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Universiteit Leiden

Author: Simarmata, Rikardo
Title: Indonesian law and reality in the Delta : a socio-legal inquiry into laws, local bureaucrats and natural resources management in the Mahakam Delta, East Kalimantan
Issue Date: 2012-12-06

Indonesian Law and Reality in the Delta

Leiden University Press

Indonesian Law and Reality in the Delta

A Socio-Legal Inquiry into Laws, Local Bureaucrats and Natural Resources Management in the Mahakam Delta, East Kalimantan

PROEFSCHRIFT

ter verkrijging van
de graad van Doctor aan de Universiteit Leiden,
op gezag van Rector Magnificus prof. mr. P.F. van der Heijden,
volgens besluit van het College voor Promoties
te verdedigen op donderdag 6 december 2012
klokke 11.15 uur

door

Rikardo Simarmata

geboren te Sinapuran, Indonesië in 1971

Promotiecommissie:

Promotoren:	prof. dr. J.M. Otto prof. dr. G.A. Persoon
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Lay-out: Anne-Marie Krens – Tekstbeeld – Oegstgeest

ISBN 978 90 8728 184 7
e-ISBN 978 94 0060 131 4
e-PUB 978 94 0060 132 1

To my parents
who strongly believe in the importance of education

Acknowledgements

I would like to begin these acknowledgements by mentioning the people who greatly helped me with the selection process at the Van Vollenhoven Institute (VVI) and the Institute of Environmental Sciences (CML) of Leiden University in early 2007 for the position of PhD researcher. They are my former colleagues at Huma, a Jakarta-based NGO. I would like to thank them for their generosity to allow me to use some of Huma's office facilities, which enabled me to smoothly pass all steps of the selection process. I would therefore like to thank Asep Yunan, Mak Uci, Siti, Emi, Andiko, Steni, Mas Didin, Nifan, Pak Lando and Pak Leman.

I would also like to express my gratitude to those who have generously helped me with the rewarding and exciting field-work I have undertaken. My early acquaintance with some important regional and local officials would not have been possible without the help from Abrianto Amin and Edy Marbianto.

Also essential for my field-work was the openness of some officials of East Kalimantan and Kutai Kartanegara district government who were willing to be my interviewees and contact persons. To be honest, the openness of some officials of Kutai district government surprised me, for I used to think that few officials would be willing to host researchers. However, I was proven wrong as the majority of Kutai district officials were extremely cooperative and even provided me with important documents.

Some of the officials whom I interviewed were not just interviewees but became counterparts in the project. With them I shared ideas on legal and empirical aspects of natural resource management, and discussed what would be the best method to achieve effective administrative management of natural resources. I would like to thank Abdullah Madjidi, Halid Imran, Erwin Suharno, Muslik, and Nurdin Uha Sadjiru who all work at the Kutai district government. Other interviewees have proven invaluable by becoming my contact persons. They are the field officials who introduced me to new names that were not (yet) on my list. Angga, an official of the local office of the Kutai Fishery Agency, is one person to whom I owe a great deal.

Even though my research did not focus on the village level, I undertook several village visits, which gave me the opportunity to meet local resource users, notably shrimp farmers and fishermen. I would like to thank the villagers and village government officials, who welcomed me warmly during

my visits. Likewise, I was warmly received by the officials of the sub-district offices.

In Samarinda and Balikpapan, two cities where I spent some time during my field-work, I met a number of local researchers and academics. Their broad knowledge about local people of East Kalimantan, local politics and local government policies helped to further understand the information and data I had gathered myself. In this respect I would like to thank Haris Retno, Erwiantono and Iwan Suyatna from the University of Mulawarman, and Muhammad Muhdar and Muhammad Nasir from the University of Balikpapan. I particularly would like to thank Akhmad Wijaya, a research assistant of the East Kalimantan Programme, who has extensive knowledge on the people of East Kalimantan.

During my field-work in Samarinda I was impressed by the outstanding service provided by the local staff of the East Kalimantan Library Office. Their dedication to their job as civil servant enabled me to get some important documents as well as allowed me to use their reading rooms. The staff here showed a rare example of how public services should be delivered.

During my short stay in Jakarta I spent time discussing socio-legal issues with some (former) colleagues at the Faculty of Law of the University of Indonesia. Here I have in mind Ibu Sulis, Ibu Tien, Inge, Tirta, Cindy, Rival and Tita. I owe them for helping me better understand socio-legal studies. I am proud of becoming part of this group, because its members form an epistemic community, which has been promoting the socio-legal perspective in the study of law in Indonesia.

My colleagues at Pusaka, another Jakarta-based NGO, also helped me during my stay in Jakarta. Emil, Angky and Asep invited me to use Pusaka's office facilities. For that generosity, I would like to express my sincere thanks.

During my stay in Netherlands, I experienced a wonderful academic life. I owe thanks to a number of people who helped me benefit from the opportunities available. In the first place I would like to mention my supervisors Jan Michiel Otto and Gerard Persoon. I am greatly indebted to them for teaching me the fundamentals of how to become a good scholar. I would like to thank my former PhD colleagues at the Van Vollenhoven Institute. They became my colleagues as well as friends during the last two years of my PhD scholarship. Their insightful ideas inspired me in writing my thesis. Not only were they partners for discussion, they have also become friends with whom I have shared feelings of happiness and disappointment. On this occasion I would like to thank Sandra Moniaga, Myrna Safitri, Laure d'Hondt, Stijn van Huis, Ling Li, Ken Setiawan, Rili Djohani, Herlambang Wiratraman, Antonius Cahyadi, Henky Widjaja, Loes van Rooijen and Elizabeth Alividza.

I was also inspired by insights from Janine Ubink and Marco Lankhorst and obtained wonderful stories about Dutch culture from Titia van der Maas

and Katrien Bardoel. Adriaan Bedner and Jacqueline Vel, two other VVI colleagues, played a special role challenging my assumptions and observations with critical questions. I should add that the amazing experience of academic life would not have been possible without the professional support of Kari van Weeren, Kora Bentvelsen and Dennis Janssen of the VVI secretariat. On several occasions, they were instrumental to the successful completion of my field-work. Another person I should certainly not forget in relation to the support I was given is Jan van Olden. He set up the earlier arrangements of my PhD scholarship. I should also thank Annelies Oskam who used to be a secretary at CML for her helpful support during my first stay in the Netherlands in 2007.

Beside my colleagues at the VVI, I also received useful help and warm friendships from other people. I enjoyed spending time with Gustaaf, Nadia, Stijn and Dyah. I owe them for helping me relax during the tougher times in the Netherlands. The gatherings with other Indonesian students in the Netherlands also helped in that respect, for example with some refugees who have been granted political asylum in the Netherlands. I would like to thank them for the interesting discussions on social and political issues, and of course for the get-togethers with wonderful Indonesian food.

I am thankful to my former PhD colleagues and researchers of the East Kalimantan Programme who I have worked with for the last five years in carrying out interdisciplinary research. A special thanks goes to the Indonesian PhD students of the East Kalimantan Programme, Duddy, Syarif, Hidayat and Anas. In relation to the East Kalimantan Programme, I would like to thank the Royal Netherlands Academy of Arts and Sciences (KNAW) for the grant awarded to the East Kalimantan Programme. I would also like to thank the Leiden University Fund (LUF), which provided me with a grant for my participation in the Law and Society Annual Meeting in San Francisco, June 2011.

Before turning to my family members, allow me to make a special mention of Hannah Mason, who has done a great job language editing my full thesis. I am also indebted to Jaap Timmer, a former post-doc of the East Kalimantan Programme, who has been such a good colleague and friend during the first two years of my PhD research. I would also like to use this special occasion to offer my deep condolences to the friends and family of two of my former friends of the Public Interest Lawyers Group (popularly known in Bahasa as *Pendamping Hukum Rakyat*). They are Edison Robert Giay and Hedar Laudjeng who passed away earlier this year. During my seven years as an NGO activist, they provided me with important knowledge on the issues of indigenous peoples and natural resource management. They were dedicated NGO activists who gave their full to improving the position of marginalized people.

I strongly believe that my dream to accomplish a PhD program would not have been possible without the attention, support as well as love of my family. My parents, who never themselves graduated from elementary school, taught me the importance of education. I admire them because they believed in something that they never experienced themselves. I am thankful to my brothers Martua, Ediston, Hesron and sisters Osda, Rusmaya and Roida, with whom I shared tough times due to our family's poverty. I would also like to give my special thanks to my parents-in-law as well as brothers and sisters-in-law. I have received wonderful support from them over the last seven years.

I would like to end these acknowledgements by giving my very special thanks to my wife. She is the person closest to me and has been throughout the entire PhD journey. I admire her because she manages to understand me, even though she sometimes struggles with understanding what the PhD programme actually means. For the love, understanding and support she gave me, I think she deserves the strongest words of admiration from me.

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Glossary

Alas hak	Foundation of rights
Alur pelayaran	Public shipping lane
Api-api	A type of mangrove tree which is dominant in the Mahakam Delta. In Latin: *avicennia*
Badan	Body
Bakau	A type of mangrove tree. In Latin: *rhizopora*
Banjir kap	Non-mechanized timber extraction
Budidaya tambak tradisional	Traditional shrimp pond
Daerah swapraja	Self-governing territory
Dompeng/ketinting/ces	A small boat for 4-5 people
Ganti rugi merintis/ *passelle ma'bela*	Payment of compensation for the clearing of forest
Haji	A Muslim title for someone who has made the pilgrimage to the city of Mekkah
Hak garap/hak garapan	Cultivation rights/use rights
Jabatan fungsional	Expertise-based official
Julu	Tidal trap net
Kapersil	Small-scale logging
Kartu keluarga	Family card
Kawasan hutan	Designated forest area
Kelompok tani	Local farmer association
Kepala daerah	Local government head
Komplangan	Local name for silvo-fishery
Konsesi	Large forest or oil and gas work area that is issued by the Central Government
Kontrak kerjasama/ perjanjian karya	Contract of work
Konversi tanah	Land conversion
Kuasa pertambangan	Right to control oil and gas resources
Memakai	To use
Memanfaatkan	To utilize
Memutihkan	To not take any legal action to a past violation of law
Pemegang hak	Rights-holder
Pendatang	Migrant
Pengadaan tanah	Land acquisition
Perambah hutan	Forest squatters
Perjalanan dinas	Work travel

Permusyawaratan	Deliberate consultation
Petinggi/demang	Village head during the pre- and Dutch colonial period
Pimpinan	Head
Punggawa	Patrons or heads of complex local networks
Rambu-rambu	Traffic lights
Rukun tetangga	Neighbourhood
Sabuk hijau	Green belt
Surat keterangan	Clarification
Surat pengantar	Letter of introduction
Surat pernyataan	Letter of self-declaration
Surat tanah	Land letter, kind of possessory evidence
Tanah garapan	Cultivation of land
Uang keperdulian/pengganti jasa/pengakuan atas jerih payah	Donation/charity fund
Unit pelaksana teknis	Technical implementation unit
Wilayah hukum pertambangan	Legal administrative mining zone
Wilayah kuasa pertambangan	State mining zone

Abbreviations & acronyms

ADD	Alokasi Dana Desa (Annual Village Budget)
APL	Area Penggunaan Lain (Area for Non-Forest Use)
APBD	Anggaran Pendapatan dan Belanja Daerah (Annual Regional Budget)
BAL	Basic Agrarian Law
Bappeda	Badan Perencana Pembangunan Daerah (Regional Planning Agency)
BKSDA	Balai Konservasi Sumberdaya Alam (Regional Technical Implementation Unit of Natural Resource Conservation)
BPDAS	Balai Pemangkuan Daerah Aliran Sungai (Regional Technical Implementation Unit of Watershed Management)
CDK	Cabang Dinas Kehutanan (Local Forestry Office)
CDP	Cabang Dinas Perikanan (Local Fishery Office)
CGS	Community Group for Surveillance
DKSP	Draft Kutai Spatial Plan
DONLA	District Office of the National Land Agency
DPD	Dewan Perwakilan Daerah (Regional Representative Council)
DPR	Dewan Perwakilan Daerah (People's Representative Council)
DSPMD	Detailed Spatial Plan of the Mahakam Delta
EKP	East Kalimantan Program
FBL	Fishery Business License
FL	Fishing License
Gerbang Dayaku	Gerakan Pengembangan Pemberdayaan Kutai (Moving Forwards Kutai's Development Endeavours)
GTS	Gathering and Testing Satellite
HPH	Hak Pengusahaan Hutan (Forest Concession)
HPHH	Hak Pemungutan Hasil Hutan (Forest Product Extraction Permit)
Ind.	Bahasa Indonesia
IPPK	Izin Pemungutan dan Pemanfaatan Kayu (Timber Collection and Utilization Permit)
ITCI	International Timber Corporation Indonesia
Japex	Japan Petroleum Exploration
KBK	Kawasan Budidaya Kehutanan (Forest Cultivation Area)
KKDCCR	Kutai Kartanegara District's Committee on Conflict Resolution
KKLD	Kawasan Konservasi Laut Daerah (Local Protected Marine Area)
KBNK	Kawasan Budidaya Non-Kehutanan (Non-Forest Cultivation Area)

KPH	Kesatuan Pemangkuan Hutan (Local Forest Management Unit)
LPND	Lembaga Pemerintah Non-Departemen (Non-Departmental Ministry)
LRL	Land Reclamation License
Muspika	Musyawarah Pimpinan Kecamatan (Sub-District Leaders Consultation Forum)
NGO	Non-Governmental Organization
NJOP	Nilai Jual Objek Pajak (Land and Building Tax Imposition Base)
PAD	Pendapatan Asli Daerah (Regional Government's Revenue)
Pertamina	Perusahaan Pertambangan Minyak dan Gas Bumi Negara (State-Owned Oil and Gas Company)
POMA	Provincial Office of the Ministry of Agriculture
POMF	Provincial Office of the Ministry of Forestry
PONLA	Provincial Office of the National Land Agency
PPI	Pangkalan Pendaratan Ikan (Fish Port)
PPNS	Pegawai Penyidik Negeri Sipil
PSC	Production Sharing Contract
PSP	Provincial Spatial Plan
RePPProT	Regional Physical Planning Program for Transmigration
UIM	Unit for Inventory and Mapping
UFAE	Unit for Forest Area Establishment
SMZ	State Mining Zone
SPPT	Surat Pemberitahuan Pajak Terutang (Tax Assessment)
SSFRC	Small Scale Fisheries Registration Certificate
TGHK	Tata Guna Hutan Kesepakatan (Agreed Forest Land Use Plan)
TISMMD	Team for Integrated and Sustainable Management of the Mahakam Delta
TPI	Tempat Pelelangan Ikan (Fish Market)
TUFPC	Technical Unit for Forest Product Circulation
TUFPS	Technical Unit for Forest Planning Samarinda
UPTD	Unit Pelaksana Teknis Daerah (Regional Technical Implementation Unit)
UPTD PH3	Unit Pelaksana Teknis Daerah Perlindungan Hutan dan Hasil Hutan (Forest Protection and Forest Product Protection)
Vico	Virginia Indonesia Company

1 Introduction

'Great ancient and current civilizations begin in deltas'
(The Jakarta Post, 6 October 2011).

1.1 The Delta: vital but vulnerable

The last three years have been hectic years for stakeholders who are involved in delta issues. In 2010, the first World Delta Dialogue was held in Louisiana, United States, and in 2011 the first World Delta Summit was held in Jakarta, Indonesia. Alongside these two global events, the Delta Alliance was formed in 2010. The Delta Alliance is an international knowledge-driven organization which currently focuses on eleven deltas worldwide, including the Ciliwung and the Mahakam Delta of Indonesia. The events and the alliance have brought together representatives from government agencies and civil society groups: engineers, academics in 'hard' and social sciences, environmentalists and many others.

What makes the participants with various backgrounds willing to gather and cooperate is that they have all noticed that the vital function of deltas is currently under threat. They realize that the deltas which provide homes to more than half of the world's population, are vulnerable. This vulnerability has increased due to industrialization, population growth and climate change. These three factors have generated environmental problems like congestion, depleted fresh water supply, land subsidence, erosion, saline intrusion, water pollution, increasing temperatures and flooding (Wim, Slingerland and Trajan 2010). In the end, the deterioration gradually weakens the deltas and prevents them from playing their vital role of providing environmental resources and services (Bucx, Marchand, Makaske and Guchte 2010).

For deltas which are situated in rural remote areas and provide rich natural reserves, human rights abuses appear as another important issue besides environmental destruction and poverty. Strong evidence suggests that the deterioration of the environment eventually hampers the majority of the population who inhabit the deltas in securing adequate standards of living, food, water, housing, health and life (United Nations Development Project 2006; Amnesty International 2009, p. 12).

The discussion about the rise of economic and ecological problems of the delta is often associated with ineffective government. An assessment held by

the Delta Alliance on the vulnerability and resilience of ten deltas worldwide discovered that conflicting government layers and agencies, centralization and poor public participation in policy making, are the most common governance issues which eventually lead to ineffective governance of the delta (Bucx, Marchand, Makaske and Guchte 2010). These conflicts between governing institutions are seen as incongruent with the nature of the delta ecosystem which needs an integrated and collaborative management approach. In addition to conflict, weak or inadequate capacity of government officials plays a role too (World Bank 1995; Bucx, Marchand, Makaske and Guchte 2010). In case of the rural remote deltas, they are described as regions which suffer from administrative neglect (UNDP 2006, p. 9; Amnesty International 2009, p. 9). Taking South Aceh of Indonesia as an example, McCarthy (2006, p. 14) said, 'in remote areas power might be highly localized, while the official institutional frameworks of state policy may be weakly established'.

The notion that deltas suffer from administrative neglect is widely accepted. This has led to many promoting the establishment of coordinating forums, and building capacity as solutions to the problem of neglect. A workshop held by the Delta Alliance Indonesia Wing in 2010, attended by representatives of national institutions, regional governments, universities, international institutions and the private sector, recommended a better institutional structure and capacity to cope with the governance problems of Indonesia's deltas.[1] The issue of climate change which is seen to accelerate the vulnerability of the deltas, has made the recommendation more urgent.[2]

Those who point at the abovementioned problem of administrative neglect of the delta and present a number of simple solutions, usually emphasise that the intended goals of planned programmes are usually not (fully) achieved. This view often focuses on the performance of government officials who work at the national, provincial and sub-district offices. Accordingly, this approach has not paid much attention to the factors that influence the local, social realities of policy implementation. The so-called 'compliance' view of administration assumes that once policies are announced they will be implemented by subordinate administrators and that intended results will be achieved in non-political and technically competent ways (Cheema and Rondinelli 1983, p. 26). As a result, the notion overlooks the agency and the field officials who actually attempt to implement law and policy by developing particular behaviours that respond to their social environments. Instead of taking into account the actual implementation, this view is quick to regard such behaviours

1 See 'Scoping Workshop of Delta Alliance International Indonesia Wing', held in Jakarta on 2-3 August 2010, p. 4. www.delta-alliance.nl/nl/25222819 %5Blinkpage%5D.html?...true... (accessed on 23 May 2012).

2 How climate change, vulnerability and recommendations are related can been seen in various documents produced by the Delta Alliance. They can be found on http://promise.klimaatvoorruimte.nl/pro1/publications/publications.aspx.

as illegitimate. It is therefore not surprising that the recommendations that this view proposes neglect the context, including the complex relation between the agency, field officials and local people, and between formal and informal rules.

Focusing on the Mahakam Delta which is situated in the Kutai Kartanegara District of the province East Kalimantan, Indonesia, this book will examine formal and informal rules on resource use, and how these rules have been formed and implemented. It shows how the processes of formation and implementation have been prominently influenced by a context where numerous and complex factors and actors coincide. One of the contextual factors that this book emphasizes is the fact the Mahakam Delta is located in a remote area and is scarcely populated. By paying attention to the local officials, whose work brings them into direct contact with the resource users, this book examines the formation of formal and informal rules and the implementation of law. This book argues that apart from pursuing self-interest, the local officials also seriously and rightly take into account the context. As a result, they do not always implement the formal rules but together with local resource users generate informal or semi-official rules, which legitimize the actual resource use.

1.2 THE RESEARCH PROBLEM

A central question that this book poses is how law regulates resource use in the Mahakam Delta, how it has been implemented and what prominent actors and factors have influenced its making and its implementation. The main question is further elaborated in the following three sub-questions.

How does legislation, including both laws and regulations, regulate natural resources use in the Mahakam Delta?

This sub-question allows for an examination of the legal aspects of public management of natural resources of the Mahakam Delta. Numerous important provisions on forest, oil, gas, fish and land resource use are described and analysed. The provisions do not only concern rules on resource rights, but also on the government institutions which are assigned to implement and enforce the formal rules. Here I define *law* as legislation which is made by the Peoples' Representative Council (national parliament) together with the President; *regulation* should be understood as lower legislation made either by executive organs – national or sub-national – or by sub-national representative councils (see Section 4.3).[3]

3 On the difference definition between 'law' and 'regulation' see for instance Black (2002, p. 29-34).

To which extent and in what way have regional and local bureaucracies implemented these laws and regulations, and which are the key actors and factors which have influenced the implementation of these laws and regulations?

This sub-question examines to which extent the formal rules have been implemented, and the level of (attempted) influence of a number of actors and factors in the implementation process. The sub-question also looks at the actual behaviours of the legal implementers in coping with these actors and factors.

How has the making of some of these regulations been influenced by the administrative and political context?

The third sub-question examines the making of some regional regulations and drafts concerning natural resources management in the Mahakam Delta. It investigates various factors, notably administrative and political factors that prominently influence the making of those regulations.[4] Unlike the first and the second sub-questions which also examine the laws, this sub-question only deals with regulations.

1.3 Conceptual background

1.3.1 Bureaucracy's role in legal processes

Bureaucracy in developing countries is often criticised for impeding the development process as well as public service provision. La Palombara (1963) argued that in developing countries where the bureaucracy is the legacy of the colonial tradition of law and order, the use of bureaucracy is more a tool to control rather than to achieve development. According to Palombara, bureaucracy impedes development and public service delivery due to its simultaneously powerful and powerless position.[5]

In the case of a seemingly powerful bureaucracy, it can become a captive and exclusive institution in which development goals are subject to vested

4 I use the word 'legislation making', and 'law-making' interchangeably. In as far as laws are meant to lay down policies, law-making coincides with policy making. Even though there have been some studies on law-making, yet for the most part, in order to understand the actual processes, we must borrow from studies on policy making to which the study of public administration has paid much attention. Hence, I use certain theories on policy making in explaining law-making.

5 Haque (1997) mentioned many dimensions of incongruities and incompatibilities between the bureaucracy and social reality that subsequently cause the bureaucracy in developing countries to become an impediment to or shortcoming for development. Dube (1969) pointed at the alienation and uprootedness of bureaucracy from society as factors which lead to its shortcoming.

interests, and public services are delivered unjustly and unequally. In that situation, the bureaucracy is not responsive and sensitive to public needs, making it a dead weight on society that eventually hinders development and socio-economic change (Jain 1992, p. 23). Moreover, a powerful position can enable the bureaucrats to anticipate and adapt to any plans or efforts that might jeopardize their comfort zone from which they benefit (Dube 1969, p. 214 and 216; Hirschmann 2000, p. 289). In the situation where the bureaucrats consider themselves as a new class and where their power is not based on ownership of the means of production but on the position in the state apparatus and the level of access to various state agencies that regulate and control resources, they become exclusive, and allocate resources and provide public services on the basis of self-interest (Haque 1997, p. 447).

In the opposite situation, when the bureaucracy is seemingly powerless, it is subject to severe interference from external influences, either from elites, patrons or families, making it dependent and preferential (Dube 1969, p. 216-217; Eisenstadt 1969, p. 370; Haque 1997, p. 437-438; Hyden et al. 2004, p. 137). In Indonesia, since the resignation of President Soeharto (1966-1998), elected politicians have more influence than public administrators as a result of the multiparty democratic system (Hyden et al. 2004, p. 132). Apart from external forces, the decrease in the power of the bureaucracy may also be due to the incompetence and unwillingness of the bureaucrats. It is believed that the dependence on particular external groups leads to an unequal allocation of resources while incompetence and unwillingness hinder the bureaucracy from effectively carrying out policies (Haque 1997, p. 446-447). As Haque (1997, p. 448) points out, the bureaucracy in developing countries in general, instead of being the agent of development and change, has maintained existing structures, benefits from affluent classes and foreign capital and exacerbates the dependence and underdevelopment of poor classes and the nation. Riggs (in Hirschmann 1981, p. 472) even points out that the bureaucracy contributes to negative development, while Harold Laski (in Sayre 1969, p. 342) sees the bureaucracy as a threat to democratic government.

These views on bureaucracy have also been criticized. One argument against this view, for example, is that it is unlikely that the bureaucracy, when they have an interest in ensuring that development is continued is indeed mostly perceived as a development impediment. Moreover, as a result of establishing relations with external groups, the bureaucracy is constantly influenced and therefore adapts to external demands (Eisenstadt 1969).

Rather than regarding bureaucracies in developing countries either as powerful and self-interested, or powerless and ineffective, one could also depart from the assumption that the bureaucrats always have to adapt to the societies in which they live. Firstly, due to a great spread of traditional institutions and practices on one hand and the perception which bureaucrats in developing countries often hold of themselves as the agents of development on the other hand, they often assign themselves the duty to modernize more

traditional, lower-educated people (Dube 1969, p. 213; Asmerom, Hoppe and Jain 1992, p. 23; Kajembe and Monela 2000, p. 381). In that context, the bureaucrats are more required to be pioneers, negotiators and motivators rather than policy implementers (Eisenstadt 1969; Esman 1974, p. 14).

Maintaining a continuous equilibrium between autonomy and responsiveness to external influences is another reason why a bureaucrat is often not willing to be strict about its formal tasks (Eisenstadt 1969). To a large extent, the strategy is needed in the hope that the bureaucracy can still fulfil its formal functions. For the field officials who live in the same community as the affected groups, it is important to be responsive or adaptable to the external influences, not only for ensuring that planned programmes are implemented but also as a survival strategy. As Kajembe and Monela (2000, p. 383) found, forest field officials in Tanzania were unwilling to break the link with the local people who dwelled in state forest, for they perceived the local communities as their living environment. The ability to survive will prevent the bureaucrats from social exclusion (Thompson and McEwen 1958, p. 29). In many occasions they even have to be in favour of the affected community in an effort to obtain social insurance (Milne 1970, p. 61; Gray (1985). In other words, they have to create a credible social relationship to avoid social risk in which the affected communities may resist or even jeopardize them physically (McCarthy 2006, p. 105-106). As one of the forest field officials of the National Gunung Halimun-Salak National Park of West Java, Indonesia, said, 'Without credible relationships with the local community, we cannot work (Kubo 2010, p. 246).

The above refers to ways in which the bureaucracy plays a role in development in general. What role does the bureaucracy play in legal processes, notably law-making and implementation of law? For critics who regard the bureaucracy as an obstacle to development, law-making in non-Western countries is seen as a top-down process in which particular elites or a small group of powerful persons have the main say. As Seidman (1978, p. 454) said, in some African countries feedback institutions in which people can participate in policy formulation favour the local elites over the mass. As Riggs (1964) pointed out, in a society in which family ties and traditional forms of authority are still prevalent, elitist or corporatist groups may dominate the law-making processes.

Not only the domination of the elites influences the formation of law but also the competition among government agencies in pursuing their own agencies' interests (Otto et al. 2008, p. 60). Moreover, when the society has become increasingly complex and heterogeneous, the process of law-making tends to import law through legal transplantation (Seidman and Seidman 1994). The type of law making in which the public hardly participates and in which there is hardly a rational debate and decision making process can jeopardise the quality of the law. Consequently, the pursuit of compliance and enforcement will be more difficult.

Concerning the implementation of law, the bureaucracy is often found to prevent the law from reaching its primary goals by shaping the implementation of the law in favour of its personal interests or the interests of a closely affiliated group. Pursuing personal interests in the implementation of law has led to corrupt behaviour among the bureaucracy. Whilst, when the bureaucracy is captured by the interests of a powerful regulated group, the bureaucrats may be reluctant to implement the law (Riggs 1969, p. 418; Cotterrell 1984). As Seidman and Seidman (1994, p. 139) point out, whereas the bureaucracy is far from favouring the mass, it seems that it systematically implements the law in ways that strengthen the reigning oligarchy. Hauck (2008), for instance, has shown that despite the fact that the Government of South Africa has promulgated democratic fishery laws since 1998 to give small-scale fishermen the opportunity (*bona fide*) to formally obtain access to marine resources, the implementation of the law has not been effective because powerful local elites have hijacked the opportunities.[6]

These point to circumstances, attitudes and practices of administration which may be incongruent with formal arrangements (Riggs 1969, p. 416; Haque 1997, p. 444-445). Obidzinski (2003) has described how a patronage network for illegal logging in the Berau District of East Kalimantan generated a form of informality whereby formal forest rules were denied. McCarthy (2006, p. 170) describes a similar situation in South Aceh where new institutional arrangements or new informal understandings emerged concerning forest resource use in a way to accommodate local demands and corrupt behaviours of the local forest officials at the same time. Furthermore, due to functional pathologies, the bureaucracy is blamed for increasing the gap between planned goals, policies and their actual implementation. In natural resources management, a bureaucracy widely practicing corrupt behaviour, obviously puts the natural resources at risk (Auer, Karr-Colque, McAlpine and Doench 2006; McCarthy 2006).

Apart from such negative assessments, other insights in the literature point to different attitudes, for example that the bureaucracy is continuously seeking ways to make law which has an effect on society on one hand and takes into consideration people's voices on the other hand. The gap between what the law says and what the social reality requires constitutes the main reason for why this balance is needed. There are a number of actual social circumstances that call for more responsive and adaptable laws. Firstly, the diversity and complexity of societies. Secondly, the different abilities of its citizens. Thirdly, the need to provide access to its citizens. Fourthly, the need to avoid unwanted or unexpected situations such as worse local livelihoods, conflict, larger violations of law and a larger workload for the bureaucracy.

6 Similar accounts could be also found in Gezelius and Hauck (2011).

That societies are diverse and complex is an important factor. In a 2000 report the World Bank suggests that when public participation is limited, there are various normative systems, and the enforcement institutions are weak, the bureaucracy needs to apply the law flexibly in an effort to pursue compliance. In such circumstances, the bureaucracy is better off advancing co-operation, maintaining a non-repressive approach in law enforcement, and using strict sanctions and deterrent methods, if the first way of working has failed (Aalders and Wilthagen 1997).

When the bureaucrats try to follow the law but need to take into account the ability of the regulated groups as well, they often make the law compromising whereby they may not impose all necessary legal requirements (Ayres and Braithwaite 1992; Rosenbloom and Schwartz 1994; Baldwin, Cave and Lodge 2012).

Due to the different abilities of citizens to change their behaviours as required by the law, the bureaucracy has to establish dialogues which result in different patterns of service and methods of delivery (Esman 1974, p. 14). The importance of pointing at the factor of ability is that compliance is often influenced by the extent to which the regulated actor has the ability to comply with a certain rule (Kagan and Scholz 1984).[7]

Likewise, an adaptable and responsive law matters when it concerns some unexpected circumstances as mentioned above. When poorly regulated groups violate the law to sustain their livelihood, the bureaucracy is better off neglecting or reinterpreting the law to avoid the livelihood problems getting worse (Kaimowitz 2003). As McCarthy (2006, p. 105) wrote, '…forestry officials were reluctant or afraid to arrest poor villagers with few economic options other than logging the forest'. In cases of forest resource use, when it is clear that illegal forest use is the only source of income for the local users, the forest bureaucrats prefer to only warn rather than punish those breaking the law (Chhteri, et al. 2012). Kubo (2010) found that the field forestry officials of the National Gunung Halimun-Salak National Park preferred to give warnings to the illegal forest occupants and firewood collectors, and sometimes take them to an office to draft a statement about their wrongdoing. The field officials did not punish them according to the formal forestry rules, as they knew that this form of local use would not harm the National Park. The same policy is often followed when bureaucrats expect that the imposition of formal rules could generate conflict or larger violations.

Literature on administrative law, sociology, public administration and regulatory studies have long mentioned discretionary power-based policy and decisions as administrative means to cope with the gap or discrepancy between law-in-the books and law-in action. As what Riggs (1964, p. 183) labelled 'formalism', bureaucrats may produce interpretations of law which permit

7 On factors that influence people to abide by the law see Seidman and Seidman (1994, p. 45-46); Seidman, Seidman and Abeyesekere (2001, p. 16) and Tyler (2006).

them to do what the affected groups find useful, when social behaviour does not confirm to a prescribed norm. Hyden et al. (2004, p. 133) suggest that local bureaucrats often use discretionary powers to twist central government policy in directions other than those originally intended.

In the context of this book it is important to underline that bureaucrats attempting to make the law responsive and adaptable is not always merely driven by the interest of maximizing wealth or maintaining the existence of the bureaucracy, but could also be because of rising social concerns and solidarity among the bureaucrats with the affected groups (Barnard in Milen 1970; North 1990; Dixit 1997). In addition the bureaucracy has to take into account the fact that it often lacks resources (funds, capacity). The field officials of the Federal Ministry of Environment and Rivers of Nigeria, for example, relied on the vehicles and laboratories of the private oil companies to investigate the pollution that, according to the local people, was caused by the oil company alone (UNDP 2006; Amnesty International 2009, p. 44). As said, due to the shortage of resources, the bureaucracy often realizes that they are not able to fulfil the required conditions or be ready for the consequences if they impose the formal rules.

In other words, a situation whereby the bureaucrats are not willing to make the law enforceable may well coincide with them wanting the law to benefit the affected groups. The bureaucracy can have these two seemingly contradictory attitudes simultaneously. As said, sustaining their autonomy whilst responding to external influences means that bureaucrats must strive for a continuous equilibrium (Eisenstadt 1969). Having these attitudes simultaneously, the bureaucracy can appear to be ambivalent in orientation (Riggs 1969, p. 427). Such ambivalence will also follow from a deliberate strategy to set up flexible law enforcement. The flexibility ranges from cooperative to punitive law enforcement. Punitive law enforcement is needed to maintain the credibility of threat (Braithwaite 2002). Moreover, in the case of field officials, the range of options could help them play their role as intermediary agent, subject to administrative duties on one hand but needing to be responsive to the demands of the community on the other hand (Arce 1993).

In the context of decentralization regional and local government officials often cannot effectively implement policy on decentralization due to a number of structural factors, including reluctance and fear of central government officials, competition among different levels of government, and political and social structures.[8] Reluctance and fear eventually lead to a shortage of financial resources at the level of local administration, given that the central government keep the largest proportion of financial resources to themselves (Chemma and Rondinelli 1983, p. 295-314). Regional and local governments in Latin America, for example, can hardly cover their basic operational costs, let alone other

8 For an account of the numerous factors which influence the policy implementation on decentralization see Cheema and Rondenelli (1983).

activities such as expanding the range and quality of public services (Harris 1983, p. 195). The structural factors coincide with behavioural factors, such as a centralist mentality or centralist ideology. Field officials of regional and local governments in many Asian countries are hindered in implementing policies, as central officials often do not trust them and consider them as incompetent and lazy (Mathur 1983, p. 71).

At this point it is useful to elaborate on what is meant by the process of implementing the law. As already mentioned above, this book defines the implementation of law as an effort to ensure that laws have an effect. Regarding the effect, Seidman et al. (2001, p. 10-11) argued that it emerges if the implementation of law can change institutions. It is important to underline that the term 'institution' is here understood in the sociological sense of a repetitive pattern of social behaviour. Thus, it could be argued that law is effective if those who are regulated behave in accordance with prescribed norms. As Aubert (1966, p. 99 and 105) said, law has an impact if the behaviour of affected people is confirmed by the rules laid down in the law.

