor planned to reclaim an area of 10.2 Ha in Tanjung Piayu, Batam for an integrated tourism area.⁸²⁹ The KPK found the Governor of Riau Islands gradually received SGD 11,000 and IDR 45 Million from the investor to speed up the issuance of the reclamation permit.⁸³⁰

This finding is supported by broader theoretical work on regulation. For example, Estache and Lewis argue that it is common corruption involves government agencies and their monitoring agencies in developing countries.⁸³¹ Similarly, Anthony Ogus uses ‘capture theory’ to explain why the public interest objectives designated to state agencies have been undermined by ‘bribery’ and other such ‘hidden interests’.⁸³²

To sum up, the Anti-Corruption Law can and has been applied to prosecute government officials who violate spatial planning laws for general benefit under the Anti Corruption Law. Unfortunately, this has never happened in Bali. The failure to enforce criminal sanctions means Governors and Regents believe they will never face prosecution and the central government, instead of revoking the permit, will support it, as the Tahura and Reclamation Projects have shown.

VI POOR JUDICIAL DECISIONS REGARDING THE STANDING OF PUBLIC INTEREST ORGANISATIONS TO SEEK JUDICIAL REVIEW OF SPATIAL PLANNING DECISIONS

A *How Poor Decisions Have Contributed to the Failure of Spatial Planning Regulation*

I have already discussed how recent court decisions have produced a very narrow test of standing that prevents public interest organisations from holding government officers to account where environmental damage is foreseeable but has not yet occurred. I will now explain these decisions in more detail.

As mentioned, in the Tahura Project, although the Denpasar District Administrative Court agreed with the logical proposition that a violation of spatial planning (Tahura Zoning Map) could damage the environment, the Appellate Administrative Court and the Supreme Court avoided the

⁸²⁷ Ibid.

⁸²⁸ ‘Terkait Izin Reklamasi, KPK Tangkap Tangan Enam Orang Malam ini’ [Concerning a Reclamation Permit, KPK Arrested Six People Tonight], *Bali Tribun* (online, 10 July 2019) <<https://bali.tribunnews.com/2019/07/10/terkait-izin-reklamasi-kpk-tangkap-tangan-enam-orang-malam-ini>>.

⁸²⁹ ‘Fakta Kasus Gubernur Kepri: Suap Izin Reklamasi, Uang Pecahan Asing, hingga Ditahan KPK’ [The Fact of the Case of the Governor of Riau Islands: A Bribery in a Reclamation Permit, Foreign Currency Money, and the Arrest from KPK], *Kompas* (online, 12 July 2019) <<https://nasional.kompas.com/read/2019/07/12/07050921/fakta-kasus-gubernur-kepri-suap-izin-reklamasi-uang-pecahan-asing-hingga?page=all>>.

⁸³⁰ Ibid.

⁸³¹ Antonio Estache and Liam Wren-Lewis, ‘Toward a Theory of Regulation for Developing Countries: Following Jean-Jacques Laffont’s Lead (2009) 47(3) *Journal of Economic Literature* 729, 745.

⁸³² Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford University Press, 1994) 57. See also Christine Parker and John Braithwaite, ‘Regulation’ in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 119,127.

adjudication of this issue and instead focussed on the issue of standing. In the Appellate Administrative Court, the Judges focused on the ‘potential’ environmental damage that might be caused by the violation of spatial planning law as a means of determining whether an environmental protection organisation had the necessary interest or standing to challenge the decision of a Governor.⁸³³ The court in that case held that ‘potential’ environmental damage only became ‘real’ after the investor completed the infrastructure development and the projects were running.⁸³⁴ Only at this stage did the court recognise that a public interest organisation would have standing to apply. The Supreme Court upheld this, saying that WALHI, as an environmental NGO, had no standing to challenge the violation of the spatial planning law, because the environmental damage was still ‘potential’ at the planning stage, and the impact of environmental damage could not be measured.⁸³⁵ By that time, of course, it would be too late to prevent the damage itself.

B *Why this Decision Occurred*

Three reasons might explain why judges applied such a narrow test of standing, namely: their incompetence; their dependence on the existence of the Supreme Court; and corruption.

Judicial incompetence is a common cause of regulatory failure in developing countries.⁸³⁶ As in the case of the Tahura Project, the decisions of the Appellate Court and the Supreme Court should be criticised for avoiding the main issue in the dispute, namely the fact that the decree of the Governor violated the spatial plan in Tahura Ngurah Rai. Both the Appellate Court and the Supreme Court considered issues of standing and applied a narrow test of standing by stating that the environmental NGO had no standing because environmental damage had not yet occurred, thus allowing them to avoid adjudication of the legality of the Governor’s decision.

The environmental damage that will occur if the Tahura Project proceeds is obvious, because the project is being developed in a protection block. Surely the loss of part of the protection block, and the ensuing decline of mangrove ecosystems, means that the project inevitably involves environmental damage. Could it ever be possible to develop a project located in dense vegetation areas without logging the mangrove trees, and thus clearly causing environmental damage? The judgement makes a mockery of spatial planning laws, the object of which is to *prevent* environmental damage, amongst other matters.

Moreover, there is no legal basis or previous court decisions that state that environmental damage must have occurred before an environmental organisation will be granted standing to commence judicial review proceedings in a public interest matter. Law No. 32 of 2009 on the Environment states that an environmental organisation has standing in an environmental lawsuit as long as it complies with the following requirements:⁸³⁷

- a. it is a legal entity;

⁸³³ High Administrative Court Decision (n 601) 159.

⁸³⁴ Ibid.

⁸³⁵ The Supreme Court Decision (n 605) 94.

⁸³⁶ For analysing the regulatory failure in a developing country caused by judges’ incompetence, see David M. Trubek, ‘The Rule of Law in Development Assistance: Past, Present, and Future’ in Y Matsuura (ed), *The Role of Law in Development: Past, Present and Future* (Nagoya University CALE Book, 2005) 1, 3.

⁸³⁷ Environmental Law (n 319) art. 92.

- b. it is stated in its constitution that the goal of this organisation is to protect the environment; and
- c. it has conducted environmental activities or programs at the minimum of two years.

If this kind of judicial incompetence is allowed to stand, public interest groups will be unable to challenge violations of spatial planning laws by means of judicial review, because this absurd test of standing requires them to demonstrate that their interests are affected by actual damage rather than potential damage. This would mean that the government and investors are free from potential lawsuits and they can continue their unsustainable projects. Judicial decisions such as these mean that spatial planning laws are failing to prevent environmental damage caused by unsustainable projects.

Interestingly judicial incompetence has been evident in other environmental protection cases. Specifically, the Judges of the Palembang District Court controversially decided in 2015 that burning forest did not constitute environmental damage. In this case, the Ministry of Environment and Forestry filed a lawsuit against a company, PT Bumi Mekar Hijau ('BMH') for burning forest in South Sumatra.⁸³⁸ However, the Judges held that the evidence presented was not sufficient.⁸³⁹ One of the reasons was that there was no scientific evidence to show that the burning process had actually damaged the land.⁸⁴⁰ Furthermore, the court held, the land still functioned well, as acacia trees could later be planted on the burned land.⁸⁴¹ This absurd decision led to some critics, saying that on this rationale, theft might not be a crime because the victims of the theft could earn money back through working.⁸⁴² Similarly, in 2019, WALHI filed a lawsuit against the PT Kusuma Raya Utama, which conducted coal mining in the Bukit Kabu Seminang conservation forest block.⁸⁴³ The panel of judges at the Bengkulu District Court rejected WALHI's claim, arguing that it had not presented strong evidence to show that coal mining in the conservation forest block could damage the environment.⁸⁴⁴

The reluctance of judges to refer to previous judges' decisions is another factor contributing to judicial incompetence. Although Indonesia has a civil law tradition, this does not mean that judges can always neglect previous relevant judges' decisions. They can be persuasive and should, at least, be considered. In 2014, there was a case in the Meulaboh District Court, Aceh, involving the Ministry of Environment and Forestry and Kalista Alam Company.⁸⁴⁵ This company was accused of

⁸³⁸ *Keputusan Pengadilan Negeri Palembang Nomor: 24/Pdt.G/2015/PN.Plg* [The Decision of Palembang District Court No. 24/Pdt.G/2015/PN.Plg] 114.

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Ibid.*

⁸⁴² 'Dikritik Majelis Hakim yang Bebaskan Perusahaan Yang Diduga Bakar Hutan' [It is Criticized the Panel of Judges Who Released Companies Suspected of Being Forest Burns], *Tribunnews* (online, 4 January 2016) <<http://www.tribunnews.com/nasional/2016/01/04/dikritik-majelis-hakim-bebaskan-perusahaan-yang-diduga-bakar-hutan>>.

⁸⁴³ 'Gugatan Walhi ditolak, Hakim anggap tambang batubara tak cemarkan lingkungan' [Walhi's lawsuit was rejected, Judges considered the coal mine did not pollute the environment], *Antara* (online, 9 May 2019) <<https://bengkulu.antaranews.com/berita/66108/gugatan-walhi-ditolak-hakim-anggap-tambang-batubara-tak-cemarkan-lingkungan#.XNPwQfQjsMN.facebook>>.

⁸⁴⁴ *Ibid.*

⁸⁴⁵ *Keputusan Pengadilan Negeri Meulaboh Nomor: 12/ PDT.G/ 2012/ PN.MBO* [The Decision of Meulaboh District Court No12/ PDT.G/ 2012/ PN.MBO] 2.

burning land in the Rawa Tripa peatland in Nagan Raya District.⁸⁴⁶ SPL 2007 and central governmental Regulation No. 26 of 2008 classified the Rawa Tripa as a part of the Leuser Ecosystem Area with protected functions.⁸⁴⁷ The Rawa Tripa has an important role in absorbing carbon, preventing flooding, encouraging species diversity, and supporting traditional fishers.⁸⁴⁸ However, the company burnt this area to become open land that was later used for oil palm plantations.⁸⁴⁹ The Meulaboh District Court found the company liable, and ordered it to pay material compensation of IDR 114 billion to the state and IDR 251 billion for land recovery funds.⁸⁵⁰ This case was a good example of judicial competence that properly applied spatial planning laws. The judges in the Tahura case should have referred to this decision, which showed that the violation of spatial planning would likely damage the environment, sooner or later, and so WALHI should have been granted standing.

Lower court judges' dependence on the Supreme Court also plays an important role. Under the Soeharto administration (1967-1998), the executive body, through the Ministry of Justice, controlled judicial administration, including budgeting, employment, and promotion of the judges.⁸⁵¹ As a consequence, state intervention in judicial decisions was rampant in this era.⁸⁵² Specifically, judges' decisions were not grounded 'on evidence before them but telephoned instructions from Soeharto's inner circle'.⁸⁵³

After 1998, in the Reformation era, the Supreme Court took control from the Ministry of Justice, implementing changes to article 24 of the Constitution of 1945, which now guarantees judicial independence. Reflecting this, judges are now named as 'state officials' or *pejabat negara* instead of 'civil servants' or *pegawai negeri*.⁸⁵⁴ However, the dominant control of the Supreme Court created by its formal independence gave it complete administrative and managerial authority over all courts below it. As a result, lower court judges are now highly dependent on Supreme Court officials, and need to have a 'good relationship' with the higher courts for their careers to advance.⁸⁵⁵ This has led to an increase of patronage networks within judicial institutions in Indonesia.⁸⁵⁶ The Chief Justice of the Supreme Court often issues so-called 'magic memos' or '*surat sakti*', instructing a lower court to make a particular decision, or stating that a particular decision cannot be enforced.⁸⁵⁷ These memos have no clear legal basis, and are often seemingly the result of corruption, but are usually followed as if they were law, and are frequently used to override spatial plans.⁸⁵⁸

⁸⁴⁶

Ibid 5.

⁸⁴⁷

Ibid 174, see also *Peraturan Pemerintah Republik Indonesia Nomor 26 Tahun 2008 Tentang Rencana Tata Ruang Wilayah Nasional* [Governmental Regulation No. 26 of 2008 on National Spatial Plan] (Indonesia) art 59.

⁸⁴⁸

Ibid 202.

⁸⁴⁹

Ibid 178.

⁸⁵⁰

Ibid 231.

⁸⁵¹

Butt and Lindsey (n 152) 82.

⁸⁵²

Ibid.

⁸⁵³

Ibid.

⁸⁵⁴

Ibid.

⁸⁵⁵

Ibid.

⁸⁵⁶

Ibid.

⁸⁵⁷

Simon Butt, 'Surat Sakti: The Decline of the Authority of Judicial Decisions in Indonesia' (Legal Studies Research Paper No. 09/35, Sydney Law School, May 2009) 2.