Effectiveness may also relate to validity and legitimacy (Soeprapto 1998, p. 19). It is presumed that valid and legitimate law will not be resisted by the affected people given it is desirable and useful (Manan 1994, p. 28).

Another point that must be underlined regarding the implementation of law is that 'administrative implementation' can be distinguished from 'regulatory implementation of law'. The former refers to the actual role of public administration in the implementation process, in other words, to law-in-action. The latter refers to 'making lower executive regulations',[9] i.e. it refers to the normative aspects, to the law and regulations which govern the administrative implementation of law. In other words, it could be seen as the promulgation of implementing rules by the government accompanied by mechanisms for monitoring and enforcement (Black 2002, p. 11)

1.3.2 The quality of legislation

This book includes a discussion of the quality of Indonesian legislation with regard to the different expectations that resource users, and regional and local government officials have. The resource users expect legislation to be able to provide certainty about their tenure rights whereas the government officials expect the legislation to be able to inform them on the following two issues: their authority and what constitutes as legal/illegal. The different demands of the two different actors show that the 'quality' of legislation can vary in the eyes of different beholders (Florijn 2008, p. 76-77). In academic discourse, there are at least two strands of thought about the quality of legislation. Firstly,

9 Chen (2002, p. 1) and Otto (2002, p. 23).

there are theories on the rule of law or general jurisprudence. The second strand of thought consists of theories on the relation between the quality of legislation and social change (Van Rooij 2006, p. 33).

Theories on the rule of law discuss the quality of legislation in terms of two substantive elements of the rule of law: formal legality and democracy. It is assumed that legislation will be of good quality if it is clear, certain, consistent, predictable and general in its application (Tamanaha 2004; Bedner 2010). Good legislation should also result in general consent so that legislation can be an instrument for controlling state intervention (Bedner 2010). In practice, democratic law-making can turn into the reverse situation as it can cause unclear law, but at the same time it might enable legislation to fulfil various expectations (Florijn 2008, p. 76). In general, formal legality enables the regulated people to plan their behaviour because they know how the state responds to their actions. In other words, the legislation gives predictability so people know in advance what legislation demands from them, what legislation grants to them, and what sorts of behaviour they can expect from the officials, if they undertake particular actions (Seidman et al 2001, p. 255).

The element of formal legality of the rule of law is actually a primary subject matter of the doctrinal study of law. Doctrinal analysis of law is primarily concerned with the extent to which legal authoritative text (laws, regulations, court decisions) are consistent and coherent so that they are able to bring about certainty as well as equality (Dworkin 1986; Kissam 1988; Hesselink 2009). Consistency and coherence are pursued on the assumption that law has an inner system or logical integrity (Schwartz 1992, p. 181). Consistent legislation means that there are no contradictions, whereas coherency refers to the entirety of legislation (Fuller 1964, p. 66; Ehrlich and Posner 1974; Seidman et al. 2001, p. 262-263; Siems 2008, p. 149). Schrama (2011) suggests that non-contradiction does not only apply to the different pieces of legislation itself (internal consistence), but also when legislation is compatible with the context and culture in which it operates (external consistence). Coherent legislation means that the different pieces of legislation do not logically cancel each other out, but that they fit together. They have to be mutually interdependent (Balkin 1995, p. 116).[10] Another definition of coherence is that there should be as many relations as possible among the different pieces of legislation, where one piece of legislation is a reason for another (Mommers 2002, p. 46 and 48).

It should be underlined that consistency and coherence have a relation. As Balkin (1994, p. 117) argues, legal coherence is possible, if principles that underline law and regulations are consistent with one another. That includes consistency in resolving conflicts among laws and regulations. Hage (2004,

10 Discussions on legal coherence mainly focus on principle, policy and purpose underlining legal rules. Therefore legal coherence is understood as a connection between legal principles and legal rules. See Balkin (1994) and Hage (2001).

p. 90) even suggests that consistency is a dimension of coherence next to comprehensiveness and mutual support.

Theories on how law relates to social change assume that law can be an instrument to generate social change, acknowledging that law can also be a product of social change (Mehren and Sawers 1992; Seidman et al. 2001). To be able to generate social change one may say that law should be implementable. Van Rooij (2006) concisely summarizes four characteristics of good or implementable legislation: adequacy, feasibility, certainty and adaptability. One prominent indicator of adequacy is if compliance with the law by the affected group results in greater benefits than violation of the law. The law is feasible if it takes into consideration the ability of the regulated people to comply with the law and of officials to implement it. The aspect of ability is related to what resources are available to the regulated people and officials. Thus, the aspect of feasibility means that law enforcement is possible (Van Rooij 2006, p. 37).

As already said, certainty concerns clarity and predictability. If a law is clear and free from ambiguity and vagueness, it helps prevent the use of discretion in interpreting the law. Unlike certainty which requires that law is as detailed as possible, adaptability requires the law to be abstract and open. This is to allow the implementation to adapt to a complex reality and to be balanced with regards to the interests of different stakeholders. In developing countries where administrative implementation often lacks resources on one hand and there is often a huge gap between law-in-the books and law-in-action on the other, an adaptable law is needed.

Based on the above accounts, it is clear that the four characteristics of good legislation can contradict each other. It occurs because on one hand the law is concerned with the needs and wishes of the law makers, and on the other hand it needs to take into account the social reality in which the law operates. In this regard, implementable law is law that balances these characteristics (Van Rooij 2006, p. 43).

In Indonesia, law itself has set the standards for how to make good legislation, as can be found in Law No. 12/2011 on the Making of Legislation. It should be noted that this law contains a complete set of indicators of good legislation. Law No. 12/2011 does not only apply the substantive elements of the rule of law (Bedner 2010), it is also concerned with the implementability of the legislation.[11] Apart from the substance and implementability, this law adds the law-making process as another indicator of good legislation. To a large extent, these indicators of good legislation resemble the indicators, which Indonesian legal scholars have put forward. These include the following: clearly defined objectives, made by an authorized state institution, proper subject matters, consensual, implementable, certain, and in conformity with

11 On the substantive and procedural elements of the rule of law see Bedner (2010).

national fundamental norms and the constitution (Attamimi 1990; Manan 1994, p. 27-29).

Concerning the elements of the rule of law, Law No. 12/2011 determines that legislation should be easy to understand so that it does not generate multi-interpretations.[12] In other words, it should be clear (Rahardjo 1991, p. 84; Manan 1994, p. 29). The legislation should also be general in application without taking religion, ethnicity, race and social status into consideration.[13] Furthermore, Law No. 12/2011 determines that to pursue certainty, the legislation should take into consideration legality and make lower legislations compatible with higher legislation.[14] In this regard, Law No. 12/2011 reasserts the official adoption of the theory on the hierarchy of legislation within the Indonesian legal system (see Section 4.3).

Indonesia's legal discourse also relates the hierarchy of legislation to the concept of harmonization.[15] It suggests that the hierarchy of legislation constitutes a means to achieve harmonization. In its broader meaning, harmonization is not only concerned with the relation between higher and lower legislation, but also with the relation among sectoral legislations, between legislation and administrative rules, legislation and court decisions, formal rule and social rule, and between national law and international law (Gandhi 1995, p. 30; Otto 2003, p. 16; Goesniadhie 2006, p. 300). Wargakusumah et al. (2000, p. 33-34) points to eight causes that could cause disharmony. These include the differences between statutory law and customary law, statutory law and court decisions, higher legislation and lower legislation, central regulation and local regulation, and conflict of authority among the government agencies. The ultimate goal of harmonization is certainty and equality. In relation to the cause, Otto (2003, p. 17-18) points out that disharmony may emerge throughout all stages of the 'law-and-policy cycle' notably during the setting of goals, principles and legal norms, administrative competition, implementation, and enforcement.

It is even suggested that there cannot be legal certainty without harmonization. Harmonization is the situation in which legal sub-systems fit together or are congruent (Gandhi 1995; Goesniadhie 2006). Thus, in this respect harmonization resembles coherence. Congruence is possible because different sub-systems are brought into agreeable conformity with one another (Otto 2003, p. 16 and 19).

With regard to the law-making process, two indicators of good legislation can be suggested. Firstly, the legislation should be made by an authorized state institution (Attamimi 1990, p. 345-346). Any legislation which is not made

12 See the Elucidation of Article 5f of Law No. 12/2011.
13 See the Elucidation of Article 6h of Law No. 12/2011.
14 See the Elucidation ofArticle 5c and Article 7(2) of Law No. 12/2011.
15 For thoughts, which suggest this relation, see for instance Goesniadhie (2006, p. 119-129) and Wargakusumah (2000).

by an authorized state institution should be avoided.[16] Another procedural indicator that Law No. 12/2011 states is that the process in which legislation is made should be transparent and provide every citizen the opportunity to give input or suggestions.[17] This form of open process will result in consensus-based legislation (Manan 1994, p. 28).

In the legal analysis in Chapters 5-9, I will use the standards of good legislation, namely the substantive elements of the rule of law and implementability, as Law No. 12/2011 suggests, to assess the natural resources legislation for the Mahakam Delta.

1.3.3 Tenure rights

Resource tenure and property rights

This book deals with legislation on the use of natural resources and how it has been implemented in the Mahakam Delta (see 1.2). It employs the term 'resource use' in the sense of 'land tenure' in its broader meaning. Thus this term includes tenure of land as well as of other natural resources. Sometimes, instead of the term 'resource use', people use the term 'land tenure' referring to the same meaning (FAO 2002, p. 7). As Bruce (1998, p. 2 and 6) has pointed out, resource tenure describes the rights to land, water, trees and other resources. The term may also include flora, fauna and the water system in so far as they are associated with an area of land (Leonard and Longbottom 2000, p. 35).

This book prefers not to make sharp distinctions between the terms 'resource tenure', 'land tenure' and 'property rights' given that they are conceptually not significantly different.[18] Conceptually, the three terms are concerned with the relationship between and among persons from which a person gains legitimacy to use resources. I will therefore use the terms interchangeably. I here follow the notion that resource tenure should not be seen simply as a set of rules, but also as principles and processes. When it includes social practices as well, a more proper term that could be used is 'resource arrangements'.[19]

In academic discourse, the term 'resource arrangements' actually represents a criticism on earlier thoughts which saw property rights and land tenure simply as rights and obligations, or as terms and conditions on the basis of which resources were held, used and transacted (Adams, Sibanda, and Turner

16 See the Elucidation of Article 5b of Law No. 12/2011.
17 See the Elucidation of Article 5g of Law No. 12/2011.
18 For work which conceptually distinguishes between the two terms see for instance Safitri (2010, p. 24).
19 See McCharty (2006) and Safitri (2010, p. 24).

1999). In discussions about property rights, the instrumentalist rule-based approach defines property rights as rights to use, to earn income from, and to transfer or exchange assets and resources (Libecap 1989). This notion, which strongly echoes a neo-classical economic approach, has recently re-emerged through the work of Hernando De Soto. De Soto basically argues that the informal sector will gain certainty, if it is formalized. Formalization will make extra-legal property easy to transfer and use as a collateral. According to De Soto, this could ultimately eradicate poverty (De Soto 2000).

Some scholars have reacted to this instrumentalist approach arguing that it overlooks a usually complex reality. This type of criticism originates in notions, which challenge rule-based and legal centralist approaches. The scholars point out that instead of land tenure merely consisting of a rule, it comprises of principles, practices and processes, whereby society defines control over, access to, management of, exploitation of, and use of means of existence and production (Dekker 2001). Broader than a mere legal institution, resource tenure is a social institution that specifically governs how humans interact with nature, particularly in relation to the control of the use of natural resources (Hanna et al. 1996, p. 1). It is perceived as patterns of behaviour rather than that it specifically serves to control society's use of environmental resources (Crocombe 1971). The social reality that profoundly influences the forming of resource tenure often consists of different rule systems that exist simultaneously. The different rule systems interact which makes resource tenure rather complex (Franz and Keebet von Benda-Beckmann in Moeliono 2000).

This book will approach the issue of land tenure from both a legal and social perspective. As a result, this book suggests that resource tenure includes complex and various sets of norms, practices and processes regarding resource use in which both legal and non-legal factors have an impact. The processes, in which various actors with different or even conflicting interests and perceptions and influenced by various prominent factors interact, have shaped a form of resource tenure where formal and informal legitimacy meet. Formal and informal legitimacy are in constant contact, which sometimes turns into conflict, but also accommodate each other or support mutual recognition. An accommodating relation can result in tenure rights based on a combination of formal and informal legitimacy – even when in terms of form they could still be identified as formal or informal rights. Because of the fact that there are many different forms of legitimacy of resource use, this book does not rigidly follow the categorization of formal, informal and *de facto* resource tenure.[20]

Meanwhile, property rights are also perceived as bundles of rights. This means that there may be several layers of rights over one certain piece of

20 On this categorization see for instance Reerink (2011, p. 15).

property. Riddell (1987) points out that a parcel of land might belong to a person or a group of persons, whilst it is used by others to collect firewood, fruits, and crops and in some cases even to live on. Regarding the bundle of rights, it is important to underline that in a situation where formal and informal rules are combined, it may happen that each right in the bundle is subject to a different normative order. For example, the ownership rights could be subject to formal rule, while the use rights fall under informal rule or vice versa. The dynamic aspect of the rules constellation suggests that a bundle of rights changes over time subject to constant interaction between the actors involved (Van Meijl and Von Benda-Beckmann 1999).

Tenure security

Tenure security broadly refers to the holding or exercise of rights by right holders without any hindrance or interference from other (groups of) persons. A more detailed definition of tenure security is that someone has the right to resources on a continuous basis, free from the imposition or interference from outside sources, as well as the ability to reap the benefits of labour and capital invested in the resources, either in use or upon transfer to another holder (Migot-Adholla and Bruce 1994; Bruce 1998). Accordingly, tenure security is associated with the extent and duration of the rights, which determine the scope of the rights (Ubink 2008, p. 18). It is conceptually assumed that rights are secure if: (i) they encompass many actions that right holders may exercise including the exclusion of others; and (ii) they have a long period of validity. Given these assumptions, formal private property is often assumed to have the strongest tenure security (FAO 2002, p. 18; Lund in Ubink 2008, p. 18).

However, due to the weak correlation between formal resource tenure and tenure security, some critics suggest that tenure security should also take into account informal or actual resource use. In a 2003 report, the World Bank pointed out that formal land titles are not necessarily sufficient for a high level of tenure security. In a situation where formal institutions are absent or powerless, it is better to choose a gradual approach and build on the existing system(s) of land tenure, such as local non-state institutions (Deininger 2003, p. 33). Thus, tenure security is also possible within an informal tenure system (Migot-Adholla and Bruce 1994, p. 25).

Concerning the source of tenure security, this book follows Safitri's and Reerink's notions that perceived security can also contribute to tenure security besides formal and actual tenure security. Safitri (2010, p. 30) and Reerink (2011, p. 16) define perceived security as a perception, or strong conviction, that the right holders are secure in having and exercising their rights, because they think that the government officials agree with them. In such cases the perception may derive from their knowledge and experience with formal tenure (Safitri 2010, p. 30). Nevertheless, following the definition and sources

of tenure security as the Food and Agriculture Organisation (FAO) has formulated, this book found that the perceptions of other actors, such as government officials and company employees, also contribute to perceived tenure security (FAO 2002, p. 18-20).[21] As Reerink (2011, p. 221 and 225-226) found, as far as a regional and local government is concerned, long residence and land-related documentation are two prominent factors that encourage local officials to perceive semi-formal *de facto* land tenure as legitimate. As already mentioned (Section 1.2), such perception might emerge as a result of the bureaucrats' understanding of the ability of the land holders to abide by the law or the risks or consequences they might encounter if they impose the formal rule.

1.4 METHODS OF RESEARCH

When I commenced my research mid-2007, East Kalimantan was indeed not new for me. My first visit to this second largest province of Indonesia was in 1999. At that time, I joined a group of NGO activists and university lecturers who were undertaking a comparative study on community forestry. We visited some upstream villages in the West Kutai District, at that time a new district and formerly part of the Kutai Kartanegara District. The local villagers we met during this study belonged to Dayak indigenous groups.

I grew more familiar with the Province when I worked in Balikpapan city in 2000, and during my consulting jobs for a local NGO and in the course of two international projects. The jobs provided me many opportunities to meet the Dayak indigenous groups who resided in the interior part of the Province. Likewise, I also had the chance to meet Provincial and Kutai District officials through which I enhanced my knowledge on legal and policy issues in East Kalimantan. I was fortunate to have two opportunities which later became important for my PhD research. The first opportunity was to contribute to an international research project concerning the management of Balikpapan Bay, through which I became familiar with the coastal issues of the Province. The second opportunity was to carry out a research on community forestry policy for a Bogor-based NGO in 2002.

Considering the abovementioned work experience in the Province, I could say that my PhD research has given me a great opportunity to develop a closer acquaintance with the Kutai District government, and with coastal issues as well. This research then led to my first encounter with the Mahakam Delta. It brought me, who formerly worked in the field of indigenous peoples, into closer contact with immigrant communities.

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21 According to the FAO's definition, tenure security may derive from many sources. It may derive from communities and the government. One may have tenure security from those sources in cumulative (FAO 2002, p. 19-20).

I obtained most information and data for this research through interviews and the collection of documents. In addition to these two methods, I undertook non-participatory observations in which I observed the ways in which the officials of the Province, Districts and deconcentrated government agencies acted and understood their day-to-day activities. Meanwhile, from a number of village visits which I made in the course of 2007 up to 2011 and from a survey carried out by a post-doc researcher in the East Kalimantan Program, I became acquainted with the villagers and their local tenure (see Section 1.5 for an account of the project).

1.4.1 Collection of Documents

The documents that I obtained can be divided into three groups/types of data. Firstly, there are authoritative legal texts consisting of legislation, administrative rules and court decisions. The local regulation and administrative rules comprise of provincial, district and sub-district legislations and administrative rules. The court decisions comprise of district court, high court and supreme court decisions and also include a decision by the Constitutional Court. Secondly, I collected and studied research reports and publications of government agencies, companies, universities and NGOs. Thirdly, I used official reports and minutes of Provincial and Kutai District government meetings. Apart from these three types of data, I also gathered documents regarding dispute settlements on environment and land.

Given that the Mahakam Delta was practically new to me, I first collected several research reports which provided me with much information concerning the environmental condition of the Mahakam Delta, the livelihood of the local people, and stakeholder initiatives in the pursuit of sustainable management of the Mahakam Delta. Those reports and publications also provided me with an overall picture of the law and policy problems of the management of the Mahakam Delta, which this research further examines in a comprehensive and analytical manner. It should be underlined, however, that the reports had little to say about the role of local bureaucrats in the law and policy processes. Therefore data collection through interviews was important for this research.

In general, there were few serious handicaps in getting the authoritative legal texts. Nowadays, national legislation, certain administrative rules and quite a number of court decisions can easily be accessed via the internet. Yet local regulations and policies are not all online. I collected these from various circles, including government offices, NGO activists, company employees, and university lecturers. I visited the Provincial and Kutai District Fishery, Forestry, Environmental Agencies and several bureaus of the Provincial and District Secretariat Office to obtain local legislations, administrative rules and draft regulations. I also visited regional offices of the Ministry of Forestry and the National Land Agency, as well as the offices of some NGOs, company

employees and university lecturers. I visited the Kutai District Court and two law offices to get the verdicts of lower and higher courts. I found the cassations on the internet. To obtain the research reports, publications, meeting reports, minutes and maps, I mostly visited the offices of government officials, NGOs, company employees, and university lecturers.

My contact with some NGO activists in East Kalimantan also helped me with collecting data. They introduced me to government officials and company employees, which helped me in building trust. This made them more willing to provide the data I needed. However, I also encountered some difficulties in getting the data. The district annual budget, maps of the Forest Areas and the reports of forest delineation were the three documents that were most difficult to obtain. I had to make an appointment with a Provincial Forestry official to get a map of the delineated Forest Area of the Mahakam Delta. He asked me to meet him at the office, where he held a side job. I was asked to pay for the map.

To obtain the report on forest delineation, I even had to wait until an office head was moved to another office. I was lucky because the new head trusted me and allowed me to copy the reports, though this only occurred after we had met and discovered we shared cultural ties. I received the reports in the last year of my PhD research. On the other hand, when I met government officials who had formerly worked as a journalist or NGO activist, I found it easy to obtain the data. They were even willing to send me any data I still needed by email.

I also collected documents during my several visits to the Netherlands. My first two visits in 2007 and 2009 introduced me to the academic debates through the expansive university library collections. It is an extraordinary privilege to have access to such a huge collection of publications and reports. There I found not only literature on the Mahakam Delta but also on Indonesia and on the theoretical framework that I employ for this book.

1.4.2 Interviews

In total I interviewed 120 respondents consisting of civil servants (82), retired civil servants (11), company employees (6), university lecturers (6), police officers (4), NGO activists (3), a parliament member (1), lawyers (2), and community members (5). The fact that the largest group of respondents consists of active and retired civil servants (93/120), shows the focus of this research. On average, I interviewed these people more than one time, and in some cases three or four times.

As previously said, my network among the East Kalimantan NGOs helped me to get the documentary data from government officials and company employees. It provided me with similar support for conducting interviews. With the help of the network, few government officials asked me to present

ahead my research permits before the interviews took place. Nevertheless, the network was not the only factor that eased the process of holding interviews. I noticed that my official status as PhD student at a foreign university and sharing cultural ties also helped.

Some of my interviewees were welcoming once they knew that I was following a PhD program abroad. The interviews often commenced and ended with conversations about what it meant to have or how they could get an opportunity to study abroad. The interviewees' questions about studying abroad could be out of personal interest or for their children's future education. On some occasions, attempts to get interviews scheduled and the running of the interviews themselves went well, because I consciously and naturally used my cultural ties (which I prefer not to disclose due to ethical reasons).

Yet, the main reason for the success of the interviews was the growing transparency of the Kutai District government. The environment started changing after the prosecution of a number of high-ranking officials who were accused of corrupt practices. The prosecutions, to some extent, forced the Kutai District government officials to be more welcoming to those who were requesting public information. However, this context impeded the interview process at the same time. I found it difficult to make interview appointments with some retired government officials. They or their family members were not very willing to meet me, suspecting I was sent by the central government to hold a legal investigation. Therefore several interviews were refused. Their family members explained that the person I was looking for, was not an active official anymore, and asked me to contact the active officials instead.

High-ranking employees of the companies were the most difficult persons to reach during the research. I sent official letters twice asking for an interview but neither was answered. As an alternative I held informal interviews with some of the company's middle and lower-ranking employees. I had met them before during some seminars and conferences. They were willing to be interviewed on the condition that I would not disclose their identity.

Meanwhile, it seemed that the lawyers were pleased to be interviewed as they expected their office names to be quoted in a book written abroad. They therefore did not mind if I copied the relevant legal documents I needed, something that they may not have done, if I had been a student at an Indonesian university.

When arranging the interviews with the Kutai District government officials I was not necessarily intent on interviewing the officials, who were at the top of the decision making processes in their respective agencies. Given my research does not focus on top-level decision making processes, I actually needed interviewees who had adequate knowledge of matters of my interest. It was a fact that some or even most of the District Agency Heads or Heads of Divisions of the Agencies knew little about their office regulations and policies. This was mainly due to the unstable condition of the Kutai District government during the period 2006-2011. In that period, many high-ranking

officials were frequently replaced due to political favouritism. Lower staff was therefore the only group that had useful knowledge for they had been working in their respective offices for a longer period of time.

1.4.3 Observation

As said, I conducted a non-participatory observation for this research. I used two methods. Firstly, I observed what the officials did routinely during office hours. Secondly, I took part in the implementation process of some programs and out-of-office hour activities.

From observing the daily routine of the officials, I learned firstly and foremostly much about the working environment of some agency offices. Due to the fact that the Kutai District government is overstaffed, too many employees work in one room, leading to an overcrowded office space. The officials whom I interviewed were sometimes uncomfortable answering my questions because their colleagues and superiors could hear them. Therefore, when necessary, I encouraged them to have conversations outside their offices. A situational factor that helped me was the fact that many agency officials did not have a chair, which made it easier to approach them. Some of them stayed in the rooms, and occupied themselves with activities that were not related to their job. Others were standing or sitting at the corridors of the offices during office hour. This situation enabled me to easily approach them and have conversations, as they were not on duty.

Meanwhile, my observations in two sub-district offices provided me with another view of the bureaucratic environment. At least two realities I can share: how the sub-district officials provided daily administrative services to various resource users, and how the sub-district officials who did not have a background in law dealt with legal matters. Concerning the first reality, I witnessed how the sub-district officials, who dealt with issuing legalization letters to resource users, were not aware of the formal signatory procedures. One day in March 2009, I came across an official, who was in charge of a land matter, and was under a lot of pressure, because some people were demanding to receive the sub-district secretary's signature immediately. The reason for doing so was that if the newly appointed sub-district head were inaugurated they might not be able to get the signatures from the new sub-district head so easily. This put the official in a difficult position, because on one hand she knew that the signature of the sub-district secretary did not have a strong legal basis, but on the other hand she did not want to disappoint the people.

With regard to the second reality of the sub-district bureaucracy, I found how an official with an educational background in agriculture tried to master law. She bought some books on land legislation for self-study. During the interview I found she had misunderstood some provisions of the land legislation. I did not correct her, for I knew that it could influence the way she

was thinking. At the same time, I found myself in a dilemma. Whilst I did not want to have my research influenced by changing the mind of an interviewee, I also knew that correcting her at an early stage could help improve the services to the public. I finally decided to point her to the correct legal provisions, but only after my fieldwork was nearing the last stage.

The second form of observation consisted of various activities. I joined several field officials' village visits. My opportunity to become more involved in the agency's official activities grew, when I informally assisted the Kutai District Land Bureau in setting up some policy development. Apart from my involvement in their official activities, I also joined them informally in the canteens and played cards with them in the office's back rooms. These settings gave me the opportunity to get information that maybe they would hesitate to tell me in the office rooms or during office hours.

1.5 Development of the research

This research formed part of an extensive research project called the 'East Kalimantan Program' (EKP). The original title of the EKP is 'Linking Forests with Marine Systems: Investigating Developmental, Biological, Legal and Economic Ties across Scales in East Kalimantan'. The main title was later divided into several sub-titles and my research falls under the sub-title 'Stakeholder Interests and the Potential for Sustainable Coastal Management through Rights Regulation Practices in the Context of Decentralization in the Mahakam Delta, East Kalimantan'.

The EKP was a joint collaboration between a number of Dutch universities and Indonesian universities and government institutions. The researchers involved came from various educational backgrounds due to the interdisciplinary nature of the research. Most researchers involved in the EKP studied natural sciences, namely biology, geology, hydrology and engineering. Thus, legal and social aspects formed only a small part of the EKP. My specific sub-project involved one post-doc researcher and one PhD researcher.

The different members of the EKP were keen on applying an interdisciplinary approach. Regular internal meetings and conferences were held in which the various researchers presented their findings. By learning about the findings of other disciplines, the researchers were expected to seek the link between their own research and that of others, either within the natural sciences or between the natural sciences and socio-legal sciences. To some extent this has been successful, at least in the form of being able to use findings from other pieces of research as supporting data.

Another effort to apply the interdisciplinary approach was to prepare a synthesis report of the EKP where the major research findings of two clusters of this project namely the Mahakam Cluster and Berau Cluster, were combined into one report. The main idea of making the synthesis report was to formulate

a future scenario for the management of the two deltas from an interdisciplinary point of view. From a substantive point of view, the synthesis was aimed at making comparisons and finding interconnectedness between the two deltas. For this purpose, I undertook nine days of fieldwork in Berau, as did the post-doc researcher. I have not included the findings from the fieldwork in Berau in this book for it was originally intended for the synthesis. More importantly, it would be methodologically incorrect seeing that I spent far more time in Mahakam (one and half years) than in Berau (nine days), making it impossible to compare the fieldwork and the results on an equal footing.

As said, this PhD research was originally a joint research project with a post-doc researcher. Within the framework, a division of focus was set up. The post-doc, a social anthropologist, was to focus on *local* tenure arrangements, whereas I myself being a jurist would focus on *state* tenure arrangements. To maintain collaboration, periodic meetings between the two of us were planned. We envisaged that the meetings would take place somewhere in between our two work spaces between the village and the city: at one particular coffee shop (Ind. *warung kopi*) in the sub-district. That we would meet at a coffee shop is mentioned not only to indicate the division of focus but also because the coffee shop symbolizes where our research meets. Some of the data used in this book therefore originates from the coffee shop meetings.

1.6 Limitations of research

On many occasions where I had the opportunity to present the preliminary findings of this research, it was suggested to me to also pay sufficient attention to the accounts of local resource use. I would have liked to respond to these suggestions, yet due to the division of focus I already described, this book will not discuss local resource use much. Thus the extent to which I have included accounts of local resource use is mainly limited to what I gathered from government officials. More extensive accounts of local resource use are expected to be available in the works of the post-doc researcher.

In describing law-making, this book focuses on the processes that took place within the district bureaucracy. Very little is said about the processes in which the district parliament was involved. Therefore, the number of local members of parliament who were interviewed is small: in a book focusing on the bureaucracy, there is less need for accounts about the legislative and judicial institutions.

There are three sub-districts in the Mahakam Delta, as other reports and publications suggest (see Section 2.1). However, due to time constraints, this research only focuses on two of the three sub-districts, i.e. Anggana and Muara Badak. In terms of distance, the two selected sub-districts are closer to Samarinda, the Province's capital city, where I mostly stayed during my field work.

1.7 OUTLINE

The chapters of book can be divided up in three main parts. The first part consists of the chapters in which I mostly describe my fieldwork findings (Chapter 5-9). The second part is mostly based on the documents and literature I collected (Chapter 1-4). In the third part I analyse the data which have been described in the previous chapters (Chapter 10). The topic and content of each chapter is briefly outlined below.

As an introductory chapter, Chapter 1 explains why this research is significant (1.1), the research questions (1.2) and the conceptual background for the analysis of my findings (1.3). The remaining parts of the chapter concern methodology, the research obstacles, issues of access, strategy and forms of collaboration when the research took place (1.4 and 1.5). In relation to the applied methodology, this chapter also lists the limitations of this research (1.6).

Chapter 2 is about the setting and environment of my research, including the geography (2.1), ecology (2.2), human settlements (2.3), social structures (2.4), livelihood (2.5), stakeholders (2.6) and policy problems (2.7).

Chapter 3 and 4 function as background chapters. Chapter 3 provides a historical background whereas Chapter 4 gives a legal and administrative background. The focus of Chapter 3 is the history of state intervention in resource use in three historical periods, namely 1945-1970 (3.1), 1970-1998 (3.2) and 1998-present (3.3). Meanwhile, Chapter 4 provides an account of governmental structures in Indonesia, both horizontally (4.1) and vertically (4.2), and of the legislative system (4.3).

As said Chapter 5-9 provide extensive accounts of the field findings. In general, the five chapters contain the following sections: (i) law-making processes and main legal provisions, (ii) implementation of law, (iii) legal problems, and (iv) interactions between state and resource users. The sections on law-making processes portray how national legislation on forest delineation (5.2; 6.2), local regulations on fisheries (7.2), land (8.2) and spatial planning (9.2) were made. The sections on the main legal provisions (5.2; 6.2; 7.2; 8.2) chiefly describe government institutions or officials who are authorized to issue rights or permits, terms and conditions to obtain the rights or permits, rights and obligations of the right- or permit-holders and how to exercise the rights or permits. In addition to the provisions, the section describes a number of government institutions that were formed to implement and enforce the formal rules. The legal provisions encompass local, regional and national legislation.

The sections on the implementation of law (5.3; 6.4; 7.3; 8.4; 9.3) focus on some areas, where the implementation of law has been effective or not. They further point to prominent factors that have hampered effective implementation. The sections on the interaction between state and resource user (5.5; 7.5) zoom in on the actual reality of the implementation of law, whereby one can

see that field officials frequently made direct contact with the local resource users.

Meanwhile, the sections on legal problems (5.4; 6.3; 7.4; 8.3; 9.4) examine the appearance of incoherence and inconsistency in the formal rules in the respective sectors, which consequently had an effect on the way in which the law was implemented. They also assess its impact on the legal certainty of the resource users.

Chapter 10 systematizes the legal problems and factors that have influenced the law-making processes and the implementation of law. Concerning the legal problems, the chapter examines the extent to which laws and regulations are inconsistent and incoherent (10.1). Meanwhile, in assessing why and how actors were involved in law-making, the chapter suggests three areas of focus (10.2). Factors that are internal and external to administrative institutions are recalled to explain why the regional and local government officials did not effectively implement the formal rules and at the same time provided legitimacy to the actual resource users (10.3). By way of conclusion, the final section of the chapter presents a conceptual recommendation to improve the management of the Mahakam Delta, namely that the actual implementation of law needs to be taken into account during all phases of the policy process (10.4).

2 The setting

This chapter deals with the various settings in which the different forms of resource use discussed in this book took place and where state jurisdiction was exercised. The settings concern geography, ecology, social structure, livelihood and policy. This book argues that the settings have directly or indirectly influenced the making and the implementation of laws and regulations concerning natural resources use in the Mahakam Delta. Conversely, the laws and regulations have also impacted those settings.

2.1 GEOGRAPHY: AN INACCESSIBLE AREA

Due to its geographical location and formation, the Delta is not an easy place to reach. It is a remote area indeed. The Delta is located at the mouth of Mahakam River, in the eastern part of Borneo Island (see Map 2.1). The Delta is in front of the Makassar Strait, which separates the two islands Borneo and Sulawesi. The Delta itself comprises of a chain of 92 small islands (totalling 1,000 km²), in addition to three main tributary rivers and dozens of connecting rivers (Bapedalda Kukar and PKSPL IPB 2002, p. III-1 and 3).

Map 2.1: Mahakam Delta with research location indicated

None of the 92 small islands can be reached by road; the only way to reach them is by boat. To reach and leave the Delta, most of the Delta villagers use a small boat for four to five people locally named *dompeng* and *ketinting/ces*. A few of the residents as well as non-residents use privately rented boats. Thus, there is no public sea transportation that the government provides. Likewise, there are no public river ports that the government has built in the Delta (Bappeda Kutai Kartanegara 2010, p. 58).[1] The three main villages of the Delta are approximately two hours away by speedboat from Anggana, the capital city of Anggana sub-district, three hours away from the Provincial capital Samarinda, and four hours by car and boat from Tenggarong, the capital of Kutai District. The trip can take longer if made by a small boat such as a dompeng or ketinting. Yet it can be faster if a large speed boat (called sea-truck) is used, which is common for the employees of Total E&P Indonesie, the gas and petroleum company which has been operating many production units in the Delta. The rental price for a one way trip on the speedboat is approximately US$ 390-490.

It is only Muara Pantuan and Tani Baru that have been connected by a wooden road. Therefore, to travel around the islands, the villagers mostly use the dompeng and ketinting. Dompeng and ketinting are both motor boats with an engine size of 13-24 and 5-12 horsepower respectively. Actually, most of the time, the villagers use the dompeng and ketinting for fishing. There is hardly a household in the Delta that does not have a dompeng or ketinting (Lenggono 2004, p. 136).[2]

The story about the remoteness and inaccessibility of the Mahakam Delta has long been known, for it has been used many times as a hiding place by pirates, independence fighters and fundamentalist Islamic activists. In the course of the Sultanate period (late 15th century-1844) and the Dutch administration (1844-1942), pirates had hidden or taken a rest in the Delta before they raided the ships which were loaded with exported forest products and imported goods (Magenda 1991, Peluso 1987, Knapen 2001). In independent Indonesia, during the period of the Revolutionary War (1945-1949), some nationalist fighters had hidden away in the Delta to escape the Dutch army (Magenda 1991). More recently, in the Reformation era, two allegedly fundamentalist Islamic activists hid in the Delta before an Indonesian anti-terrorism special force finally discovered them in Tanjung Berukang, Sepatin village in November 2002.[3] Lately, some immigrants from South Sulawesi who were

1 A recent draft of the District's development planning reveals that water transportation is still an important means of transportation in the District, for only small parts of its areas are otherwise accessible. Since founded in 1957 up to present, the District has had eight public river ports and no public sea ports. Meanwhile, oil and gas companies have built five sea ports for private use. See Bappeda Kutai Kartanegara (2010, p. 58-59).