⁸⁵⁸

Ibid.

A large number of scholars support the assertion that the most prominent problem in the judicial system in Indonesia is corruption. Samekto argues that a legal crisis in Indonesia has taken place because the legal enforcement apparatus treats the law as ‘tradable activities’ as if justice belongs only to a particular group of people – so-called ‘justice (not) for all’.⁸⁵⁹ Mahfud MD, a former chief justice of the Constitutional Court, explains that although in the public spotlight during the ten years of reform since 1998, the practices of the so-called ‘judicial mafia’ have persisted. The government has made judicial reforms through the establishment of the Judicial Commission and the enhancement of the integrity and quality of judges,⁸⁶⁰ but they have not been able to restore public trust in law enforcement in Indonesia.⁸⁶¹

Referring to the number of complaints submitted to the National Ombudsman Commission, Crouch shows that most of them are related to corruption within the Supreme Court and general courts.⁸⁶² Similarly, Butt and Lindsey argue that bribery scandals involving judges and court officials are common⁸⁶³ and this is, in fact, one reason why courts tend to favour development over the environment in so many cases. For example, in 2018, Corruption Eradication Commission or *Komisi Pemberantasan Korupsi* (KPK) has revealed bribery scandals implicating judges and court officials all across Indonesia, including, among others, Bandung,⁸⁶⁴ Bengkulu,⁸⁶⁵ Tangerang,⁸⁶⁶ Medan,⁸⁶⁷ South Jakarta,⁸⁶⁸ Jepara,⁸⁶⁹ and Balikpapan.⁸⁷⁰

⁸⁵⁹ FX Adji Samekto, *Justice (Not) for All (Kritik terhadap Hukum Modern dalam Perspektif Studi Hukum Kritis)* [Critics for Modern Law from the Perspective of Critical Legal Studies] (Genta Press, 2008) v.

⁸⁶⁰ Mahfud MD, ‘Capaian dan Proyeksi Kondisi Hukum Indonesia’ [Achievement and Projection of Indonesia’s Law] (2009) 16(3) *Jurnal Hukum* 291, 300. See also Eman Suparman, ‘Menolak Mafia peradilan: Menjaga Integritas Hakim, Menyelaraskan Perbuatan dan Nuraninya’ [Refuse the Judicial Mafia: Maintain Judges’ Integrity, Synchronise Their Actions and Conscience] (2017) 47(1) *Jurnal Hukum & Pembangunan* 61, 62.

⁸⁶¹ Ibid.

⁸⁶² Melissa, Crouch, ‘Indonesia’s National and Local Ombudsman Reforms; Salvaging a Failed Experiment?’ in Tim Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 2008) 382, 386.

⁸⁶³ Simon Butt and Tim Lindsey, ‘Judicial Mafia: The Courts and State Illegality in Indonesia’ in Edward Aspinall and Gerry van Klinken (eds), *State and Illegality in Indonesia* (KITLV, 2010) 189.

⁸⁶⁴ ‘Kasus Suap Hakim, KPK Gali Peran Walikota Bandung’ [Judges Bribery Case, KPK Investigated the Role of the Mayor of Bandung], *Berita Satu* (online, 29 May 2013) <<https://www.beritasatu.com/nasional/116692/kasus-suap-hakim-kpk-gali-peran-walikota-bandung>>.

⁸⁶⁵ ‘KPK Periksa Polisi dan Jaksa Dalam Kasus Suap Hakim Bengkulu’ [KPK Investigated Police and Public Prosecutor over Judges Bribery Case in Bengkulu], *Gatra* (online, 6 June 2016) <<https://www.gatra.com/detail/news/204276-kpk-periksa-anggota-polri-dan-jaksa-terkait-suap-hakim-bengkulu>>.

⁸⁶⁶ ‘Tangerang Court Officials Arrested in Bribery Case’, *Jakarta Post* (online, 13 March 2018) <<https://www.thejakartapost.com/news/2018/03/13/tangerang-court-officials-arrested-in-bribery-case.html>>.

⁸⁶⁷ ‘Judge in Meiliana Trial Arrested for Alleged Graft’, *Jakarta Post* (online, 28 August 2018) <<https://www.thejakartapost.com/news/2018/08/28/kpk-arrests-meiliana-judge-for-alleged-bribery.html>>.

⁸⁶⁸ ‘South Jakarta Court Judge, Employee Arrested for Alleged Bribery’, *Jakarta Post* (online, 28 November 2018) <<https://www.thejakartapost.com/news/2018/11/28/south-jakarta-court-judge-employee-arrested-for-alleged-bribery.html>>.

⁸⁶⁹ ‘KPK Tahan Bupati Jepara Terkait Kasus Suap Hakim PN Semarang’ [KPK Arrested the Regent of Jepara over Bribery Case Involving the Judges of the Semarang District Court], *Tempo* (online, 13 May 2019) <<https://nasional.tempo.co/read/1205049/kpk-tahan-bupati-jepara-terkait-kasus-suap-hakim-pn-semarang>>.

⁸⁷⁰ ‘Kasus Suap Hakim PN Balikpapan: KPK Telah Geledah 6 Tempat’ [Judges Bribery Case of the Balikpapan District Court: KPK Searched 6 Spots], *Kompas* (online, 6 May 2019) <<https://nasional.kompas.com/read/2019/05/06/19333471/kasus-suap-hakim-pn-balikpapan-kpk-telah-geledah-6-tempat>>.

VII CONCLUSION

This chapter has described five interrelated legal factors to explain why the regulations of spatial planning fail to prevent environmental damage as a result of tourism projects. First, it found that the spatial planning governance system lacks district-level detailed plans, putting the enforcement mechanism of the spatial plan at risk. Although central government Regulation No. 36 of 2010 requires district governments to complete district-level detailed plans no later than three years from the enactment of the general spatial plan, less than 25 per cent of districts and cities have followed this regulation. None of the districts or the city in Bali has finished a district-level detailed plan. Without such a plan, it is very challenging to analyse and qualify spatial use activities as spatial planning violations. The reason for the delay in the creation of the district-level detailed plan is principally the result of burdensome requirements for the issue of these plans.

A further problem identified in this chapter is conflicting regulations on the review and amendment of the spatial plan. SPL 2007 stipulates that the government at all levels may review or amend the spatial plan once every five years. Only large-scale disasters and the change of boundaries of regions can justify the government reviewing and amending the spatial plan more than once in that time. However, there are a number of implementing regulations that completely contradict SPL 2007, allowing the government to review and amend the spatial plan whenever nationally strategic projects and economic development are involved.

Although SPL 2007 and its implementing regulations require public participation, this process is often ignored. Even if implemented, public participation is usually restricted to the provision of information and consultation (formalities). There are no legal consequences or sanctions if the government does not undertake public information and consultation. SPL 2007 also does not clarify the stage at which public participation should be undertaken.

The absence of criminal sanctions is the next problem identified in this chapter. Corruption is still one of the main reasons behind the absence of criminal sanctions, causing a lack of enforcement of spatial planning laws. It is also caused by the current trend of regular revision of the spatial plan to retrospectively legalise a Governor's or Regent's permit that contradicts it.

Finally, judges' decisions applying a narrow test of standing are a product of, and have aggravated, the factors mentioned above. Specifically, the courts have held as long as the infrastructure development is not complete and the projects are not up and running, there can be no indication of environmental damage. This means that, at this point, no environmental protection groups, and potentially no public interest group more generally, has any interests affected, even if a violation of the spatial plan is apparent. Judges have consistently argued that environmental damage can only happen if the threat of damage has materialised and is not longer just potential. Judges' incompetence, their dependence on the Supreme Court, and corruption are likely to be the key reasons behind this controversial judgement.

After explaining legal factors behind the regulatory failures of spatial planning in Bali, the next chapter will analyse non-legal factors.

Chapter 7

The Non-Legal Factors behind the Regulatory Failures of Spatial Planning

I INTRODUCTION

This chapter explores four non-legal factors behind the regulatory failure of spatial planning in Bali. The importance of economic development in governmental decision-making compared to the goal of sustainable development in spatial planning laws is the first. As reflected by my three case studies, regional governments (provinces and districts) and the central government seem to pursue short-term and unsustainable tourism projects to increase their regional income, neglecting the importance of sustainable development. Related to this, is the pursuance of economic enrichment by local elites, the next non-legal factor. Special treatment and irregularities in issuing a spatial planning permit are common in tourism projects, and some government officials in provincial and district governments use economic development to justify or to hide their real intention (individual enrichment). The third non-legal factor is a lack of coordination due to disharmonious relationships between provincial and district governments. Specifically, the district government does not always involve the provincial government in planning and implementing spatial use, particularly when it comes to location permits for tourism projects. Finally, a lack of human resources, particularly in the map-making process for detailed spatial plans, has significantly impeded the issuance of plans.

The presence of non-legal factors in this thesis, reflected in the case studies, offers empirical evidence of the complexity behind the failure of spatial planning. Whilst these factors may seem obvious, and are certainly common to many countries in the Global South, what the case studies demonstrate is that they are exacerbated and made more challenging because of their interrelationship with other factors.

II ECONOMIC DEVELOPMENT OUTWEIGHS SUSTAINABLE DEVELOPMENT GOALS

A *How Economic Development Outweighs Spatial Planning Goals*

The giving of the greater priority to economic development over spatial planning objectives is a global issue.⁸⁷¹ For example, in the Covent Garden Opera House case in 1988, Westminster City Council granted planning permission for the development of the commercial centre and the refurbishment of the Opera House although this project had conflicted with its development plan.⁸⁷² The council insisted on allowing this project, considering the profits from a commercial centre were to be applied to execute much-needed improvements to the opera house.⁸⁷³ Interestingly, the court supported this claim, arguing the profits were within the meaning of permitted valid material consideration.⁸⁷⁴

⁸⁷¹ See Malcolm Grant, 'Planning Law and the British Land Use Planning System: An Overview' (1992) 63(1) *The Town Planning Review* 3, 10.

⁸⁷² *Ibid.*

⁸⁷³ *Ibid.*

⁸⁷⁴ *Ibid.*

Searle and Cardew argue that these developments are a result of the relationship between neoliberalism and planning, wherein planning has been arranged to achieve the neoliberal agenda.⁸⁷⁵ Boland expresses this fact as ‘neoliberal spatial governance’.⁸⁷⁶ For example, in the early 1980s, a giant tourism project (the Fairmont tourist resort) in Australia threatened conservation and heritage values in the Blue Mountains in New South Wales.⁸⁷⁷ Environmental NGOs, dreading the demolition of a mountain ridge, initiated protests after the local council lodged an application with the Department of Environment and Planning to rezone land on the edge of the ridge for the resort.⁸⁷⁸ NGOs then lodged three different appeals to the Land and Environment Court against the approval of the council of the project application.⁸⁷⁹ In 1985, the New South Wales Labor Council agreed to stop the project if environmental protection was neglected.⁸⁸⁰ As this measure could impede potential economic benefits of this project, the government promulgated special legislation, the so-called *Blue Mountains Land Development (Special Provisions) Act* to avoid possible delays, end existing court action, and authorise the Minister for Planning to approve the resort's development, which eventually opened in 1988.⁸⁸¹ Another example, also in Australia, is the establishment of Darling Harbour located on the western side of Sydney CBD. The government originally planned the redevelopment of Darling Harbour to serve social objectives, such as education and health services.⁸⁸² However, it was soon changed to be a major entertainment and leisure destination area for tourism.⁸⁸³

In Indonesia, the central government anticipated the likelihood that provincial and district governments would pursue economic development goals over sustainable development. Specifically, the academic paper accompanying central government Law No. 26 of 2007 on Spatial Management (‘SPL 2007’) expressly refers to the notorious trend of district governments focusing more on short-term investment projects to increase district income, neglecting the importance of sustainable development.⁸⁸⁴

Hotels are an attractive source of income to regional governments. Since hotels provide a source of regional income, district governments are often keen to grant investors any necessary permits. There have been many cases showing how district governments allow huge business projects to proceed, even though they conflict with existing spatial plans. This is a factor that occurs across Indonesia.⁸⁸⁵

⁸⁷⁵ Glen Searle and Richard Cardew, ‘Planning, Economic Development and the Spatial Outcomes of Market Liberalisation’ (2000) 18(3) *Urban Policy and Research* 355, 358.

⁸⁷⁶ Philip Boland, ‘The Relationship Between Spatial Planning and Economic Competitiveness: the ‘Path to Economic Nirvana’ or a ‘Dangerous Obsession?’’ (2014) 46 *Environment and Planning* 770.

⁸⁷⁷ Searle and Cardew (n 875).

⁸⁷⁸ *Ibid.*

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid* 365.

⁸⁸³ *Ibid.*

⁸⁸⁴ Academic Paper of SPL 2007 (n 145) 2.

⁸⁸⁵ For example, Meikarta Projects plan to develop a massive apartment project in an area of 22,000,000 m² in Cikarang, West Java. Since 2016, this project has successfully sold around 117,000 units. However, the investor started this project without completely fulfilling the building permit, and a location permit over 480 Ha of land is the only permit the project has. Moreover, even that the permit is only for a building industry and an agriculture area, not housing. See ‘Meikarta, Manfaatkan Peluang di Tengah Lemahnya Tata Ruang’ [Meikarta Gains

Moreover, district governments often impose taxes and levies even for services not provided or that are unnecessary.⁸⁸⁶ For this reason, the central government enacted Law No. 28 of 2009 on Regional Taxes and Levies, as a way to control exploitative regional taxes and levies imposed by district governments.⁸⁸⁷

When the Ministry of Home Affairs cancelled regional regulations, most were regulations on regional taxes and levies.⁸⁸⁸ From 2005 to 2009, this Ministry invalidated 1518 regional regulations, and 1142 regional regulations, of which around 75.23 per cent dealt with regional taxes and levies.⁸⁸⁹ In Bali, from 2005 to 2009, the Ministry cancelled 21 regional regulations, of which 17, or around 80.95 per cent, regulated regional taxes and levies.⁸⁹⁰ Interestingly, in 2017, this Ministry lost the power to cancel regional regulations following a Constitutional Court or *Mahkamah Konstitusi* ('MK') decision.⁸⁹¹ In its judgement, the MK held that the cancellation of regulations below the level of the statute in the hierarchy could only be undertaken by review by the Supreme Court, not the Ministry of Home Affairs.⁸⁹² Therefore, the central government now has no power to cancel district regulations even if these regulations are issued solely to raise revenues, neglecting the national and provincial spatial plans.

Although district governments are notorious for pursuing unsustainable economic development, the central government also exhibits such behaviour. As mentioned earlier in the previous chapter, two central government regulations, Presidential Regulation No. 3 of 2016 and the Circular Letter of the Coordinating Minister of Economy, allowed district governments to revise the spatial plan to allow economic development and strategic projects, although SPL 2007 limits the revision of spatial plans to only once every five years. This shows that legal problems, particularly those related to conflicting regulations regarding the review and amendment of the spatial plan, are motivated by non-legal factors, especially the tendency to pursue unsustainable economic development and economic enrichment.

In Bali, some hotel projects have violated spatial planning laws, but, as mentioned, there is a lack of enforcement to respond to such violations.⁸⁹³ The main reasons for this are, again, economic considerations relating to the role of investors (who have violated the spatial planning law) in the economic development in Bali.⁸⁹⁴ The Mulia Project shows how spatial planning regulations are insufficient to handle the weight given to economic benefits compared to environmental protection. The Regent of Badung disregarded the significance of this protection by letting the Mulia Project go

Benefit Amid the Weakness of Spatial Planning], *Validnews* (online, 5 September 2017) <<http://validnews.co/Meikarta--Manfaatkan-Peluang-di-Tengah-Lemahnya-Tata-Ruang-V0000901>>.

⁸⁸⁶ *Undang-Undang Nomor 28 Tahun 2009 tentang Pajak Daerah dan Retribusi Daerah* [Law No 28 of 2009 on Regional Taxes and Levies] (Indonesia) The Elucidation.

⁸⁸⁷ Simon Butt and Nicholas Parsons, 'Reining in Regional Governments? Local Taxes and Investment in Decentralised Indonesia' (2012) 34 *Sydney Law Review* 91.

⁸⁸⁸ Suyatna (n 791) 136.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Keputusan Mahkamah Konstitusi No 137/PUU-XIII/2015* (n 259).

⁸⁹² *Ibid.*

⁸⁹³ Sukeni (n 399) 40.

⁸⁹⁴ *Ibid.*

ahead for the sake of the economic benefit of this project for the district government and the wider community.

In the Tahura Project, although the Bali Provincial government and the Badung District government tried to hide the economic agenda, the existence of the letter of the Regent of Badung revealed the real intention of this revision. This letter suggested the Governor of Bali changed the status of Pudut Island (part of Tahura Ngurah Rai) from a protection block to a utilisation block because the Badung District Government intended to develop this island as a major tourist attraction in order to generate a new source of district income.⁸⁹⁵

In the Benoa Bay Reclamation Project, the Governor of Bali insisted on allowing the reclamation of the Benoa Bay, even though this bay was classified as a conservation area.⁸⁹⁶ As just explained in Chapter Five, the central government reinforced the decision of the Governor of Bali by changing the status of the Benoa Bay from a conservation area to a general utilisation area.⁸⁹⁷ Although the Governor and the investor tried to cover up the economic motivations behind this project, the investor later acknowledged that the goal of this project was to develop commercial tourism areas over 700 hectares of newly reclaimed land, with a value of USD 3 billion.⁸⁹⁸

A spatial planning law expert from the University of Udayana revealed how the provincial and district governments undertake economic calculations when considering whether to enforce spatial planning laws in Bali.⁸⁹⁹ Although many hotels blatantly violate spatial planning, the district government believes that their economic contribution to the district's income outweighs such violations.⁹⁰⁰ Similarly, an official from the Ministry of Environment and Forestry, Regional Office for Bali and Nusa Tenggara, says that when violations of spatial planning cause environmental damage, the government will not revoke the permit as it will decrease the regional revenue earned by the district government, which it utilises to build public infrastructure and alleviate poverty.⁹⁰¹ It is true that many hotels have contributed to economic development because they provide jobs for the local community, taxes, and make corporate social responsibility ('CSR') contributions.⁹⁰² However, in the long run, the cost of recovering environmental damage will be much higher than the taxes and CSR payments contributed by these hotels.

Governments at all levels in Indonesia prefer to pursue short-term and unsustainable tourism projects to increase their regional income, neglecting the importance of sustainable development. The importance of economic development, particularly investment, leads governments to make great efforts to attract tourism projects. If project locations contradict existing spatial plans, they are often willing to revise the plan to justify the project, as happened in the Tahura and Reclamation Projects.

⁸⁹⁵ Regent of Badung's Request (n 549).

⁸⁹⁶ Sarbagita Spatial Plan (n 641) art 55 (5b).

⁸⁹⁷ The Revision of Sarbagita Spatial Plan (n 650) art 63A.

⁸⁹⁸ 'Konsep Revitalisasi Kawasan Teluk Benoa' [The Concept of the Revitalisation of Benoa Bay], *Kompas* (Jakarta), 28 January 2014, 12.

⁸⁹⁹ Dahana (n 584).

⁹⁰⁰ Ibid.

⁹⁰¹ Interview with Eka Sarjana, Head of Sub Directorate of Law Enforcement, Ministry of Environment and Forestry, Regional Office of Bali and Nusa Tenggara (I Gusti Ngurah Parikesit Widiatedja, Denpasar, Ministry of Environment and Forestry, Regional Office of Bali and Nusa Tenggara, 22 January 22, 2018).

⁹⁰² Ibid.

B *Why Economic Development Outweighs Spatial Planning Goals*

There is a major misconception about spatial planning's role in economic development in Indonesia. Instead of viewing it as a complementary factor, governments seem to see spatial planning as a direct rival to economic development. Spatial planning is often considered a bureaucratic impediment that obstructs economic development. Hence, when an economic development plan is decided, and there is an existing spatial plan that is unsuitable for this plan, governments react by revising the spatial plan.

Spatial planning needs to be understood as a complementary element of economic development, particularly sustainable economic development.⁹⁰³ Specifically, 'successful regional economic development requires complementary successful spatial planning practices',⁹⁰⁴ because spatial planning will, at least, provide land for employment sites, and infrastructure support, including housing and transport for workforces.⁹⁰⁵ Spatial planning can assist the government to anticipate road traffic so that it contributes to energy efficiency and reduced congestion.⁹⁰⁶ Spatial planning is also significant in supporting high-tech development, particularly related to the anticipation of environmental impacts.⁹⁰⁷ Once spatial planning is able to execute its function in supporting economic development, it will stimulate investment in a particular area.⁹⁰⁸ Finally, spatial planning can prevent regional disparities that may occur because the developmental benefits are not equally distributed or dispersed across areas.⁹⁰⁹

The goal of spatial planning is actually realising development from sustainable economic, social-cultural, and environmental perspectives.⁹¹⁰ Hence, when realising this goal through a regulatory tool, spatial planning should guide economic development to respect and protect the environment. As a result, spatial planning can guide tourism development to achieve sustainable development.

Tourism developments that comply with spatial planning have not only contributed to economic development but also environmental protection, as the following examples will show. Managers of two compliant hotels explained in an interview that their hotels have contributed significantly to the government revenue and local communities. For example, the Human Resources Manager of the Prama Sanur Beach Bali states that the hotel pays hotel and restaurant tax, entertainment tax, and income tax annually.⁹¹¹ Furthermore, the hotel provides monthly support IDR 5.000.000 (AUD 500) for the local community.⁹¹² As regards employment, the hotel has 419 employees, and 49 employees

⁹⁰³ See Phil Allmendinger and Graham Haughton, 'The Evolution and Trajectories of Neoliberal Spatial Governance: 'neoliberal' Episodes in Planning' (2013) 28(1) *Planning, Practice and Research* 6, 10.

⁹⁰⁴ David Counsell and Graham Haughton, 'Regional Planning Tensions: Planning for Economic Growth and Sustainable Development in Two Contrasting English Regions' (2003) 21 *Environment and Planning C: Government and Policy* 225, 229.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ibid 231.

⁹⁰⁷ Wei-Ju Huang and Ana María Fernández-Maldonado, 'High-tech Development and Spatial Planning: Comparing the Netherlands and Taiwan from an Institutional Perspective' (2016) 24(9) *European Planning Studies* 1662, 1663.

⁹⁰⁸ Counsell and Haughton (n 904) 231.

⁹⁰⁹ J Peter Clinch & Eoin O'Neill, 'Applying Spatial Economics to National Spatial Planning' (2009) 43(2) *Regional Studies* 157

⁹¹⁰ See Brackhahn and Kärkkäinen (n 17) 7.

⁹¹¹ Arinata (n 56).

⁹¹² Ibid.

come from the local community (Intaran village). In terms of corporate social responsibility, the hotel has annual activities, such as beach and coastal cleaning, blood donation, orphanage support, and a turtle conservation program.⁹¹³ Similarly, the Human Resources Manager of the Nusa Dua Beach Hotel explained that the hotel spent IDR 104.000.000 (10.400 AUD) on corporate social responsibility programs in 2017, including blood donation, orphanage, and Badung's conservatory program.⁹¹⁴ The hotel has 530 employees, with 147 from the local community (Benoa village).⁹¹⁵

The existence of such hotels, which comply with the existing spatial plan, raises an interesting question about hotels that do not. Why do they insist on building hotels very close (less than 100 meters) to the beach or within a conservation area or by dredging the ocean? Is there a significant benefit in doing so? Given the fact that many hotels that comply with the existing spatial plan have also been profitable and provided economic benefits to their communities, it is hard to see what the benefit is of building a hotel that does not comply with spatial planning law. Ignorance as to the benefits of sustainability, an unwillingness to act in the public interest, and ultimately, the increasing shortage of space legally accessible to investors, may all explain this unlawful behaviour.

To sum up, the fact that economic development is considered to be more important than spatial planning regulations shows the presence of 'capture theory' behind the regulatory failures of spatial planning in Bali. Gunther Teubner applies the term 'over-socialization' of law as a part of 'the regulatory trilemma' wherein the law is 'captured' by politics or by the regulated subsystem, specifically, the law is 'politicised', 'economised', and 'pedagogised'.⁹¹⁶ In this context, the spatial planning regulation in Bali has been 'economised', to favour economic development, neglecting the importance of sticking to the goals of spatial planning regulation to maintain the function and the carrying capacity of the environment.

III THE PURSUANCE OF ECONOMIC ENRICHMENT

A *How the Pursuance of Economic Enrichment Has Occurred*

I have just argued that Indonesian governments at all levels neglect the importance of the spatial plan, seeing it as a developmental impediment. However, this is not the only driver of their behaviour. There is also a personal or elite interest in pursuing economic enrichment. This trend is clear from the process of issuing permits for tourism projects.