2 A 2003 survey shows that 77.5% of the residents of the three villages of the Delta had a dompeng, while 15.5% had a ketinting. See Rachmawati (2003, p. 48).

3 'Imron Akui Terlibat Bom Bali', *Suara Pembaruan* daily 14/1/2002.

sought for crimes, such as gambling and drugs, moved to the Delta to hide away from a police investigation.

2.2 Ecology and natural resources

The ecological formation of the Delta is highly determined by the mangrove ecosystem. The ecosystem has subsequently determined the existence of various flora and fauna. The dominant vegetation of the Delta consists of trees that are associated with mangrove. The three most common trees are *bakau* (*rhizophora*), nypa (*nypa fruticans*) and *api-api* (*avicennia*). The nypa appears most frequently, covering approximately 60,000 ha and thereby making it one of the largest nypa-growing areas in the world (Dutrieux in Kusumastanto 2001, p. 63).

Being predominantly a mangrove ecosystem, the Delta is a favourite place for various fish species to feed, spawn and nurse. The mangrove provides the fish with abundant nutrition. The calm of the waters and the shade cast by the leaves of the mangrove trees furthermore make it a suitable place for spawning and nursing the young (Soetrisno 2007, p. 24-25). Not only is the Delta a favourite place for the fish, some mammals too take advantage of the abundance of the Delta. One of these is the 'proboscis monkey' (*nasalis larvatus*), an endemic species. The 'proboscis monkey' lives of the leaves of the bakau and api-api (Alikodra et al. in Soendjoto et al. 2006, p. 35).

Meanwhile, the geological development of the Delta has allowed for the existence of fossil fuels. Scientists widely believe that the oil and gas reserves in the Delta do not originate from the sea, but that they were formed by sedimentation flowing downstream (Tokita et al. 2005). In addition, the tidal nature of the Makassar Strait also contributed to the content of the reserve.

Due to this ecological formation, the Delta has a large biodiversity on one hand and rich natural resources on the other. Traditionally, the two most prominent valuable natural resources of the Delta are fish and petroleum. In terms of biodiversity, the Delta has 129 species of fish (Sandjatmiko 2005, p. 54).

Besides providing valuable resources and biodiversity, the ecosystem of the Delta also has a basic ecological function. The Delta protects the environment from destruction by for example abrasion, sedimentation, sea water intrusion and pollution (Aspar in Kusumastanto et al. 2001, p. 28, Husein 2006). The way the mangrove ecosystem offers protection is by managing the effects of the tide and predators for a multitude of fauna that find the mangrove a very suitable reproduction area (Bourgeois et al. 2002: 23).

However, over the last fourteen years, the basic ecological function of the Delta's mangrove forest has been tested due to major environmental changes resulting from large-scale and destructive natural resources use. It has repeatedly been suggested that deforestation namely the conversion of mangrove

forest into particular uses is the main cause of environmental destruction in the Delta (Bapedalda Kutai Kartanegara and PKSPL IPB 2002, p. III-46; Bourgeois et al 2002, p. 2; Lembaga Afiliasi Penelitian dan Industri (LAPI) ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. IV-10; Noryadi et al. 2006, p. 23). Deforestation has caused other forms of environmental destruction, such as abrasion, water intrusion, depleted fishery resources and reduced biodiversity. In most cases where the mangrove forest has been converted – as suggested by bureaucrats, academics, politicians and NGO activists – the purpose was to build shrimp ponds. Some suggest that new settlements and the installation of pipes and other facilities by the oil and gas companies might have been other reasons to convert the forest (LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. IV-5; Hidayati 2004, p. 98; Syafrudin 2005, p. 17 and 18). The latter have allegedly caused water pollution (Dinas Perikanan dan Kelautan Kutai Kartanegara 2007c, p. 8).

Finding reliable data concerning the scale of mangrove conversion into shrimp ponds is not easy, as the figures vary according to how the satellite imagery is interpreted. However, in general it can be observed that deforestation has increased considerably over the last decade (Sidik 2009). Moreover, some researchers in the early 2000s presented useful figures in this regard. According to Dutrieux (2001, p. 63-64), in the early 1980s, the entire Delta was covered by extremely dense vegetation, composed of different mangrove species. In 1992, as a result of the initial emergence of large-scale shrimp ponds, deforestation began with 3,700 ha of deforested area in 1992. Within three years, in 1996 the figure reached 15,000 hectares. As the price of exporting shrimp rocketed due to devaluation of the Indonesian currency against the US$ during the Asian financial crisis, it triggered a more massive opening of new shrimp ponds resulting in 67,000 ha deforested area in 1999. Deforestation peaked in 2001, when it reached 85,000 hectares (Duitrieux 2001, p. 64).[4]

As mentioned, the deforestation was followed by abrasion, water intrusion, depleting fishery resources and reduced biodiversity. The best indicator of the water intrusion is the extent to which upstream cities like Samarinda and Tenggarong have had water intrusion especially during the dry season. When the water has reached the two cities then drinking water supply emerged (Sidik

4 In 2002, a Total E&P sponsored research report reiterated the above figures (Bourgeois et al. 2002, p. 28-31). These figures have also been widely used by various stakeholders of the Delta including the regional and local government. Some regional government-funded research reports, government planning documents as well as multi-stakeholder official documents repeatedly quote these figures. For instance see Bapedalda Kutai Kartanegara and PKSPL IPB (2002, p. III-46), LAPI ITB and Bappeda Kabupaten Kutai Kartanegara (2003, p. IV-10), Tim Sosialisasi Kawasan Delta Mahakam (2008, p. 7), UNDP (2009, p. 4-5), and Bengen et al. (2011, p. 17). Recent figures of the scale of the conversion are contested. Some say conversion is still continuing and has reached 90,000 ha (Bengen et al. 2011, p. 17), whereas others say the areas have been naturally reforested, as many shrimp farmers have abandoned their shimp ponds due to decreasing productivity. For the latter observation see Dinas Perikanan dan Kelautan Kutai Kartanegara (2007c).

2009, p. 5). Abrasion can lead to sedimentation on the bottom of river basin. In the last decade, there has been ten times as much abrasion as in the previous decade (UNDP 2009, p. 5). At the same time, during high tide, local people were affected as some settlement areas, shrimp ponds and sport fields were flooded.

Deforestation also causes a depletion of the fishery resources and reduction of the biodiversity. Once the mangrove ecosystem disappears the fish lose their favourite spawning and nursery grounds. In association with the depleting fishery resources, there is a significant reduction of biodiversity, which is especially catastrophic for endangered species such as 'proboscis monkey' (Sandjatmiko et al. 2005; Bengen et al. 2011).

The other environmental destruction that the local people often complained about is soil and water pollution which decreases the productivity of the shrimp ponds. In the period 1996-1999, when pond productivity peaked, a one-hectare pond could yield 20-40kg of tiger shrimp and 600kg of wild shrimp and crab (Bourgeois et al. 2002, p. 65). One study even stated that a one-hectare pond could yield up to 200-1,000kg of tiger shrimp (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008c, p. 25-26). More recently, productivity has fallen to only 21,5kg/ha and 24,5kg/ha of tiger shrimp and wild shrimp respectively (Noryadi et al. 2006). Regarding the cause of the decreasing productivity, while company employees, bureaucrats and academics believe that white spot disease (see footnote 8) caused the decrease, the shrimp farmers suspected that oil spillage from the oil and gas extraction caused the pollution (Aspar 2001, p. 28).

2.3 HUMAN SETTLEMENTS

The history of human settlement in the Delta is closely related to the history of war and the economy, which are the two main factors that have motivated people to move to and settle in the Delta. In relation to war, migration to the Delta was an effort to escape conditions at home (Vayda and Sahur 1985, p. 94; Vayda and Sahur 1996, p. 9). Particularly the Bone War (1859-1860) and the Banjarmasin War (1859-1863) led to migration to the Delta and to East Kalimantan at large.

Despite the fact that traders had for long sailed along the tributary rivers of the Delta (Peluso 1987, Magenda 1991, Linblad 1985, 1988, Zwager 1996), none of them had established any settlement there. The main reason was because they feared the pirates who had been actively operating across the Mahakam Strait before the Dutch colonial government pacified them by the nineteenth century (Black 1985, p. 281; Peluso 1987, Magenda 1991).[5] Therefore,

5 For a further account of how pirates existed along the Makassar Strait see Zwager (1996) and for how they existed in South-East Kalimantan in particular see Knapen (2001).

the first people who braved to settle in the Delta were Bajau people.[6] It occurred some time in the early nineteenth century. It is important to note that during the Sultanate and colonial period, Bajau people were often associated with pirates (Healey 1985, p. 3). However, the first settlement was inland in order to avoid raids from the pirates (Levang 2002, p. 4).[7]

The second wave of migration to the Delta occurred in late nineteenth century when a group of Bugis people migrated from the Pasir district due to the Dutch army carrying out an attack on the Pasir Sultanate. This group did not start a new settlement and joined the Bajau people in the two already existing settled areas. New settlements were established when the Bajau and Bugis people in the Delta moved to places nearer to the sea. These waves of migration took place before the Second World War. Apart from the fact that the coastal area was now safer due to the pacification of the pirates by the Dutch, the main reason for the move was an epidemic of smallpox. The two new settlements they established later became the largest villages in the Delta, called Sepatin and Muara Pantuan. In the 1940s, other people trekked further south which eventually resulted in a new village, called Tani Baru.

The next settlers in the Delta hardly established new settlements but joined the existing settlements, even though they came in large groups. In the late 1950s, a large wave of migrants, mostly Makassar people, came to the Delta, escaping the Indonesian army which hunted anyone who was alleged to be a supporter of the Kahar Muzakar rebellion. In the Delta, they mostly moved into the hamlets of Sepatin and Muara Pantuan. Sometime in this period, a small group of Banjar fishermen coming from up-stream of the Mahakam river also moved to Sepatin, and established a new hamlet called Sungai Banjar.

Meanwhile, the establishment of settlements also occurred on the Kutai mainland, such as in Salo Palai and Saliki villages. Settlement on the Kutai mainland took place later than on the coastal Delta (i.e. the islands), namely in the early twentieth century (Levang 2002:4). Besides the Bugis people, Banjar people were also involved in the settlement. The latter moved to the Delta due to the Banjarmasin War in the nineteenth century (Magenda 1991, p. 3; Knapen 2001). Settlement in the mainland further occurred in the 1950s when some Makkasarese from South Sulawesi and Banjarese from South Kalimantan

6 Bajau or Bajo people are considered as the earlier inhabitants of the major coastal areas of East Kalimantan before the arrival of the Buginese. In this period, Bajo people had an important role as link between the Chinese traders and indigenous population of East Kalimantan. Apart from that role, Bajo people were also known as pirates, which explains why the Kutai Sultan had asked help from the Buginese in order to control the Bajo people. As the attempt was successful, people started to associate Bajo people with a bad character. As a result Bajo people gradually started to hide their cultural identity and indentify themselves as Buginese. In the Mahakam Delta, they sometimes call themselves Bugis-Bajo Wijaya (N.d., b).

7 The first settlements were located in Pemangkaran and Mangkubur. Both are currently under the administration of Sepatin village.

moved to the Delta in order to avoid the chase of respective Kahar Muzakar and Ibnu Hazar followers.

Settlements in or migrations to the Delta as of the New Order regime (1965-1998) up to the present have almost all been driven by economic reasons. Lenggono (2004) states that the reason for the migrants to move to the Delta in this period is to pursue a better life. In addition, in terms of ethnic background, the migrants during this period are more diverse for the group also includes Javanese people. Yet, in terms of place, the migrants in this period have not actually discovered new places, but rather reside in already existing settlements. Some are temporary settlers, as they originate from nearby districts and sub-districts so they regularly return to where they came from in the first place.

The heavily economic-oriented migrations commenced in the late 1960s (1968-1970). Most people from South Sulawesi, mostly from Bone and Wajo, moved to East Kalimantan hoping to be able to find employment in non-mechanized timber extraction, popularly named as *banjir kap*. Their relatives who lived in the Delta encouraged them to come to East Kalimantan arguing that there were ample job opportunities in timber extraction (Vayda and Sahur 1996, p. 9). However, after the timber extraction came to an end in 1970 when the national government introduced a centralized timber management policy, the migrants who previously worked in the timber extraction chose to stay in the Delta instead of returning to South Sulawesi.

Not long after the *banjir kap* ended, other migrants from South Sulawesi and Java came to the Delta to pursue two types of labour opportunities. Firstly, a job with an oil and gas company. Given the migrants were mostly unskilled, the companies offered them a position as surveyor, speedboat driver or security guard. The two oil and gas companies commenced their operations in 1972 and 1973 respectively. Secondly a job as a fisherman for one of the two cold storage facilities , which were established in 1974 and 1975. The two cold storage facilities needed more fishermen who would catch fish and sell it to them through local Buginese leaders, the *punggawas*. About the extent to which the companies impacted the population size in the Delta, Levang (2002) says:

> Until the beginning of the 1970s population in the Delta was scarce. Everything was to change with the start of oil exploration and production.

The Delta continued to attract migrants through to 1997 and 1998. In this period Indonesia was hit by the Asian financial crisis which dramatically weakened the value of the Indonesian currency against the US dollar. The crisis caused a steep price hike of all Indonesian export products including shrimps. The rise in prices made some villagers rich, and their stories spread across South Sulawesi. Apart from the success stories in that period, some shrimp ponds in South Sulawesi were suffering from a massive white spot disease

which Java had experienced earlier (Bailey 1988, Bailey 1997, Jhamtani 2003).[8] The attraction that the Delta offered this time was stronger than before; the migrants did not only originate from South Sulawesi but also from nearby districts of the mainland. The migrations also included many temporary workers originating from East Java.

2.4 SOCIAL STRUCTURE

In the seventeenth century, La Ma'dukelleng, Prince (Arung) of Singkang, led a number of Buginese, wishing to escape the Bone War, to flee to East Kalimantan. The Kutai Sultan pleasantly welcomed them and granted them a place to settle. In their new homeland, East Kalimantan, they pleaded (Ind. *bersumpah*) to move away from a stratified or socially ranked society as they had formerly practiced in their homeland. As a result they expected to apply a new system, in which each person would be of equal social status (Ind. *sama rendah*).[9]

Unfortunately, the dream never came true. As several studies point out, instead of moving away from the stratified social system, the Bugis migrants across Indonesia in fact continued this system. The stratified system here mentioned is one based on a patron-client relationship, called *punggawa-sawi* or loosely understood as a leader-follower system.[10] Yet, according to Pelras (1996), the original patron-client system has been adapted from a historical political to an economic relationship. The adapted patron-client system is characterized by ties where the patron ensures that the basic life needs for the client are provided, while the client ensures the supply of labour (Vayda and Sahur 1996, p. 15). However, despite the fact that the present *punggawa-sawi* system has been influenced by modern capitalism it is not purely a capitalistic mode of production given the system developed a level of reciprocity and charity between patron and client, as Lenggono (2004, p. 133; Lenggono 2011, p. 307) points out. This is exactly what currently occurs in the Mahakam Delta.

Despite the fact that the patron-client system in the Delta started to lack social cohesion, and became more secular and individualistic, the *punggawas* have taken over some of the state roles e.q. as service provider. This makes the system considerably influential. According to Powell and Osbeck (2010, p. 8), in the absence of governmental and social services, the patron-client

8 White spot disease (*ichthyophthirius multifiliis*) also known as Ich, is a parasite that most tropical fish will at one time or another have to deal with. These parasites can be fatal to a fish and getting rid of them takes persistence (see at http://www.wikihow.com/Treat-Tropical-Fish-With-White-Spot-Disease-(ich), accessed on 7/10/2011).

9 See Magenda (1991) and Levang (2002, p. 23).

10 For an account of how elementary the Bugis' patron-client ties are in their homeland see Pelras (1996), and for Bugis abroad see Acciaioli (1989), and Vayda and Sahur (1996).

system has become an important institution in the daily life of fishermen and shrimp farmers. Within the system, rather than acting narrowly as an employer, the *punggawas* also act as wholesale traders, service providers and dispute settlers (Levang 2002, Lenggono 2004, Timmer 2010, p. 707). Indeed, the main role of the *punggawas* in the Delta is as money lender and/or trader. They lend money to poor people (fishermen, shrimp farmers) to enable them to engage in fishing and hold aquaculture. In the case of aquaculture, usually the *punggawas* provide their own land to be cultivated by the workers. It is widely known that the *punggawas* have large parcels of land.[11]

Yet in other cases, the *punggawas* do not only provide land, but also vessels and seeds, and meals before the first harvest. In return, the fishermen and farmers sell their catch or harvest to the *punggawas* until the loan is completely repaid (Lenggono 2004, p. 218). Not only do the *punggawas* provide money for operational purposes, but also for house repairs, medical and school fees and ceremonial obligations (Timmer 2010, p. 707).

Nevertheless, economic dependence is not the only pillar that underpins the leader-follower system. There are also two social pillars that support the system, namely kinship ties and the social status of *haji* – having made a pilgrimage to Mecca. The *punggawas* can easily ask their relatives from South Sulawesi or elsewhere in East Kalimantan to work for them due to their social status. From their relatives' point of view, the *punggawas* are respected people due to their economic achievements. The fact that almost all *punggawas* have a *haji*-title, further increases their social prestige. For a commoner Bugis, a *haji*-title endowes social status rather than religious status, because the title indicates that someone is economically capable (Wijaya n.d.a).

Having such important economic and social position, it is inevitable that the *punggawas* further influence the running of the village affairs, as Lenggono (2004, p. 117) points out:

> […] as leaders who have many followers, the *punggawas* have quite strong influences, and they are also taken into account in village policy making.

As mentioned before, some followers even involved their *punggawas* in settling a dispute with a company. Actually, the participation of the *punggawas* in dispute settlement is to ensure that their followers will repay part or all of their debts. Yet, whatever the reason behind the support, in most cases when a *punggawa* is involved in a particular dispute, he is the one who shapes the

11 Even though no study mentions the exact size of all land owned by the punggawas, some studies indicate that there is a concentrated land ownership in the Mahakam Delta. According to Bourgeois et al. (2002, p. 37) some people have a thousand hectares. A fisherman who used to be the head of a neighbourhood of Sepatin village confirmed the finding by pointing at a punggawa, who held almost a thousand hectares of land. The area is constituted by fifty ponds, which all are located in Sepatin village. Interview J, the head of Benati neigbourhood of Sepatin village, 22/2/2010.

followers' ideas. Therefore, the companies will prefer to listen to the *punggawas* rather than the village government official. A recent case on compensation in Muara Pantuan shows the strong influence of a *punggawa*. In favour of the company, the village head urged for the 300 fishermen to accept the compensation that the company offered, but most fishermen refused the offer as they were bound by the *punggawa*'s decision to claim a higher compensation than the company offered.

In spite of its considerable role, the patron-client system is actually not the only factor that influences the social structure. Social classification based on the period of settlement, and/or profession is another factor that influences the system. The earlier migrants regard themselves as *bugis kalimantan* or *orang asli* (native people) while they perceive the later migrants as *bugis sulawesi* or *pendatang* (Wijaya n.d.a). Meanwhile, those who work at the oil and gas company are socially more respectable than the fishermen or pond workers. Meanwhile, the migrant occupants possess more land than the native occupants as the latter have sold most of their land to the migrant occupants. The native-migrant divide always becomes manifest during the election of the village head. Apart from the Bugis people, there are also thousands of Javanese people who work as labourers for the Bugis people. Most of them live in the Delta temporarily.

2.5 Economic activities and local livelihood strategies

The economic activities and local livelihood strategies of the people living in the Mahakam Delta reflect the situation in the Province and the District on a small scale. As is the case in the Province and District, the abundance of natural resources influences the nature of economic activities and livelihood strategies of the Delta inhabitants to a great extent.

As mentioned before, the Mahakam Delta is rich in oil, gas and fish. Oil and gas alone contribute significantly to both national and local revenue. Recent figures show that Total E&P Indonesie and Vico, who operate in the Delta area, are jointly responsible for 43% of the total gas production in Indonesia and that Total E&P Indonesie also contributes 9% to Indonesian oil production (PriceWaterhouseCoopers 2010, p. 10-11). In the last five years, the Province has been responsible for around 31% of Indonesia's annual GDP and the majority of it originated from oil and gas revenues.[12] In fact, the Province ranked among the top three in terms of revenue from oil and gas in the country (Ahmad and Mansoor 2002). Even though only around 5% of the revenue was sent back to the Province in the form of shared revenue, this form of income still dominates the Provincial Annual Budget (Ind. *Anggaran*

12 Seehttp://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id_subyek=52&notab=1 (accessed on 8/11/2011).

Pendapatan dan Belanja Daerah abbrev. APBD).[13] Shared revenue from oil and gas features even more prominently in the District annual budget. On average, shared revenue forms 70% of the total annual revenue. For instance, in the District 2011 budget, the shared revenue added up to US$ 340 million out of the total annual revenue of US$ 410 million.[14] As a result Kutai District is dependent on revenues from oil and gas extraction especially since revenues from forest extraction have started to gradually decline.

The vast amounts of shared revenue do not necessarily benefit the Delta people, yet, as Levang points out, the presence of oil and gas extraction provides economic opportunities to the people.[15] As most of the villagers are unskilled, they cannot work as managers, supervisors or technicians. However, some of them work as operators. More importantly, the way the local people have benefited most from the companies is by trading basic goods and services with the companies' salaried workers (Levang 2002, p. 7). Many studies concerning the sources of economic income or occupation of the people of the Delta show that apart from fishing and aquaculture, trade is another major occupation and source of economic income as well.[16]

Recently, due to the massive decline of shrimp pond productivity since 2002, many aquaculture farmers have deliberately generated disputes with the companies accusing them of pollution and hoping that the companies would pay compensation for the loss of shrimps (Bourgeois et al. 2002, Timmer 2010, Simarmata 2011, p. 177-196). Another way to deal with the declined pond productivity is the recent selling of land by pond owners to absent land owners who live in nearby towns or even in other parts of Indonesia (Bosma et al. n.d, p. 11).

Meanwhile, even though the revenue in terms of numbers of fishery and shrimp cultivation is not as large as the revenue of oil and gas extraction, this

13 Shared revenue has been an issue of discussion for both the Provincial and District governments as well as for civil society groups. These groups demand that the central government increases the share to at least 10%. For recent discussions concerning this issue as recorded in the local media see 'Kepala Daerah Diajak Judicial Review ke MK. Vico: Kaltim Idealnya Dapat Bagi Hasil 50%, *Kaltim Post* daily, 6/1/2011, and 'Kaltim tak Minta Otonomi Khusus. Gubernur Kaltim Singgung Minimya Dana Pusat', *Kaltim Post* daily 17/1/2011.

14 See 'APBD Kukar 2011 Didominasi Dana Perimbangan', *Kaltim Post* daily 6/1/2011. For the dominant role of oil and gas in the District's economy before fragmentation (*pemekaran*) in 1999, see Casson (2001, p. 9-10).

15 One reason why the people living in the Delta do not benefit from the shared revenue is because the sub-districts near the Delta receive a smaller share of the revenues as distributed by the Kutai District government than other sub-districts, especially those that are situated nearby the District capital. For instance in 2011, Anggana and Muara Jawa sub-districts received a share of only around $US 12 and 1 million respectively. See 'Warga Muara Jawa Blokade Jalan Protes Infrastruktur Jelek, Minim Alokasi APBD, and 'Anggana Minta 'Mahar' 206 M Konsekuensi Tak Bergabung untuk Kutai Pesisir, in *Kaltim Post* daily, 10/1/2011 and 18/2/2011.

16 Examples of these studies are Bourgeois et al. (2002); Hidayati et al. (2004) and Sandjatmiko et al. (2005).

sector has attracted most of the people to the Delta.[17] Many studies have pointed to the prominence of the occupations of fishermen and aquaculture workers in the Delta.[18] In Anggana sub-district for instance, most of which is situated in the Delta, 50% of its total population work as fishermen and aquaculture farmers (Bosma et al. n.d., p. 6, Bapedalda Kukar and PKSPL IPB 2002, p. III-48). Yet, the fishermen too have their disputes with the companies. They have seen the amount of fish decline due to the use of destructive equipment. From the dispute settlements they expected to receive compensation from the companies whom they accused of ruining the fishing nets or disabling them from fishing in particular areas.

Nevertheless, fossil fuels, fish and shrimps are not the only resources of the Delta; the people of the Delta have other sources of income and occupations too. As already mentioned, some people use the forest to make a living, for instance by making nypa roof covers and cutting mangrove (*rhizophora*) trees for making the frame of a julu net (Rachmawati 2003, p. 36). The production of nypa roofs is even quite substantial; as 1,164 households of Anggana and Muara Jawa sub-districts are involved in it, it creates sufficient income (Rachmawati 2003, p. 36, Bapedalda Kukar and PKSPL IPB, p. III-45). Moreover, there are some other activities that are associated with fishing and shrimp farming. Regarding the former, people make money by catching crab, collecting seeds, making crab traps, and drying salted fish. Concerning the latter, people work as pond-caretakers and shrimp collectors (Bosma et al. n.d., p. 6). Next to the activities directly associated with the oil and gas companies and fish and shrimp sector, a small number of people in the Delta serve as civil servants or military officers.

2.6 Overview of stakeholders

It is possible to discern two categories of stakeholders or key actors in the Delta. The first group provides government services, while the second group is directly involved in private production and trade (Bourgeois et al. 2002, p. 3).[19] The first group consists of civil servants both from the central as well

17 Actually, the Kutai Kartanegara District catches the most amount of fish compared with other districts in the Province. On average the District brings in approximately 40%-45% of the total fish on offer of the Province. See Pemerintah Kabupaten Kutai Kartanegara (2006, p. 77), Dinas Perikanan dan Kelautan Kutai Kartanegara (2007b, p. 1 and 4), and Dinas Perikanan dan Kelautan Kutai Kartanegara (2008b, p. 1).

18 See for instance in Bourgeois et al. (2002); Hidayati et al. (2004) and Sandjatmiko et al. (2005).

19 Meanwhile Powel and Osbeck (2010) divide the stakeholders in the Delta into three categories: owners, actors and clients. The owners are the Ministries of Internal Affairs and Forestry; the actors are the Provincial and District governments; the clients are farmers, companies and traders.

as regional and local government, including people at the district, sub-district and to some extent village level. In the second group there are numerous stakeholders. Fishermen and shrimp farmers are stakeholders who are engaged in primary production, while shrimp collectors and cold storage companies engage in trading. Oil and gas companies engage in production as well as in trading. The stakeholders of this group who engage in production could also be called resource users. They are right holders when they have rights over the resources legitimized by either formal, non-formal rules or practices (Harkes 2006, p. 45).

The above definition of a stakeholder is only one of many. From a policy point of view, it may be useful to distinguish between those who make or determine decisions and actions, and those who are affected by the decisions and actions of others. In this view, the former group could be regarded as active stakeholders and the latter as passive stakeholders (Grimble and Wellard 1997, p. 176; Grimble et al. N.d, p. 3). In line with this distinction, groups of stakeholders could also be divided based on their influence on policy formulation as well as its outcome (Reed et al. 2009, p. 138). Regardless of the distinction or variety of stakeholders they all have in common that they have an interest or stake. As Persoon (in Harkes 2006, p. 45) noted, stakeholders are people who make a claim or have an interest in a resource. Here, 'interest' refers to the utility and welfare of the stakeholder (Grimble and Wellard 1997, p. 175).

The list of stakeholders of the Delta as mentioned above would be longer if NGOs, academics and even international actors like importing companies were included (Bapedalda Kukar and PKSPL IPB 2002, p. 61-62; Hidayati et al. 2005: 3,). Regarding the NGOs and academics, even though they do not engage in either production or trade, they are perceived to play a role both in the promotion of community rights and sustainable resource management.

The various stakeholders of the Delta have demonstrated different viewpoints and concerns when they were asked to discuss the Delta's problems. About the differences, Bourgeois et al. (2002, p. 90) write:

> The bounded perceptions of each make discussions difficult. It leads to misinterpretations or misunderstandings, rendering agreement hard to reach and can even lead to type of conflicts seen in the Delta.

Sometimes particular stakeholders have different ideas on what is important. For example, while some stakeholders notably oil and gas companies, local officials, university lecturers, NGO activists, and some farmers thought that mangrove rehabilitation was important, the *punggawas* believed the opposite, for it would not benefit them (Hidayati 2004, p. 102-103). They do not see themselves as having an active role in the rehabilitation (Bourgeois et al. 2002, p. 87).

Many studies have suggested that the difference in interests leads to conflict amongst stakeholders (Faculty of Fisheries and Marine Science of Mulawarman University 2010: 18). It is important to underline that the conflict is not only between the resource users or right holders, but between the various levels of government as well (Hidayati 2004, p. 104, Hidayati et al. 2005).

2.7 Concluding remarks

On the basis of the above observations, one could say that the Mahakam Delta is a vital frontier area. Its nature reserve, ecological functions as well as biodiversity demonstrate the importance of the Mahakam Delta. Due to its wealth in natural resources, the Mahakam Delta has attracted many migrants who have moved to the area in the pursuit of a better life. The extraction potential has also attracted large-scale private companies. At the same time, due to its remoteness, many people have used the Mahakam Delta as a place to hide in times of war and unrest.

The richness of the Mahakam Delta has boosted state revenue and has had implications for the livelihood of the local people. As for the government, particularly oil, gas and fishery have long made significant contributions to its income. Meanwhile, the local population benefits from the richness by conducting fishing and shrimp cultivation, working for the companies or providing goods and services that the companies need. These settings may in one way or another all affect how the institutional arrangements of resource use in the Mahakam Delta work, as the following chapters will show.

3 A short history of state intervention in the Mahakam Delta

Let me commence this chapter by quoting a statement, to which many other scholars have referred: 'No introduction to East Kalimantan is complete without mentioning the fact that East Kalimantan's petroleum, liquid natural gas, and timber export have earned nearly one-quarter of Indonesia's total export earnings in some years' (Daroesman 1979, p. 43). The period that the statement refers to is East Kalimantan in the late 1970s, but this is still the case today.[1] As said (Section 2.5), natural resources in the Mahakam Delta in general, and oil and gas extraction in particular constitute a significant part of national revenue in Indonesia.

Due to the importance of natural resources extraction for state revenue, state intervention (formal and actual exercise) in natural resources management in East Kalimantan[2] and Kutai Kartanegara[3] has been influenced considerably

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1 The significant contribution of East Kalimantan to national revenue had actually begun in the 1920s, when the Dutch government managed oil extractions around Balikpapan, Tarakan, Sanga-Sanga and Samboja. In 1928, for instance, the Province provided 66% of the total Netherlands-Indies production of crude oil, before it decreased to 22% in 1940 due to the discovery of oil fields mainly in Sumatera Island (Daroesman 1979, p. 50; Lindblad 1985; Wood 1985, p. 65; Lindblad 1989). Meanwhile, the forest sector began to contribute significantly to national revenue in the early 1970s. The Province became used to being the centre for commercial timber industry, for it supplied 25% of national commercial needs (Poffenberger and McGean 1993, p. 2). Another figure shows that in 1970, the Province had a share of US$ 55 million of Indonesia's total value of timber export of US$ 91.7 million (Manning 1971, p. 31 and 56). In 1975 it rose to US$ 307.43 million of the national total value of US$ 500 million of timber export. Meanwhile, for domestic consumption, East Kalimantan supplied two-thirds of total national timber supply (Magenda 1991, p. 83-84).

2 East Kalimantan Province was officially established in 1956 when the central government enacted Law No. 25/1956 concerning the Establishment of the Autonomous Regions of West Kalimantan, South Kalimantan and East Kalimantan. Previously, as stated in Law No. 2/1953, the whole Indonesian part of Borneo Island was administered in only one province. When it was officially established in 1956, East Kalimantan consisted of three autonomous regions namely Kutai, Berau and Bulungan.

3 The name of Kutai Kartanegara district was found in 1999 when the district was fragmented into three districts and one municipality (see Section 3.3 footnote 61). Before that, from 1959 onwards, the district was named Kutai. The central government officially declared Kutai as autonomous district (*swapraja*) together with three other districts and two municipalities (*kota praja*) through Law No. 27/1959. Prior to the status as an autonomous district, as of 1953 Kutai had a status as special region (*daerah istimewa*). See Pemerintah Provinsi Daerah Tingkat I Kalimantan Timur (1992, p. 130-137).

by the desire to control the natural resources in the Province (Daroesman 1979; Wood 1985; Magenda 1991; Peluso 1992; Jemadu 1996). Putting an emphasis on forestry resource, Peluso (1992, p. 53; Peluso 2000, p. 148) points out that the nature of natural resources management of East Kalimantan, and in particular forest resource, is epitomized by formal forestry control superimposed on traditional forms of natural resources management. Some scholars suggest that the high level of state intervention in natural resources management has been strongly pushed by the motive to get money to fund political agendas (Magenda 1991, Obidzinski 2003, p. 94-95). It is also due to its richness in natural resources, in particular in oil and gas, that the Province was often listed as a priority target for conquest during wars (Magenda 1991, p. 37-38; Pemprov Kaltim 1991; Obidzinski 2003, p. 75).

Although the state declared its formal control over natural resources use in the marine part of the Mahakam Delta since the 1960s over fisheries, 1970s over oil and gas and 1980s over mangrove forest, it is important to highlight that the way formal control was exercised differs from the way it was done on the Kutai mainland. The nature of natural resources – whereby oil and gas are more profitable compared to forest and fishery resources -, in this remote area with few inhabitants, and with actual open access of resource use, has led to a different exercise of state intervention in the Mahakam Delta than on the mainland.

This chapter discusses state intervention in natural resources management of the Mahakam Delta throughout three periods. The three periods are 1945-1970, 1970-1998, and 1998-2011. For each of these periods, evolvement and changes in state intervention will be described. The period of 1945-1970 in itself could be divided into two sub-periods. In the first sub-period, from 1945-1950, formal colonial natural resources management mostly remained in place. In the second sub-period, from 1950-1970, the Indonesian government eventually obtained political and legal authority to control natural resources management. Yet, in response to strong demands from the regions to share power, the central government applied decentralized natural resources management. In practice, the Provincial and Kutai District governments hardly intervened in the Mahakam Delta.

Unlike the first period, in the second period of 1970-1998 the state intervened actively and systematically by enacting some laws and regulations followed by a formal designation of the administrative territories of sectoral departments. It is a period, in which natural resources management is centralist in nature. For the Mahakam Delta it is a period of both formal and actual state intervention.

The period of 1998-2011 is a period in which state control was seriously tested by the strong competition to gain access to natural resources. For the Mahakam Delta in particular, it is also a period in which the District Government together with other stakeholders developed many policies and programs

to pursue sustainable resource use, notably of fish, shrimp, and mangrove forest.

This book argues that the type of state intervention in natural resources management in the Mahakam Delta that matters most in practice, is intervention at the district and provincial level. Therefore, an account of state intervention at the district and provincial level will be put ahead of that by national agencies, especially in Sections 3.2 and 3.3.