For instance, in the case of the Mulia Project, the involvement of a fugitive in the ownership and funding of this project, along with irregularities in the transfer of ownership, indicate the pursuance of economic enrichment by a Regent or local elites. As mentioned earlier in the case studies chapter, Djoko Soegiarto Tjandra owned the company that built the Mulia Hotel. He was a fugitive. Due to public scrutiny, he transferred the ownership of Mulia Hotel to a director of one of his company, Viady Sutojo.⁹¹⁷ This raises the question of how a fugitive can propose a hotel project in Bali,⁹¹⁸

⁹¹³ Ibid.

⁹¹⁴ Sukerti (n 59).

⁹¹⁵ Ibid.

⁹¹⁶ Gunther Teubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter deGruyter, 1986) 299, 311.

⁹¹⁷ The Building Permit of the Mulia Project (n 452).

⁹¹⁸ 'Pembangunan Hotel Mulia' (n 469).

and how he can transfer his ownership while being actively pursued by the police.⁹¹⁹ For transfer of ownership to be undertaken, there should be direct contact between him and government officials.⁹²⁰ This fact reflected the existence of elite circles where the owner of this project had a close relationship with the inner circle of the president at that time.

In the Tahura Project, the irregularity was the speed at which the process of issuing the permit took place. Specifically, from application to approval took only a year, which is highly unusual in Indonesia.⁹²¹ Equally, the investor who established a company in 2009 had no track record of managing nature tourism. Tirta Rahmat Bahari or TRB was only registered as a limited liability company in August 2011, meaning that it was only a year old when it was granted a permit to exploit Tahura Ngurah Rai, Bali.⁹²² What mattered most was his money, not his expertise.

In the Reclamation Project, the involvement of powerful investors associated with national-level political leaders in Indonesia can explain the insistence of the central and the Bali Provincial governments to change Benoa Bay from conservation area to a general utilisation area to allow this project to continue. The investor in this project is Tommy Winata, the owner of the huge Artha Graha Group, which has interests in property, banking, insurance, gambling, and leisure businesses.⁹²³ Media in Indonesia reported that, as a result of large donations, he enjoys close relationships with political and military leaders in Indonesia.⁹²⁴ For example, he supported renovations to Indonesian police headquarters in Jakarta, including the office of Anti-Terrorist Squad, auditorium, mosque, boarding houses, and car park.⁹²⁵ In 2011, the United States embassy claimed that he also became one of the major financial supporters of President Soesilo Bambang Yudhoyono (2004-2014), although he strongly rejected this claim.⁹²⁶ In the Reclamation Project, Winata openly claimed that he had spent IDR one trillion (US\$ 70 million) to expedite the Reclamation permit's approval.⁹²⁷ Bali Corruption Watch, a leading anti-corruption NGO in Bali, believed governmental officers had illegally received some of this money and asked the Corruption Eradication Commission or *Komite Pemberantasan Korupsi* ('KPK') to investigate.⁹²⁸

⁹¹⁹ 'Rising Indignation over Mulia Hotel Project' (n 470).

⁹²⁰ Ibid.

⁹²¹ Suardana (n 443).

⁹²² Ibid.

⁹²³ 'Dili tycoon deal triggers alarm', *the Sydney Morning Herald* (online, 3 May 2009) <<https://www.smh.com.au/world/dili-tycoon-deal-triggers-alarm-20090502-aqtj.html>>.

⁹²⁴ Jacqueline Baker, 'The Rise of Polri: Democratisation and the Political Economy of Security in Indonesia' (PhD Thesis, London School of Economics and Political Science, 2012) 64.

⁹²⁵ Ibid 66.

⁹²⁶ Deborah Cassrels, 'The businessman who aims to turn Bali into the new Palm Islands', *Financial Review* (online, 9 September 2016) <<https://www.afr.com/lifestyle/anguish-bali-tourist-development--and-the-enigmatic-tomy-winata-20160829-gr3v4r>>. See also Jim Castle and Greg Fealy, 'James Castle: Indonesia's Economy – The Next Ten Years | Greg Fealy: Missing Islam?' <<https://www.usindo.org/briefs/james-castle-indonesias-economy-the-next-ten-years-greg-fealy-missing-islam/>>.

⁹²⁷ 'Iri KPK Bongkar Reklamasi Teluk Jakarta, Pasek Berharap Teluk Benoa Diusut Juga' [Jealous KPK reveals Jakarta Bay Reclamation project, Pasek hopes that Benoa Bay is also investigated], *Kompas* (online, 9 April 2016) <<https://regional.kompas.com/read/2016/04/09/16470081/.Iri.KPK.Bongkar.Reklamasi.Teluk.Jakarta.Pasek.Berharap.Teluk.Benoa.Diusut.Juga>>.

⁹²⁸ Gaduh Reklamasi Teluk Benoa, BCW Minta KPK Bongkar Aliran Dana Rp 1 Triliun [The Brawl of the Benoa Bay Reclamation Project, Bali Corruption Watch asks KPK to reveal illegal funds of IDR One Trillion], *Berita*

In August 2019, I Wayan Suardana, as the coordinator of the Bali Forum against Reclamation or *Forum Rakyat Bali Tolak Reklamasi* ('Forbali') who coordinated a movement against the Benoa Bay Reclamation Project, stated that ForBali had submitted data directly related to the alleged corruption of the Reclamation Project to the KPK.⁹²⁹ He claimed the report was sent when Abraham Samad was still serving as the KPK Chairman.⁹³⁰ Samad took the view that indications of irregularities were already obvious so that a monitoring process had been started, but he was removed from his position shortly afterwards.⁹³¹ Explaining the progress of the report, the KPK Spokesperson, Febri Diansyah said public complaints related to alleged corruption cases could not be provided to the public in detail, but added that all parties had the right to submit a report if there was an indication of corruption when government officials issued particular permits.⁹³²

This all suggests the Regent of Badung and the Governor of Bali did not make a decision in good faith with the public interest in mind. Although some environmental NGOs claimed bribery was behind the issuance of permits for these three projects, there has never been a formal procedure (such as police investigation) to investigate this.

B *Why the Pursuance of Economic Enrichment Has Occurred*

As I argued in the previous chapter, in my view, this pursuance of economic enrichment is facilitated by legal weaknesses in the spatial planning system, namely, the absence of the district-level detailed plan. Without such a plan, government officials have considerable discretion to issue a permit for tourism projects, even if these projects actually conflict with the general spatial plan. In other words, if a detailed plan had been issued, that would significantly reduce government flexibility to issue permits for commercial activities within its region, including those motivated by personal economic enrichment.

Conflicting regulations on the review and amendment of the spatial plan also become loopholes for government officials. When the importance of economic development justifies the revision of spatial plan without having to wait five years, officials can use this to justify revising a spatial plan, hiding their main aim of personal enrichment. Moreover, criminal sanctions have never been applied, so issuing a permit that conflicts with the existing spatial plan has no serious implications.

Courts are also corrupt as shown by the Tahura Project. Of course, there are many reasons behind corruption in Indonesia, many of them unrelated to the design of spatial planning laws and their enforcement. One of the most significant factors, which is worth raising here, is the cost of elections. Local elections require huge sums of campaign money. Governors and Regents are motivated to collect money to prepare for future elections and to recover financial expenditure after winning.

Bali (online, 25 April 2016) <<https://www.beritabali.com/read/2016/04/25/201604250008/Gaduh-Reklamasi-Teluk-Benoa-BCW-Minta-KPK-Bongkar-Aliran-Dana-Rp-1-Triliun.html>>.

⁹²⁹ 'Tanggapan KPK Terkait Laporan Dugaan Korupsi Reklamasi Teluk Benoa' [KPK's Response on the Accusation of Corruption in the Benoa Bay Reclamation Project], *Bali Tribun* (online, 18 August 2019) <https://bali.tribunnews.com/2019/08/18/tanggapan-kpk-terkait-laporan-dugaan-korupsi-kasus-reklamasi-teluk-benoa>.

⁹³⁰ *Ibid.*

⁹³¹ *Ibid.*

⁹³² *Ibid.*

Becoming a Governor or a Regent in the current era of direct elections is extremely expensive. One candidate for Regent spent around IDR 10 billion (USD 1 million) just to campaign in a local election in a medium-sized district. In gubernatorial elections, a candidate must spend IDR 100 billion (USD 10 million) to realistically win the election.⁹³³ This cost consists of the nomination of a candidate to participate in the elections;⁹³⁴ and the involvement of strategic advisors, political consultants, opinion surveys and media campaigns.⁹³⁵ Interestingly, the costs also cover what it is called as ‘vote-buying’: illegal distribution of cash payment to voters.⁹³⁶ It is an arduous task to detect this practice, as vote-buying is now considered part of local culture.⁹³⁷ As a result of this, locally powerful and wealthy individuals who can organise and fund networks from their personal resources are the most successful candidates.⁹³⁸

In this context, the Mulia Project occurred in 2011, and the Badung District government had held a local election in 2010. Meanwhile, the Tahura Project took place in 2013, the same year the Bali Provincial government held a gubernatorial election. There is no evidence to connect the violations of spatial planning laws discussed in these three case studies to the cost of elections. However, given the highly unusual irregularities in the issuance of permits, the involvement of tycoon investors and the time when elections were held, one can speculate that there is a connection between elections, money, and spatial planning permits.

To sum up, when state officials involve their personal or group interests⁹³⁹ in seeking bribes to issue permits concerning a spatial plan, they reflect a narrow interest that departs from the principles of sustainable development, thus ‘capturing’ or diverting the regulation of spatial planning.⁹⁴⁰ In spatial planning, the practice of pursuing a personal or group interest by receiving material benefits from a permit process is known as ‘planning gain’.⁹⁴¹ In my view, in the era of regional autonomy, government officials from district governments have new and wider opportunities to receive

⁹³³ Marcus Mietzner, ‘Funding pilkada: Illegal campaign financing in Indonesia’s local elections’ in Edward Aspinall and Gerry van Klinken (eds), *The State and Illegality In Indonesia* (KITLV, 2010) 123, 128.

⁹³⁴ Stefanus Sampe, ‘Political Parties and Voter Mobilisation in Local Government Elections in Indonesia: the Case of Manado City’ (Phd Thesis, the University of Canberra, 2015) 53.

⁹³⁵ Mietzner (n 933) 128.

⁹³⁶ Ward Berenschot, ‘The Political Economy of Clientelism: A Comparative Study of Indonesia’s Patronage Democracy’ (2018) 51(12) *Comparative Political Studies* 1563, 1570.

⁹³⁷ Edward Aspinall et al, ‘Vote buying in Indonesia: Candidate strategies, market logic and effectiveness’ (2017) 17 *Journal of East Asian Studies* 1, 14.

⁹³⁸ Edward Aspinall and Wawan Mas’udi, ‘The 2017 Pilkada (Local Elections) in Indonesia: Clientelism, Programmatic Politics and Social Networks’ (2017) 3(3) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 417, 420.

⁹³⁹ For an analysis of the existence of personal or group interest in the regulation, see Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2011) 31.

⁹⁴⁰ For an analysis of the reasons behind the crisis in law and development studies, see David M Trubek and Marc Galanter, ‘Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States’ (1974) *Wisconsin Law Review* 1062, 1070. For analysing the reason behind regulatory capture, see Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford University Press, 1994) 57. For explaining a political capture behind regulatory capture, see Joseph Stiglitz, ‘Private Uses of Public Interests: Incentives and Institutions’ (1998) 12(2) *Journal of Economic Perspectives* 3, 22.

⁹⁴¹ For a definition of ‘planning gain’, see Martin Loughlin, ‘Planning Gain: Law, Policy and Practice,’ (1981) 1(1) *Oxford Journal of Legal Studies* 61, 62.

planning gain, pursuing their own enrichment by using economic development to justify or to hide their real intentions.⁹⁴²

IV THE LACK OF COORDINATION BETWEEN THE PROVINCIAL AND DISTRICT GOVERNMENTS

A *How Lack of Coordination Occurred*

As discussed in Chapter Two, Indonesia has been drastically transformed from one of the most centralised, into one of the most decentralised countries.⁹⁴³ This change, however, has created some unsolved problems. There are, at least, four crucial ones: lack of capacity at the regional level; inequality between the rich and poor regions; massive corruption;⁹⁴⁴ and lack of coordination or disharmony between central and local governments.⁹⁴⁵

The following shows how this disharmony occurs, particularly as regards relations between the provincial and district governments. In the era of regional governments, there is no longer a vertical relationship between a Governor, as head of the provincial government, and a Regent, as head of a district government. Under the current system, the Governor no longer acts as a decisive leader of governments in his or her province, but only as the coordinator of the Regents.⁹⁴⁶ In spatial planning governance in Bali, the lack of coordination between the district and the provincial governments occurs because the district government does not involve the provincial government in planning and implementing spatial use, particularly as regards the issuance of a location permits. Bali Provincial Regulation No. 16 of 2009 on Spatial Plan of Bali 2009-2029 ('Bali Provincial SPL') expressly states that spatial planning of the provincial area aims to integrate national, provincial and district/city spatial planning.⁹⁴⁷ Equally, the integration process is essential as a means of protecting space functions and preventing negative impacts on the Balinese environment and culture from the inappropriate use of space.⁹⁴⁸

Moreover, in my view, SPL 2007 shows inconsistency as regards the involvement of the provincial government. On the one hand, this Law has given power to the district government to issue location permits without consulting the provincial government. Article 26(3) states that 'the district spatial plan shall process location permit applications, and develop land administration policies'.⁹⁴⁹ On the other hand, the Law requires a Governor's recommendation if a district government intends to issue a district-level detailed plan.⁹⁵⁰ Why does SPL 2007 require the involvement of the Governor in the

⁹⁴² For the real intention of local elites in the regional autonomy in Indonesia, see Marco Bunte, 'Indonesia's Protracted Decentralization: Contested Reforms and Their Unintended Consequences' in Marco Bunte and Andreas Ufen (eds), *Democratization in Post-Suharto Indonesia* (Routledge, 2009) 102, 204.

⁹⁴³ Edward Aspinall, and Greag Fealy, 'Introduction: Decentralisation, Democratisation and the Rise of the Local' in Edward Aspinall and Greag Fealy (eds), *Local Power and Politics in Indonesia: Decentralization and Democratization* (ISEAS, 2003) 2.

⁹⁴⁴ Ibid.

⁹⁴⁵ The World Bank, *Indonesia Development Policy Review: Enhancing Government Effectiveness in a Democratic and Decentralized Indonesia* (The World Bank, 2009) xvii.

⁹⁴⁶ Hikmahanto Juwana, 'Koordinasi Antarinstansi', [Coordination Among Institutions], *Okezone* (online, 28 May 2009) <<https://news.okezone.com/read/2009/05/28/58/223811/koordinasi-antarinstansi>>.

⁹⁴⁷ Bali Provincial SPL (n 333) art 3.

⁹⁴⁸ Ibid.

⁹⁴⁹ SPL 2007 (n 252) art 26(3).

⁹⁵⁰ Ibid art 18(2).

issuance of the district detailed plans, but not the issuance of a location permit? No explanation is available.

The Bali Provincial SPL gives the Bali Provincial government authority in areas that are classified as provincial strategic areas. The following interests determine this categorisation: defence and security; economic growth; Balinese social and culture; utilisation of natural resources and high technology; and the functionality and carrying capacity of the environment.⁹⁵¹ Article 82 of Bali Provincial SPL explains provincial strategic areas from an economic growth perspective. These areas include, among others: Nusa Dua, Tuban, Kuta in Badung Regency; Sanur in Denpasar City; Ubud in Gianyar Regency; Soka in Tabanan Regency; and Air Sanih in Buleleng Regency.⁹⁵² In other words, the Bali Provincial government has authority in Kuta, Nusa Dua, and Tuban, and it should be involved in the issuance of location permits within these three areas.

An official from the Bali Public Works and Spatial Planning Agency told me that the inclusion of tourism areas (such as Nusa Dua) in provincial strategic areas is because the Bali Provincial government anticipates that although those areas are located in the district of Badung, their influence will impact Bali more generally.⁹⁵³ Hence, when there is a problem in those tourism areas, such as environmental damage, the province will also bear the consequences, not just the regency.⁹⁵⁴ In reality, however, the Badung District government does not involve the Bali Provincial government. For example, the Mulia Project in Nusa Dua falls within the scope of provincial strategic areas.

B *Why the Lack of Coordination Has Occurred*

In my view, the lack of coordination between the provincial and district governments occurs as a result of a wide-spread poor understanding of regional autonomy in local governments. In the era of regional autonomy, Governors, Regents and Mayors are no longer determined by the central government, as in the past. Instead, voters choose them through a direct election process. Those who serve as Governors, Regents, and Mayors may come from different political parties. When Regents are from different political parties to Governors, disharmonious relationships are likely to occur. Regents often prioritise the interests of their constituents or the elites that back them over the interests of the central government and its spatial plan.

As mentioned, one of the common problems in the coordination process is the absence of Regents/Mayors at coordination meetings. To answer this, the central government issued Government Regulation No. 19 of 2010 concerning Procedures for the Implementation of Duties and Authorities and the Financial Position of the Governor as a Central Government Representative in the Provincial Region. Specifically, the Governor has the authority to invite meetings of Regents/Mayors and their staff,⁹⁵⁵ and he/she has the right to impose sanctions on Regents/Mayors

⁹⁵¹ Ibid art 80.

⁹⁵² Ibid art 82.

⁹⁵³ Interview with Nyoman Wiarta, Section Head of Spatial Control Management, Bali Public Works and Spatial Office (I Gusti Ngurah Parikesit Widiatedja, Bali Public Works and Spatial Office 5 January 2018).

⁹⁵⁴ Ibid.

⁹⁵⁵ *Peraturan Pemerintah Nomor 19 Tahun 2010 tentang Tata Cara Pelaksanaan Tugas dan Wewenang Serta Kedudukan Keuangan Gubernur Sebagai Wakil Pemerintah di Wilayah Provinsi* [Governmental Regulation No. 19 of 2010 on Procedures for the Implementation of Duties and Authorities and the Financial Position of the Governor as a Central Government Representative in the Provincial Region] (Indonesia) art 4(a).

whose performance is deemed unsatisfied.⁹⁵⁶ However, the regulation does not elaborate on the kind of sanctions to be imposed.

An administrative law expert from the University of Udayana suggests sectoral self-interest is behind the lack of coordination between Governors and Regents. Each has authority determined by Regional Autonomy Law.⁹⁵⁷ However, in the implementation of this law, conflicting or overlapping authority is unavoidable. When it happens, instead of discussing, they tend to show their powers by unilaterally interpreting the authority given them by Regional Autonomy Law.⁹⁵⁸ In the Mulia Project, the Regent believed he did not need to coordinate with the Governor, as he had authority to issue location permits according to the Regional Autonomy Law. In contrast, the Governor insisted that there should be coordination between the provincial and district governments due to the fact that the location of this project was within the provincial strategic area, based on considerations such as the function and carrying capacity of the environment. The lack of formal and informal coordination measures due to disharmonious relations between Governor and Regents is one reason why spatial planning regulations very often fail to function efficiently.⁹⁵⁹

Finally, the lack of coordination between the Bali Provincial and Badung District governments reflects a regulatory failure of spatial planning at the implementation stage. Under the current process, the Bali Provincial government is unable to control the issuance of a location permit for tourism projects by the Badung District government, although the Bali Provincial government has authority to do so if projects are located in a provincial strategic area. As a result, the Bali Provincial government has no power to revoke the location permit if it contradicts the provincial spatial plan, causing environmental damage.

V A LACK OF TRAINED HUMAN RESOURCES IN PREPARING THE DISTRICT DETAILED SPATIAL PLAN

As mentioned earlier in the previous chapter, the absence of the district-level detailed plan has a connection with the lack of human resources. This section explores further how this issue has arisen in Bali. The quality of human resources has always been an issue when discussing a complicated process such as the map-making process for the district-level detailed plan in Indonesia. It requires an accurate survey process, involving experts (such as planners and consultants) from various disciplines and multilayered governments and agencies. The Chairman of the Indonesian Planning Experts Association has stated that almost 5000 detailed plans are yet to be completed.⁹⁶⁰ The reason behind this is a lack of qualified city planners, not just in remote districts, but also in big cities.⁹⁶¹ The Head of the Geospatial Information Agency also acknowledges the lack of capacity of the people involved in preparing the district detailed plan.⁹⁶² There are still errors in the data processing

⁹⁵⁶ Ibid art 4(c).

⁹⁵⁷ Wairocana (n 816).

⁹⁵⁸ Ibid.

⁹⁵⁹ Baldwin, Cave, and Lodge (n 939) 31.

⁹⁶⁰ Diela (n 714).

⁹⁶¹ Ibid.

⁹⁶² 'Minimnya SDM Jadi Hambatan Perbaikan Tata Ruang Kota' [The Lack of Human Resources is a Challenge to Revise City Spatial Plan], *Detik* (online, 30 August 2016) <<https://finance.detik.com/berita-ekonomi-bisnis/d-3287105/minimnya-sdm-jadi-hambatan-perbaikan-tata-ruang-kota>>.

and spatial mapping processes that do not follow mapping methods and standards established by the Geospatial Information Agency.⁹⁶³

In the Badung District government, the lack of qualified city planners in Bali forced the government to involve professional planners from Jakarta.⁹⁶⁴ Some of these were also involved in preparing maps of detailed plans for many other districts across Indonesia so it takes a long time to complete any one map, and the deadline is eventually exceeded.⁹⁶⁵ In fact, only a few local officials in spatial planning agency in the Badung District government even understand how to read and prepare a map properly.⁹⁶⁶

This also happens in other countries. Gallent and Kim reveal how administrative barriers exist in spatial planning governance in Korea.⁹⁶⁷ Local agencies do not have enough experience in planning processes because the professional planners work mainly in the central government,⁹⁶⁸ and so local officials are not professionally qualified.⁹⁶⁹ In Poland, according to Krajewska, Żróbek and Kovač, the lack of expertise has led to difficulties in issuing a clear zoning guideline, causing ambivalence and uncertainty in urban planning.⁹⁷⁰

The lack of capacity has been exacerbated by the major restructure of government agencies. Specifically, before 2014, central government Law No. 32 of 2004 on Regional Autonomy spread spatial planning authority across three different institutions namely, the Regional Development Planning Board of Bali, which focussed on spatial planning issues; the Bali Environmental Agency, which had the authority to control the spatial planning, particularly to anticipate the negative impact of development on the environment; and, finally, the Bali Public Works Agency, which had a dominant role in the utilisation of spatial planning.⁹⁷¹ In 2014, Governmental Regulation No. 18 of 2016 on Regional Apparatus (which implements central government Law No.23 of 2014 on Regional Autonomy) transferred all authority to the Bali Public Works and Spatial Planning Agency, and the Badung Public Works and Spatial Planning Agency at the district level.⁹⁷² Interestingly, at the central level, the central government has separated the Ministry of Public Works and Spatial Planning, as the central government has merged spatial planning with the Ministry of Agrarian and National Land Agency.

Both officials from the Bali Public Works and Spatial Planning Agency, and the Ministry of Agrarian and Spatial Planning admit the change of nomenclature, both in the central government

⁹⁶³ Badan Informasi Geospasial, 'BIG Menyelenggarakan Pendidikan dan Pelatihan Pemetaan Tata Ruang' [BIG Conduct Training on the Map of Spatial Plan, *BIG* (online, 18 August 2015) <<http://www.big.go.id/big-menyelenggarakan-pendidikan-dan-pelatihan-pemetaan-tata-ruang/>>.

⁹⁶⁴ Adnyana (n 706).

⁹⁶⁵ Ibid.

⁹⁶⁶ Ibid.

⁹⁶⁷ Nick Gallent and Kwang Sik Kim, 'Land Zoning and Local Discretion in the Korean Planning System' (2001) 18 *Land Use Policy* 233, 242

⁹⁶⁸ Ibid.

⁹⁶⁹ Ibid.

⁹⁷⁰ Krajewska, Żróbek and Kovač (n 10).

⁹⁷¹ Interview with I Made Teja, Head of Environmental Compliance of Bali's Environmental Agency (I Gusti Ngurah Parikesit Widiatedja, Bali's Environmental Agency, 12 December 2017).