3.1 THE PERIOD OF 1945-1970: HARDLY ANY INTERVENTION

Even though independent Indonesia had declared formal state rights to control natural resources management in the 1945 Constitution, in reality these could not be exercised due to the re-entry of Dutch colonial rule, e.g. the Netherlands-Indies Civil Administration (NICA), which resulted in five years of Revolutionary War (1945-1949). This was certainly the case for East Kalimantan, where the NICA administered forestry and mining as before. Regulations on natural resources management implemented during this period were actually identical to those, which had existed prior to the three years of Japanese military occupation (1942-1945). They will be described briefly in the following paragraphs.

As of the late nineteenth through to the early twentieth century, formal rule on natural resources management in East Kalimantan was influenced considerably by the common colonial strategy known as 'indirect rule'. This meant that four sultanates, namely Kutai, Bulungan, Sambaliung and Gunung Tabur, were given the political status of self-governing territory. The status supported the traditional relation between the sultans and the land, which they claimed they owned, and the condition that land use was conditional upon a license issued by a village head (*petinggi/demang*). The same principle was applied both to the extraction of minerals and the collection of forest products (Kanwil Depdikbud Kalimantan Barat 1990, p.119-120 and 132).[4] The sultanates' status of self-governing entity and their authority over land and natural resources were laid down in an exclusive contract and a 'short declaration' (in Dutch *Korte Verklaring*), in the late nineteenth and early twen-

4 Many scholarly works (Wortman 1971; Peluso 1983; Peluso 1987; Magenda 1991; Peluso 1992) have actually highlighted the impossibility of the sultan to be able to exercise its domain declaration by controlling people's activities, production and land use. In reality, due to the absence of a strong bureaucracy which had real power and the fact that the sultanate was more like a tributary state, the domain declaration was hardly exercised effectively, in particular in the case of Dayak's communities, who mostly resided in the interior. The domain declaration is therefore perceived as a mere claim which was strongly influenced by Islamic law, and reinforced by a mystical Hindu-Buddhist philosophy (Peluso 1987, p. 5).

tieth century.[5] At the same time, the contract and declaration abolished the sultans' authority to collect tributary payments on agricultural and forestry products.

The acknowledgment of the self-governing status on one hand, and the take-over of management control over natural resource use on the other hand resulted in the following arrangement of power-sharing. Firstly, the Dutch government in Batavia would pay a regular salary, share of revenue and rent to the sultans (Peluso 1983; Peluso 1987; Lindblad 1988; Potter 1988; Magenda 1991; Pemprov Kaltim 1991, Selatto 2001; Obidzinski 2003). Having obtained all the rewards, the sultanates were not allowed to collect taxes and tributary payments from the resource users. All power to collect taxes and tributes now rested with the Dutch authorities. Secondly, the sultanates still had the authority to issue particular forest utilization rights to foreigners and native people. In addition, they could grant permits to native people for collecting non-forest products and fishing.[6] With regard to fishing rights, the sultanates could award exclusive rights to collect sea cucumbers or shells on the condition that the fishermen paid a levy (Knapen 2001; Butcher 2008, p. 7).

Apart from debates among the Dutch government officials about the extent to which the 'domain declaration' (*domeinverklaring)* was socially and culturally appropriate for the colonial government to apply in Borneo, and the fact that the 'domain declaration' could not entirely be enacted in self-governing states, it was officially enacted in Southeast Borneo in 1888.[7] However, the 'domain declaration' only slightly enhanced state intervention in natural resource use. With the enactment of the *domeinverklaring* through which forest was perceived as waste ground, the Dutch government could now issue plots for long-lease, which at that time were needed to grow tobacco (Potter 1988, p 130; Lindblad 1988).[8] In Samarinda and Upper Mahakam, where the Dutch government exercised direct government and where therefore all populations were subject to the Dutch administrative and judicial system, the *domeinverklaring* could

5 An exclusive contract was signed with the Kutai sultanate, while the other three sultanates signed a short declaration. The Kutai sultanate was given an exclusive contract as a reward for its neutral position in the Banjarmasin War, while the other three sultanates had been on the side of the Banjar sultanate (Lindblad 1988; Magenda 1991; Obidzinski 2003).

6 There were three types of utilization or collection rights over forest resources at that time, namely a long-term contract or concession, small logging plot and small-scale cutting permit. Long-term contracts and small logging plots were given for commercial purposes, while small-scale cutting permits were merely for subsistence needs. Small logging plots and small-scale cutting permits were awarded by the Sultan and did not exceed 5,000 ha. In practice, resident or resident assistants had the authority to review the issuance of small logging plots (Potter 1988, p. 139 and 142; Obidzinski 2003, p. 67).

7 The *domein verklaring* is a legal principle which was laid down in the *Agrarische Wet* of 1870 during Dutch colonial rule. It stated that all land of which absolute private ownership right (*eigendom*) could not be proven, could be claimed as state land.

8 See Potter (1998, p. 133-134) about objections against the application of state designation on forest, which traditionally belonged to indigenous communities.

even be fully imposed.[9] Following the passing of a regulation on land reclamation in the 1920s, the award of land reclamation permits to native people had to be approved of by the Dutch authorities (*districthoofd*) as well as traditional local authorities (*demang/petinggi*).

Through the resurgence of the pre-Japanese legal framework on natural resources management, NICA reorganized supervision over natural resources extraction, mainly mining and forest, that had laid idle during the three years of Japanese military occupation. In order to boost tree cutting, NICA issued a regulation through which small-scale logging was re-legalized (Obidzinski 2003, p. 88). Meanwhile, as the status of self-governing state was returned to them, the sultanates regained their rights to receive a salary, a share of the revenue and rent. In addition, the authority of the sultanates to issue permits on the collection of non-forest products and fishing was recovered as well (Magenda 1991, p. 42).

Following the agreement of the Round Table Conference in The Hague (1949) between the Indonesian and Dutch delegations, in which the Dutch government officially recognized Indonesia's independence, the actual control over natural resources management went to the government of the Republic of Indonesia. The official incorporation of the Federation of East Borneo[10] into the Unitary State of the Republic of Indonesia in August 1950 marked the end of the first sub-period. In spite of the official status of the four sultanates as self-governing territories (*daerah swapraja, daerah istimewa*) during the first sub-period, their authorities and rights over natural resources extraction were considerably reduced from now on. The oil and gas, coal and forest companies did not directly pay royalties to the sultans through the Federation of East Borneo, but to the central government instead. The central government subsequently shared a particular amount of the revenue from natural resources extraction with the provincial government of South-East Borneo, which included the present region of East Kalimantan. The Provincial government office, which at that time was situated in Banjarmasin (South Kalimantan), further shared the budget they obtained with the four sultanates or *swaprajas* of East Kalimantan (Peluso 1983, p 133; Magenda 1991).[11]

Despite the shift of power with regard to the collection of revenue from the NICA to the government of the Republic of Indonesia, the appointed resident of East Kalimantan (see Section 4.1 for an elaborate description of governmental structure and position in East Kalimantan) continued to use the legal framework as well as norms on natural resources management,

9 For an account of the forms of traditional and Dutch administrative and judicial structures and the division of jurisdiction see Pemerintah Provinsi Daerah Tingkat I Kalimantan Timur (1992, p. 55-73).

10 This federation of sultanates in East Kalimantan was established in 1946.

11 The arrangements of sharing the revenue were stipulated in Law No. 32/1956 on the Fiscal Balance between the Central Government and Autonomous Regions.

inherited from the NICA. With the sultanates having been granted the formal status of autonomous regions during the early years of the unitary Republic of Indonesia, the central government e.g. resident continued to recognize their former authorities to issue forest utilization rights, and permits for the collection of non-forest products and fishing (Peluso 1983, p. 139). To give an example, in the early 1950s, the resident of East Kalimantan issued a regulation, which allowed the sultanates to issue small-scale logging permits on an area of 1,000 ha (Obidzinski 2003, p. 95). The inherited colonial legislation still largely existed in 1957, when the central government eventually enacted and established some new regulations and government institutions concerning forest management. One of the important regulations passed in that year is the Government Regulation of 1957 concerning the Partial Devolvement of Authority from Central to Provincial Government with regard to Fisheries, Forestry and Small-Scale Rubber Plantations.[12]

Even though there was a significant level of power sharing between the central and the provincial government concerning forest management, in the second sub-period (1950-1970) there was little change in the form of state intervention. The only two changes were that the central government emerged as a new actor replacing the role of the former Dutch government, and that the Provincial government enjoyed greater autonomy. The forest exploitation system that was officially determined by the Government Regulation of 1957 did not differ much from the colonial and the first sub-period. As Obidzinski (2003, p. 95) points out: 'The exploitation system relied on the continuation of regulations from the Dutch period that allowed for timber extraction either by means of large concessions or smaller logging plots'.

Given the central government assumed itself as the highest political authority, thereby undermining lower non-state authorities, the Government Regulation of 1957 determined that the central government was entitled to exploit forests or allow someone to carry out forest exploitation on the grounds of a license. Concerning the license, the Government Regulation maintained the previous categorization of types of forest utilization and collection, comprising of large-scale logging (concession), small-scale logging (*kapersil*) and the collection of forest and non-forest products. The concession was given for an area, the size of which did not exceed 10,000 ha and for twenty years. A license for *kapersil* applied to an area which did not exceed 5,000 ha and was valid for five years. A license for the collection of forest and non-forest products was given for the duration of two years.[13] The governor was authorized to award a concession, while the district head could award a license for *kapersil* and collection. Meanwhile, the authority to issue a concession for an area larger

12 No. 64/1957 on Partial Delegation of Government Affairs on Fishing, Forestry and Small-Scale Rubber Plantation to Provinces. The Government Regulation was made to implement the new Law No. 1/1957 on Regional Autonomy.

13 See Article 10 (2) of Government Regulation No. 64/1957.

than 10,000 ha rested with the Director-General of Forestry of the Ministry of Agriculture (Magenda 1991, p. 78).

The implementation of the Government Regulation of 1957 which lasted for more than a decade (1957-1970) was seen to benefit local people greatly. As Magenda (1991, p. 79) wrote:

> The period between 1967 and 1970 was considered a happy and prosperous one by most of the people of East Kalimantan who in one way or another benefited from the flood of logs.[14]

Peluso (1983, p. 177) also points at the importance of the period saying that not only there were *banjir kap*, but also an increase in employment opportunities, investment, high profits and prosperity for nearly all participants. Not only did it benefit local residents, the implementation also stimulated large waves of migration to East Kalimantan from South Sulawesi, South Kalimantan as well as Java (Wood 1985; Magenda 1991, Jemadu 1996; Obidzinski 2003).[15]

However, instead of getting the benefit from effective implementation of the Government Regulation, the local people and migrants actually benefitted from a severe lack of effective implementation. With only a simple forestry administrative organization with low-educated officials, effective protection and supervision of fourteen million ha of production forest proved difficult.[16] Meanwhile, forestry officers from the Ministry of Agriculture undertook only irregular surveys of East Kalimantan (Obidzinski 2003, p. 95). As a result, the only way the local people could benefit from the regulations was through the revival of small-scale logging and the easy procedure of obtaining a cutting permit.[17] The system only required local people to get a permit from the sub-

14 Flood of logs or *Banjir kap*, is a term for the manual (non-mechanized timber extraction) felling of trees particularly along the river banks and then floating them down river when the monsoon floods come (Daroesman 1979, p. 45; Tacconi et al. 2004, p. 141).

15 For an account of the migration from South Sulawesi in response to job opportunities see Vayda and Sahur (1985). On how it also attracted Dayak people see Peluso (1983, p. 179) and Urano (2010). See also Manning (1971, p. 56) and Peluso (1983) for how the small-scale timber extraction impacted the labour dynamic in general. Whereas for an account of how it also attracted villagers of the Mahakam Delta see Levang (2002, p. 7).

16 The fourteen million hectares of production forest came under control of the Provincial government after the Directorate-General of Forestry was pushed for several years to hand over the forestry management to the Province, following its establishment in 1956. As the Directorate-General of Forestry accepted the demand, Perhutani, which was replaced by Inhutani II in the 1960s, only managed the remaining 3,5 million hectares. Perhutani got the 3,5 million hectares concession from the Ministry of Agriculture through a Government Regulation No. 35/1963 (Manning 1971, p. 36; Bappeda Kabupaten Kutai 1971, p. 66; Peluso 1983, p. 176; Departemen Kehutanan RI 1986, p. 76; Magenda 1991, p. 77-8; Jemadu 1996, p. 128).

17 In brief the system was shaped by an exchange between upstream people and downstream trading communities. The latter consisted of town-based timber exporters, middlemen and contracted lumberjacks. The parties involved were interlinked by a system of advance

district government to be able to cut trees, regardless of what they found before they sold the logs to downstream traders (Peluso 1983, p. 177; Magenda 1991, p. 78). In this system, family-owned businesses would only need to ask local people, who resided upstream, to cut trees, which could then be sold downstream.

It is important to remember that the revival of the small-scale logging system coincided with the rise of political power of the military following the declaration of a state of emergency in 1958.[18] Across regions, the state of emergency put civil administrative government under the supervision of regional military commanders (*Penguasa Perang Daerah* abbrev. Peperda). In East Kalimantan, this resulted in the dissolution of the Provincial Forestry Agency in 1958, just one year after the agency was created. In that political context, it is not surprising that family-owned forestry firms became connected with local military officers (Obidzinski 2003, p. 104). Besides military officers, some members of political parties, who courageously campaigned against foreign timber concessions for the sake of nationalism, also had family-owned forestry firms (Magenda 1991, p. 77-78). This context impeded effective implementation of the Government Regulation of 1957 and a Provincial Regulation of 1963.[19] One expert even suggests that the small-scale logging was entirely unregulated whilst hundred kapersils that the regional government had issued were insufficiently monitored (Daroesman 1979, p. 45).[20] This turned forest exploitation predominantly into economic and political assets.

Decentralized forest management and anti-foreign investment policies which were in place during the second half of the 1950s officially came to an end after the issuance of the Basic Forestry Law of 1967 and two liberal investment laws.[21] The Basic Forestry Law of 1967 provided a legal basis for centralized forest management, whereby state control and authority over forests seemed to be the most important principle (Peluso 1994; Jemadu 1996, p. 127). Nevertheless, political conditions at that time were still not suited to implementing centralized forest management. As a result, the Ministry of Agriculture notably the Directorate-General of Forestry, on one hand commenced centralized state intervention in forest exploitation by issuing several large-scale forest concessions, but on the other hand kept old lower regulations, which allowed

payment, either in kind or cash for deliveries of timber within an agreed period of time (Obidzinski 2003, p. 54-55).

18 The state of emergency was officially declared through Government Regulation in Lieu of Law No. 1/1958.

19 Provincial Regulation No. 9/1963.

20 In 1963 across East Kalimantan, 245 kapersils were granted covering a total of 584, 300 ha. Kutai District was dominant among other districts of East Kalimantan with 213 kapersils covering a total of 447, 200 ha (Obidzinski 2003, p. 312-313).

21 The two investment laws were respectively No. 1/1967 on Foreign Direct Investment and No. 6/1968 on Domestic Investment. The two laws have been superseded by Law. No. 25/2007 on Investment.

governors and district heads to issue small-scale logging concessions, in force. This resulted in a contradictory three year period (1967-1970), in which the Directorate-General of Forestry gave a large part of the 17 million ha of Production Forest of East Kalimantan to non-residential foreign and domestic forest concession holders. Other parts were given to local family-owned firms for small-scale logging by governors and district heads.[22]

Meanwhile, the absence of an up-to-date land use map, a strong desire to attract foreign investment, and a political motive to repay some generals who supported the New Order, caused the large and small-scale logging concessions to neglect the forest rights of the local people (Peluso 1983; Magenda 1991).[23] As Poffenberger (1997, p. 456) points out:

> The mapping of areas for timber leases, due to the paucity of information, has rarely considered the boundaries of community lands, particularly forest tracts used for hunting, gathering, and long rotation agriculture.

With the forests on the mainland of the Mahakam Delta being downstream of the Mahakam River, logged trees could be easily transported to the sea. They therefore formed an attractive project location. So, it was widely known that East Kalimantan was one of the most favorable provinces for timber extraction, due to its well developed river transport system, of which the Mahakam River and its tributaries are the most important parts (Manning 1971, p. 57). About 1,000 hectares of the one million hectares of Perhutani/Inhutani II area in Kutai District was situated on the mainland of the Mahakam Delta (Bappeda Kabupaten Kutai 1971, p. 66). Likewise, the 600,000 ha of the PT. ITCI concession area which was awarded in 1967 was partly located on the mainland of the Mahakam Delta.[24] Nevertheless, during all this years there were no forest concessions nor kapersil and Perhutani/Inhutani II areas in the Mahakam Delta. This restricted the level of state intervention in this area severely.

Compared to forestry, the level of state intervention in oil and gas resources in the Mahakam Delta during the second sub-period of 1945-1970 was much higher. This commenced in 1967 when the Minister of Mining officially designated Mahakam-Bunyu Block as a state mining zone, and at the same time

22 During 1968-1971 the Governor and four District Heads issued kapersils totalling 1,148,750 ha in size (Obidzinski 2003, p. 314-318).

23 Poffenberger (1997, p. 456) points out that due to the issuance of large forest concessions, an estimated 2,5 million indigenous Dayak people were displaced or resettled due to logging activities, resettlement projects, and other development activities. For accounts of how the issuance of forest concessions affected the actual local and indigenous forest rights in East Kalimantan see Kartawinata et al. (1984); Vargas (1985); Peluso (1992); Poffenberger and McGean (1993); Eghenter (2001).

24 Another forest company, which obtained a large forest concession, was Kayan River Timber Products, a Philippine subsidiary of an American company. The company obtained 1.2 million hectares in Bulungan District (Gunawan et al. 1999, p. 17).

awarded a concession to the Japanese oil and gas company, Japan Petroleum Exploration (hereafter Japex). As will be described further in Chapter 6, the award of the concession was given a legal basis through Law No. 44 Prp/1960 on Oil and Gas and Law No. 11/1967 on Basic Mining Law. The two laws both respected communities, by prohibiting mining extraction taking place in areas where grave yards and sacred places (*tempat-tempat suci)* existed.[25] In addition, the Basic Mining Law provided access to local people to get involved in mining extraction through a scheme of community mining.[26]

3.2 THE PERIOD OF 1970-1998: AUTHORITARIAN STATE

According to the annual figures of East Kalimantan Province and Kutai District in 1970, the number of kapersils had increased significantly since 1963. In Kutai District alone, 865 kapersils had been awarded by the district head, and 58 by the governor. The nearly 1,000 kapersils of the Kutai District were located in around two million hectares of forest area (Bappeda Kabupaten Kutai 1970, p. 65). Across East Kalimantan, the governor awarded hundreds of kapersils sizing 1,200,000 ha in total (Operation Room Kantor Propinsi Kaltim 1971, p. 78-81).[27] The volume of logs from small-scale logging in Kutai District formed two-thirds of the total production of logs in East Kalimantan (Peluso 1983, p. 181). This led to a large increase in revenue. To give an example, during 1969-1970 the Provincial government earned around US$ 200,000 from timber, while the Directorate-General of Forestry could only earn around US$ 30,000 (Magenda 1991, p. 86). Other figures shows that in 1970, the Provincial government received IDR 978 million for forest royalties, whereas the Directorate-General of Forestry only received IDR 445 million (Manning 1971, p. 44). Concessions, which were owned by foreign and Jakarta-based companies, were not as profitable as the kapersils, due to the lack of experience in tropical logging, and the longer gestation period of large-scale investment (Manning 1971, p. 57).

Having a legal basis in the Forestry Law of 1967, an interest-based coalition of concession owners, the Directorate-General of Forestry and some high-ranking military officers was formed which campaigned for centralized forest management. The coalition pursued the central government to dissolve the

25 Article 7(3) of Law No. 44 Prp/1960 and Article 16(3) of Law No. 11/1967.

26 Pursuant to Government Regulation No. 32/1969, a license for community mining can be given by the Minister of Mining or governor for a maximum of 25 ha and a five year expiry date.

27 Manning (1971, p. 57) and Daroesman (1979, p. 47) estimate that the Governor issued kapersils of a total size of two million hectares. In the same period, the Directorate-General of Forestry awarded around 37 national and domestic forestry companies with concessions on an area of approximately 5,600,000 ha (Operation Room Kantor Gubernur Propinsi Kaltim 1971, p. 81-83).

governor's and district head's authority to issue kapersils. To advocate the dissolution, the coalition used three arguments mainly on environmental, economic and political grounds. They argued that centralized control was more effective than decentralization of authority as far as forest conservation was concerned (Jemadu 1996, p. 129). Besides, for administrative officials and military officers of the central government, the enormous income that the Provincial and District government earned from the timber exploitation was frightening, for it could lead to a substantial accumulation of economic power outside Jakarta (Magenda 1991, p. 80).[28] With good access to as well as political and economic ties with policy makers in Jakarta, the coalition easily reached their desired objective.

The successful lobbying of the coalition resulted in the issuance of the Government Regulation No. 21/1970 on Forest Exploitation Rights and Rights to Collect Forest Products. Through the Government Regulation, the central government fully took over the authority to issue kapersils from the governor and district head.[29] The authority was now given to the Minister of Agriculture.[30] Nevertheless, the Government Regulation maintained that the issuance of rights to collect forest and non-forest products belonged to the district head.[31] The above provisions together with other provisions stipulating that a timber fee had to be paid to the Directorate-General of Forestry, as well as the control and freeze of the existing indigenous rights over the forests, marked the emergence of centralized forest management. In other words, the new regulation ended nearly twenty years (1950-1970) of regional and local governments benefiting from decentralized forest management.

Concerning the implication of the new regulation for local rights on forest use, Peluso (2000, p. 154) points out that such regulation, which favors timber production and ignores local people's rights, led to the criminalization of local forest use.[32] Legally speaking, the criminalization was later confirmed through Government Regulation No. 28/1985 which stated that a permit was needed for any logging or the collection of forest products and that this activity would otherwise be criminalized (see Section 5.2 for detailed accounts of the Government Regulation).[33] The move towards centralization of forest management can also be seen in the Government Regulation of 1970 on Forest Planning,

28 For accounts of environmental grounds see Manning (1971); Vargas (1985, p. 143) and Magenda (1991).
29 Cf. Article 10 (1) of Government Regulation No. 64/1957.
30 See Article 12 (1) of Government Regulation No. 11/1970.
31 See Article 12 (2) of Government Regulation No. 21/1970.
32 Jemadu (1996: 136) points at the alienation of local people from the management of forest resources as another impact of centralized forest resource.
33 Article 9 (2 and 3) of Government Regulation No. 28/1985 on Forest Protection.

which puts matters of forest designation and status under the authority of the Ministry of Agriculture.[34]

The implementation of the abovementioned centralized forestry management resulted in six years (1970-1976) of widespread issuance of concessions in East Kalimantan. The majority was issued during 1970-1973 (Daroesman 1979, p. 47). In fact, 15 million hectares of production forest of East Kalimantan were granted to 120 non-residential foreign and domestic forest concession holders (Vargas 1985, p. 142; Jemadu 1996, p. 132).[35]

Meanwhile, on the Kutai mainland, the largest part of which was included in the work area of the so-called Technical Unit for Forest Product Circulation of the Provincial Government (Ind. *Unit Pelaksana Teknis Daerah Peredaran Hasil Hutan*, hereafter TUFPC), dozens of forest concessions were granted.[36] Some examples are PT. Baltimur Timber (70, 000 ha), PT. Meranti Sakti Indonesia (32,500 ha), PT. Perdana Kutai (23,500) and PT. Kayu Mahakam Kutai (40,000 ha).[37] As happened during the peak of the kapersil issuance, no single forest concession was issued in the Mahakam Delta. This set the mangrove forest of the Mahakam Delta apart from the mangrove forest in the northern part of East Kalimantan (Bulungan District). In the latter mangrove forest, the Directorate-General of Forestry gave separate concessions to four companies.[38]

Meanwhile, apart from the considerable difficulties of the Directorate-General of Forestry to control the 120 concessions, it did manage to exercise some degree of state intervention in forest resource use.[39] The exercise of control was stepped up, when in 1983, the Minister of Agriculture issued a decree which designated the Forest Areas of East Kalimantan.[40] Legally speaking, the Forest Area designation gave the government the authority to apply forest regulation in the designated areas, in spite of its late appearance. The

34 See Article 5 and 8 of Government Regulation No. 33/1970 on Forest Planning. For detailed accounts of the regulation see Section 5.2.

35 According to Daroesman (1979, p. 47) only six of the 120 concessions were held by persons or firms resident in East Kalimantan.

36 There were twenty granted forest concessions in 1984 covering an area of 364,295 ha in total. This dropped to fifteen in 1986 with area of 404,565 ha. However, some of them were inactive at that time. See Laporan Tahunan KPH Mahakam Ilir 1983/1984, 1984/1985 and 1985/1986.

37 Small-large forest concessions were for instance CV. Karya Jasa, Fa. Alga, and Fa. Telaga Mas.

38 Namely, Karyasa Kencana, Bina Lestari, Inhutani II and Jamaker. The concession area of the four companies together sized approximately 213,040 ha (Soetrisno 2007, p.12). About (perceived) reasons for why there is no forest concession granting in the Mahakam Delta see Chapter 5.

39 The lack of forestry officials to exercise the control was significant. A lack of skilled/trained personnel and operational equipment has often been cited as a prominent factor causing ineffective control. Another factor was that local forestry officials were afraid of enforcing the law upon the large forest concessions, for they were backed up by high-ranking officials and military officers in Jakarta (Magenda 1991; Jemadu 1996; Poffenberger 1997).

40 No. 024/Kpts/Um/1/1983.

issuance of the Government Regulation of 1985 on Forest Protection later strengthened this legitimacy. The 1985 Government Regulation gave legitimacy to forest officials to enforce the law on those who did not have licenses. Across the Forest Areas of East Kalimantan, forest officials or forest rangers warned forest settlers for clearing land or cutting trees or they even caught them.[41]

On the Kutai mainland, the exercise of state intervention in illegal forest use in the designated Forest Areas also took place. One instance of a form of control that the TUFPC used frequently was curbing illegal logging. To eradicate illegal logging, the TUFPC established dozens of check points with guards, who were assigned to do daily checks on trucks which were loaded with logs. Due to its downstream location, the TUFPC encountered more illegal logging cases than the other two technical units of the Provincial Forestry Agency which were situated upstream. The groups of people that were involved in illegal logging and which the TUFPC dealt with included local residents, forest companies and sub-contractors of Pertamina.[42] Confiscating the illegal logs and filing the cases with a court were two of the most common forms of control that the TUFPC used. At the TUFPC it was thought that if the institution would collect levy they could legalise illegal logs,[43] but in practice this did not happen.

Vargas's work (1985) on the interface between the customary law of a Dayak community and national law on land in a village of the Loa Kulu sub-district of Kutai District interestingly shows how state intervention which infringed upon customary land rights appeared through the operation of the PT. International Timber Corporation Indonesia (ITCI).[44] The employees and lawyers of the ITCI denied the request for compensation conveyed either by the indigenous Dayak community or migrant communities arguing that the Dayak traditional group did not have legitimate rights. The local forestry officials told the Dayak community that the ITCI should not have to pay compensation for cutting down trees, given that the company already paid to the

41 For concrete examples of law enforcement as cited above see Vayda and Sahur (1985); Vayda (1996, p. 42).

42 The sub-contractors of Pertamina cut trees from Forest Areas mainly for constructing platforms of rigs, employees' housing and helipads (Kesatuan Pemangkuan Hutan Mahakam Ilir 1985, p. 4 and 8).

43 See Laporan Tahunan KPH Mahakam Ilir 1983/1984.

44 The name of the village is Jonggon. When Vargas did her field work, the village was mostly inhabited by Kedang Dayak. Indeed, Loa Kulu is not precisely located on the mainland of the Mahakam Delta. It is located further upstream. See Poffenberger and McGean (1993) for a comparison of how the presence of the ITCI also neglected the traditional rights over forest resource in other villages of the Dayak community. I could not find any literature which describes how state intervention occurred through large-scale extraction on the mainland of the Mahakam Delta during the period of 1970-1998.

government, as the owner of the forest (Vargas 1985, p. 167).[45] Using the same argument, the ITCI employees and local forestry officials forbade the Dayak community to cut trees in their customary primary forest, arguing this area now fell within the forest concession. The government also denied customary land rights in the case of a project of a small-holder in rubber, run by the Provincial Plantation Crop Service. In addition, the Kutai District government denied customary rights over non-timber forest products, notably birds' nests by forbidding the Dayak community to exercise their traditional rights, whilst awarding licenses for the harvesting of bird's nests to outsiders.

Whilst most parts of East Kalimantan experienced such fierce state intervention in forestry resource use, particularly since the 1983 forest designation followed by the enactment of the Government Regulation of 1985 on Forest Protection, this contrasted rather starkly with what happened in the Mahakam Delta. As will be further elaborated in Chapter 5, there was hardly any exercise of state intervention in the 'Production Forest' of the Mahakam Delta. As a result, unlike the local residents on the Kutai mainland who were unable to utilize surrounding forest land due to the claim of state ownership, the local residents of the Mahakam Delta freely opened the mangrove forest to plant coconut and pepper crops, before converting to shrimp ponds (Levang 2002, p. 6 and 17; Lenggono 2004, p. 112-113). However, though they did not experience any state intervention directly, there was a level of intervention through the presence of oil and gas companies, as is explained in the following paragraphs.

After three years of failing to discover an oil reserve, in 1970 Japex handed over the Mahakam-Bunyu Block to Total E&P Indonesie with the agreement of equal benefit sharing (see Section 6.2). Two years after the hand-over (1972), Total E&P discovered an oil field which was followed by further oil field discoveries in 1974, 1977, 1986, 1991 and 1992 (Sandjatmiko et al. 2005, p. 149). Meanwhile, Virginia Indonesia Company (Vico) discovered an oil and gas field in Muara Badak sub-district in 1972 which was estimated to deposit the largest oil and gas reserve in Indonesia.[46]

The commencement of oil and gas exploitation by Total E&P and Vico definitely affected fishermen and farmers. Total E&P occupied some river and sea areas in the Mahakam Delta that were used for fishing (Hidayati et al. 2004; Hidayati et al. 2005), while Vico used some plots of land that were already utilized or possessed. Given that both Total E&P and Vico used fishing grounds and land that the local people had been using, this inevitably turned

45 When the ITCI eventually paid the compensation, the real motive was not that they recognized the land rights of the Dayak community and recent immigrants, but primarily to avoid trouble (Vargas 1985, p. 166).

46 The field was named Badak Field. The discovery was followed by six other oil and gas fields in adjacent areas. VICO used to be called HUFFCO Indonesia or Huffington Company Indonesia. The company was founded by two Americans. See http://id.wikipedia.org/wiki/VICO_Indonesia (accessed on 27/10/2011).

to conflict. To deal with conflicts with fishermen regarding fishing grounds, Pertamina Unit IV with which Total E&P and Vico had signed production sharing contracts sent a letter to the Kopkamtib's Regional Special Operation Unit (Laksusda) of East Kalimantan asking to pay attention to the fishing and sailing in or around the platforms of oil and gas companies.[47] Laksusda conveyed this message in a radiogram to the Governor. The Governor, then, sent a radiogram to the Kutai District Head. The correspondence finally ended with a letter made by the District Head which was sent to the Head of the Kutai Fishery Agency and four sub-district heads, namely those of Bontang, Sangkulirang, Anggana and Muara Badak. In general, the radiogram and letter aimed at controlling the fishing and sailing in and around the companies' platforms.

In the meantime, Vico and Total E&P, strongly assisted by Pertamina Unit IV, obtained land for their exploitation through land acquisition. Recognizing the local ownership of land, Vico and Pertamina provided compensation for land, trees and huts. However, they sometimes applied a physical standard to determine whether a plot of land was private (*tanah garapan*) or state land. If the land was still fully covered by trees, they would claim it as state land and compensation would not have to be paid. When intending to obtain 30 ha of forest land in Sambera, Salo Palai village of Muara Badak sub-district in 1978, Vico did not pay compensation to the local residents, but instead to PT. Meranti Sakti, whose concession areas included this area.[48]

Whilst state intervention in land, forest and oil and gas resources occurred primarily through the issuance of concessions, this was not the case for fishery resource use. Apart from issuing permits, determining fishing zones and prohibiting particular types of gear, the state used two other prominent policy measures to control fishery resource use. Since the late 1960s the Provincial and Kutai District government passed some regulations on fishery resource use to implement the national fishery regulations.[49] In order to exercise formal state intervention, the Kutai District Fishery Agency installed some warning boards and check points. However, as occurred with the forestry regulations, formal state intervention in fishery resource use similarly lacked effective implementation. As Hartoto (1997, p. 78) observed.

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47 The term Kopkamtib stands for Operational Command for the Restoration of Security and Order (Komando Pemulihan Keamanan dan Ketertiban). It used to be an intelligence organization. It was established not long after the so-called G30 S event in 1965. Like the ordinary military organizational structure, the Kopkamtib also existed at the regional level namely in the form of Laksuswil (Kopkamtib's Inter-regional Special Operations) and Laksusda.

48 Vico paid around US$ 30,000 to PT. Meranti Sakti for cutting down all trees. The acquired 30 ha of land are presently located in non-forest area.

49 See Hartoto (1997, p. 78) about the severe ineffectiveness of the Kutai District Regulation of 1978 on Fishing.

Even though the Kutai District Agency has built some check points nearby the lakes of the middle Mahakam River, no guards stayed at the check points or watched around the lakes. Likewise, even though there were some warning boards installed prohibiting fishing in the lakes, during my field research, there were more than twenty boats operating.

3.3 Period of 1998-2011: the 'Reformasi' and decentralization

As said, in the period from 1998 until 2011, the fierce competition to gain access to natural resources tested formal state intervention, which had been developed as of the late 1960s in the Mahakam Delta and since the 1950s elsewhere in East Kalimantan. Due to the abovementioned pressure, environmental deterioration came up as overarching issue. This has recently led to discussions on how to establish sustainable natural resources use in the Mahakam Delta, which could generate income for various users on one hand, and protect and preserve the environment on the other.

The pattern of competing to gain access to natural resources in this period is heavily influenced by the way local actors perceived the '*reformasi*' in relation to natural resources management. For local actors, whether government officials or local people, the reformasi has been understood as an opportunity to benefit from natural resources extraction from which they had been excluded for more than thirty years of timber concessions steered by the central government (Barr et al. 2001; Obidzinski and Barr 2003; McCharty 2006; Moeliono at el. 2009). In relation to the perception which suggests that reformasi is an opportunity, district government officials on many occasions said that the reformasi, which held decentralization of natural resources management high on the agenda, would provide greater prosperity to local people. One way to achieve that goal would be to give greater access to local people in utilizing natural resources, so they would get a greater share of its benefits (Casson 2001, p. 15).

Similarly, regional and local government officials regarded the reformasi as an opportunity to end centralized natural resources management. Pursuing revenue generation and enhancing the prosperity of local people were two of the most important reasons for pushing the central government to move to immediate and full regional autonomy (Moeliono at al. 2009). The former Kutai District Head said during his opening speech of the start of an ambitious program, entitled 'Moving Forwards Kutai's Development Endeavours' (*Gerakan Pengembangan Pemberdayaan Kutai* abrrev *Gerbang Dayaku*).

> With capital originating from Law No. 22/1999 and Law No. 25/1999,[50] we had many opportunities to determine and colour our future lives. We can shape the regional community of Kutai to be independent, creative and prosperous.[51]

At the time the central government was formulating laws and policies on decentralization, in many places local people reclaimed their rights over natural resources, which they perceived as having arbitrarily been taken away from them by the government or private companies. Those who made the claim on the basis of their customary rights argued that customary law was now equal to state law (Barr et al. 2001, p. 26; Potter 2005, p. 390; Barr et al. 2006, p. 12).[52] Their claims corresponded with the long standing promotion of community-based natural resources management, which NGOs had campaigned for the early 1990s. In a place like the Mahakam Delta, the occupation of state forest land was not based on customary claims, but on the fact that the forest land was not utilized (Hidayati et al. 2005; Timmer 2010). Apart from these specific arguments, there was an underlying general notion at stake, namely the perception that the reformasi meant the disappearance of previous control, which in Indonesian language is popularly called freedom (*bebas)* (Potter 2005, p. 390; Arnscheidt 2009, p. 350).

These changing social phenomena at the regional and local level influenced the substance of the reformasi in natural resources management that the central government was shaping, considerably. A former Head of the Kutai Forestry Agency, who served during 2001-2004, conveyed a very interesting view on the reason which the Minister of Forestry used for forming the policy that gave district heads the authority to issue small-scale logging. To him, the policy was primarily aimed at controlling the anger of the local people by allowing

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50 While as far as political issues are concerned the two laws were made in the hope to prevent national disintegration, from a legal point of view the two laws were enacted in a way to formulize legal instruments for decentralization policies after 32 years of an authoritarian regime led by Soeharto. Prior to the passage of the two laws in 1999, the People's Consultative Assembly had made the decree No. XV/MPR/1998 concerning regional autonomy, just natural resources use and fiscal balance between the central government and the regions, which laid down an official political consensus on decentralized government. The political consensus was subsequently translated into the two laws. Law No. 22/1999 on Regional Autonomy in which the central government transferred some of its authorities to regional governments, indeed contained a spirit to boost regional governments to pursue people's prosperity by allowing the regional governments to generate regional development on the basis of local creativity. This creativity can, for example, be translated into exploring potential sources of local revenue that can be used to fund regional development. For this purpose, Law No. 25/1999 on the Fiscal Balance between the Central Government and the Regions was made. This law introduced new fiscal relations between the center and the regions and provides new formulas for dividing revenues (Hidayat and Antlov 2004: 270). It was assumed that the two laws formed a package for policy on regional autonomy. See Fauzan (2006, p. 225); Sabon (2009, p. 152) and Sutedi (2009, p. 8).

51 Casson (2001: 15). See also Syaukani (2004a); Syaukani (2004b).

52 For the accounts of how local people reclaimed their customary forest land to pursue compensation from private companies see Casson (2001); Obidzinski and Barr (2003, p. 25).

them to enter forest areas and cut trees.[53] This view reminds us of the reasons, which motivated the central government, when responding to the emergence of regionalism in the 1950s and 1960s (see Section 3.1).

This concrete instance of forest policy formulation shows that allowing local people to legally participate in natural resources extraction was an important objective of the reformed policies on natural resources management. Some departments of the central government thought that giving the authority to district/municipality governments to issue small-scale logging would be the most appropriate response to the increasing demand of the local people. In addition, they also thought that decentralization would enable democratic natural resources management, given that the local people could more easily access decision-making (Barr et al. 2001, p. 25; The Asia Foundation 2003; Aspinall and Fealy 2003; Moeliono at al. 2009, p. 5).

In the light of the above developments, the central government immediately passed some regulations on the transfer of government affairs to regional government, notably at the district/municipality level. With regard to natural resources management, public management of forests, plantations and mining was transferred. In the forestry sector, the partial transfer of authority through the enactment of the Government Regulation of 1998, had even taken place before the Law on Regional Autonomy, the Law on the Fiscal Balance between the Central Government and the Regions and the Law on Forestry were all passed in 1999.[54] Without waiting for the completion of the new Forestry Law, which was in the process of being drafted, the Minister of Forestry continued to make regulations concerning the transfer of authority through the issuance of a Government Regulation and two ministerial decrees in 1999.[55]

With the ultimate goal of decentralizing forest management, notably by issuing concessions which increase local people's access to forest exploitation, the regulations stipulated the following two things. Firstly, they expanded the authority of the provincial and district/municipal governments in matters of forest management. Secondly, they gave a governor the authority to issue small concessions on timber and the extraction of forest products on areas sizing no more than 10,000 ha, whereas a district head/mayor could issue a concession on an area not larger than 100 ha. To ensure that the concession

53 Interview SS, a former Head of Kutai Forestry Agency, 11/6/2008.

54 Government Regulation No. 62/1998 on the Partial Delegation of Authority in the Forestry Sector to the Region. This regulation replaced Government Regulation No. 64/1957.

55 The Government Regulation was No. 6/1999 concerning forest enterprises and the extraction of forest products in areas designated as Production Forest, and the Decree of the Minister of Forestry and Estate Crops No. 310/Kpts-II/1999 concerning guidelines for the issuance of licenses for the extraction of forest products, and No. 317. Later, the Ministerial Decree was changed by No. 317/Kpts-II/1999 concerning the indigenous rights on the collection of forest products in areas designated as Production Forest. Later, the former ministerial decree was replaced by No. 05.1/Kpts-II/2000.

would be given to local people, the regulations stated that the concession had to be awarded to an individual Indonesian citizen, cooperatives or another Indonesian legal body.[56]

Similarly, the Minister of Energy and Mineral Resources formed regulations which granted a district/municipality the authority to issue a mining license. In 2000, the Minister passed a decree, which authorized district heads/mayors to issue a small mining concession over an area sizing no more than 5,000 ha.[57] Before this decree was issued, licenses concerning vital and strategic mining which could only be issued by the Minister of Energy and Mineral Resources. Restrictions remained. For example, the district head/mayor could only issue a license for mining which was not classified as vital and strategic. The small mining concession could be assigned to local cooperatives (Salim 2005; Susmiyati 2007, p. 22 and 38).

Policies aimed at enabling local communities to benefit more from land and natural resources extraction occurred too in the plantation sector. In 1999 and 2002, the Minister of Forestry and Estate Crops and the Minister of Agriculture respectively issued decrees. The decrees gave a governor and district head/mayor the authority to grant licenses for small-scale estate plantation (Colchester et al. 2006, p. 45).[58]

Meanwhile, in contrast with the forestry, mining and plantation sector, no such regulations, which were to create greater access for local people, were introduced for the fishery sector (Patlis in Resosudarmo 2005, p. 233).[59]

As a province which has approximately ten million hectares of production forest, and which contains large mining reserves, East Kalimantan was one of the first provinces in Indonesia to implement the regulations on the issuance of small-scale logging. Moreover, the number of forest concessions that were still active by the end of the centralized government had decreased from 120 to 75 (Poffenberger 1997, p. 456). On the Kutai mainland, some of the large forest concessions had ceased to operate since the second half of the 1980s.[60] Since many large forest concessions were no longer active, around two millions hectares of Production Forest lay idle and became suitable for the issuance of small forest concessions (Badan Planologi Kehutanan 2002, p. 9). The fragmentation (*pemekaran*) into new districts, which sought to immediately generate

56 See Article 22(2) Government Regulation No. 6/1999, and Article 4 (3) the Decree of the Minister of Forestry No. 310/Kpts-II/1999.

57 The provision was stated in the Decree of the Minister of Energy and Mineral Resources No. 1453K/29/Mem/2000.

58 Pursuant to the Decree of the Minister of Forestry and Estate Crops No. 603/2000 and the Decree of the Minister of Agriculture 357/Kpts/HK.350/5/2002, a district head could issue a license on an area sizing no more than 100 ha.

59 In 1999, Berau District Government issued Local Regulation No. 69/1999 concerning the management of turtles and their eggs (Obidzinski and Barr 2003, p. 13-15).

60 Interview A, a staff of Muara Badak office of Kutai Forestry Agency, 6/3/2009.

district revenue, was another factor that pushed district governments to issue small concessions.[61]

Through these enabling and push factors, the implementation of the regulations on the transfer of authority in East Kalimantan resulted in a large number of small concessions on forest, mining and plantation.[62] To illustrate the point, this book takes Kutai District as an example. During 1999-2000, the period when many small forest concessions were granted, the Kutai District Head issued 200 Timber Collection and Utilization Permits (*Izin Pemungutan dan Pemanfaatan Kayu* abbrev. IPPK) and 50 Forest Product Collection Permits (*Hak Pemungutan Hasil Hutan* abbrev. HPHH).[63] During the period of 2002-2006, the Kutai District Head issued 493 letters confirming coal mining licenses (*Surat Keterangan Izin Pertambangan*). Of these, 309 permits resulted in exploration permits, and 90 exploitation permits (Susmiyati 2007, p. 44).[64] It should be noted that the issuance of the small concessions was only possible through the prior passing of some Kutai District regulations. Two of these are Kutai Regulation No. 22/1999 concerning private forest land, and No. 2/2001 concerning mining permits.

As said, the central government expressed hopes that the decentralization of natural resources management in which the local people would have a greater share of its benefits, would effectively control their anger on one hand,

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61 After being divided into four districts and two municipalities in 1959, in 1997 East Kalimantan province saw the establishment of another municipality called Tarakan. During the early stage of the 1999 decentralization, the Province saw a further division with two large districts, Kutai and Bulungan, being fragmented into several smaller districts through Law No. 47/1999. The fragmentation resulted in Kutai District being divided into three districts and one municipality namely Kutai Kartanegara, Kutai Timur, Kutai Barat and Bontang. Bulungan District was divided into three districts namely Bulungan, Nunukan and Malinau. In 2002 and 2007, the region was further fragmented with Penajam Pasir Utara and Tanah Tidung as new districts.

62 Another push factor behind the issuance of the large number of small-scale concessions on natural resources extraction in East Kalimantan was the desire of local politicians to collect money for their respective political activities. It resembled the situation of the 1950s, when there was a democratic multi-party rule. The engagement of local politicians in the business coincided with the emergence of new local networks, mostly with ethnic and kinship ties, which benefited from the small-scale concession system. See Peluso (1983); Obidzinski and Barr (2003); Obidzinski (2003); Barr et al. (2006). For an account of how the local networks evolved and played a role in the small-scale logging in Central Kalimantan see McCarthy (2001); McCarthy (2004), and in Sumatera see McCarthy (2005), and McCarthy (2006).

63 Across East Kalimantan, around 700 IPPKs/HPHHs were issued during that time, covering hundreds of thousands of hectares of forest land. See Casson and Obidzinski (2002, p. 137-138); Barr et al. (2006, p. 89).

64 According to a figure released by the Indonesian Forum for Environment of East Kalimantan (Walhi Kalimantan Timur), with a total area of 1.2 hectares of coal mining, Kutai District has the largest coal mining area in East Kalimantan. See 'Total Izin Melebihi Luas Kaltim. IUP Tambang Bermasalah Disorot Lagi. LSM Sebut Bertolak Belakang Kaltim Green'. *Kaltim Post*, 7/8/2010.

and prevent environmental destruction on the other hand. However, uncontrolled issuance of small concessions generated serious social and environmental problems. Due to a severe lack of local forestry officials, particularly for newly established districts, the destructive management of the small concession holders could not be controlled (Casson 2001; Obidzinski and Barr 2003; Barr et al. 2003; Moeliono at al. 2009). Moreover, in reality there was much logging without a permit from the district government (Casson and Obidzinski 2002; Obidzinski 2003; Barr et al. 2006).

As said, in a Production Forest like the Mahakam Delta where no forest concession or protection existed, the practice of competing to gain access to natural resources was widespread. At that time the local people and recent immigrants who cleaned up the forest to convert it into shrimp ponds, found the area empty and belonging to nobody. For this reason they felt that their occupation was legitimate, despite perceiving the empty area as state land (Hidayati, Djohan and Yogaswara 2008, p. 57).[65] The only state-like intervention in obtaining land rights was through the role of village heads, who gave semi-official permissions to some land holders (Lenggono 2004, Hidayati et al. 2005; Hidayati, Djohan and Yogaswara 2008). Only after the land holders started undertaking transactions on their land – e.g. acquisition, sale and loan –, formal and semi-formal rules began to apply. Only later, they encountered objections to or contestations about their rights over the forest land by advancing economic, social and legal arguments (see Chapter 8 for a further description of the various arguments that land holders advanced).

3.4 Concluding remarks

Since independence in 1945 until the late 1950s, natural resources management in East Kalimantan, notably in Kutai District, did not only rely on legal norms, but also on government structures inherited from the colonial times. In the course of this period, regulations concerning permits on forest, mining and fishery resource use chiefly continued to be based on a colonial framework. The only change to the legal system on natural resources in this period was the person, who makes the decisions in public administration, notably who was authorized to issue permits and collect royalties, levy or tax. One thing that should be noted is that in the course of the period, due to their past status as self-governing states and the slow establishment of regional government agencies, the four sultanates still played a significant role in issuing permits in addition to collecting tax, levy and royalties. In the years between 1957 and 1970 the decentralization of management of natural resources enabled local

65 For an account of how a similar argument was used by local residents and migrants to occupy a mangrove forest in Bulungan District see Setiawati (1999).

people to interact more closely with local politicians or policy makers so that they could practice their customary norms on natural extraction.

During the period of 1970-1998 state intervention in natural resources use was carried out through centralized natural resources management. To implement the centralized state intervention, the central government produced a packet of laws and regulations. The laws and regulations did not only move the authority to issue permits to the central government, but also superimposed formal rules on traditional or local rights on land and natural resource use. During the period of centralized management it became difficult for people to exercise their local rights on natural resources management. In many places, it was prohibited for local people to clear land and cut trees. The only way the local people were able to practice their rights was through informal and semi-informal arrangements, which could emerge since the actual implementation of formal state intervention was very weak.

It can also be observed that during the period of centralized management, state intervention was less exercised in one sector, but strongly exercised in others. As will be elaborated in detail in Chapter 5, in this period the local people were relatively free to clean up forest to convert it into farms and later shrimp ponds. There were hardly any local forest officials who warned or even asked them to stop converting the forest land. Unlike the timber companies on the mainland, which regarded the rights claims of the local people as illegitimate, Vico and Total E&P behaved differently. They recognized the local people's rights on their land by providing compensation. At the same time, state intervention in fishery resource use was fiercely exercised by creating restricted fishing zones. This fiercer form of state control ensured that oil and gas extraction was not interrupted.

From 1998 the reformasi and decentralization were perceived by the local actors (government officials, politicians, community leaders and ordinary local people) as implying more freedom to exercise authority and customary law on one hand, and by the central government as an opportunity to manage the anger of local actors on the other. The period of 1999 until the present has been filled with regulations which primarily allowed provincial and district/municipality governments to issue permits on small-scale natural resources extraction. By awarding small-scale extraction to the local people, the regulators expected that the local people would get a greater share in benefit from natural resources use. However, this objective has not been fully realized, as narrow self-interests of local networks have impeded an effective exercise of state intervention. As a result, in reality, the extent to which the local people could utilise local natural resources use has depended heavily on informal and semi-informal arrangements. This has also been the case with the local people of the Mahakam Delta, as no official permit has been issued by either the Provincial or Kutai District government.

4 Indonesia's government structure and legislation system

Indonesia is a republic and a unitary state.[1] As a republic, power is distributed among the legislative, executive and judicial branches. Nevertheless as a unitary state, the authority of public administration primarily rests in the hands of the central government (Ridwan 2009, p. 15). As a result, the regional and local governments have the authority to carry out public administration only if the central government transfers (some of) its powers through decentralization (Gadjong 2007, p. 71-72). In this context, the book uses a narrow definition of the concept 'decentralization', the meaning of which corresponds closely with 'devolution'. In the broader sense, decentralization can be defined as the transfer of authority, responsibility, and resources, through deconcentration, delegation, or devolution, from the centre to the lower level of administration (Rondinelli 1981, p. 137; Cheema and Rondinelli 2007, p. 1).[2] However, it is important to underline that Indonesia is not a pure unitary state given that the way in which government authority is divided between the central and regional is fixed in the Constitution and laws. Thus, to some extent Indonesia is federally organized (Asshiddiqie 2001, p. 28).

Apart from transferring some government authorities to the regional governments, the central government also distributes its authority over its own units, notably the departmental ministry, non-departmental ministry (Ind. *lembaga pemerintah non-departemen* abbrev. LPND) and executive branch agencies.[3] The ministerial departments, non-ministerial departments and executive branch agencies can further transfer the governmental authority to their respective established lower units. That kind of authority is in the Indonesian context based the principle of deconcentration.

This chapter approaches 'government' in the sense of executive power.[4] Focusing on the executive, this chapter will therefore only describe Indonesia's public administration, looking at both its horizontal and vertical sectors. The

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1 Article 1(1) of the Constitution of 1945.

2 Meanwhile, devolution is defined as the divestment of functions by the central government and the creation of new units of governance outside the control of central authority (Rondinelli 1981, p. 138). In addition, in the Indonesian context the concepts of *desentralisasi* and *dekonsentrasi* are distinctly legal and are explicitly defined by law.

3 There are various names for the LNPD namely (Ind.) *badan, lembaga, biro* or *dewan*. See Hadjon (1990, p. 171).

4 In its broader meaning, that term could also encompass legislative and judicial power (Manan 2002, p. 100-101 and 103).

horizontal sectors here refer to the layers of government in terms of decentralization, while the vertical sector refers to the sectoral departments and agencies and its deconcentrated lower units.

Government structure and the theory of the 'hierarchy of legislation' are the main factors that shape Indonesia's legislation system, which is structured hierarchically. The principle, popularly named as the 'hierarchy of legislation', presupposes that lower legislation shall not be in contradiction with higher legislation. In line with the unitary form of the state, the hierarchy should make sure that legislation enacted by regional governments shall not be in contradiction with legislation made by the central government. Yet, the principles resulting from the unitary government structure and the 'hierarchy of legislation' have been long disregarded through the fact that administrative or policy rules (*peraturan kebijakan*) are often different from and in contradiction with higher legislation. That often occurs when government officials exercise discretionary powers.

4.1 Government structure: horizontal layers

I will first assess Indonesia's broader government structure as stipulated in the 1945 Constitution, before moving to the accounts of the horizontal structure of Indonesia's government structure. Pursuant to the Constitution there are a number of state institutions that have the authority to exercise legislative, judicial and executive power. Together with the Regional Representative Council (Ind. *Dewan Perwakilan Daerah* abbrev. DPD), the People's Representative Council (Ind. *Dewan Perwakilan Rakyat* abbrev. DPR) has the power to make legislation in addition to two other functions, namely determining the public budget and monitoring the executive.[5] Meanwhile, the DPD is formed to strengthen regional representation, so that it can convey the regional demands in the process of law-making to the central level. The DPD and DPR sit together to form the People's Consultative Assembly (Ind. *Majelis Permusyawaratan Rakyat* abbrev. MPR). Unlike its powerful pre-constitutional amendment (2001 and 2002) position, the MPR presently has only very limited functions: to amend the Constitution, inaugurate the president and vice-president, and impeach the president.[6]

The Supreme Court (Ind. *Mahkamah Agung* abbrev. MA) together with lower provincial and district courts, and the Constitutional Court exercise judicial power.[7] They hear civil and criminal cases. For particular cases concerning matters on commerce and administration, commercial and state administrative courts are in charge. There are also courts which hear cases involving particular

5 See Article 20 (1) and 20A (1) of the Constitution.
6 See Article 3 of the Constitution.
7 Article 24(2) of the Constitution.

groups of society, such as the military courts for military officers and the Religious Court for Muslims. As said, beside the Supreme Court, the Constitutional Court can also exercise power over the judiciary. The Constitutional Court specifically hears cases concerning the legality of the law, general elections, the dissolution of political parties, and the scope of the authority of state institutions.

The president together with the vice-president holds power over the administration of the government.[8] In running the administration of government, the president and vice-president are assisted by a number of ministers and the heads of the non-ministerial departments as well as executive branch agencies.[9] Each ministerial and non-ministerial department deals with particular matters of government.[10] In addition to holding power over administering public matters, the president also has the power to submit law to DPR.[11]

It is important to note that besides this traditional division of power among and within the legislative, executive and judicial branch, a state auxiliary organ (*organ negara penunjang*) has emerged which exercises mixed or quasi legislative, executive and judicial powers. This state auxiliary organ comprises of independent state agencies or independent regulatory bodies, and executive branch agencies or dependent regulatory agencies (Tauda 2012, p. 5 and 96). Concerning its position, the former are neither part of the legislative nor executive branch, while the latter is part of the executive (Indrayana 2009, p. 57). Having mixed powers, the independent state agencies are able to make law, provide public services as well as dispute settlement (Asshiddiqie 2006b, p. 79; Asshiddiqie 2006c, p. 8; Indrayana 2009, p. 6-7; Tauda 2012, p. 93). As of December 2009, Indonesia has fourteen independent state agencies[12] and 29 executive branch agencies (Indrayana 2009, p. 11-12 and 57-58).[13]

As said, Indonesia is a unitary state in which government matters are not wholly exercised by the central government, but partly transferred (*dipencar*) to regional governments, whether provincial or district/municipality.[14] This

8 See Article 4 and 17 (3) of the Constitution.

9 See Article 19 (1) of Law No. 32/2004 on Regional Autonomy, Article 7 of Law No. 39/2008 on State Ministries, and Article 1 and 2 of Presidential Decree No. 103/2001 concerning the functions, tasks, authority and organizational structure of non-ministerial departments.

10 Law No. 39/2008 on State Ministries: Article 5 elaborates on what are government affairs. The Law however states that not every government 'affair' needs a ministry (Article 6).

11 Article 5 of the Constitution.

12 Examples are the National Commission on Human Rights (Komisi Hak Asasi Manusia), the Corruption Eradication Commission (Komisi Pemberantasan Korupsi) and the Judicial Commission (Komisi Yudisial).

13 Examples are the National Law Commission (Komisi Hukum Nasional), the Public Attorney Commission (Komisi Kejaksaan), and the Indonesian Police Committee (Ind. Komisi Kepolisian Indonesia).

14 The term 'district' refers to '*kabupaten*' in Bahasa while 'municipality' refers to '*kota*'. One often sees the term 'regency' as a translation of '*kabupaten*'. As said, autonomous regions, both districts and municipalities, have a similar government structure except for the fact that a municipality does not have villages. Concerning formation, districts should comprise

is clearly stated in the Constitution, which determines that Indonesia is divided into provinces, districts and municipalities. Every provincial and district/municipal government carries out their respective government duties.[15] In an effort to implement the principle of deliberate consultation (*permusyawaratan),* the Constitution determines that the regional governments have their own Regional House of Representation.[16] This has led to the regional governments exercising executive and legislative powers concomitantly.[17] In other words, regional governments are composed of an executive and legislative body. The local executive and legislative body are meant to be on an equal footing, and a cooperative and harmonious relation between the local executive and legislative body is expected (Soeprapto 1998, p. 86-87).

According to Manan (2002: 105-6), the formation of the Regional House of Representatives does not really change the type of affairs that the regional government administers. Even though the regional government has a Regional House of Representatives which has legislative power, this legislative power is limited to matters of public administration only (*administrasi pemerintahan negara*); As a result, regional regulation that the Regional House of Representatives passes only concerns matters of public administration and not constitutional matters (*ketatanegaraan*). The limited legislative power of the Regional House of Representatives and regional government is due to the restricted authority granted by the law to implement regional autonomy. Therefore, one may say that the main task of the Regional House of Representatives is to control the regional executive, whereas the legislative task comes secondary (Asshiddiqie 2006c, p. 302).

Governors, district heads and mayors have two main roles. One is related to decentralization and the other to deconcentration. The title of governor, district head or mayor is given in their capacity to lead their autonomous regional government, while their title of local head (*kepala daerah*) is related to their role as the leading regional or local representative of the central government (Soeprapto 1998, p. 88).

There is a slight difference between the organizational structure of a provincial and district/municipal government. The organizational structure of the provincial government primarily consists of a secretariat or office of governor, inspectorate, implementing divisions (*unsur pelaksana*), and supporting divisions (*unsur pendukung*). The organizational structure of the district/municipal government also includes sub-districts.[18] In accordance with the above provisions, village governments are not officially part of a district

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of no less than seven sub-districts, while municipalities should comprise of no less than four sub-districts. One other thing that distinguishes a district from a municipality is that districts cover a larger area but have a smaller population compared to a municipality.

15 Article 18 (1 and 2) of the 1945 Constitution.

16 Article 19 (3) of the 1945 Constitution. See also Gadjong (2007) and Ridwan (2009).

17 Article 19 (2) and 40 of Law No. 32/2004.

18 See Article 120 of Law of 2004 on Regional Autonomy.

government. The implementing divisions of the provincial and district/municipality government usually constitute of an agency (*dinas*) whereas supporting divisions include an office (*kantor*), a body (*badan*) and a local hospital.[19]

Concerning their functions, the secretariat of the provincial and district/municipal government or office of governor/district head/mayor is primarily there to prepare policies and coordinate the different implementing divisions and supporting divisions. Consequently, every bureau of the secretariat has those two primary functions. Similarly, the implementing divisions and supporting divisions are there to prepare policies concerning their respective work fields. Yet as an implementing division, the agency can provide public services, whilst the supporting division has only supporting tasks. Meanwhile, the sub-district government is there to carry out some of the government tasks, which have been transferred by the district/municipal government, namely to coordinate community participation, to maintain order and enforce the law, to supervise the running of the village governments and to provide public services.[20]

Implementing divisions and supporting divisions are primarily composed of secretariat office, division (*bidang, bagian*) and expertise-based official ((Ind. *kelompok jabatan fungsional*). Under the divisions there are section and sub-division. Apart from a secretariat and a division the implementing division and supporting division usually also has a technical implementation unit (Ind. *unit pelaksana teknis*). The technical implementation unit has the following organizational structure: secretariat office, section (*seksi*) and expertise-based officials. Before decentralization effectively was in force in 2001, the implementing divisions could have regional or local office (*cabang dinas*).[21] The organizational structure of a sub-district government is composed of a secretariat office and sections. The organizational structure of the village government is much more simple. It consists of a secretariat, a technical section for implementation (*pelaksanan teknis lapangan*) and territorial units. The territorial units can be neighbourhoods (Ind. *rukun tetangga*).[22]

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19 The office (*kantor*) and office (*badan*) are formed to administer more specific government affairs such as environment, food security, library or archive. Like the implementing divisions, the supporting divisions are under the supervision of the governor, district head or mayor. The regional government are free to choose whether to use the term *kantor* or *badan* for their supporting divisions. See Article 15(1) of Law No. 32/1004, Article 8 of Government Regulation No. 41/2007, and the Regulation of the Minister of Home Affair No. 57/2007 concerning the Organizational Structure of Regional Government.

20 Article 126(3) of Law of 2004 and Article 17(3) of Government Regulation No. 41/2007 concerning the Organizational Structure of Regional Government.

21 See Government Regulation No. 84/2000 on Organizational Structure of Regional Government.

22 The Elucidation of Article 202(2) of Law of 2004 and Article 12(3) of Government Regulation No. 72/2005 concerning the village.

As for the current regulation on the organizational structure of the provincial and district/municipal government, below are two organizational charts of the provincial and district government.

Figure 4.1: Organizational structure of the provincial government

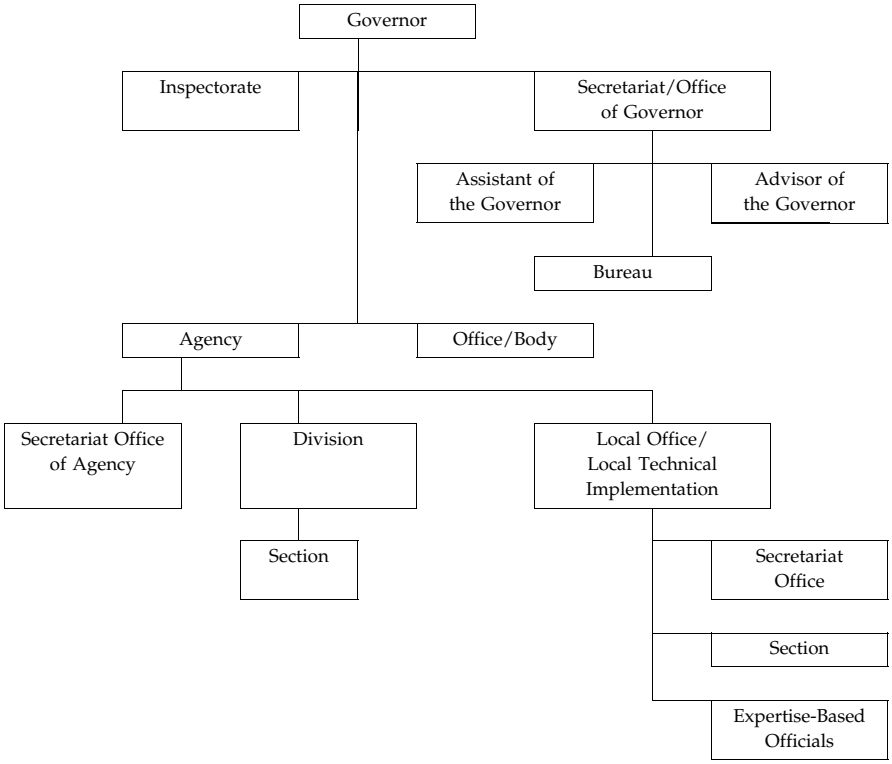
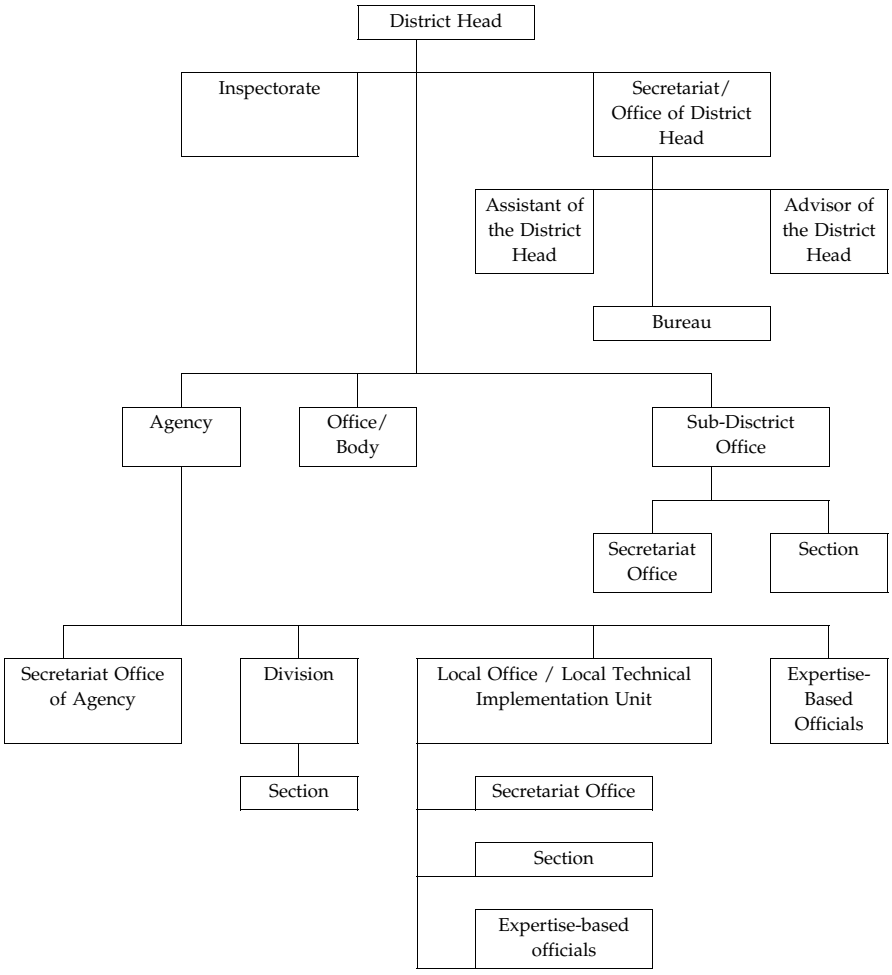


Figure 4.2: Organizational structure of the district government

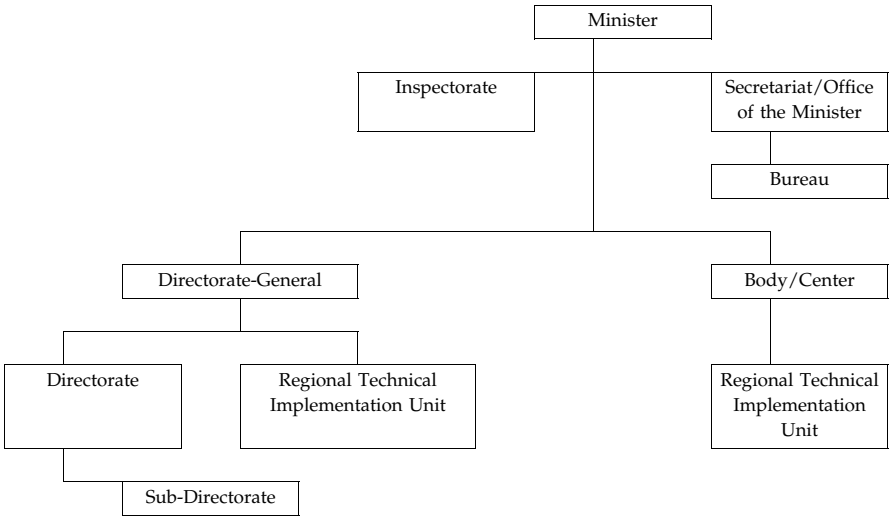


4.2 GOVERNMENT STRUCTURE: VERTICAL OR SECTORAL GOVERNMENT

As said, the president and vice-president are assisted by a number of ministers who head departmental ministries as well as non-departmental ministries (LPND) and executive branch agencies in order to run the government administration. Pursuant to legislation, the ministries can be divided into two distinctly defined groups: the ministries which are charged with carrying out particular government affairs, and the ministries which are not charged with a particular government affair. The latter is popularly named a 'coordinating

ministry' (*kementerian koordinator*).[23] The main task of the coordinating ministries is to synchronize and coordinate the making and implementation of policies in their respective areas.[24] Meanwhile, the former can be divided into three groups. Firstly, ministries which are explicitly named in the Constitution.[25] Secondly, ministries whose names are not mentioned in the Constitution but whose scope of work is.[26] Thirdly, ministries whose main task is to pursue coordination and synchronization among and within the different departments.[27]

Figure 4.3: Organizational structure of departmental ministry



The organization of a departmental ministry whose title and scope of work have been named and stated in the Constitution, primarily consists of the head (*pimpinan)*, assisting (*pembantu*), implementing (*pelaksana*), supporting (*pendukung*) and inspecting (*pengawas*) divisions,[28] regional technical implementation

23 Indonesia currently has three coordinating ministries. The first deals with political, legal and security issues. The second deals with economic issues and the third with welfare issues.

24 Article 6 and 7 of Presidential Regulation No. 47/2009.

25 They are respectively the Ministry of Home Affairs, Ministry of Foreign Affairs, and Ministry of Defense.

26 For instance, the Ministry of Forestry, Ministry of Marine and Fishery Affairs, and Ministry of Energy.

27 For instance, the Ministry of Environment, Ministry of Land Affairs, and Ministry of Science and Technology.

28 The inspectorate is an internal control instrument. Its main functions are to monitor performance and budget expenses. The inspectorate can conduct an internal investigation in case of corruption, nepotism and administrative abuse (*pelanggaran* administrative). See Article

units (*unsur pelaksana tugas pokok daerah*) and foreign representatives (Figure 4.3). The assisting division refers to the secretariat or office of the minister.

The implementing division refers to the directorate-general, which is subsequently divided into directorates and sub-directorates, whereas the supporting division usually consists of a body (*badan*) or a center (*pusat*).