⁹⁷² *Peraturan Pemerintah Republik Indonesia Nomor 18 tahun 2016 tentang Perangkat Daerah* [Governmental Regulation No18 of 2016 on Regional Apparatus] (Indonesia) art 15(3).

and the regions, has implications for a longer adjustment process, particularly related to human resources.⁹⁷³ Specifically, the result is not just a change of the name but also of the function of the agency, and that process requires significant bureaucratic adjustment. The merged agency (a result of the change of nomenclature) has to organise new people, and make new delegations of authority. In the Badung Spatial Planning Agency, the majority of local officials used to serve different agencies before moving to the Public Works and Spatial Planning Agency.⁹⁷⁴ Some of these officials have no experience and no qualification in spatial planning governance.⁹⁷⁵ Interestingly, as practice has shown, officials are often moved to different agencies after working in the spatial planning agency for just one or two years.⁹⁷⁶

A lack of planners in Indonesia has also contributed to the problem. As a profession, planners are not as popular as in the United States, the United Kingdom, and Australia.⁹⁷⁷ Dhani M. Muttaqin, Executive Director of the Indonesian Planners Association, has revealed that students who graduate from the Urban and Regional Planning department in Indonesia are not keen to become planners.⁹⁷⁸ For example, in Bandung Institute of Technology, 40 percent of suitably qualified graduates do not work as planners.⁹⁷⁹ Moreover, only a very small number of planners have ever passed the relevant certification process in Indonesia.⁹⁸⁰

One of the directors in the Ministry of Agrarian and Spatial Planning provides an interesting analysis. He says that the lack of human resources in the making of district-level detailed plans has correlated with the fact that most universities in Indonesia, particularly the departments of urban and regional planning in the faculties of engineering, do not even teach students how to make detailed plans.⁹⁸¹ In most universities in Indonesia, Urban and Regional Planning is a four-year bachelor program.⁹⁸² Graduating from this program, each student has to pass 46 compulsory subjects, seven elective subjects, and three ‘personality development’ subjects.⁹⁸³ However, incredibly, none of

⁹⁷³ Teja (n 970) and Renald (n 704).

⁹⁷⁴ Interview with I Gusti Ngurah Antareja Mahaputra, Former Head of Section of Monitoring and Evaluation of the Public Works Agency of Badung (I Gusti Ngurah Parikesit Widiatedja, the Public Works Agency of Badung, 4 January 2018).

⁹⁷⁵ Ibid

⁹⁷⁶ Ibid

⁹⁷⁷ ‘Mengenal Seorang Plannner’ [Understanding A Planner], *Kompasiana* (online, 7 September 2015) <<https://www.kompasiana.com/miftakhulhuda243/55ed601b509373560d800c63/mengenal-seorang-plannner?page=all>>.

⁹⁷⁸ Dhani M. Muttaqin, ‘Ideologisasi Profesi Planner Dalam Proses Pendidikan Perencanaan’ [Ideologising the Professional Planner in the Planning Education Process], *National Land Agency* (Web Page) <http://tataruang.atr-bpn.go.id/Bulletin/upload/data_artikel/Ideologisasi%20Profesi%20Planner%20dalam%20Proses%20Pendidikan%20Perencanaan-Dhani%20M.Muttaqin,ST.PDF>.

⁹⁷⁹ Ibid.

⁹⁸⁰ ‘IAP DKI Jakarta Targetkan Sertifikasi 1.000 Planner’ [Jakarta Planning Association targeted to certify 1000 planners], *Indonesia Housing* (online, 17 January 2017) <<http://indonesiahousing.co/iap-dki-jakarta-targetkan-sertifikasi-1-000-planner/>>.

⁹⁸¹ Sarosa (n 740).

⁹⁸² For example, See ‘the Curriculum of Urban and Regional Planning of Gadjah Mada University’ <<http://pwk.archiplan.ugm.ac.id/structure-and-content/>>. See also ‘the Curriculum of Urban and Regional Planning of Brawijaya University’ <<http://teknik.ub.ac.id/en/wp-content/uploads/2013/10/FT50-03-Jurusan-66-67-68.pdf>>.

⁹⁸³ Ibid.

these subjects deals with the existence of detailed plans.⁹⁸⁴ The common practice is that they teach urban planning in general through urban planning (semester IV), urban planning practice (semester V), and regional planning (semester V).⁹⁸⁵

To sum up, the lack of sufficient expertise,⁹⁸⁶ along with a lack of skill among local officials,⁹⁸⁷ has contributed to the regulatory failure of spatial planning, particularly at the creation stage. This is because these officials are technically unable to issue a district-level detailed plan that should act as the crucial source of guidance to implement and enforce spatial planning regulations in Bali in order to prevent environmental damage caused by commercial projects, including tourism projects.

VI CONCLUSION

This chapter has identified and analysed non-legal factors behind the regulatory failures of spatial planning in Bali. It finds that there are four primary non-legal factors behind the failure of spatial planning regulation in Bali. The first is the importance of economic development, which outweighs spatial planning goals in realising sustainable development. As shown by my three case studies, the Bali Provincial government and the Badung District government prefer to pursue short-term and unsustainable tourism projects to increase their regional incomes, neglecting the importance of sustainable development. The reason behind this trend is the misconception about spatial planning's role in economic development in Bali. Instead of seeing it as a complementary factor, governments seem to view spatial planning as a rival to economic development. In fact, spatial planning is not in contradiction with economic development, and there is evidence to suggest that tourism projects that comply with spatial planning also contribute to economic development in Bali. There is also a trend where greedy investors and government officials take an advantage of the shortage of space that is available for tourism projects.

The pursuance of economic enrichment by local elites is the next non-legal factor. There have been 'special treatments' or irregularities in issuing a permit for tourism projects as the three case studies have shown. The reason behind this trend relates both directly and indirectly to the legal problems discussed in the previous chapter. Specifically, government officials who pursue economic enrichment benefit from the following factors: the absence of regulation of the detailed plan; the conflicting regulation on the amendment of the spatial plan; and the lack of implementation of SPL 2007. Thereafter, there is a lack of coordination due to disharmonious relations between the provincial and district governments under current regional autonomy arrangements. Specifically, the district government does not involve the provincial government in planning and implementing spatial use, particularly related to the issuance of location permits for tourism projects. Finally, the lack of adequate human resources in the map-making process for the detailed plan is a major cause of delays in the creation of district-level detailed plans in Bali.

⁹⁸⁴ Ibid

⁹⁸⁵ See 'the Curriculum of Urban and Regional Planning of Surabaya Institute of Technology' <<https://pwk.its.ac.id/sumber-daya/kurikulum/>>. See also the Curriculum of Urban and Regional Planning of Bandung Institute of Technology <http://www.pl.itb.ac.id/?page_id=18>.

⁹⁸⁶ Explaining the relation between the regulatory failure and the lack of sufficient expertise, see Baldwin, Cave, and Lodge (n 939) 29.

⁹⁸⁷ For the relationship between the modern law and the existence of professional staff to enact modern law, see Marc Galanter, 'The Modernization of Law' in Myron Weiner (ed), *Modernization* (Basic Book, 1966) 153.

All in all, intertwined legal and non-legal factors both contribute significantly to the failure of spatial planning regulations in Bali to achieve their regulatory objectives. Although the hotel industry offers Bali, and Indonesia more broadly, significant economic and social benefits, the failure of spatial planning laws has meant that these developments are not being sustainably managed. The next chapter concludes the thesis by proposing regulatory reforms that could help to make spatial planning regulations more effective.

PART IV

CONCLUSION AND SUGGESTIONS FOR REFORM

I INTRODUCTION

This thesis has argued that both legal and non-legal factors have contributed to the regulatory failure of spatial planning in Bali. Although these factors are different, they are inter-related and operate in complex ways to frustrate spatial planning objectives of preventing environmental and social damage by tourism projects. This thesis responds to these findings by proposing regulatory reforms to make spatial planning regulations more effective. These reforms try to respond to legal and non-legal factors, for example, by proposing the use of existing zoning rules as a temporary enforcement mechanism, and strengthening the legal consequences of not completing a district-level detailed plan to respond to the problem of the absence of the district-level detailed plan. In addition, the enforcement of criminal sanctions for government officials are intended to respond to the absence of criminal sanctions for them, particularly Regents and Mayors who issue permits that conflict with the existing spatial plans. Lastly, the proposal for the involvement of provincial governments in the issuance of location permits is intended to respond to the current lack of coordination between the provincial and district governments.

Although reform in spatial planning governance is urgently needed, I must be realistic about the difficulties to be faced. In general, experience suggests that processes of law reform in Indonesia are far from complete, and have had only a few concrete successes. Therefore, most of the recommendations made in this thesis will be more effective if supported by other related factors. For example, the use of zoning rules as an alternative enforcement mechanism requires the initiative and political will of district governments because there is no strict obligation to do so based on existing spatial planning regulations in Indonesia. Given the conflict avoidance character of Indonesian society,⁹⁸⁸ the enhancement of public participation will also require the active participation of society in monitoring and raising critical questions when they find something unclear and incorrect in spatial planning governance. Also, the enforcement of criminal sanctions should go hand-in-hand with the efforts to eradicate corruption in Indonesia. Finally, some other problems are beyond the scope of this thesis, for instance, the revision of the university curriculum to include content dealing specifically with the creation of general and detailed spatial plans.

⁹⁸⁸ For the conflict avoidance character of Indonesian, see Daniel S Lev, 'Judicial Institutions and Legal Culture in Indonesia' in Claire Holt (ed), *Culture and Politics in Indonesia* (Cornell University Press, 1972) 246, 281.

Chapter 8

Conclusion and Suggestions for Reform

I CONCLUSION

Visiting a luxurious hotel, overlooking sea and coastal areas can be an outstanding and memorable experience. However, visitors will not always know whether the development of the hotel has adversely affected the environment and the life of the local community. What if a hotel was built not just very close to the sea but on top of it, as a result of reclamation? Or what if a hotel was built in a conservation forest area? In Bali, spatial planning laws are meant to determine which areas are open for tourism projects, and which are closed, based on environmental and social considerations. However, spatial planning law does not work, leading to failures to protect the environment, vulnerable communities and natural resources from being damaged as a result of tourism developments.

The current central government Law No.26 of 2007 ('SPL 2007'), which aims to address drawbacks in previous spatial planning laws, regulates spatial planning in Indonesia comprehensively, at least on paper. It covers: the division of authority between the central, provincial, and district governments in spatial planning governance; the significance of sustainable development; the inclusion of public participation; and the application of both administrative and criminal sanctions to breaches of the plan. However, as a reflection of the fragmented approach to spatial management that prevails in Indonesia, this Law only applies to land-related governance. Central government Law No. 27 of 2007 regulates spatial distribution in coastal areas, while central government Law No.41 of 1999 only applies to forest areas. At the provincial and district levels, the Bali provincial and the Badung district governments have also issued spatial planning regulations, dividing areas in Bali and Badung into conservation and utilisation areas. The thesis finds that that spatial planning laws have allowed largely unchecked development of hotels in Bali, and have done very little to prevent environmental damage caused by this development. Spatial planning laws need to be reformed to strictly prohibit commercial activities, including tourism projects within conservation areas, to ensure their protection for environmental and social reasons.

Using three major hotel projects as case studies, this thesis has demonstrated that, in reality, there is a significant gap between the law 'on the books' and the law in action.⁹⁸⁹ The Mulia Project demonstrates failures in the decision making process for authorising building projects of this kind and the lack of enforcement of spatial planning laws, damaging coastal areas, marine biota, and local communities. There was no action taken by any level of government to stop the hotel project when it was built at a distance from the shoreline that conflicts with spatial planning regulations. Also, this project involved an ownership scandal and a lack of transparency around the EIA and inspection reports.

⁹⁸⁹ See eg, Jean-Louis Halpérin, 'Law in Books and Law in Action: the Problem of Legal Change' (2011) 64(1) *Maine Law Review* 46, 47.

The Tahura Project demonstrates how the development of guest houses on a protected block, where development is prohibited, will cause damage to Tahura Mangrove Forest and local communities. This project has led to litigation. The ensuing decisions of the Provincial Appellate Administrative Court and the Supreme Court in Jakarta are highly controversial, as they apply a very narrow test of standing that impedes environmental NGOs from holding government officers to account in cases where environmental damage is foreseeable but has not yet occurred.

Lastly, the Benoa Bay Reclamation Project provides evidence that spatial planning regulations can be easily and hastily changed by the central government to suit its development objectives. This can be seen from the way the status of Benoa Bay was changed from a conservation area to a general utilisation area to support the provincial government's measures to allow the reclamation of Benoa Bay.

Explaining the factors that have caused spatial planning to fail, this thesis finds interrelated legal and non-legal factors. Concerning legal factors, the absence of a district-level detailed plan weakens government objectives of protecting the environment through spatial planning regulations, meaning it is difficult to know which areas are closed for tourism projects and reserved for environmental and social protection programs. Another legal factor is conflicting regulations on the review and amendment of the spatial plan. Although SPL 2007 states that spatial plans may only be revised once every five years, some implementing regulations allow the revision of the spatial plan as often as needed to meet the needs of economic development and infrastructure projects. Thereafter, public participation is just a formality rather than a means of protecting affected communities from environmental damage. Moreover, criminal sanctions are never applied to government officials in Bali, although there is clear evidence that they deliberately issue spatial planning permits that conflict with the existing provincial and district spatial plans. Finally, in instances where violations of spatial planning laws do not cause immediate environmental damage, the Appellate Administrative Court and the Supreme Court have held that environmental protection organisations do not have standing sufficient to commence judicial review proceedings against the government.