The regional technical implementation units are usually called *unit pelaksana teknis* (abbrev. UPT) in Bahasa. There are a number of important things that need to be underlined regarding the technical implementation unit. Firstly, this unit can be tasked with technical and operational matters. It is not charged with policy-making.[29] Secondly, the technical implementation unit has a work area which may differ from the division of administrative territory. The work area of a technical implementation unit may be located in more than one administrative territory, thereby trespassing administrative boundaries.[30] Thirdly, with regards to their hierarchical position, the technical implementation unit can fall under a directorate-general, agency or centre.[31]

The president forms LPNDs for specific government matters (Soeprapto 1998, p. 78). These LPNDs have to coordinate their tasks with particular departmental ministries. For the most part, the organizational structure of a LPND is similar to a departmental ministry, given it has a head, an assistant (secretary), implementing and inspectorate divisions, and regional technical implementation units.[32] The implementing division encompasses a number of directorates and centers. If needed, the LPND can also form working groups.[33] A particular LPND such as the National Land Agency can also form regional offices in an attempt to carry out its assigned task at a regional level.[34]

It is important to note that before decentralization in 2001, some departmental ministries and non-departmental ministries had regional offices (*kantor wilayah*). After decentralization, only departmental ministries which are charged

39 Presidential Regulation No. 47/2009, and Article 602 and Article 639 of the Regulation of the Minister of Forestry No. P. 40/Menhut-II/2010 concerning Organizational Structure of the Ministry of Forestry.

29 Article 4(1) of the Regulation of the Minister of Administrative Reform No. PER/18/M. PAN/11/2008 concerning a guide for forming the organization of a service unit of the ministerial and non-ministerial departments.

30 Article 4(1) of the Regulation of the Minister of Administrative Reform No. PER/18/M. PAN/11/2008.

31 See Article 2(1) of the Regulation of the Minister of Administrative Reform No. PER/18/M. PAN/11/2008.

32 See Article 79 of the Presidential Directive No. 103/2001 concerning the function, tasks, authority and the organizational structure of non-ministerial departments, and Article 2(1) of the Regulation of the Minister of Administrative Reform No. PER/18/M. PAN/11/2008.

33 See Article 102 of the Presidential Regulation No. 103/2001.

34 See Article 29 of the Presidential Regulation No. 10/2006 on National Land Agency.

with government affairs which are not transferred to regions, can have regional offices.[35]

4.3 The legislation system

4.3.1 Hierarchy of legislation

Discussions on Indonesia's legislation system often refer to the legal principle of 'hierarchy of legislation' (in Indonesian commonly known as *hirarki* or *susunan perundang-undangan*). The 'hierarchy of legislation' which was theorised by a prominent legal positivist, Hans Kelsen and later by his student Hans Nawiasky, primarily postulates that the validity of lower legislations is given by higher legislations while the validity of the highest legislations is provided by a hypothetical fundamental norm (*Grundnorm*) presupposed by the jurist (Soeprapto 1998, p. 39; Nurbaningsih 2004; Asshidiqie 2010). A higher legislation can overrule a lower legislation if they both rule on the same matter.

From a historical point of view, the official application of the principle to Indonesia's legislation system as first stated in the Decree of MPRS/1966 was meant to bring order to Indonesia's legislation system, which had been disrupted during the Old Order (Nurbaningsih 2004, p. 40). In an attempt to realize this aim, the regulations concerning the 'hierarchy of legislation' determine that Indonesia's legislation is structured by a hierarchy. In accordance with Law No. 12/2011, the below figure illustrates this hierarchy of legislation.[36]

The hierarchical structure prevents lower legislations from contradicting higher legislation. In line with this hierarchy, district/municipal regulation cannot be in contradiction with provincial regulation. Likewise, provincial regulation can not be in contradiction with a presidential regulation, and so on and so forth. Meanwhile, the Constitution which sits at the top of the hierarchy has to be compatible with the *Pancasila*, which is laid down in the constitutional preamble and is considered as the state fundamental norm or ultimate legal source.[37] The hierarchy of legislation presupposes that there is no need to seek the validity of the state fundamental norm through higher

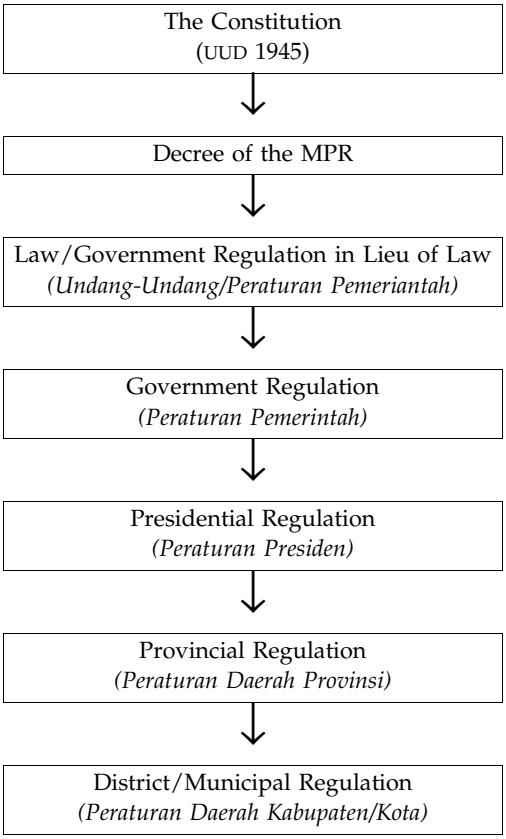
35 The departmental ministries are the Ministry of Foreign Affair, the Ministry of Defense, the Ministry of Justice and Human Rights, the Ministry of Finance, and the Ministry of Religion.

36 See Article 7(1). The above hierarchical structure as stated in Law No. 12/2011 revised the hierarchy of the Decree of MPR No.III/2000 which made a Government Regulation in Lieu of Law equal to a law. The MPR's Decree of 2000 revised the 1966 MPR's Decree, which mistakenly classified the Constitution as legislation. According to Soeprapto (1998: 48-49), the Constitution should have been classified as legislation given it still consists of fundamental norms and therefore the norms are still very general.

37 See Article 2 of Law No. 12/2011 and its Elucidation.

legislation because it already existed before the Constitution and legislation were made. The validity of the fundamental norm is pre-supposed (Simanjuntak 1994, p. 26; Soeprapto 1998, p. 28-29). This implies that all legislations of the hierarchy must be compatible with the values of the *Pancasila*.

Figure 4.4: Indonesia's hierarchy of legislation



Lower legislation not contradicting higher legislation is needed as it will provide validity to the lower legislation. In a more legalistic approach, it is suggested that lower legislation will be valid only if its making is requested by higher legislation or if it is made by authoritative officials (Soeprapto 1998, p. 19; Asshiddiqie and Safaát 2006, p. 110).[38]

Apart from legislation listed in the hierarchy, all regulations made by the MPR, DPR, DPD, Supreme Court, Constitutional Court, state commissions,

38 See also Article 8(2) of Law No. 12/2011.

ministerial departments, non-ministerial departments, Provincial and District/Municipal House of Representative, Governors, District Heads/Majors and village heads, are regarded as legislation as well.[39] However, existing laws and regulations do not clearly stipulate the place of the respective regulations in the hierarchy. This lack of clarity used to lead to a serious question: was a local regulation higher than a Ministerial Decree given the latter did not exist in the hierarchy? The question can be answered by regarding Indonesia as a unitary state. Given that the ministers are part of the central government, namely as the president's assistants, leads to the conclusion that any regulations they enact overrule the local regulations. As an organ of the central government the ministers make legislation, which is enacted nationally.[40] Asshiddiqie (2006a, p. 107-110) points out that because Indonesia is a unitary state, it is reasonable that the central government exercises control over regional governments. In line with that, regional and local legislations should therefore be compatible with higher national legislations.[41]

In order to ensure that the legal principle and norms concerning the 'hierarchy of legislation' function effectively, Indonesian law provides a general control mechanism namely the judicial, legislative and executive review. Regarding the judicial review, laws and regulations primarily state that the Constitutional Court reviews laws to check whether they are in contradiction with the Constitution or not, while the Supreme Court reviews any lower legislation to check whether it may be in contradiction with laws.[42] Meanwhile, the laws and regulations state that the executive review over local regulations is to be carried out by the President or Minister of Home Affairs. Pursuant to the Law on Regional Autonomy of 2004, the President and Minister of Home Affairs can annul local regulations which are in contradiction with the public interest and/or higher legislation.[43] Provincial and district/municipal governments, whose regulations are annulled, can lodge an appeal, by filing a judicial review with the Supreme Court.[44]

39 Article 8 of Law No. 12/2011.

40 The statement is a legal advice given by the Minister of Justice and Human Rights responding to similar questions addressed by various ministries concerning the position of the Ministerial Decree in the hierarchy of legislation. See Letter No. M.UM.01.06-27, dated on 23rd February 2001.

41 See Latief (2005, p. 65-68) for a similar argument.

42 See Article 24A(1), 24C(1)of the 1945 Constitution; Article 9 of Law No. 12/2011, Article 10(1) of Law No. 24/2003 on the Constitutional Court, and Article 11(2) of Law No. 4/2004 concerning judicial power.

43 See also Article 37 of Government Regulation No. 79/2005 concerning *Pedoman Pembinaan dan Pengawasan Penyelenggaraan Pemerintahan Daerah*.

44 See Article 145 of Law No. 32/2004.

4.3.2 Administrative rules

Whilst discussing legislation and its implementation by government officials we also need to refer to administrative rules or policy rules (*peraturan kebijakan*). There are two reasons for that. Firstly, to a great extent, the state reaches society by means of such administrative rules (Cotterrell 1984, p. 260). In other words, legislation can affect a regulated group through administrative rules. Secondly, government officials have long been using administrative rules in a way to mediate between legislation or rule of law and their practical significance for the regulated (Cotterrell 1984, p. 278). That way may enable government officials to meet broader developmental or governmental goals (Baldwin 1995, p.12; Black 1997).

In Indonesia, discussions on administrative or policy rules are often associated with a discussion on the limit of legislation as a governmental instrument. Legal scholars of constitutional law and public administrative law believe that administrative or policy rules are derived from discretionary powers given to government officials. These discretionary powers are given due to the limits or lack of legal rules as a means to achieve development goals. Thus, discretionary powers are expected to enable government officials to strive for prosperity or effective public services (Marzuki 1996; Hadjon et al. 2001, p. 156; Ridwan 2003, p. 133; Latief 2005). Having the discretionary power to make administrative rules, government officials can no longer refuse providing public services by arguing that no legislation exists yet (Ridwan 2003, p. 133).

Even though government officials are not required to base administrative rules they make on certain prevailing legislation, such rules should not be against the rule of law. As Atmosudirdjo (1994, p. 82) already emphasized, administrative rules are bound by the principle of legality where all government actions must be based on law. Nonetheless, as administrative rules should comply with the principle of legality on the one hand yet are not regarded as legislation on the other hand, Indonesian legal scholars are still debating whether administrative rules can or can not be a subject of judicial review. Those who suggest that administrative rules can not be a subject of judicial review argue that administrative rules are practices; not law.[45] Those who suggest that they are subject to judicial review argue that so long as administrative rules are meant to generally bind (Ind. *mengikat secara umum*), they are legislation and can therefore be reviewed (Latief 2005, p. 234).

Concerning the binding force of administrative rules, Attamimi (1993, p. 12) points out that administrative rules are generally binding since the regulated community is not able to refuse abiding by it. However some legal scholars argue that administrative rules are not generally binding, but that they have a legal relevance (Manan in Ridwan 2001, p. 139; Hadjon et al. 2001, p. 153).

45 See for instance in Hadjon et al. (1994, p. 154).

Given that they are generally binding, the content of administrative rules is abstract and can be applied generally. In this respect, administrative rules resemble legislation and are unlike a *beschikking (penetapan, keputusan).* Administrative rules could appear in the latter form when they regulate concrete matters and are applied to particular individuals (*konkrit, individual, final*) .[46] However it should be underlined here that unlike legislation which can stipulate both criminal and administrative sanctions, administrative rules can only stipulate administrative sanctions.

In terms of content and form, administrative rules can resemble legislation. Yet some administrative rules can be unwritten, such as an official announcement made by a government official or a spoken order of a superior to his staff. Written administrative rules can appear in the form of a decree (*keputusan*), directive (*instruksi, surat perintah*), official note (*nota dinas*), circular letters (*surat edaran*) and administrative guidance (*pedoman*).[47] Thus, administrative rules do not have a standard form.

Legal scholars of administrative law strongly relate the emergence of administrative rules to the absence or vagueness of legislation. This insight helps explain the way they define discretionary power. They define discretionary power as power given to government officials to make an appropriate administrative decision, whenever the legislation is absent or vague. Such definition has led to a rather formalistic way of viewing administrative rule by scholars of administrative law. They very much stress the absence or vagueness of legislation as the foremost, if not only, factors that cause government officials to make administrative rules. In other words, according to these scholars, discretionary power only appears, if legislation is lacking or vague.

The above insight is much different from notions developed by scholars of regulatory studies who approach the issue more from an empirical point of view. According to them, discretion can appear even if the legislation is present and clear. It occurs given discretion results from interpretation and choices made by public officials (Black 2001). Thus discretion should be seen as a complex instead of a simple phenomenon. It appears not solely because of official descriptions and designations of organizational goals and practices but through complex interactions between the regulators and regulated community (Cotterrell 1984, p. 280). It is seen by some to be the outcome of the interactions between networks, or alternatively webs of influence, which operate in the absence of formal governmental and legal sanctions (Black 2002, p. 8 and 27). Pursuing vested interests, protecting government agencies from political interference, a lack of resources, taking into account the living law, the perception of the regulated community, and advancing the realization of policy goals are instances of the combined complex of factors from which

46 Soeprapto (1998, p. 52).
47 See Attamimi (1993, p. 13); Ridwan (2001, p. 137), and Latief (2005, p. 12).

discretion could derive (Cotterrell 1984; Rosenbloom and Schwartz 1994; Baldwin 1995; Black 1997; Black 2001).

4.4 Regulatory implementation of law

As already mentioned (Section 1.3.1), it is important to distinguish between 'regulatory implementation of law' and 'implementation of law'. Understanding the regulatory implementation of law as the promulgation of implementing rules, this chapter brings 'the making of lower regulations' into the discussion on the regulatory implementation of law. In the Indonesian legal system, the making of lower legislation is perceived as the first instrument to implement law, while the second one is to implement policies or provide public services. Concerning the first perception of the implementation of law, it is common that Indonesian legislation requests lower officials to make lower legislation or implementing rules as a way to implement (Ind. *melaksanakan* or *menjalankan*) the enacted higher legislation.[48]

4.4.1 Transferred legislative power

That the first instrument of the implementation of law consists of making lower legislations is based on the authority given by legislation to a particular government unit or state/government bodies (Soeprapto 1998, p. 35; Matutu, Latief and Mustamin 1999, p. 127). There are two kinds of transfer, namely attribution and delegation. The former is given by the constitution or a law to a particular government unit or official. Since the authority originates from the constitution or law, the authority therefore exists unless the constitution or law changes. Meanwhile, delegation to make law is given by particular legislations to particular government units or officials either to create new legislation or merely to further elaborate the subject matter of higher legislation. Unlike the former type of transfer, the latter is temporary and valid as long as the transferred authority is not withdrawn.

Indonesia's legislation system practices the transfer of legislative power strongly. The Constitution, for instance, gives the president legislative power by stating that the president can propose draft bills to the DPR, and make government regulations in order to carry out law and Governmental Regulation in Lieu of Law (Ind. *Peraturan Pemerintah Pengganti Undang-Undang* abbrev. Perpu).[49] The Constitution does not only grant the president, but also the regional government legislative power to make regulations to implement

48 For instances see Article 5(2) of the Constitution and Article 146(1) of No. 32/2004 on Regional Autonomy.

49 See Article 5, and Article 22(1).

regional autonomy.[50] In this respect the president, regional governments receive legislative power by means of attribution.

The majority of legislative power, which the executive receives however, is by means of delegation. Delegation is certainly subject to the government structure and the hierarchy of legislation. In accordance with this structure and hierarchy, the president can delegate legislative power either to the ministers, heads of the non-departmental ministries, executive branch agencies or lower officials such as governor. An example of this is Government Regulation No. 26/2008 on a National Spatial Plan which stipulates that a minister who is in charge of water management will further regulate the water resource management model.[51]

Meanwhile, the ministries, heads of non-departmental ministries and the executive branch agencies are able to delegate legislative power to the heads of their respective implementing, inspectorate and supporting divisions or service units. In the meantime, the governors can transfer legislative power either to his secretariats or agencies, technical/service units and district/municipal governments. Likewise, the district head/mayor can delegate power to his respective secretariats, agencies, technical/service units and village governments.

The transfer of legislative power does not always go in steps. The provincial and district/municipal governments for instance, can obtain legislative power from laws directly. A number of laws on natural resources have given authority to district/municipal governments to make local regulations concerning the recognition of indigenous groups.[52] The Law on Regional Autonomy of 2004 repeatedly stipulates that provincial and district/municipal governments have legislative power in order to support regional autonomy and implement higher legislation. It even specifically states that in order to implement regional and local regulations, governors and district heads/mayors are able to make regulations (*peraturan*) and decrees (*keputusan*).[53]

It is important to note that in accordance with the Law on the Making of Legislation of 12/2011, only the state and government bodies which are mentioned in the Law can receive legislative power, given they have the authority to make legislation (Ind. *kekuasaan membentuk hukum*).[54] Their legislative power does not merely derive from legislation which gives them the power but also from the legislation which has established state and government bodies. For example, the Government Regulation on State Ministries of 2009 stipulates that state ministries are to formulate, endorse and implement the

50 See Article 18(16).
51 See Article 48(6).
52 See Article 67(2) of the Forestry Law of 1999, Article 9(2) of the Law on Estate Plantation No. 18/2004, and Article 6(2) of the Law on Water Resources Management No. 7/2004.
53 Article 146(1) of Law No. 32/2004 on Regional Autonomy.
54 See Soeprapto (1998: 54).

policies of their respective fields of work.[55] Likewise, a Presidential Directive on the National Land Agency of 2006 gives the National Land Agency the task to formulate policies on land.[56]

4.4.2 Policies and Public Services

Implementing policies or providing public services are another instrument for the regulatory implementation of law. In this respect, implementing policies or providing public services constitute administrative activities to realize what laws desire. Whereas in policy studies law is usually seen as a 'policy instrument', in legal studies we might say that a policy is an instrument enabling law to reach the public by for instance determining which rights and services the enactment of the law should guarantee for the public. As said, public officials can make administrative rules, if they think that is necessary to achieve policy goals effectively.

As said above, the legal basis for public officials to make policies and provide public services is the legislation on the forming of the respective government body. Such legislation states that the making of policies and providing public services belong to the main functions or tasks of the government body. To give an example, the Kutai District Marines and Fisheries Affairs Agency is there to formulate as well as control their implementation policies on marines and fisheries.[57] It is stated that the policies made by the Kutai District agencies should be compatible with the district development planning documents.

Both the central, regional government are obliged to make long-, medium- and short-term development plans.[58] Regarding the process, in making the development plans, the agencies follow the principles of the unitary state. The 'Short-Term Working Development Plan of a Departmental Ministry/Non-Departmental Ministry and Regional/Local Agency' should refer to the 'Short-Term Working Development Plan of Central or Regional Government'. The making of the 'Medium-Term Development Plan of the Departmental Ministries and Non- Departmental Ministries' should take into account the 'Medium-

55 See Article 26 of Government Regulation No. 47/2009.

56 See Article 3 of Presidential Directive No. 10/2006.

57 Article 41 of Kutai Regulation No. 12/2008 concerning the Organizational Structure of Kutai District Agencies.

58 The long-medium-short-term development plans are respectively called 'National/Regional/Local Long-Term Development Plan', 'National/Regional/Local Medium-Term Development Plan', 'Medium-Term Strategic Plan of the ministerial departments and local agencies', 'National/Regional/Local Short-Term Working Development Plan', and 'Ministry and Regional Agency Short-Term Development Plan'. Long-term indicates twenty years, medium-term five years, and short-term one year. See Law No. 25/2004 on National Development Planning System, and the Law No. 32/2004 on Regional Autonomy.

Term National Development Plan'. Equally, the 'Medium-Term Development Plan of a Regional Government Agency' should refer to the 'Medium-Term Regional/Local Development Plan'. Meanwhile, the making of a 'Medium-Term Regional/Local Development Plan' should refer to the 'Long-Term Regional/Local development Plan' and take into account the 'National Long-Term Development Plan'. The making of the 'Regional/Local Long-Term Development Plan' should refer to the 'National Long-Term Development Plan'. The highest standard in development planning, the 'National Long-Term Development Plan', is made in an effort to elaborate the ultimate goals of Indonesia as written in the Preamble of the Constitution.

The 'Medium-Term Strategic Plan' of regional government agencies primarily contains a vision, a mission statement, objectives, strategies, policies and main programmes or activities, while the 'Short-Term Working Development Plan' contains policies, main programmes and activities.[59] In addition to policies, main programmes and activities, the 'Short-Term Working Development Plan' also contains a budget estimate for each planned program/activity. The budget of each program/activity is further detailed in another planning document called the 'Budget and Activity Plan'.

The Regional Planning Agency uses the Short-Term Working Development Plan to make a Regional Short-Term Development Plan. The latter planning document is further used to inform the regional annual budget.[60] Pursuant to the Law on Regional Autonomy, Government Regulation No. 79/2005 and the Regulation of the Minister of Home Affairs No. 53/2007, a draft Provincial Regulation on the regional annual budget – agreed on by the governor and the Provincial House of Representatives – should be submitted to the Minister of Home Affairs for evaluation. In the case of a district, a draft district regulation is submitted to the governor. Draft regulations that the Minister of Home Affairs/governor accept can be promulgated as a definitive regional regulation on the regional annual budget.

Not only do the regional/local agencies implement policies, they also have the task to control the implementation of the policy they make. Internal control is carried out alongside external control by the district inspectorate. Like the function of the directorate of ministries (see Footnote 28), the main function of the district inspectorate is to monitor and evaluate the activities of the district, sub-district and village governments. In cases of corruption, the inspectorate is responsible for carrying out the investigation.[61]

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59 See Article 151 of the Law on Regional Autonomy of 2004.

60 At the national level, the National Planning Agency (*Badan Perencanaan dan Pembangunan Nasional* abbrev. *Bappenas*) uses the short-term working development plans of the ministries to make the central annual budget, which may end in a promulgation of a law on the central annual budget. See Article 21(2) of Law No. 25/2004.

61 See Article 7 of the Kutai Regulation No. 15/2008 concerning the organizational structure of the district inspectorate, office and technical unit.

4.5 Government institutions at play in the Mahakam Delta

The next five chapters (5-9) will frequently mention the following government institutions: regional technical implementation units of ministerial departments and of East Kalimantan's Provincial government, the bureaus of the office of the Kutai District Head, the agencies/bodies/offices of Kutai District government, and sub-district governments (Section 4.1).

The regional technical implementation unit of the Ministry of Forestry that will be most frequently mentioned is the Unit for Forest Area Establishment of Region IV (*Balai Pemantapan Kawasan Hutan*). The Ministry of Forestry established this technical implementation unit in 2001 under the Directorate General of Forestry Planning. Besides this regional technical implementation unit, there also used to be – until 2001 – the former Regional Office (Ind. *Kantor Wilayah*) of the Ministry of Agriculture/Forestry. Another regional technical implementation unit of a ministerial department is the Port Administration Office at Samarinda of the Ministry of Public Transportation, which falls under the Directorate General of Sea Transportation.

Apart from the above two regional technical units of two ministerial departments, another government institution that will also be frequently mentioned is a non-ministerial department called the Executive Agency for Upstream Oil and Gas Activities or Executive Agency of the Regions of Kalimantan and Sulawesi (*Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi).* The president appoints the head of the Executive Agency whereas the Minister of Energy and Mineral Resources appoints its vice-head. In some matters, particularly program planning and budgeting, the Executive Agency is under the supervision of the Minister of Energy and Mineral Resources. The Executive Agency was officially established in 2002 and to some extent it took over the tasks of Pertamina, a state-owned oil company.

The Provincial and District Offices of the National Land Agency will also appear frequently in the next five chapters.

There are two Provincial government's technical implementation units that will be frequently mentioned as well: the Technical Unit for Forest Planning at Samarinda (*Unit Pelaksana Teknis Daerah Planologi Samarinda*) and the Technical Unit for Forest Product Circulation (*Unit Pelaksana Teknis Daerah Peredaran Hasil Hutan).* The former used to be a regional technical implementation unit of the Ministry of Forestry called Unit for Inventarisation and Mapping (*Balai Inventarisasi dan Perpetaan Hutan*) whereas the latter used to be a district office of the Provincial Forestry Agency. Both units were established in 2001.

Of the Kutai District government, the secretariat office including the assistants of the Kutai District Head and three bureaus, two agencies and one body will often be mentioned in the next five chapters. The three bureaus are respectively the bureau for the administration of natural resources (*Bagian Administrasi Sumberdaya Alam*), the legal bureau (*Bagian Hukum*) and the bureau for land administration (*Bagian Administrasi Pertanahan*). The two agencies are

the Forestry Agency (*Dinas Kehutanan*) and the Fishery and Marine Affairs Agency (*Dinas Perikanan dan Kelautan*) whereas the body is the Environmental Agency (*Badan Lingkungan Hidup Daerah*). The two agencies have their own local officials, the local offices (*Cabang Dinas*) of Anggana and Muara Badak sub-districts respectively.

At the sub-district level, one can distinguish Anggana and Muara Badak sub-district offices of which the section on government (*Seksi Pemerintahan*) will be frequently mentioned. Below is a table of the frequently mentioned government institutions.

Table 4.1: Frequently mentioned government institutions

Name of institution	*Position*	*Office location*
Unit for Forest Area Establishment Region IV of the Ministry of Forestry	A regional technical implementation unit under the Directorate General of Forestry Planning	Samarinda
Unit for Inventory and Mapping of the Ministry of Forestry	Former regional technical implementation unit	Samarinda
Regional Office of the Ministry of Agriculture/Forestry	Former regional office	Samarinda
Forestry Agency of the Provincial government of East Kalimantan	Regional Office	Samarinda
Port Administration Office at Samarinda of the Ministry of Public Transportation	A regional technical implementation unit under the Directorate General of Sea Transportation	Samarinda
The Executive Agency for Upstream Oil and Gas Activities of the Regions of Kalimantan and Sulawesi	A Non-Ministerial Department, under the supervision of the Ministry of Energy and Mineral Resources	Balikpapan
Provincial and District Offices of the National Land Agency	Regional offices of the National Land Agency	Samarinda and Tenggarong
Technical Unit for Forest Planning at Samarinda	A provincial technical implementation unit	Samarinda
Technical Unit for Forest Product Circulation	A provincial technical implementation unit	Samarinda
Office of the Kutai District Head	Assisting division to the Kutai District Head	Tenggarong

Name of institution	*Position*	*Office location*
Bureau on the Administration of Natural Resources, Bureau on Land Administration, and Legal Bureau of Kutai District government	Assisting divisions to the Kutai District Head	Tenggarong
Forestry Agency of Kutai District government	Implementing division	Tenggarong
Fishery and Marine Affairs Agency of Kutai District government	Implementing division	Tenggarong
Environmental Agency of Kutai District government	Supporting division	Tenggarong
Local office at Anggana and Muara Badak of Kutai Fishery and Marine Affairs Agency		Sungai Meriam and Muara Badak Ulu
Local office at Muara Badak of Kutai Forestry Agency		Muara Badak Ulu
Sub-district office of Anggana and Muara Badak		Sungai Meriam and Batu-Batu

5 A forest area: the fate of the mangrove forest ecosystem

5.1 INTRODUCTION

In 2003 the Kutai District Head issued a circular letter (No.100/75/Pem A/IV, dated April 14th) concerning illegal conversion of mangrove into fish ponds and the use of an excavator (digging machine) in the Mahakam Delta. The circular letter targeted all people who live by and/or own a shrimp pond in the Delta, asking them to pay attention to as well as give support for the preservation of the mangrove forest of the Delta (see Section 2.2). For the sake of preservation, the Kutai District Head asked the target groups to no longer clear the mangrove forest or convert it into new ponds. In addition, he asked them not to operate illegal excavators anymore.

To back up his argument, the circular letter mentions Law 41/1999 on Forestry and 4/1982 on Environmental Management Law. The idea behind mentioning these laws is to inform the people that according to the two laws the conversion of the mangrove forest into shrimp ponds is prohibited. As the conversion is legally prohibited, the Kutai District Head ordered the concerned Kutai agencies, and particularly the Forestry Agency, to implement the provisions of these two laws.

The circular letter actually points to a more general dilemma which the Kutai District government was facing on how to exercise authority in the Delta. The sending of the letter constitutes the maximum effort that the Kutai District government could make in this dilemma. Some external factors had pushed the Kutai District government to issue the letter. Two of the push factors were research findings and land conflicts. The former contributed to the rise of environmental concern amongst the Kutai District government for the research data revealed severe deforestation as well as environmental degradation.

However, the Kutai District government's concern to pursue environmental preservation was limited, for they also had to take into account the interests of the shrimp farmers at the same time. They could not turn a blind eye to the fact that the conversion into ponds had provided thousands of people with an income. Furthermore, the Kutai District government was hesitant to carry out serious enforcement as it could trigger a political demand of the coastal inhabitants to establish a new separate district.

Not only was the Kutai District government influenced by these economic and political factors. The making and content of the letter was also influenced by the legal framework. Rather than enforcing the law, the letter only aimed

at preventing deforestation due to new conversions. The Kutai District government officials deliberately chose such aim because they regarded themselves unauthorized to carry out law enforcement in respect of an illegal occupation and utilization of the mangrove forest. They still believed that this authority was in the hands of the Ministry of Forestry and the Provincial Forestry Agency. Because of this perception, the Kutai District government officials could only carry out prevention and rehabilitation of the production forest of the Delta.

This chapter discusses the legal framework as well as the legal norms regulating the use of forest resources in the Delta, both from a normative and empirical perspective. From the normative perspective, this chapter mainly discusses the consistency and coherence existing within the legal framework and norms on the use of forest resources. In order to know why the content of the forest laws and regulations is coherent and consistent or not, this chapter examines the making of the laws and regulations. From the empirical perspective, the discussion deals with the following matters: (i) the extent to which the political and economic context have influenced the making of the so-called Agreed Forest Land Use Plan (hereafter Agreed Forest Plan); (ii) the extent to which the forestry legal norms on delineation and protection have been effectively implemented, and major factors that have influenced the implementation; and (iii) the actual interactions between the Provincial and District government officials and the shrimp farmers in implementing the forestry legal norms on delineation and protection.

With these questions as the underlying basis, the chapter will be organized into four sections. It begins with a section (5.2) which describes how legislation on the Agreed Forest Plan was made. This also discusses some main provisions of forestry legislation with a focus on legislation on forest delineation and forest protection. Focusing on forest delineation and forest protection, the next section (5.3) describes how formal forest rules have been implemented. It shows how a number of factors have influenced the implementation. The following section (5.4) concerns some of the legal problems which can be found within the formal forestry rules. How the local officials who are geographically and socially close to the regulated communities, adapted the formal rules to real life situations is described in the next section (5.5). Some concluding remarks end this chapter.

5.2 Law making and legislation: main laws and provisions

5.2.1 The Forest Designation as an epicentre of law making

The epicentre of law making concerning the use of forest resources of the Delta lies in a 1983 Forest Designation by the Minister of Agriculture. This is still the case despite the fact that the central government has devolved some affairs

of forest management upon the Kutai District government as of 1995. The designation which led to the enactment of the forestry laws and regulations, has made some subsequent policy initiatives as well as law-making that the Kutai District government had organized, static and uncertain. The following comment of an official of the Kutai District government shows how decisive the designation is:

> Almost all discussions about the Delta rest on the question of the legal status of the mangrove forest; there is however no solution to it.[1]

The designation has not only hampered subsequent policy initiatives and law making yet it has also raised tensions between the Kutai and the Provincial government which has led to an absence of forest protection in the rich oil and gas delta. Due to the decisiveness of the designation, it is therefore important to describe how it has been formed.

After independence, from 1959 onwards, the Minister of Agriculture granted some large and small forest concessions.[2] Yet, the Minister of Agriculture designated the Forest Area (Ind. *kawasan hutan*) of East Kalimantan in early 1983. The minister made the designation through a decree issuance.[3] The areas which were designated forest were written down in a document, the so-called Agreed Forest Plan. The designation is actually an implementation of the Forestry Law of 1967 and some consecutive forestry regulations. The law and regulations stipulated that the Ministry of Agriculture should use the designation as a means to determine particular areas as Forest Area. According to the law, in addition to fulfilling the ecological criteria, a Forest Area should be officially designated thus by the government. At the same time, the designation of the Forest Area implied the passage of state jurisdiction over the areas.

In general, the 1967 law and regulations stipulated that the Minister should base the designation on a plan for land use and on particular ecological indicators namely slope, soil type and rainfall. In addition, the laws and regulations stipulated that the designation should also take into account administrative borders and the interests of those people whose land would be expropriated because of it. Furthermore the law and regulations regulated that the Ministry of Agriculture should engage other related ministries to arrange the designation. How has the 1983 forest designation of East Kalimantan been prepared,

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1 Interview M, a head of section of Kutai Fishery Agency, 11-12/6/2008.

2 Before 1984 forestry affairs were handled by a directorate-general under the Ministry of Agriculture. In 1983, by an issuance of Presidential Decree No. 45/M 1983 concerning Kabinet Pembangunan IV a new Forestry Ministry was established. By that time, the Regional Office of the Ministry of Agriculture was changed into the Regional Office of the Ministry of Forestry. See also footnote 10.

3 No. 024/Kpts/Um/1/1983.

and to what extent has the preparation complied with the provisions of those earlier laws and regulations?

In the early 1980s the Provincial Office of the Ministry of Agriculture (POMA) commenced the making of Agreed Forest Plan of East Kalimantan. There are two main sources that the POMA used to compose the Agreed Forest Plan. The first source is a draft plan for land use of East Kalimantan. The draft document was actually the result from a survey, the so-called systematic survey on land use that the Provincial Office of the National Land Agency (PONLA) undertook during the late 1970s and the early 1980s. To make the document the PONLA itself relied on two sources of data. Firstly, a truthing check. Whilst carrying out the truthing check the agency officials also visited the Delta where they found some coconut plantations, settlement areas, and the few shrimp ponds which existed at that time. Secondly, a topographical map that the topographical agency of the Indonesian Army (Jawatan Topograpi Angkatan Darat) had previously released. The topographical map was a renewed version of the map that the Dutch government had made in 1941, 1942 and 1946 respectively. The earliest version of the Dutch map was actually a vegetation map of 1924 and 1926. The vegetation map resulted from an initial inventory and exploration. It basically indicated primary and secondary Forest Areas, as well as grasslands and agricultural land. In accordance with the 1924 map, 94% of Southeast Borneo residency (presently East, South and Central Kalimantan) was indicated as Forest Area (Potter 1988, p. 136-137; Peluso and Vandergeest 2001, p. 782; Obidzinski 2003, p. 43).[4]

The systematic survey that the PONLA undertook was actually aimed at examining the soil type. To provide comparable estimates, the survey had measured four ecological and physical indicators namely height, slope, hydrology, and rainfall. Though it took several years, the survey finally came up with a spatial division that generally divided East Kalimantan into a Forest Area and a Non-Forest Area with the Forest Area covering 80% (17, 116,000 ha) and the Non-Forest Area covering 20% (3,189,000 ha).[5]

The second source for the Agreed Forest Plan is the maps of forest concession areas. As already mentioned, prior to it, the Forestry Directorate General of the Ministry of Agriculture had granted numbers of forest concessions in the Province. Forest concessions were not only granted by the Forestry Directorate General but also by district heads and governors. In fact, hundreds of

4 Based on the 1924 map, later in the same year the Dutch government issued a forestry ordinance in which Forest Areas were divided into reserved and unclassified Areas. In the reserved Forest Areas, utilization was not allowed, while in the unclassified Forest Areas utilization was allowed once an official license either from the resident or sultans had been obtained (Potter 1988, p. 139).