This thesis also finds that there are four main non-legal factors behind the regulatory failures of spatial planning in Bali. To begin, the importance of economic development usually outweighs spatial planning aims in pursuing sustainable development. It is common for central and provincial governments to make great efforts to attract tourism projects. If the location of the project is in a prohibited area, they are often even willing to revise the plan to justify the project. The pursuance of economic enrichment by local elites (corrupt practices) is the next non-legal factor. This can be traced through special treatment given to many projects, as well as irregularities in issuing permits for tourism projects. A lack of coordination also occurs because of the disharmonious relationship between the provincial and district governments. For instance, the district government disregards the provincial government when issuing location permits for tourism projects. The final factor is a typical problem in developing countries, that is, a lack of trained human resources, particularly in the creation of district-level detailed plans. This problem is linked to the lack of qualified planners, the lack of capacity of district government officials, and the fact that most universities in Indonesia do not sufficiently teach students how to prepare general and detailed plans.

In line with the main focus of this thesis, in the next section I suggest some regulatory reforms to make spatial planning regulation more effective in Indonesia. Although the next section focuses on regulatory reforms, this does not lessen the need for additional reforms in other areas. For example, setting out a training procedure for government officials or details of revision of the university curricula. These are also issues in need of further research.

II SUGGESTIONS FOR REFORM

A *Zoning Rules as an Alternative Enforcement Mechanism*

I have proposed some regulatory reforms to make spatial planning regulation more effective in Indonesia. First, I propose, as a temporary measure, that existing zoning rules be used as an enforcement mechanism. When the government asserts that the district-level detailed plan is the only effective way to enforce spatial planning law, it generates inflexible and over-stringent regulation, leading to the failure of spatial planning. There should be other ways to enforce spatial planning law if a district government has not yet completed its detailed plan.

Although Indonesia has not issued an accurate map (of the kind available in the detailed plan), the district government could still implement and enforce spatial planning law, particularly in relation to land allocation. De Soto argues that some developing countries take the view that property assets are unable to be formally registered unless they have been accurately recorded by using geographical information technology.⁹⁹⁰ However, this is not entirely true, as Americans and Europeans successfully recorded all their property assets long before they had discovered computers and geographical technology.⁹⁹¹ Japan, too, recorded land assets, employing maps from the Edo period – three to four centuries before the discovery of computers and global positioning systems (GPS).⁹⁹² In this context, there should be another mechanism to enforce spatial planning law in Indonesia without having to wait for the completion of the elusive district-level detailed plans.

The district government could, for example, employ a zoning regulation to enforce spatial planning law when its detailed plan has not yet been completed. This is not to say that the detailed plan is no longer needed, as it is still the most robust way to enforce spatial planning law, just that something else can be done if the plan is not yet in existence.

The application of zoning regulations can be based on existing legal grounds. SPL 2007 defines ‘zoning regulations’ as ‘provisions that regulate the spatial use and control elements that are arranged for each designation zone by a detailed plan’.⁹⁹³ Ideally, after completing the district-level detailed plan, the district government issues a zoning regulation to explain the existence of its detailed plan. Nevertheless, SPL 2007 also recognises that the zoning regulation can be applied as a means of controlling spatial use.⁹⁹⁴

Minister of Public Works Regulation No. 20/PRT/M/2011 further explains how a zoning regulation can be employed to control spatial use without the presence of the district-level detailed plan.

⁹⁹⁰ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan, 2000) 37.

⁹⁹¹ *Ibid.*

⁹⁹² *Ibid* 163.

⁹⁹³ SPL 2007 (n 252) Elucidation Art 36 Paragraph (1).

⁹⁹⁴ *Ibid* art 35.

Specifically, the district government can issue a zoning regulation without completing the detailed plan if the following conditions are met:⁹⁹⁵

1. The district/city spatial plan does not have a spatial map with a minimum level of accuracy of 1: 5000; and
2. The district/city spatial plan has mandated a part of its territory that is necessary to be regulated by the detailed plan.

This regulation is clear that zoning regulations have the following functions: as operational devices for controlling space utilisation; and as references in providing incentives and disincentives as well as in imposing sanctions.⁹⁹⁶ For these reasons, the Minister of Public Works Regulation expressly states that the district government can employ a zoning regulation as a means of enforcing spatial planning law, and this is true regardless of whether a detailed map exists. However, this regulation is yet to be applied to use a zoning regulation as a legal basis to take action against a spatial planning violation.

The Badung District government has issued a Badung District SPL that includes zoning rules.⁹⁹⁷ It should be able to use these zoning rules to enforce spatial use in the absence of a detailed plan. For example, Badung District SPL divides its territory into a conservation and integrated agriculture area (North Badung); a capital city and civic centre area (Central Badung); and a tourism area (South Badung).⁹⁹⁸ It then regulates protected areas and cultivation areas.⁹⁹⁹ As mentioned in chapter two, protected areas include local protected areas, encompassing holy areas; sacred sites; coastal borders; river borders; cliff borders; and the areas around lakes and reservoirs.¹⁰⁰⁰ The zoning rules define a 'coastal border area' as 'land along the sea edge at a distance of at least 100 from the highest tide point of the sea to the land'.¹⁰⁰¹ When there is a proposed tourism project in North Badung (not a tourist area), and its development plan does not follow the coastal border requirement under the zoning rules, this should be a strong indication that the project will violate the existing spatial plan. As a result, the district government should reject the project on the ground of zoning rules alone.

In the Mulia Project, when the proposal for the project (particularly related to the development plan) showed that the location of proposed buildings was very close to the beach (less than 100 meters), the Regent of Badung should have refused this project for contradicting existing zoning rules. The Regent should not have issued a recommendation letter as he has an authority to refuse any development plan that contradicts existing zoning rules. Moreover, he could refuse to issue a recommendation, even if the Central Government, through the Capital Investment Coordinating Board or *Badan Koordinasi Penanaman Modal* ('BKPM'), had granted the investor a permit-in-principle. This would have prevented the investor processing the building permit because it is

⁹⁹⁵ *Peraturan Menteri Pekerjaan Umum Nomor : 20/PRT/M/2011 tentang Pedoman Penyusunan Rencana Detail Tata Ruang dan Peraturan Zonasi Kabupaten/Kota* [Minister of Public Works Regulation Number: 20 / PRT / M / 2011 concerning Guidelines for Preparation of Spatial Detail Plans and District/City Zoning Regulations] (Indonesia) point 1.4.

⁹⁹⁶ *Ibid.* Attachment Chapter III.

⁹⁹⁷ Badung District SPL (n 357) the Preamble.

⁹⁹⁸ *Ibid* art 4.

⁹⁹⁹ *Ibid* art 23.

¹⁰⁰⁰ *Ibid* art 25.

¹⁰⁰¹ *Ibid* art 74.

prohibited for an investor to start a project without the building permit, and the building permit can not be issued without a recommendation letter from the Regent of Badung. In reality, however, he let the project continue, taking advantage of the absence of the district-level detailed plan.

Zoning rules are actually available as an enforcement mechanism. However, doing so requires the political will of district governments as under the current spatial planning laws, there is no strict obligation to take such action. This can be challenging, given the hidden motive behind the big question of why district governments seem reluctant to apply zoning rules, that is, corruption, which spans not only executive bodies in Indonesia, but also judicial ones as well. As long as the eradication of corruption is not effective, the application of zoning rules will be an arduous task.

B *Legal Consequences for not Completing District-level Detailed Plans*

The next proposal relates to the legal consequences of not completing a district-level detailed plan. As mentioned in Chapter 2, SPL 2007 requires district governments to enact detailed plan regulations within three years after the issuance of the general spatial plan. However, this Law does not impose any consequences for breaches of this time limit, leading to a risk that the limits will be ignored, and the statutory provisions not enacted.¹⁰⁰² There should be legal consequences for this, such as removing the authority to issue building permits until the detailed plan is produced. The removal of authority would have significant deterrent effects for the district government. The core idea of the regional government is that district governments have more authority to regulate and manage their regions to better respect the aspirations and interests of local communities.¹⁰⁰³ The more authority that is given to district governments under the framework of regional government, the more opportunity there is for them to maximise their regional incomes, for example, through fees earned from granting permits.

When the authority to issue building permits is revoked, the Governor should take over this authority. Under the concept of regional government, the Governor acts as the Central Government's representative, with functions to monitor, evaluate and supervise district governments' performance.¹⁰⁰⁴ In addition, the Governor also has the authority to assess the draft district-level spatial plan and supervise the existing district-level spatial plan.¹⁰⁰⁵ Moreover, after district governments complete the draft of their detailed plans, the draft is submitted to the provincial government for the Governor's approval.¹⁰⁰⁶ For these reasons, the Governor is the right party to be entitled to issue building permits.

There is a regulation that imposes heavier administrative sanctions for the absence of the district-level detail plan. Specifically, Government Regulation No. 12 of 2017 on Fostering and Monitoring the Implementation of Regional Government imposes administrative sanctions in Regents who do not submit a draft of any district-level regulation on regional income and expenditure budgets to the

¹⁰⁰²

Ibid.

¹⁰⁰³

Regional Autonomy Law (n 135) Elucidation point 1.

¹⁰⁰⁴

Ibid art 91.

¹⁰⁰⁵

Ibid.

¹⁰⁰⁶

SPGR 2010 (n 277) art 62(1)

district legislative council within the time period determined by this regulation.¹⁰⁰⁷ Among these administrative sanctions are delay or deduction of general allocation budget funds or *Dana Alokasi Umum* ('DAU') from the Central Government.¹⁰⁰⁸

To sum up, removing district government authority in issuing building permits seems sensible because this sanction will have a deterrent effect on district governments, and there is an appropriate party to take over this authority - the Governor. Finally, the imposition of administrative sanctions for the absence of a draft of a district-level regulation exists in the case of the regional income regulation at the district level, and this could also be done to assist in achieving the completion of district-level detailed plans on time.

Although removing the district government authority seems promising, it will only work if the Governor is committed to resisting corruption. It would be an irony if the Governor taking over authority to issue building permits also means taking over corruption in relation to the issue of these permits. Besides, there would also need to be intensive training programs on how to complete a detailed spatial plan for government officials because one of the reasons behind the lack of such plans is their lack of capacity.

C *Criminal Sanctions for Government Officials*

Criminal sanctions for government officials should also be enforced. There should be routine prosecutions of Governors or Mayors who issue permits that conflict with the existing spatial plan. Because the criminal sanctions under SPL 2007 are never applied, the Anti-Corruption Law should be applied in its stead, and the deliberate issue of permits that contravene spatial plans should be seen as corruption, as corruption is the dominant motive behind the issuance of this kind of permit. As mentioned in the previous chapter, when Governors or Regents issue a spatial planning permit, they must be aware of the existing spatial plan in their regions. Hence, it should be almost impossible for them to issue a permit that conflicts with the spatial plan. If Governors and Mayors issue a permit that contradicts the spatial plan, that should be seen as a clear sign of misconduct.

The United Nations Convention against Corruption ('UNCAC') explains that one example of corruption is 'the misuse of procedures regulating private entities, including procedures regarding subsidies and licences [permits] granted by public authorities for commercial activities'.¹⁰⁰⁹ Meanwhile, central government Law No. 31 of 1999 on the Eradication of Corruption defines a corruptor as 'anyone who unlawfully commits an act enriches himself or another person or a corporation that can injure state's finances and economy.'¹⁰¹⁰ In these circumstances, issuing permits that conflict the existing spatial plan will, in many cases, be a corrupt act. Police, public prosecutors, and judges should therefore investigate the motives behind the issuance of these permits. As my three case studies have shown, when there are irregularities in the process of issuing permits, and the indication of economic enrichment by government officials, there may be a link between issuance of

¹⁰⁰⁷ *Peraturan Pemerintah Republik Indonesia No. 12 tahun 2017 tentang Pembinaan dan Pengawasan Penyelenggaraan Pemerintahan Daerah* [Government Regulation No 12 of 2017 on Fostering and Monitoring the Implementation of Regional Government] (Indonesia) art 36(2)(n).

¹⁰⁰⁸ *Ibid* article 43(1).

¹⁰⁰⁹ United Nations Convention against Corruption, General Assembly resolution 58/4 of 31 October 2003 art 12(2)

¹⁰¹⁰ *Undang-Undang Republik Indonesia Nomor 31 tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi* [Law No. 31 of 1999 on the Eradication of Corruption] (Indonesia) art 2.

these permits, the motives involved, and corruption. Criminal sanctions would provide the deterrent effect that the current SPL 2007 and its implementing regulations lack, dissuading future violations of spatial planning regulations.