5 The composition resembles the official data which appeared in a 1971 report of the Provincial government, which states that the Forest Area sized 17.3 million ha or 85% of the total size of the Province (Operation Room Kantor Gubernur Kepala Daerah Kaltim 1972, p. 77).

thousands or even a million hectares of the concession areas were held by timber companies, so it is not surprising that the entire area of East Kalimantan was completely divided into concession areas (Vargas 1985, p. 165).[6] Concerning preparatory process, because of the initial absence of the forest designation, forest concessions were mostly issued based on desk study.[7] According to a former head of the District Land Agency, the reason why the entire area of the Province became a Forest Area was because the desk study method relied on a map scaling of 1:1,000,000. On the basis of these dimensions the entire Province area likely appeared as forest, for it could only indicate the location of cities of sub-districts and municipalities.[8]

The second source which the Agreed Forest Plan drew from, the maps of the forest concessions, was apparently supported by a legal instrument, the decree of the Minister of Agriculture No. 291/Kpts/UM/5/1970. The decree determined that the forest concession areas automatically functioned as production forests (Sumardjani 2007, p.125-126). A subsequent ministerial decree appearing seven years later stipulated that the delineation of those timber areas was intended as a preparation for declaring them as definite Forest Areas.[9]

However, POMA did not resort to both sources equally and favoured the maps of the forest concessions. Later it turned out that this choice did not only affect the way the agency coordinated with other agencies, but also existing land use, and most importantly it impacted people living nearby or inside Forest Areas.

Despite the fact that the POMA had received the draft plan for the land use from the PONLA, it was not followed up by engagement with PONLA during the making of the Agreed Forest Plan. It is apparent that the officials of the POMA perceived that the submission of the draft of a plan of the land use was already a form of participation so that they felt it was no longer necessary to invite the PONLA at meetings that they organized. The POMA was also reluctant to engage the PONLA for there existed a contestation at that time between the two agencies. The drafting of the Agreed Forest Plan coincided with an initiative of the Directorate-General of Land of the Ministry of Home Affairs which drafted a law on land use planning, which also intended to

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6 The 121 small timber concessions (locally named *kapersil*) granted by district heads and governor sized 1,161,750 ha in total. Meanwhile for particular companies, the size of the areas that the Forestry Directorate-General granted (locally named *konsesi*) was extremely large: it could sometimes add up to a million ha. To name two of them, PT International Timber Corporation Indonesia (ITCI) held 601,100 ha, and PT. Kaya River Timber Products held 1,2 million ha (Operation room Kantor Gubernur Kepala Daerah Kalimantan Timur 1971, p. 78-83; Daroesman 1979, p. 47-48; Vargas 1985; Wood 1985; Poffenberger and McGean 1993, p. 11). See Section 3.2 for the previous accounts of the *kapersil* and *konsesi*.

7 For accounts of the process see Safitri, Bangun and Philipus (1999, p. 8).

8 Interview HI, a former Head of Kutai District Office of the National Land Agency, 26/6/2008, 19&31//8/2009, and 26/1/2010.

9 Decree of the Minister of Agriculture No. 54/Kpts/DJ/1/1975.

divide the Provincial area into forest and non-Forest Area.[10] Without sufficiently consulting the other provincial agencies on the draft of the Agreed Forest Plan, POMA submitted the draft to the Ministry of Agriculture in Jakarta (Jemadu 1996, p. 145-146). Due to this process, some of the regional and local officials cynically called the Agreed Forest Plan as a 'unaccepted' document.

Meanwhile due to considerable lack of human resources the making of the Agreed Forest Plan missed the truthing check. A figure of 1977 indicates this lack, saying that in East Kalimantan on average one forestry official was in charge of 314,000 ha of forest (Poffenberger 1997, p. 456 and 458). Therefore the officials did not check whether the condition of the field agreed with the three formal bio-physical criteria as stated in the ministerial decrees concerning delineation. As a result some forest classifications were not compatible with the real conditions. A 1990 report of the Regional Physical Planning Program for Transmigration (RePPProT) pointed out that the Agreed Forest Plan map was over-generalized, inaccurate, and that much land was misclassified which caused it to not reflect the real forest situation (RePPProt 1990, p. 40, 167 and 186).[11] This was likely related both to the absence of local consultation as well as truthing check (Potter in Goenner 1985, p. 30-31; Jemadu 1996, p. 145).

Based on the abovementioned two sources and processes the 1983 designation of the East Kalimantan Forest Areas eventually stated that East Kalimantan had 21,144,000 ha of Forest Area. The number is exactly the same as the size of the Province's area. The 1970 annual statistical report of the Province says that the terrestrial size of the Province was 21,144,000 ha. It comprised of Production Forest (17,292,000 ha), Conservation Forest (41,000 ha), Agricultural/Estate Land (136,400 ha), Fishery (2,664,245 ha) and 'Other' (760,245 ha). Although the size is alike, the 1983 designation significantly changed the composition of Protected Forest (5,612,460) and Production Forest (15,531,540).

10 After eleven years of being independent (1955-1965), in 1965 the Ministry of Agraria (Land Affairs) was downgraded to become a Directorate-General under the Ministry of Home Affairs. In 1988, the independent position returned when a Presidential Decree of 1988 endorsed the National Land Agency as a departmental ministry. This remains so until the present. See Badan Pertanahan Nasional (1998, p. 13-29) Meanwhile the Directorate-General of Forestry fell under the Ministry of Agriculture from the moment it was established in 1971 up to when it was set up as an independent ministry in 1984. See http://www.dephut.go.id/index.php?q=id/profil (accessed on 15/8/2011). See Chapter 4 for a more detailed account of the history of those two Directorate-Generals.

11 RePPProt was a project hosted by the Ministry of Transmigration and funded by the British government in the 1980s. Due to the unwillingness of the Ministry of Forestry to release production forest for transmigration, the project aimed at mapping real land use as well as vegetation in attempt to find suitable places for transmigrants. Having used more sophisticated satellite imaginary as well as carrying out truthing checks, the project found remarkable inaccuracies in the Agreed Forest Plan map. For instance, the project found that the forested areas of East Kalimantan covered 17,900,000 ha, leaving three millions ha for other land use such as wet-rice, tree crops, shifting cultivation as well as settlements. Later the drafting of Law No. 24 of 1992 on Spatial Use Management was carried out on the basis of the RePPProT maps (Potter 2005, p. 382-383 and 388).

At the same time, the designation declared 11, 246,351 ha of the former Kutai District as Forest Area. The designation also classified the entire land of the Delta as Production Forest. Thus it included the agricultural land and settlement areas that the surveys from the 1970s and 1980s had already discovered.

Some scholars, researchers and even the local bureaucrats questioned the classification and considered it in disagreement with the formal criteria. According to the general criteria of the 1981 decree of the Minister of Agriculture, Production Forests[12] should have been areas that were economically feasible and geographically accessible. Furthermore, the designation of production forest should not damage either the ecology or the environment.[13] The mangrove Forest Area of the Delta did not fulfil the criteria because it is dominated by approximately 60,000 ha of palm trees, which are not economically feasible (Deutriex in Kusumastanto 2001; Bourgeois et al 2001, Bapedalda and PKSPL IPB 2002, p. III-4, 29 and 31; Creocean in Sidik 2009). The difference between what the regulation wanted and the real ecological condition of the Delta led to the suspicion tha the classification was more determined by political-economic interests. The difference suggested that the classification was in favour of the oil and gas that has existed earlier in the region (Hidayati 2004, p. 115). An official of the Provincial Forestry Agency made a guess saying that

> The classification could be because the ministry has taken into account the earlier existence of the oil and gas extraction there. The idea was that its function as production forest would prevent the companies from encountering complicated formal procedures, something that they would have encountered if it was classified as protected or conservation forest.[14]

Yet it is likely that the inconsistency does not only originate from a gap between the formal criteria and the real ecological conditions, but within the regulations themselves. The Ministry of Agriculture did not classify the mangrove forest of the Delta as protection forest, for at that time and this is still the case at present, there are other provisions saying that protection forest must be hilly land that functions as a hydrological buffer for adjacent lower areas. Another provision that recalls this view is the decree of the Minister of Agriculture of 1980 concerning criteria and measures for the designation

12 Indonesian forestry laws, on the basis of function, divide forests into three main categories: conservation forests, protection forests, and production forests. In accordance with the Agreed Forest Land, the remaining areas which are not included in the three categories of forest are by default classified as conversion forests. See page 92 for a definition of conversion forest.

13 See attachment of the Decree of the Minister of Agriculture No. 683/Kpts/Um/8/1981.

14 Interview IF, a staff of the Technical Unit for Forest Planning Samarinda of the Provincial Forestry Agency, 22/4/2008.

of protected areas.[15] Therefore protected forests should chiefly function as catchment areas.

Yet if that was the reason why the mangrove forest of the Delta was not suitable as a protection forest, then it raises another question: why then was the Delta's mangrove forest not designated a conservation forest? It is obvious that in terms of ecology the Delta's mangrove forest preserves the life of sea biota, protects coasts from erosion thereby protecting any land use behind it. The question becomes relevant, not only because of its suitable ecological condition, but also because the Minister of Forestry has designated other mangrove forests in other places in East Kalimantan as conservation forest like in Pasir District. Of the 425,372 ha of state mangrove forest in this province, 79,322 ha is conservation forest. Only a small part of it, 567 ha, is designated as protection forest. The largest part is production forest sizing 347,472 ha (Balai Pengelolaan DAS Mahakam Berau 2006, p. II-2; Soetrisno 2007, p.12).

To answer the question why the mangrove forest of the Delta was not classified as conversion forest, the above view suggests consensus as its sole factor. At the time of the drafting of the Agreed Forest Plan, the Provincial Forestry Agency officials asked other agencies about suggestions for development projects in Forest Areas, such as agriculture, plantation, residence, government buildings, industry areas as well as fishery. As a response to the question the other agencies strongly suggested that the areas that would be allocated for conversion forest should not be situated away from the existing main roads, settlement areas and agricultural land.

Taking into account the suggestion of the other agencies, the Provincial Forestry Agency then plotted 5,192,380 ha for Conversion Forest in the Agreed Forest Plan.[16] Pursuant to the prevailing forestry regulations conversion production forest is production forest that can officially be used for non-forestry purposes such as transmigration and agriculture. Anybody or any government agency that wishes to use conversion forest should submit a proposal to the Minister of Agriculture, and later the Minister of Forestry. The proposal expects the minister to take the proposed areas out of the Forest Area. Due to its small population at the time, the mangrove forest of the Delta was not included in the 5,192,380 ha of conversion forest although nearly all its adjacent mainland was included.[17]

The fact that the 1983 designation stated that the entire province was Forest Area subsequently affected the prevailing land use. All residential areas in cities such as Balikpapan, Samarinda and Tenggarong were inevitably included

15 Decree No. 837/Kpts/Um/11/1980 which was later reasserted in Presidential Decree No. 32/1990 concerning the Management of Protected Zones.

16 Nationwide the size of the conversion forest reached 30 millions ha which the Minister of Forestry designated in mid 1980s (Fay, Sirait and Kusworo n.d, p. 8).

17 Interview S and S, lecturers at the Forestry Faculty of Mulawarman University, 11/8/2009.

in the Forest Areas. This situation is actually a mere continuation of affairs, as those parts had been included in the areas of timber companies at an earlier stage (Gunawan et al 1999, p. 17). For example, some parts of the Tenggarong city used to be included in the concession area of PT International Timber Corporation Indonesia (ITCI).[18]

The above descriptions of the drafting process of the Agreed Forest Plan show that this Plan was not in accordance with the law due to a lack of resources, administrative competition as well as the inconsistency amongst the legal rules. Due to its contestation with the PONLA, the POMA missed a good opportunity to learn more about the draft of land use planning. Most importantly, through the absence of the truthing check, the drafting process did not take into account the local realities and interests of the inhabitants of the Delta who had lived there for more than a century. Those processes were subsequently reiterated in many parts during the making of the 2001 integrated map that the Ministry of Forestry had commissioned.

In 1999, about the same time as the commencement of the 1999 decentralization, under coordination of the Provincial Office of Ministry of Forestry (POMF) and technically assisted by a regional technical implementation unit of the Ministry of Forestry the so-called Unit for Inventory and Mapping (Ind. *Balai Inventarisasi dan Perpetaan Hutan*, abbrev. UIM), the Ministry of Forestry started the revision of the 1983 Agreed Forest Plan. Across Indonesia the revision of the Agreed Forest Plan was meant to harmonize it with Provincial Spatial Plan (PSP).[19] There are two reasons on the grounds of which the Ministry of Forestry argued why the revision was needed. Firstly, the ministry supposed that PSPs had not yet taken into account the interests of the ministry. One instance of such interest is that the ministry wished for estate crops to be grown in conversion forest only, not in production forest. Secondly, the making of the state's designation over the Forest Area had to be improved to become more participatory through more involvement from stakeholders (Safitri, Bangun and Philipus 1999, p. 17).

In East Kalimantan the difference appeared after the Provincial government endorsed a PSP in 1993. Yet soon the officials realized that the PSP was not harmonized with the 1983 Agreed Forest Plan. One issue that led to incompatibility is that the PSP used the term 'non-Forest Area', which the Agreed Forest Plan did not. The Ministry of Forestry contested the term arguing that the term implied that non-Forest Areas had to be excluded from Forest Areas. In response to the contestation, the Provincial government therefore revised the PSP in 1999 to harmonize it with the Agreed Forest Plan. Both the Provincial government and the Ministry of Forestry agreed on the use of a similar term

18 ITCI is a joint venture between Weyerhauser, an American based forest company, and P.T. Tri Usaha Bhakti, an Indonesian holding company controlled by seventy-five generals of the Indonesian army (Vargas 1985, p. 143; Wood 1985, p. 76).

19 For an account of the spatial use planning see Chapter 9.

to indicate Forest and non-Forest Areas, with *Kawasan Budidaya Kehutanan* (KBK) for Forest Area and *Kawasan Budidaya Non-Kehutanan* (KBNK) for non-Forest Area. The agreement upon the term implied that the Province's area was no longer entirely regarded as Forest Area because 5,184,771 ha had been excluded from the Forest Area.

Given that the 1999 PSP was made compatible with the 1983 Agreed Forest Plan, the Agreed Forest Plan revision was supposed to be much easier. It only needed to affirm what had been stipulated in the 1999 PSP. Nevertheless according to the prevailing regulations the revision involved consultations with other concerned agencies as well as a truthing check. Yet, the revision apparently missed both the consultation and the truthing check. The field officials of the Kutai agency or the officials of the Sub-District Government were not consulted. Moreover, they did not even hear of officials of the POMF or UIM undertaking a truthing check. The villagers suggested the same. This happened despite the fact that the mangrove conversion into ponds was expanding at the time the revision was taking place. The lack of consultation rendered one of the revision's objectives, namely widely engaging stakeholders, futile.

Given the lack of consultation and truthing checks, it seems that the revision of the Agreed Forest Plan was solely aimed at reconfirming the existing division of Forest and non-Forest Areas as of the 1999 PSP. After three years the revision of the Agreed Forest Plan was eventually accomplished and the Minister of Forestry officially designated it through a decree of 2001.[20] The decree designated 14,651,000 ha as the new figure of Forest Area without mentioning a figure for non-Forest Area. The Ministry of Forestry just revealed the figure for non-Forest Area in its correspondence with the Provincial government in 2007, saying that its figure is 6,492,447 ha. Parts are situated in the Mahakam Delta. They spread across the Delta in five plots. They are respectively located in Letung Island, Lerong Island, Tanjung Aju Island, Terantang Island, and Parangatan Island (for an account of the reasons why the five locations were excluded from the Forest Area, see Chapter 9). Indeed, the five plots are the places of which the survey of the PONLA discovered in the 1970s and 1980, and which was rediscovered by the RePPProt in the second half of the 1980s, that they were used for settlement, coconut plantations and a few fish ponds.

However, even though the decree is regarded as an effort to harmonize the Agreed Forest Plan and PSP, in reality this is not the case. In fact, the decree shows some differences instead. Firstly, instead of using KBK and KBNK, which the PSP uses, it uses other terms, notably Forest Area and area for other purposes (Ind. *Area Penggunaan Lain* abbrev. APL). The former is equivalent to

20 No. 79/Kpts-II/2001 concerning the Designation of Forest and Water Area of East Kalimantan.

KBK, while the latter is to KBNK. Secondly, the size of the KBNK or area for other purposes is not as large as in the PSP; it is 21.535 ha smaller.

5.2.2 Forest tenure rights: some main provisions

As has already been mentioned, the 1983 designation subsequently enabled the state to extend its jurisdiction over the designated Forest Area. The jurisdiction, in turn, allows the state to enforce the forestry laws and regulations upon the areas. The latter stipulate how and by whom the forest land as well as forest resources therein can be legally used (Vandergeest and Peluso 1995, p. 387; Kumar and Choudary 2006). The designation finds its legal basis in forestry legislation based on Forestry Law No. 5/1967 which was superseded by Law No. 41 of 1999 as well as in their respective organic regulations. This section describes three main provisions of the forestry laws and regulations namely delineation, use and utilization, and forest protection.

Delineation[21]

In accordance with forestry laws and regulations, especially Government Regulation No. 33 of 1970 concerning forestry planning, the Minister of Forestry should delineate all designated Forest Areas after the designation has come into effect. The delineation was supposed to be followed by mapping and endorsement. The reason why delineation needs to be carried out soon after the designation is that it would confirm the legal status of the designated Forest Areas by making forest borders as well as size visible. Not only the boundaries and size would become visible but the designation would also safeguard the Forest Areas against any rights claims of private parties.

The laws and regulations determine that the delineation should be carried out by a committee, the so-called Committee on Forest Boundary Delineation (*Panitia Tata Batas*). There are two main differences between regulations which were promulgated before and after 2001; they concern the official who may form the committee and the members of the committee. Prior to 2001, the Minister of Forestry was authorized to form the committee. The minister may delegate the authority to governors.[22] Strongly influenced by the authoritarian government, the members of the committee before 2001 consisted entirely of government officials. These officials came from district agencies, including

21 Here delineation is used to cover two terms namely delineation (*penataan batas*) and mapping (*pemetaan*) of Forest Areas. Delineation and mapping are two of four steps of determining a Forest Area. The other two steps are, at the start, designation (*penunjukan*), and, at the end, endorsement (*penetapan*). See Article 15 and its Elucidation of Law No. 41/1999.

22 See in the Decree of Minister of Forestry No. 400/Kpts-II/1990 Article 2(1 and 2) as amended by decree No. 635/Kpts-II/1996.

Sub-District Governments, and the regional units of the Ministry of Forestry. A district head or mayor chaired the committee. Later, following the decentralization policy, the authority was handed over to district heads.[23] A significant change to the composition of committee members occurred when village heads as well as community/*adat* leaders were included in the committee. The other significant change after 2001 is that the law does not determine anymore which government unit shall prepare funds for delineation. Before 2001, the fund primarily came from the Ministry of Forestry.[24]

In order to realize the delineation, the committee is expected to install provisional boundary markers to mark the borders of the Forest Areas. In case they find private land rights along the delineated border or inside the Forest Areas, they are asked to make an inventory of the land rights and settle any arising claim. Only after the borders have been marked and the land rights have been inventoried and settled, the committee can yield two documents namely the so-called official report of gazettement and a map of the delineated Forest Area. All the members of the committee, including district heads and mayors have to sign those two documents unless they disagree. The delineation process comes to an end when district heads or mayors have officially submitted the two documents to the Ministry of Forestry. Endorsement by the Minister of Forestry of the two documents is the next step. This is the last link in the chain of the determining of a Forest Area (see footnote 21 for an account of the chain). The endorsement consequently gives a definite legal status to the Forest Area as state-owned Forest Area.

Concerning the definite legal status of a Forest Area it is important to underline that recently different interpretations have developed on when this status is achieved. Researchers and NGO activists have developed the interpretation that the status of Forest Area will be achieved only if all four necessary steps are followed, from designation through to endorsement. By referring to Forestry Law 1999, they understand the measures as cumulative in nature. Fay and Sirait (1999; 2005, p. 8) point out that the definite status will be reached only if there is no longer any private land in the Forest Area.[25] A similar interpretation was developed in the case of Darianus Lungguk Sitorus (DL Sitorus) who was charged by the public prosecutor of illegal occupation and use of roughly 80,000 ha production forest situated in South Tapanuli District, North Sumatera. One argument the defendant raised in the course of the court sessions was that the land, which he occupied, was not official forest land, as the Ministry of Forestry had not yet completed all the four steps.

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23 See the Decree of the Minister of Forestry No. 32/Kpts-II/2001 Article 8a, and Government Regulation No. 44 of 2004 Article 20(2) concerning Forestry Planning.

24 Article 6 of the Decree of the Minister of Forestry No. 400/Kpts-II/1990.

25 Following that interpretation, Fay and Sirait (2005, p.10) eventually come up with the figure that in 2003 the definite state Forest Area adds up to only 12 millions ha (10%) while the remaining 108 millions ha (90%) is non-state forest land, upon which the Ministry of Forestry has not yet accomplished all necessary measures.

In its cassation verdict, Supreme Court judges were in favour of the argument presented by public prosecutor, as they viewed the disputed area as forest land. They argued that the land had been officially designated forest land, even though the Ministry of Forestry had not yet taken all necessary steps.[26] In 2009 the Minister of Forestry issued a regulation reasserting that it was no longer necessary that the measures were cumulative in nature, instead this would be optional.[27] The Ministry of Forestry has actually put the opinion in their official administrative document when the Minister of Forestry sent a letter to the National Police Headquarter explaining that the steps are optional.[28]

Yet, a very recent decision of Indonesian Constitutional Court in 2012 favoured the notion which suggests that the four steps need to be cumulative.[29] In this case, five district heads from Central Kalimantan province[30] and a resident of Palangkaraya municipality filed a case requesting the Constitutional Court to determine that Article 1(3) of Forestry Law 41/1999 is against the Constitution. In general, the Article 1(3) of the Forestry Law states that the four steps of determining a Forest Area are not cumulative, but optional. The five district heads argued that the implementation of the article has made it very difficult for them to carry out their authority, notably providing public services since their respective administrative areas were partly or wholly included in Forest Areas.[31] In accordance with formal forestry rules on forest use (*penggunaan kawasan*) as described below (page 99-100) whenever the government of the districts use the Forest Land, they are required to hold a forest use permit given by the Minister of Forestry. The district heads added to their argument that the implementation might cause human rights violations to residents who have their land and housing inside the Forest Areas because the Ministry of Forestry could take away their property anytime.

Meanwhile, the resident argued that the implementation of the article has made it difficult for him to get land certificates.[32] The District Office of the National Land Agency refused his application for land certificates saying that the land he proposed was situated in a Forest Area which falls under the

26 Verdict No. 2642 K/Pid/2006.

27 Regulation No. P. 50/Menhut-II/2009 concerning the Reassertion of the Status and Function of State Forest. Article 2 (1).

28 See a letter of the Minister of Forestry No. S.426/Menhut-VII/2006.

29 See verdict No. 45/PUU-IX/2011.

30 They are respectively the district heads of Kapuas, Gunung Mas, Katingan, Barito Timur ans Sukamara.

31 For instance, in accordance with a decree of the Minister of Agriculture of 1982 concerning the Agreed Forest Land Use of Central Kalimantan province, the administrative area of Kapuas district was wholly included in a Forest Area sizing 1.499.900 ha. Like Riau and Riau Island provinces, Central Kalimantan Province does not have a map which synchronizes the Agreed Forest Land Use and Spatial Plan like East Kalimantan has had as of 2001.

32 He had applied for land certificates for two plots of land sized 200m² and 619m². For the application he submitted land letters as land ownership evidence.

authority of the Ministry of Forestry. In addition, the requesters (*pemohon*) argued that Article 1(3) of the Forestry Law 41/1999 is inconsistent with Article 15(1) of the Forestry Law which determines that the four steps are cumulative.

In their decision, the judges of the Constitutional Court argued that the steps should be cumulative, as optionality could lead to an abuse of power in the determination of Forest Areas. If the determination or establishment of Forest Area lacks the last step (endorsement) then it may violate human rights of the people concerned, given the designation step does not require prior consultation with these people. In addition, the decision suggests that the inconsistency between Article 1(3) and 15 of Forestry Law 41/1999 has generated legal uncertainty damaging the constitutional rights of the requestors to get legal protection, legal certainty and equality before the law.[33] On the basis of that argument, the Constitutional Court conclusively determined that Article 1(3) of the Forestry Law is against the Constitution and therefore is not legally binding. Thus, one may say that the Supreme Court and Constitutional Court recently have had different legal interpretations of the required steps of forest area determination.

Use and Utilization[34]

Regarding the question who are allowed to utilize the forest, the two forestry laws and their subsequent organic regulations emphasize that priority should be given to the government namely the Ministry of Forestry, provincial and district government. This, however, does not mean that private parties are fully excluded from using the forest and resources therein. The forestry laws and regulations stipulate that the government can engage private parties in the utilization through two instruments. Firstly, by a joint cooperation with particular private parties, and secondly, by granting rights or permits to the particular private parties.

Yet in respect of the priority that the law and regulations determine, the government should at first carry out the utilization on its own at first, unless it considers itself incapable. Meanwhile, the fact that the engagement of private parties must necessarily go through the government's authority i.e. through a contract or permit, implies state control over all Forest Areas. The forestry regulations further regulate which private parties can be invited for a joint cooperation or awarded the rights or permits. The laws stipulate that only Indonesian citizens and Indonesian-owned companies are entitled to these privileges.

33 See Article 28D (1) of the Constitution.

34 'Use' is the direct translation from the word *memakai* in Bahasa. It means to use forest land for non- forest purposes. 'Utilize' is the direct translation from the word *memanfaatkan* in Bahasa. It means to extract forest products.

The Minister of Forestry, governor or district head are officials who are authorized to grant the rights or permit of forest utilization and collection to a particular private party. Over time the person of authority changed repeatedly according to whether the government structure was centralized or decentralized. In early 1999, before Law No. 22/1999 concerning decentralization was enacted, the central government granted authority to the governor or district head to issue permits or rights on utilization and collection. The governor could grant forest concessions applicable to an area smaller than 10,000 ha. District heads could grant rights to collect timber forest products for one year long and maximum 100 ha in size.[35]

In response to the developments of national legislations, the Kutai District government passed several district regulations (*peraturan daerah kabupaten*) with further details mainly repeating what was stated in the national legislation. The regulations state that the Kutai District Head is authorized to issue rights to either an individual, group, community or cooperative. Each permit cannot exceed 100 ha and is valid for only one year.[36]

Yet, due to the serious social and ecological impact of the grand-scale issuing of the IPPHK,[37] the Minister of Forestry withdrew the district head's authority in 2002.[38] Recently the Minister of Forestry is the only official who can issue a forest concession as well as a license to collect forest products, leaving only the issuance of rights to collect non-timber forest products to the district head.

The laws and regulations do not only regulate forest utilization and collection, but also how to use Forest Area for non-forestry purposes. In principle, the laws and regulations prohibit any non-forestry use in the Forest Areas because this could potentially change their natural functions. Nevertheless, the prohibition does not apply to all forms of non-forest use, as some have strategic goals. For this purpose, the regulations have set up a fixed list of allowed forms of non-forestry use. The list, for example, includes mining, but excludes aquaculture such as shrimp farming.[39] The exclusion of aquaculture from the list likely resembles a 1984 joint ministrial decree that

35 Those provisions were mentioned in Government Regulation No. 6/1999 and the Decree of the Minister of Forestry No. 0.51/Kpts-II/2000.

36 For a detailed account of the provisions, see Kutai Kartanegara District Regulation No. 15/2001 on the Collection of Timber Forest Products.

37 See Section 3.3 on IPPK.

38 See the Decree of the Minister of Forestry No. 541/Kpts-II/2002.

39 Apart from mining other instances of allowed non-forestry use are religion, installation of renewable energy plants, electricity, television and radio transmitters, the building of railways, highways and public roads, defence, as well as the construction of provisional settlements for the victims of a disaster. The above provision can be found in Government Regulation No. 24 of 2010 and the Regulation of the Minister of Forestry No. P.14/Menhut-II/2006 concerning Forest Use Permit, Article 4 (1 and 2).

prohibits aquaculture in production forest.[40] The decree specifically prohibits aquaculture development in production forest and in small islands sizing less than 10 km².[41]

Regarding the question who may hold a forest use permit (*izin pinjam pakai*) to use the Forest Areas for non-forestry activities, the laws and regulations mention a minister, governor, regent, mayor or company. However, the Minister of Forestry is the only official that is authorized to grant the forest use permit. To be able to get the permit from the minister, applicants should pass several procedures as well as obtain some required documents. A primary requirement is that the applicants provide a type of compensation to the ministry. According to the laws and regulation, they may choose between two kinds of compensation, either providing a Forest Area in exchange, situated in another location, or paying tax or rehabilitating watershed areas.

Besides determining which officials are authorized as well as to which parties a forest use permit may be granted, the laws and regulations determine too how the permit holders should exercise their rights over the granted forest areas. Prior to the provisions on how the rights could be exercised, the laws and regulations stipulate the type of rights that permit holders can exercise. Once the permit has been granted, the permit-owner is allowed to cut trees inside the Forest Areas in addition to exercising his/her own non forest use rights. The laws and regulations do not only regulate rights, they also describe some obligations for the permit holder, so that they fulfil their duties. The obligations stipulate that a sum of money must be paid for every tree which is cut as well as that the area must be delineated, rehabilitated and protected.

As said any utilization, collection and use of the forest is only possible through a right or permit issued by either the Minister of Forestry, governor or district head. The necessity to have a right or permit extends to any occupation of the Forest Area as well as to any device that could be used to cut trees.[42] This raises an important question: what would happen, if utilization, collection, use or entrance of the Forest Area would be undertaken without a right or permit? The answer to this question will bring us to another important part of the forestry laws and regulations; that is the provisions concerning the goals of forest protection.

Forest protection

Forest protection has two goals. The first is to prevent and eliminate the depletion of the forest, Forest Areas and forest products by human activities,

40 The Decree is No. KB 550/246/Kpts/4/1984 jointly signed by the Minister of Agriculture and Minister of Forestry.

41 Nevertheless, the decree still allows aquaculture development in conversion forest.

42 See Government Regulation No. 28/1985 Article 6(1), Forestry Law No. 41/1999 No. 50 (3) and Government Regulation No. 45/2004 Article 14 (1).

natural disaster, fire, and disease. Second is to secure the rights of state and private property over the Forest Areas as well as to forest products harvested from the Forest Areas.

Concerning the question who should protect the forest, this can be answered on several levels. First, we could back to the previous clause prescribing that all right or permit holders are obliged to protect their respective area. In addition, common people especially those who live inside and nearby the Forest Area are also obliged to care for the forest's protection. This provision comes from the argument that the forest affects the livelihood of many peoples.[43] Government at every level is another party of which the laws and regulations expect that they look after the protection beside the permit holders. However, it is important to outline that there is a shift regarding the government role in forest protection. Under the Forestry Law of 1967 and government regulation of 1985 on forest protection, government was still expected to take part in forest protection of the granted Forest Areas despite the fact that the duty of protection also was imposed on the permit holders. Yet under the Forestry Law of 1999 and government regulation of 2004 on forest protection, the responsibility seems to be mostly handed over to the permit holders.[44] With this shift the government only needs to complement the permit holders by supervision and monitoring.

In the same way as the authority to grant a right or permit, the tasks and obligations to undertake forest protection have also been influenced by the government structure. Before 1998 the assignment to undertake forest protection rested with the provincial and district forestry agencies as well as any forestry units of the Ministry of Forestry which were situated in the province.[45] This division of tasks remained unchanged even when the central government ran a pilot project for decentralization in 1995 when Kutai Kartanegara was selected together with 25 other districts. The relevant Government Regulation No. 19 of 1995 did not include forest protection as an affair that should be devolved to the selected districts. This exclusion is not surprising given the Government Regulation of 1995 had copied the provision of a decree of Minister of Forestry, which excluded forest protection from the list of devolved forestry affairs to district government.[46]

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43 See Article 15 (3) and its elucidation of Law No. 5/1967, and Article 10 (2) Government Regulation No. 28/1985.

44 Government Regulation No. 45 of 2004 on Forest Protection clearly shows the shift as can be seen in Article 8, 9 and 10.

45 For details of the provision, see Government Regulation No. 64 of 1957 Article 14, and Government Regulation No. 28 of 1985 Article 15 (1).

46 See No. 86/KPTS/II/1994. Following the decree the forestry transferred duties concerning rehabilitation, water and soil conservation, natural silk, honey resources, the management of private forest, as well as developing communities' skills on forestry. The decree was later upheld by a Minister of Forestry and Home Affairs joint decree No. 230/Kpts-II/94 and No. 52 of 1994. See Muttaqien and Prabowo (n.d, p. 4-5).

As of 1998 forest protection became an absolute responsibility of the Kutai District government. It is Government Regulation No. 62 of 1998 on Devolving Specific Tasks to the Regional Government that changed the 41 years of regulation, by stipulating that forest protection is devolved to the district level.[47] Thus, under the present regulatory framework the district carries the primary responsibility for forest protection even though particular parts of the task also rest with the central government and provincial government.[48]

In response to the national legislation on devolving authorities and strongly influenced by the decentralization euphoria of those days, the Kutai District government had promulgated a regulation concerning the Kutai's District government authorities which was very ambitious in terms of its content.[49] Not only did it reassert the forest protection as one of Kutai's authorities, the regulation moved all forest affairs under the authority of the Kutai District government. Concerning forest protection, this regulation clearly states that the Kutai District government is responsible for protecting as well as safeguarding the entire Forest Area situated in the Kutai's area.

Despite the fact that the 1999 forestry law and regulations has shifted responsibility of forest protection from the government to permit holders, the government continues to carry out some actions in relation to forest protection. They are required to organize some activities such as disseminating forestry legislation, developing collaboration with permit holders, generating alternative sources of income for forest communities, taking preliminary action to any potential destruction of Forest Area, and enforcing law upon those who trespass the law. In relation to the latter, forest rangers and civil servants who are authorized to carry out investigation over a legal case (in Ind. *Pegawai Penyidik Negeri Sipil*, abbrev. PPNS) of the forestry agency are authorized to undertake surveillance as well as criminal investigation.

Not only do the forest rangers and PPNS have the authority to examine people who do not have a permit for the utilization, collection, use and access of the forest, they can also examine all people who move away, break, make disappear or cut any boundary markers of designated Forest Areas as has often happened in the Delta. Punishment for any violation of those provisions varies and changes over time. Government Regulation 28/ 1985 on Forest Protection stipulates a maximum of ten years in jail or a fine of up to IDR 100 million for any illegal forest occupation. Besides repeating what the old forestry legislations stated, the Forestry Law 41/1999 and Government Regulation 45/

47 See Article 5i.

48 The central government is responsible for protecting Forest Areas which are located across provinces, whereas provincial governments are in charge of Forest Areas which are located across districts/municipalities. See Government Regulation No. 25 of 2000 concerning the central and regional government's authorities. Government Regulation No. 38/2007 which superseded the Government Regulation No. 25/2000 hardly made any changes to the provision.

49 No. 27/2000 concerning the authority of Kutai as has been superseded by No. 11 of 2008.

2004 on Forest Protection which superseded Government Regulation 28/1985, introduce new sanctions as well. They penalise any action of moving away, making disappear, pulling out, breaking or cutting the boundary markers with a maximum of ten years in jail or 10 billion IDR. Similarly there is a sanction for the cutting of any forest tree located in a green belt. Interestingly the regulations contain the same sanctions for illegal mining exploration and exploitation, run without a permit, taking place within a Forest Area.