However, the enforcement of criminal sanctions requires a strong commitment from police, public prosecutor, and courts. They have to have a same perspective that issuing permits that conflict the spatial plan is a corrupt act. The fact that courts are still corrupt, as shown by the case studies, will be a major challenge to achieving these reforms.

D *The Enhancement of Public Participation*

The enhancement of public participation is my next recommendation. There is a lack of clarity on the stage at which public participation should be undertaken. There should be regulation to require governments to conduct public participation not just in the revision of spatial plans, but also in their creation, implementation, and enforcement. As mentioned, in the Tahura and Reclamation Projects, the Bali Provincial and central governments conducted public participation only in the revision of the spatial plan, and even then it was a manipulated and incomplete process.

As a comparison, Hong Kong has revised its planning law to require public participation in all stages of the spatial plan. The old law, that is the 1997 Town Planning Ordinance, required so-called ‘public inspection’ after the draft had been submitted to the Town Planning Board for consideration, but the new law, that is the 2004 Amendment of the Hong Kong Town Planning Ordinance, provides ample room for public participation.¹⁰¹¹ The Board’s Planning Department prepares a so-called ‘concept plan’ and a ‘preliminary layout plan’ that must involve the public through seminars, roadshows, and radio broadcasts.¹⁰¹² After receiving feedback from the public, the Board is to prepare an ‘outline zoning plan’, enabling formal public inspection and consultation for two months.¹⁰¹³ This example shows how the public can be actively involved in the creation of the spatial plan.

As to the implementation and enforcement stages, a lecturer from the Malang Institute of Technology (‘ITN’) has developed an Android-based app called ‘Urban and Regional Watch (‘UR-Watch’) to enable the public to be actively involved in spatial planning.¹⁰¹⁴ Although this app is still in the trial phase, the idea behind it should be encouraged. When users open this app, it presents them with a map of a general spatial plan so they are informed which areas are protection or utilisation areas. When they find commercial buildings in protection areas, they can submit a report. This app can be used with the district-level spatial planning agency and the district legislative council as administrators. Later, users can look at the account history to see actions taken by the government on the report, if any.

¹⁰¹¹ Yim King Penny Wan and Bill Bramwell, ‘Political Economy and the Emergence of a Hybrid Mode of Governance of Tourism Planning’ (2015) 50 *Tourism Management* 316, 324.

¹⁰¹² Ibid.

¹⁰¹³ Ibid.

¹⁰¹⁴ ‘Dosen ITN Malang Ciptakan Aplikasi Pengendalian Tata Ruang’ [A Lecturer of ITN Malang Created An Application for Controlling Spatial Plan], *Properti Kompas* (online, 8 May 2017) <<https://properti.kompas.com/read/2017/05/08/171644221/dosen.itn.malang.ciptakan.aplikasi.pengendalian.tata.ruang>>.

This type of application can also be useful to ensure the equality of the parties involved. As mentioned, governments in Indonesia often intentionally invite only member of the public who expressly agree with the proposed tourism project. The app will offer wider opportunities for the public to express their disagreement. If they are not invited to public consultations, they can still express their concerns and convey proposals by using this application.

When the UR-Watch app is finally up and running, there should be a regulation to require governments to use it as a means of enhancing public participation. There is a good example of how Android-based applications have enhanced public participation in Indonesia.¹⁰¹⁵ Specifically, the Special Region of Jakarta has successfully employed the ‘Qlue’ application, which is linked to the Jakarta Smart City program.¹⁰¹⁶ This enables the public to report anything that relates to the public services in Jakarta.¹⁰¹⁷ The report goes directly to the Governor’s office and, on the same day, the Governor will ask the relevant agency to promptly respond to the report.¹⁰¹⁸ The progress of the report is clearly visible on screen, and is monitored by the Governor’s office.¹⁰¹⁹ Once this app is successfully applied, it will reflect accountable and transparent principles as a part of good governance.¹⁰²⁰ Finally, it will help eradicating corruption in Indonesia.

There remains a question whether the use of this app will be effective because Indonesia still faces a problem regarding the lack of capacity of its government officials. However, given the wide use of apps in Indonesian daily life such as car-sharing, food delivery, and couriers,¹⁰²¹ it is likely this app will prove popular and be widely used.

E *The Involvement of the Provincial Government in the Issuance of Location Permit*

The involvement of the provincial government in the issuance of location permits is the next proposal, particularly for tourism projects in provincial strategic areas, such as Kuta, Bena and Nusa Dua. Till now, the Badung District Government has issued location permits without ever involving the province. The Governor’s approval is required to proceed with the creation of the district-level general spatial plans and detailed plans, and this approval should also be required for the issuance of location permits. That will ensure the location of proposed tourism projects will not conflict with existing spatial plans at the national and provincial levels.

Following a recent Constitutional Court decision, the central and provincial governments are no longer able to cancel district regulations.¹⁰²² This means that when a district government issues a location permit, and it conflicts with the existing provincial spatial plan, the central and provincial governments are now no longer able to cancel that permit. In the United Kingdom (UK), the central

¹⁰¹⁵ ‘Sosok Minggu Ini: Rama, Pencipta Qlue Aplikasi Laporan Warga DKI’ [Man of the Week: Rama, the Creator of Qlue, An Application for Public Report in Jakarta], *Liputan 6* (online, 17 April 2016) <<https://www.liputan6.com/news/read/2485566/sosok-minggu-ini-rama-pencipta-qlue-aplikasi-laporan-warga-dki>>.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid.

¹⁰²⁰ See John Graham, Bruce Amos and Tim Plumptre, ‘Principles for Good Governance in the 21st Century’ (Policy Brief No.15, Institute on Governance) 3 <https://iog.ca/docs/2003_August_policybrief15.pdf>.

¹⁰²¹ See ‘Gojek: On-Demand Services’ <<https://www.gojek.io/>>.

¹⁰²² *Keputusan Mahkamah Konstitusi No 137/PUU-XIII/2015* (n 259).

government, through the Secretary of State (for the Environment, Transport and Regions), has a power to intervene in development plans at the local level, ensuring they will not contravene the national spatial plan.¹⁰²³ Similarly, in the Netherlands, the Minister of Housing, Spatial Planning and the Environment has the power to review and guide development plans, both at province and municipality level to comply with the national-level spatial plan.¹⁰²⁴ Indonesia needs this power too.

Involving provincial governments in the issuance of the location permits requires more trustworthy provincial government. In the case of the Reclamation Project, for example, not only Regents, but also the Governor, appear to behave corruptly. However, involving the provincial government will attract more public scrutiny as it will make the location permitting a national-level issue. This can make a difference. For instance, the Reclamation Project failed to continue as it did not pass its environmental impact assessment because of massive public protests from local communities in Bali that became a national-level issue in Indonesia.

F *Third Party Participation*

In this context, third party participation may be useful as a part of the privatisation of government functions. The goal of this measure is to address the issue of lack of resources and training from government officials. For example, in the Tahura Project, as a budget for maintaining mangrove forest was no longer provided, the Bali Provincial Government invited a third party to professionally manage the forest. Likewise, the Reclamation Project raised environmental damage issues (such as waste and human pressure) as a justification to let a third party manage and utilise Benoa Bay. However, as discussed in Chapter 7, the real intention was not social and environmental considerations, but merely privatisation for economic development. For these reasons, third party participation should only be for the purpose of environmental conservation or rehabilitation, and this should be strictly regulated under provincial and district regulations. As a reflection of fairness and transparency, open tenders should be undertaken to choose third parties who have the strongest commitment to manage forest and sea sustainably.

Another possible way is to collect funds from hotels or other tourism-related businesses in Benoa Bay and Nusa Dua areas as part of compulsory CSR. This fund should be transparently allocated to support government programs to protect the environment in these areas. As a comparison, Venice has recently proposed a levy on visitors to help with the infrastructure problems.¹⁰²⁵

Third party participation would also be beneficial to support the creation of district detailed plans. As discussed at length in Chapters 6 and 7, long and complicated procedures for issuing detailed plans, along with a lack of trained human resources, particularly government officials, have become a major reason for the absence of district detailed plans all across Indonesia. Professional planners should be actively involved in the creation of district detailed plans. This would only be effective if it were followed by an increase in the number of qualified planners in Indonesia, and the inclusion of practical plan production training in the curriculum of universities.

¹⁰²³ Leonie B Janssen-Jansen and Johan Woltjer, 'British Discretion in Dutch Planning: Establishing a Comparative Perspective for Regional Planning and Local Development in the Netherlands and the United Kingdom' (2010) 27 *Land Use Policy* 906, 912.

¹⁰²⁴ van der Valk (n 4) 205.

¹⁰²⁵ 'Saving Venice', *ABC News* (online, 12 March 2019) <<https://www.abc.net.au/foreign/saving-venice/10893508>>.

III DIRECTIONS FOR FUTURE RESEARCH

There remain a number of issues which could profitably be explored in future research. While the present study has focussed on the presence of legal and non-legal factors behind the regulatory failure of spatial planning in Bali, causing environmental damage by tourism projects, future studies could analyse more specifically each recommendation made in this study. For example, scholars could further examine why current administrative and criminal sanctions are not working in Bali. Why is it so difficult to enforce the law by dismantling buildings that conflict with the spatial planning regulation? Why are criminal sanctions never applied to government officials, even though they are expressly provided in SPL 2007?

Further comparative studies are also required to specifically examine the following issues. The first is the creation of the detailed plans in other countries, and how to enforce spatial planning law in the case of the absence of detailed plans. The practice of removing authority as a legal consequence for not completing detailed plans is also worth pursuing, as there are certainly other examples of that kind of approach, in other jurisdictions in other planning contexts.

As regards public participation, other countries' practices could be analysed to determine whether they are applicable in Indonesia, particularly to address the lack of clarity as to the stage at which public participation should be undertaken in spatial planning governance. For example, lessons might be learned from how Hong Kong successfully revised its planning law to require public participation at all stages of the spatial plan.¹⁰²⁶

The findings of this study show that district governments do not involve the provincial and central governments in the issuance of location permits, and that the central and provincial governments are no longer able to cancel district regulations. Hence, it is worth learning from other jurisdictions about the relationship between central, provincial and district governments in spatial planning governance. For example, how the federal or central government through the Secretary of State (for the Environment, Transport and Regions) in the United Kingdom, and the Minister of Housing, Spatial Planning and the Environment in the Netherlands, has authority to intervene in development plans at the local level, to ensure they will not contravene the national spatial plan.

The findings of this study demonstrate how economic development too often outweighs the spatial planning goal of protecting the environment in Indonesia. Hence, further investigation is needed to understand how this is dealt with in other jurisdictions. For example, would it be possible for Indonesia to use independent planning panels to make decisions about huge tourism projects where there is a potential conflict between the goal of environmental protection and economic development?

Another important study is how to effectively involve third party participation in managing protected areas so that its participation in protecting the environment is not just a justification to cover up the real main agenda, which is economic benefit, as the Benoa Bay Reclamation and Tahura Projects have shown in this thesis.

¹⁰²⁶ Wan and Bramwell (n 1011).

The lack of trained human resources also deserves more study. Would it be useful for Indonesia to employ a secondment approach, where one government agency second an employee to another agency as a way to increase their capacity to implement technically-oriented laws. In the Bali spatial planning context, perhaps if spatial planning expertise was concentrated at the central level, the central government could second relevant staff to lower levels of government to assist with implementation. Given the lack of qualified planners in Indonesia, and their crucial roles in the creation of detailed plans, there should be research on whether there is a role for foreign planners in Indonesia. Foreign services providers are mostly regulated under the General Agreement on Trade in Services ('GATS'), and Indonesia is active in GATS negotiations under the World Trade Organisation ('WTO').

All in all, a major finding of this thesis is that inter-related legal and non-legal factors have caused the regulatory failure of spatial planning in Bali, frustrating spatial planning goals. Six proposed regulatory reforms, which respond to both legal and non-legal factors, have been offered to make spatial planning regulations more effective, namely: zoning rules as an alternative enforcement mechanism; legal consequences for not completing district-level detailed plans; criminal sanctions for government officials; the enhancement of public participation; the involvement of the Bali Provincial government in the issuance of location permits; and third party participation.

Given the existence of intertwined legal and non-legal factors behind the regulatory failure of spatial planning, more studies need to be undertaken to restore spatial planning objectives as a means of preventing tourism projects in Bali from damaging the environment and the life of local communities.

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