5.3 IMPLEMENTATION OF LAW BY REGIONAL AND LOCAL OFFICIALS

This section describes the extent to which regional and local officials implemented the main provisions of the forestry laws and regulations as discussed above. Because neither the Minister of Forestry, nor governor or district head has ever granted any rights or permits to state-owned companies or private parties to use or utilize the Delta's production forest, this book regards the implementation of law in the light of the goals of forest delineation and protection.

Besides looking at the implementation of law (see Section .1.3.1 on the difference between implementation of law and the regulatory implementation of law), this section also examines the 'regulatory implementation' by looking at the extent to which those organic regulations of forestry legislations are internally consistent (or not) with the main provisions as stipulated in the higher legislation notably laws and government regulations (see Section 4.4 on the accounts of regulatory implementation). To what extent have the officials complied with those main provisions in carrying out the implementation? It is important to note that even though regional and local officials are the focus of this book yet it also discusses the officials of the Forestry Ministry based in the province.

5.3.1 Forest delineation

As already mentioned, the Ministry of Forestry, prior to 1983 the Ministry of Agriculture, should have delineated the production forest of the Delta in order to bring a certain legal status to the designated Forest Area. Beyond the normative necessity, for political purposes demarcation would facilitate state territorial control and facilitate state property claims; and would enable the implementation of ground patrols and legal enforcement (Vandergeest and Peluso 1995; Peluso and Vandergeest 2001; McCharthy 2006). An official report which discusses 'agreed forest use' in East Kalimantan (the 1987 Regional Physical Planning Programme for Transmigration Report) suggests that all boundaries which aim to restrict entry or use of land must be clearly

demarcated in the field (RePPProt 1990, p. 47 and 167; Potter in Hardjono 1991, p. 201).

Yet in the Delta the real implementation of law regarding the delineation has been far from what the legal texts desire. The delineation or demarcation of the production forest only began in the year 2000, seventeen years after the designation and would take five years. Demarcation of the production forest became a focus after the 1999 decentralization. A technical implementation unit of the Provincial Forestry Agency the so-called Technical Unit for Forest Planning of the Provincial Government (Ind. *Unit Pelaksana Teknis Daerah Planologi Samarinda,* hereafter TUFPS) carried out the demarcation. Prior to decentralization, demarcation had been the duty of a regional technical implementation unit of the Ministry of Forestry namely UIM but this unit was transferred to the Provincial government in 2001 without having commenced very much demarcation of the Delta's production forest.

In spite of the fact that the District Regulation of 2000 states that the Kutai District government is responsible for carrying out the delineation of production and protection forest, and the decree of the Minister of Forestry of 2001 that states that district heads are in charge of forming so-called committees on forest boundary delineation, the delineation of the Delta's production forest was actually not organized by the Kutai District government. It was the forestry service unit of East Kalimantan Province that organized the delineation.[50] As the Kutai District government did not organize the delineation, it consequently did not share its budget for this purpose. However some prominent officials of the Kutai District government[51] eventually signed the map of demarcated Forest Areas, despite the fact that they had not organized the delineation and they initially had objected to its results, for they regarded it against the Kutai District's policies.[52]

The TUFPS which organized the delineation was originally a regional technical implementation unit of the Ministry of Forestry, named the so-called sub UIM. Together with two other sub UIMs, Balikpapan and Tarakan, they all fell under higher UIM Region IV which was based in Banjarmasin, South

50 The fact that delineation was not conducted by Kutai District government indicates that Kutai District did not implement the new decree of the Minister of Forestry of 2001 on the Committee on Forest Boundary Delineation, but still implemented the pre-decentralization decree, the Governor's Decree No. 492/1991 concerning the forming of a Forest Boundary Committee in East Kalimantan province. That means the present committee is still formed by the governor. Interview AN, interim Head of the Technical Unit for Forest Planning Samarinda of the Provincial Forestry Agency, 2 and 5/12/2011.

51 They are the District secretary, head of the forestry agency, head of the land agency, and head of a sub-district.

52 See Dinas Kehutanan UPTD Planologi Kehutanan (2005, p.15).

Kalimantan.[53] In 2001, as part of the 1999 decentralization process, the three sub UIMs were transferred to the Provincial government and later came under management of the Provincial Forestry Agency. According to a decree of the governor of East Kalimantan of 2001 the TUFPS is responsible for carrying out inventarization and delineation.[54] The TUFPS covers an area about 6,041,000 ha spread out across five districts. Of this total, 1,887,000 ha are located in Kutai Kartanegara District.

Since the year it was established the TUFPS speeded up the delineation of its work area. As a result in 2005 it had delineated 83% of its entire work area with some areas already marked during previous delineations which had been started in 1985. Of the total of 81,180.80 ha, the production forest of the Delta constitutes 93,86% of the entire size of the Delta area. The delineation of the production forest of the Delta commenced only in 2001 due to priority given to other Forest Areas on the mainland and the upper Mahakam River, where there were numerous forest concessions and small settlements which were perceived to be a threat to the forest concessions.[55] This policy of prioritisation is apparently in line with what Government Regulation No. 33/1970 on Forest Planning vividly stipulates, namely that delineation of concessionary areas should be advanced in an effort to enable forest extraction activities.[56]

In the early days the TUFPS wanted to run the delineation alone yet soon they realised that it was hardly possible for the Provincial government to do so: the Provincial Planning Agency (*Bappeda*) as well as the Regional House of Representatives consistently rejected their proposals for funding from the Provincial Annual Budget. There appear to be three reasons for these rejections: (1) budgets for forest demarcations were usually provided by the Ministry of Forestry rather than the Provincial government; (2) in the past, the Provincial Forestry Agency unit had actually declined a budget offered by the Provincial government, which was regarded as an indicator that the budget of the unit was adequate; and (3) at the time of the requests, the Provincial government was prioritizing funding towards a national sporting competition, which East Kalimantan was hosting in 2008.

Moreover the TUFPS was facing competition for funding from another division of the Provincial Forestry Agency, which also dealt with demarcation issues and tended to be given preferential treatment. Due to the historical

53 The UIM IV itself was established in 1984 through a decree of the Minister of Forestry No. 093/Kpts-II/1984. Prior to the forestry department reestablishment, the forestry planning units were named *Brigade Planologi Kehutanan IV* (1966-1978) and *Badan Planologi Kehutanan* III (1978-1983). See http://bpkh4samarinda.net/index.php?option=com_content&view=article&id=8&Itemid=3 (accessed on 20 April 2011).

54 No. 16 of 2001 on the Forming of Organizational Structure of the Provincial Technical Units. This decree was later superseded by decree No. 03/2005.

55 Interview KK, a Head of the technical implementation unit of the Provincial Forestry Agency on Forest Fire Prevention, 5/5/2008.

56 General Elucidation of Government Regulation No. 33/1970.

background of originally being a unit of the central government, and their distance from the centre of the decision making of the agency they had trouble competing with the other division. As a result the Provincial government merely supported them with regular operational budgets, which included a limited budget for undertaking an inventory of forest resources.[57]

In an attempt to resolve its budget constraints, the TUFPS eventually submitted the budget proposal to the Ministry of Forestry. The proposal was approved on the condition that demarcation would be carried out in collaboration with a regional technical implementation unit of the Ministry of Forestry the so-called Unit for Forest Area Establishment (Ind. *Balai Pemantapan Kawasan Hutan*, hereafter UFAE). The collaboration was possible at that time because the UFAE is responsible for the delineation of conservation forests.[58] However, according to a senior officer of the TUFPS, this requirement meant in practice that they were subordinate to the UFAE.[59] Recently, due to the passing of a government regulation in 2007 the TUFPS was no longer able to access the budget from the ministry, because control over delineation was now fully returned to the ministry.[60]

Having arranged the delineation in that way the TUFPS coordinated poorly with the Kutai district agencies, particularly the district forestry agency. Some district officials said that they were never invited to engage in discussions on the delineation of the production forest of the Delta that the TUFPS had organized. The officials of the local office of the Kutai Forestry Agency raised the same concern. Two Muara Badak-based forestry officials said:

> We had neither coordinated with nor met in the field any staff of either TUFPS or UFAE.[61]

In addition, they claim to have never seen any notice board which was installed by the provincial forestry officials as an indicator that they really undertook the delineation. An interim head of TUFPS contested these observations arguing that they always organized a village meeting of five or ten participants every time they delineated an island. They invited the village and sub-district officials to those meetings. He added that they did not involve

57 For instance in 2009 the Provincial government provided US$ 9,700 to be managed by the TUFPS.

58 See a decree of the Minister of Forestry No. 6188/Kpts-II/2002, Article 3(2).

59 Interview Jn, a Head of the Technical Unit for Forest Planning Samarinda of the Provincial Forestry Agency, 11/3/2009.

60 Government Regulation No. 38 of 2007. Following the enactment of this government regulation a rumor emerged that the TUFPS would be merged with the UFAE or with other provincial service units. Interview Jn, 11/3/2009.

61 Interview I and HS, the staffs of Muara Badak Office of Kutai Forestry Agency, 31/7/2008. In their reports on demarcation (*penataan batas*) the technical team of TUFPS indeed said that they carried out demarcation in which they informed the local inhabitants about their activities. For their reports see for instance Badan Planologi Kehutanan (2004).

the Kutai District Forestry Agency because regulations state that for a Forest Area such as in the Mahakam Delta which does not host any forest concession, the members of a team of forest delineation should all come from TUFPS.[62]

Apart from the stories told by the field officials, the officials of the TUFPS undertook the long-awaited delineation between 2001 and 2005. In practice, the officials of the TUFPS undertook the delineation working together with the officials of the UFAE as a way to fulfil the requirement of the Ministry of Forestry. There were three steps that the officials passed to undertake the delineation. It started with composing a work plan based on the Agreed Forest Plan, Provincial Spatial Planning (PSP) and the harmonized spatial map of 2001. After obtaining signatures from some high-level district officials for the work plan, the officials of the TUFPS went down to the areas that had been listed in the work plan in advance. The way they organized the listed areas was not based on administrative territory of villages (*desa*). Rather they divided the areas into islands. The primary goal of the field visit was to install markers in the mapped areas. The distance between two markers was 100 meters. The markers functioned as provisional boundary markers. Again after obtaining the signatures of the district officials, the officials of the TUFPS undertook a second field visit aiming to install permanent boundary markers. Before they submitted all the maps of the delineated areas to the Minister of Forestry they had obtained the signatures of the districts officials for a third time. At the time of writing, the Minister of Forestry has not yet endorsed any of the submitted delineated maps.[63]

In spite of several field visits and village meetings which the officials of TUFPS claimed to have had, the delineation hardly involved the village actors. As the Committee on Forest Boundary Delineation was not what the decree of the Minister of Forestry 32/Kpts-II/2001 meant to be because it was not formed by district head, the delineation missed the signatures of the village heads or community leaders. As a result it also completely missed the inventarization of any land rights of the villagers over the forest land. These non-participatory practices have unavoidably hampered the effort to clarify the legal status of the production forest. In practice the villagers have (re)moved almost all the permanent boundary markers.

62 Besides the Committee on Forest Boundary Delineation (see page 95 and 96), there is also a technical team (Panitia Pelaksana Tata Batas) formed by the Head of TUFPS. Only if the Forest Areas host forest concessions then the members of the team include representatives from the district forestry agency. Interview AN, 2 and 5/12/2011.

63 Interview Spd, a member of staff of the Technical Unit for Forest Planning Samarinda of the Provincial Forestry Agency, 11/3/2009, and AN 2 and 5/12/2011.

5.3.2 Forest protection

As already mentioned, due to the absence of forest rights or permits, in accordance with the laws and regulations, all the forestry agencies or units which are based in the province or district regardless of belonging to the Ministry of Forestry, Provincial or Kutai District government, bear responsibility to protect the production forest of the Delta. From 1983 to 1998, these implementation units were the so-called Technical Unit for Forest Product Circulation (Ind. *Unit Pelaksana Teknis Daerah Peredaran Hasil Hutan*, hereafter TUFPC) and POMF. The TUFPC is another technical implementation unit of the Provincial Forestry Agency (see Section 4.1 on technical implementation units). The Provincial government had actually established the TUFPC in 1965 together with nine other similar provincial forestry technical units.[64] In the year of the establishment the nine technical units covered Forest Areas of 14 million ha.[65]

Meanwhile, from 1998 onwards the full responsibility for forest protection was moved to the Kutai Forestry Agency and several of its local offices and technical implementation units. The Kutai Forestry Agency was established in 1995 following the selection of Kutai Kartanegara district as one of 26 districts that hosted exemplary decentralization policy.[66] The Kutai Forestry Agency was the first such district agency in East Kalimantan's history. The other thirteen districts formed their agencies from 1999 onwards. Initially in 1995, the work areas of the Kutai Forestry Agency consisted of areas, which were combined and overlapped with the work areas of three provincial technical implementation units, namely UPTD Mahakam Ulu, UPTD Mahakam Tengah, and TUFPC itself. Yet in 1999 the work areas were considerably decreased due to the administrative fragmentation of the Kutai Kartanegara district into three

64 The official establishment was realised through a decree of the government of East Kalimantan No. 1/DKD 1965. The decree originally gave the agency the name Local Forest Management Unit (*Kesatuan Pemangkuan Hutan*). In 1987, through the Provincial Regulation of East Kalimantan No. 04 of 1987, the Provincial government changed the name into *Cabang Dinas Kehutanan* (Regional Office of Forestry Agency). The most recent change to the name was in 2001 when the Provincial government changed it into TUFPC, through the Provincial Regulation of East Kalimantan No. 16 of 2001.

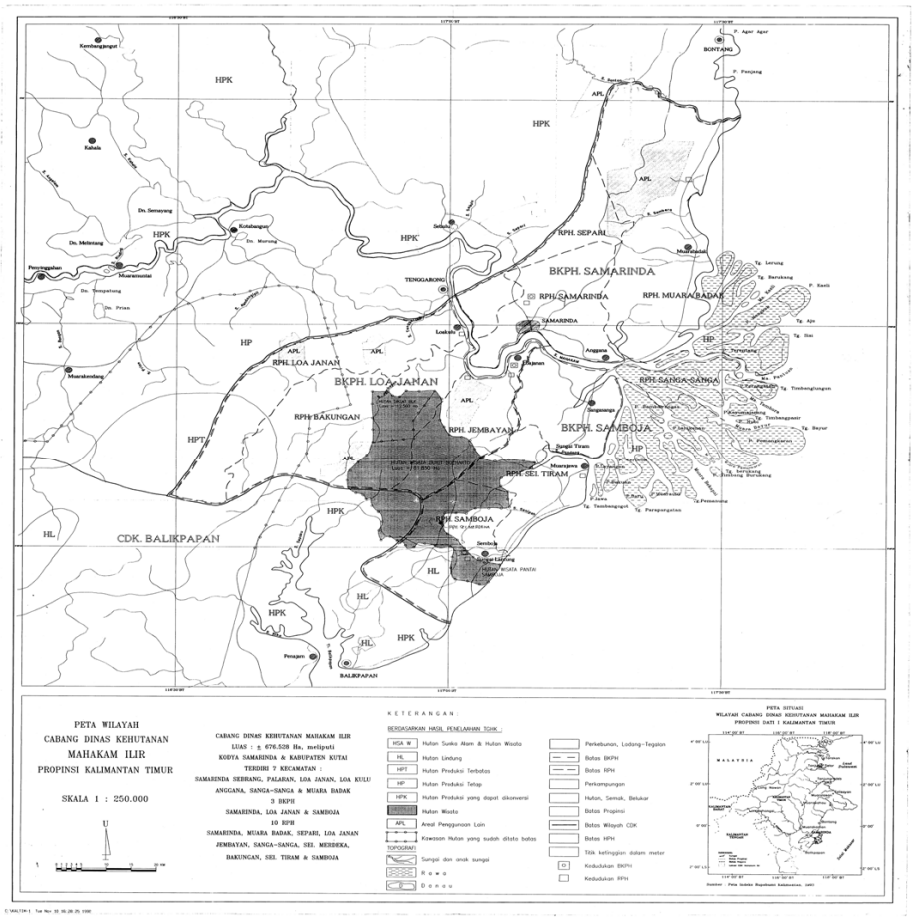
65 The remaining 3,591,625 ha of the Forest Areas of East Kalimantan were controlled by Perhutani, a state-owned company. See in Bappeda Kabupaten Kutai (1971, p. 66), and Magenda (1991, p. 78).

66 The District forestry agency was officially established through the District regulation No. 23 of 1995. The District regulation subsequently was endorsed by a decree of the governor of East Kalimantan No. 061-III.I-357 of 1995.

districts and one municipality.[67] In 2011 the Kutai Forestry Agency had a work area of 1,647,622 ha.[68]

Back to the TUFPC. Over the years its work area continued to be 676,528 ha (see Map 5.1), though in reality many parts of the area have been deforested and a few parts have been converted into non-Forest Areas.[69] Of this area, about 11,12 per cent (75,200 ha) is mangrove forest, most of which is reported to be in the Delta. In its earlier period the TUFPC used to have quite a com-

Map 5.1: The work area of Technical Unit for Forest Production Circulation



67 The other two districts are Kutai Barat dan Kutai Timur, while the municipality is Bontang.

68 See in Badan Pusat Statistik (BPS) Kutai Kartanegara (2007, p. 206). The present size of the work area is actually larger than the previous size which was 620,500 ha. It encompassed 404,565 ha of forest concession areas, and 215,935 ha of non-forest concession areas. See the annual report of the TUFPC of 1984/1985 and 1985/1986.

69 The 2006 annual report of the TUFPC continues to note its work area as a total of 676,528 ha with 75,200 ha of mangrove forest despite the fact that the Provincial government as well as the Ministry of Forestry have excluded five plots in the Delta from the Forest Area.

plete organizational structure. In order to manage such huge areas, they divided themselves into several branches, resorts as well as check points.[70]

They formerly had three branches, ten resorts and a dozen check points. Each of the branches and resorts had their own smaller work areas. The branch which was based in Samarinda and in particular the resort which was based in Muara Badak sub-district, took responsibility for protecting the production forest of the Delta. The Muara Badak resort itself was assigned to handle a work area of 203,550 ha. It was anyway the largest work area that a resort of TUFPC had at that time. Nevertheless none of the four check points was situated in the Delta.

In response to devolution to the district level and a decreasing number of timber companies as of 1986, the organizational structure was simplified in 2001. The change meant only three primary check points and a few supporting check points. Later in 2008, the two primary check points were dismissed including the one situated in Muara Badak sub-district which used to be responsible for the production forest of the Delta.

Besides the decreasing number of timber companies, the establishment of two local offices belonging to the Kutai Forestry Agency was another push factor for the organizational restructuring of the TUFPC. The Kutai District government established the local office in 2003 in an attempt to move the control over nine Forest Areas from the Provincial government to the Kutai District government.[71] One of the two local offices was set up in Muara Badak sub-district holding responsibility over the entire production forest of the Delta. The decree of the Kutai District Head endorsing the two local offices states that the main role of the offices is to assist the Kutai District Forestry Agency to undertake surveillance, safeguarding as well as control over their respective work areas.[72]

The above descriptions of the national, regional and district regulations concerning the assigned government organizations to protect the production forest of the Delta show that during all periods there was an authorized body dealing with forest protection. There may have been some overlap in terms of duties or responsibilities amongst the agencies, yet it did not lead to a legal vacuum. Yet the continued existence of government bodies assigned with this task has apparently not led to a sound protection of the production forest. In contrast, from the outset the production forest has suffered from pervasive absence of forest protection.

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70 In Indonesian they called *Kantor Balai Kesatuan Pemangkuan Hutan* (the Office of Forestry Management Unit) and *Kantor Resort Pemangkuan Hutan (*the Lower Office of Forest Management Unit*)*.

71 The actual establishment of the local office took place in 2003 whereas its official establishment was a year before, in 2002, through a decree of the District head No. 180.188/HK-265/2002.

72 Article 4e of the decree of District head No. 180.188/HK-265/2002.

None of the annual reports of the TUFPC from 1983 to 2008 mention surveillance activities in the Delta. For example in the 1999-2000 report, at a time when shrimp pond development was flourishing in the Delta, there is not a single word about the Delta itself. The reports primarily contain information about the number of officials, office inventories, correspondence, timber trade inspections, and figures for exported wood. Very few annual reports provide information about forest resource use or management. The 2002 report briefly mentions surveillance activities to manage forest fire and forest occupation, but it does not refer to the Delta as a place where surveillance occurred.[73]

A former head of the Muara Badak and Samboja forestry resorts acknowledged that during his terms (1985-1989 and 1999-2002) he never visited the Mahakam Delta, despite it falling under his authority. Instead, he ordered the staff members employed at the check points to make an inventory of the ponds located within their respective work areas. Unfortunately none of the staff eventually submitted a report. Another forestry staff member mentioned that he had never visited any of the Delta's islands for surveillance purposes, but that during a sailing holiday he had visited two islands, noticed the many new ponds, and reported these to the resort head. The resort head subsequently submitted the report to more senior management, but no response or action was taken.[74]

During the height of pond development (1996-1999) the central office of the TUFPC undertook one visit to the Mahakam Delta. This visit, in late 1999/early 2000, was precipitated by an order from the head of the Provincial Forestry Agency for the technical implementation unit to improve community supervision about the issue. The order required the officers to provide "guidance" to pond owners, and it appears that officers focused on informing pond owners about the ecological functions of the Delta's mangroves, rather than focusing on the illegality of the ponds.[75]

Even though the governor's decree of 2001 and 2005 continued to assign the TUFPC to carry out forest protection within its work area, when the Decentralization Law of 1999 came to be effectively implemented in 2001, the TUFPC staff was considerably behind in their protection of the Forest Areas. They focused intensely on the prevention of any forest product to be illegally transported and traded. A field staff member of local office of Muara Badak even managed to stay in the office although he was officially dismissed.[76] Yet he eventually left the office when the Kutai Forestry Agency established a new local office in Muara Badak sub-district in 2003. Ever since, the TUFPC has

73 See Dinas Kehutanan UPTD. Peredaran Hasil Hutan Samarinda (2003, p. 2).

74 Interview A, 6/3/2009.

75 Interview IB, a Head of the Technical Unit for Forest Product Circulation of the Provincial Forestry Agency, 28/5/2008.

76 The main reason why the field staff member stayed in the office was because he was married to a local woman. The head of the local office had asked him to stay in the office as his wife might cook for the members of staff.

hardly taken care of the protection of all Forest Areas across the mainland as well as the Delta's islands.

Instead of succeeding to pursue the Provincial government to hand over control over a number of Forest Areas, the local office of the Kutai Forestry Agency of Muara Badak has been struggling to survive. For many reasons the officials of the local office avoided surveillance, safeguarding and control and decided to mostly engage in extension and rehabilitation.[77] Instead of reporting, the officials deliberately ignored the illegal occupations and illegal timber production. The present writer even had the opportunity to witness this once. Some illegal loggers who were cutting thick mangrove trees nearby an oil company's installation, were seen. A forest ranger who was present during the visit did nothing for he believed that it would be dangerous to enforce the law upon them as this might harm him and other officials. As he presumed that the illegal loggers were backed by the local police he suggested a larger and stronger team from the Province to enforce law upon the lawbreakers.[78]

Not only the local office of Muara Badak hardly carried out forest protection in the Delta but also two technical implementation units of the Kutai Forestry Agency The central office of the Kutai Forestry Agency actually has two divisions which are specifically assigned to deal with forest protection.[79] Yet the two divisions have failed to set up any program concerning surveillance, safeguarding or the enforcement of law in respect of the illegal loggers. Similarly, a special service unit of the Kutai Forestry Agency, to which is specifically assigned the task to protect the Forest Areas and forest products, did nothing for the protection.[80]

5.3.3 Explanatory Factors

There appear to be five prominent factors according to the forestry local officials, which disabled them from carrying out forest protection. The five factors can be divided into those that are internal and those that are external to administrative institution. Internal factors, in this case, include the timber-oriented forest management policy and attitudes, severe lack of resources of the forestry units, and administrative competition between the Provincial and Kutai District government regarding forest authority. Weheras, the external

77 In the course of 2002-2007 the District forestry agency succeeded in replanting mangrove trees in the Delta sizing about ±206 ha.

78 An observation by Salo Palai village, Muara Badak, August 7, 2008.

79 See for a more complete provision the Decree of the Kutai District Head No. 180.188/HK-55/Tahun 2001, Article 7.

80 The service unit was officially established in 2004 through the Decree of the Kutai District Head No. 180.188/HK-71/2004.

factors include the existing use rights of local inhabitants as well as the importance of shrimp farmers' livelihoods and economic interests.

Internal factors

(a) Timber orientation

It is not an exaggeration to say that the timber orientation in forest management has been one of the most important factors causing the lack of implementation of forestry legislation in the Delta. This was notably the case between 1983 and 1998. Basically, timber orientation in forest management refers to a situation where timber is perceived as the most valuable forest product. Accordingly, all resources e.g. policies, laws and regulations, budgets, human resources facilitate timber management. From a narrower point of view, it can solely lead to timber extraction so that all resources are expected to serve timber extraction. As already mentioned, timber orientation, at least during the above mentioned period, was legally justified as can been seen in the forest delineation.

As far as the Delta is concerned there are maybe two adequate indicators for the appearance of timber orientation. Firstly, reasons to establish new lower units. Secondly, the expertise of the staff. The establishment of resorts and check points is very much in favour of forest concessions. A new resort has only been formed if there exists a forest concession (Ind. *hak pengusahaan hutan* abbrev. HPH) in the area where the resort office would be constructed,[81] whereas a check-point would only be established on log truck routes. This organizational development clearly implies that the organization focused primarily on protecting forest concessions and ensuring that trees were transported and sold legally. Therefore, there was never any resort or check point in the Delta.

Meanwhile apart from forest rangers, officers working at the branch and resorts were mainly staff with forestry expertise as such cruisers (Ind. *tukang taksir*) and scale makers (Ind. *tukang ukur*). The former is an expert whose job it is to calculate the number of trees that can be sustainably harvested by a concession holder. The numbers are used to arrange an annual working plan. The latter is an expert whose job it is to check if a concession holder has remained within his quota of trees as set by the annual working plan.

Not only was forest protection in the Delta absent, the officials of the TUFPC also overlooked the official legal status of the production forest of the Delta. Many of the officers of the regional and Kutai District government as well as the field officials wrongly claimed the official status of the Delta area as

81 See Kesatuan Pemangkuan Hutan Mahakam Ilir (1985, p. 7).

conversion forest, protection forest or conservation forest.[82] More surprising is that in the organization's annual reports, the Delta's production forest is not marked as part of their area.[83]

The fact that the Delta has never hosted any forest concession and the predominance of the unprofitable nypa palm tree are major explanatory factor for administrative behaviour. A former head of the TUFPC, who ran for Samarinda's mayor election in 2010, has an explanation for why forest protection in the Delta is almost absent:

> The limited presence of forest protection in the Delta may come from the unprofitable nypa trees. The government agencies are not interested in taking care of them. Therefore if the Delta was dominantly populated by the bakau (rizhopora) the protection might be seriously carried out or it might even generate contestation amongst the government agencies concerning management authority.[84]

(b) Lack of resources

The issue of lack of resources has been heard for a long time. The issue does not exclusively belong to a particular government sector, or to a particular period, such as the period before or after booming forest concessions or even before and after the decentralization era (see Section 3.1 on the lack of resources before decentralization era). By the term 'resources' is meant the availability of material resources, and manpower.

As already mentioned, since decades the ratio between the number of forestry officials and the size of Forest Areas has been imbalanced. TUFPC faced this very same problem, particularly in the case of forest rangers who were specifically assigned to undertake surveillances as well as safeguarding. A report shows that at the time pond construction was flourishing in the Delta, the Muara Badak branch of the TUFPC had only two forest rangers. As such, each forest ranger was responsible for 101,775 ha.[85] This differs substantially from the traditional ratio, whereby forest rangers usually take up more than

82 This misperception was also held by higher ranking officers, including the former head of the Provincial Forestry Agency, who commented to the local press that the mangrove forest's status was conservation forest but then 'corrected' himself saying that it was production forest. See *Kaltim Post*, Delta Mahakam, Kewenangan Pusat, 23 September 2003, and *Kaltim Post*, Mahakam Jadi Hutan Produksi, 19 May 2004.

83 See Map 5.1, and Dinas Kehutanan Propinsi Daerah Tingkat I Kalimantan Timur Cabang Dinas Mahakam Ilir (1999).

84 Interview IB, 23/7/2008 and 28/5/2008.

85 See in Cabang Dinas Kehutanan Mahakam Ilir (2000). Not only the Muara Badak of the TUFPC encountered a lack of manpower, but it also happened elsewhere in the Province. In fact, it had happened since the first time the Provincial Forestry Agency was founded in 1959. In the period when the issuance of timber concessions suddenly increased (1967-1973), all regional forestry agencies in East Kalimantan together had only 800 employees, 300 of whom were administrators and 500 technical. Of the 500 technical staff members only half were available for field work (Daroesman 1979, p. 48). See also Section 3.1, and Section 3.2.

fifty percent of the total staff positions. Ideally, a forest ranger is responsible for 2,000 up to 5,000 ha.[86]

After the Kutai Forestry Agency established its two local offices in 2003 and as a response TUFPC reduced its lower office considerably and withdrew its field officials, the ratio was getting worse. The local office of Muara Badak sub-district employed only seven officials, consisting of five full-time employees and two temporary employees. Two of the five full-time employees were forest rangers. In the earlier years of its establishment the total number of staff had been larger, yet it decreased as the employees decided to move away to places closer to cities such as Samarinda and Tenggarong.

Similarly, it has long been clear that the amount as well as quality of equipment was decreasing. In the years (1970-mid 1980s) during the period of booming forest concessions, when the income from the forestry sector was abundant, it was reported that the TUFPC had a small budget to purchase equipment and pay for the running of the office, ie. stationary, electricity and clean water. Given the small budget they reportedly had been facing a deficit. The situation was made worse as their only speed boat, which they needed for the surveillance or patrols across the Delta, was broken. Similarly, they did not own any means of transport such as motorbikes and cars, forcing them to use their personal vehicles. As a result their official communication with other agencies and timber companies was limited for they could not deliver letters to those offices. To solve the problem they borrowed transport from the villagers, and in order to be able to do so they had to be well-acquainted with the villagers. Likewise, the local office of the Kutai Forestry Agency of Muara Badak mainly used their own equipment, such as mobile phones, motor bikes or borrowed from others to do their job.

It is likely that the lack of equipment is caused by a financial deficit. The financial deficit is due to the absence of a budget for running a forest protection program. The absence originally comes from regulations stating that a service unit may only receive a budget for running the office and not for running a program. Meanwhile the budget for running the office was also limited. Only the head of the local office was financed for undertaking patrols. He received US$ 1.2 (IDR 10,000) per day for the patrols.[87] His entire staff including the forest rangers would not be paid for patrols. Nowadays the budget support is better as all members of staff are entitled to receive money for undertaking patrols.

The lack of budget further affected the extent to which they could carry out the patrols. During 2001-2008 for instance, the TUFPC, on average, could only carry out the patrol once a month while the ideal frequency is four times

86 Interview SDU, a Head of Division for Forest Protection of the Provincial Forestry Agency, 22/4/2008, and Skt, a former Head of Muara Badak office of the Technical Unit for Forest Product Circulation of the Provincial Forestry Agency, 7/3/2009.

87 The amount is valid only during the late 1980s up to the late 1990s.

a month.[88] Since 2009 they have been able to carry out patrols twice a month, because regulations were issued allowing the agency a budget for running a program. They apparently included the patrols into the proposed program. Besides the abovementioned 'regular' lack of resources, incidental lack of resources also affected the forestry officials, who had, for instance, to move office. As a technical implementation unit and local office, the TUFPC and the local office of Muara Badak sub-district respectively often became the first target in budget cuts every time the regional government intended to re-structure its organization.[89] So, they were sometimes asked to use other buildings. In their new office they soon had to deal with a new shortage, such as insufficient office space.

(c) Administrative competition

The previous section discussed decentralization several times. So, we know that through legislation, the central government devolved some forestry affairs to the Kutai District government. The devolvement did not only allow the Kutai District government to establish its own forestry agency and lower units, it has also led to the dismissal of several technical implementation units of the Ministry of Forestry. However the two occurrences, the establishment of the Kutai Forestry Agency and the dismissal of the technical implementation units of the Ministry of Forestry, have taken place at the same time as three other developments. Firstly, the Provincial government has retained its ten technical implementation units including the TUFPC simply by changing the name from regional office into technical unit. Secondly, in 1995 the Provincial government delayed the delegation of nine Forest Areas of the TUFPC's work area to the Kutai District government and promised to devolve them later. However, the Provincial Forestry Agency up until recently has refused to transfer the nine areas, arguing that existing forestry law and regulations still grant them the authority. Thirdly, the Ministry of Forestry established some new technical implementation units after the dismissal of their former technical implementation units. Some of the new technical implementation units are so-called Technical Implementation Units on Watershed Management (Ind. *Balai Pemangkuan Daerah Aliran Sungai* abbrev. BPDAS), Technical Implementation Unit on Natural Resources Conservation (Ind. *Balai Konservasi Sumberdaya Alam* abbrev. BKSDA), UFAE and Technical Implementation Unit on the Monitoring of the Utilization of Production Forest (Ind. *Balai Pemantauan Pemanfaatan Hutan Produksi* abbrev. BPPHP).

88 Interview Shr, a Head of Sub-Division of the Technical Unit for Forest Product Circulation of the Provincial Forestry Agency, 4/3/2009

89 A very recent organizational restructure of both the Provincial and Kutai District government occurred in 2008. The restructure followed the passing of Government Regulation No. 41 of 2007 concerning the organizational structure of regional government (see more in Section 4.1). A rumor has emerged that the TUFPC will probably be merged with other provincial technical units or may even be dismissed.

The first two developments have prolonged the conflict between the Provincial and Kutai District government, contesting who has authority over the nine Forest Areas. In other words, it is uncertain which level of government actually holds the authority and responsibility for the Delta's production forest. The conflict arose as the two levels of government used different regulations to support their claim of authority over the production forest. On the one hand, the Kutai District government referred to two regulations from 1995, which stipulate the closure of all central and provincial government service units located at the district level, and orders that their duties and authority be devolved to newly established district agencies.[90] On the other hand, the Provincial government referred to two Provincial Regulations (*peraturan daerah provinsi*) from 1981 and 1987 as well as the Forestry Act of 1999, to argue that the nine Forest Areas were still under provincial authority.

Initially this administrative conflict started via written correspondence in 2000 and continued up to 2008. As the conflict intensified both parties resorted to meeting forums and media reports. In several forums, the Head of the Kutai District asked the governor to devolve the Forest Areas, and the governor confirmed that he would advise the head of the Provincial Forestry Agency to organize the transfer. However, the transfer was not realised. Frustration with the process led the Kutai District Head to send another letter in 2001 announcing that the District government would take over the Forest Areas by positioning some forestry officials in the areas. As said, it was in 2003 that the Kutai District government eventually positioned its officials there by establishing two local offices of which Muara Badak-base is one. The hidden agenda behind the establishment was to force the Provincial government to devolve the authority. To date this strategy has failed, and the Provincial Forestry unit still holds the authority in the area.

As the expectation of establishing the local offices was that the Provincial government would be willing to transfer the Forest Areas, it is therefore not surprising that the Kutai District government still feels that the disputed Forest Areas do not yet belong to its territory.[91] Moreover, the conflict of authority over the areas is only a concrete case of a larger conflict emanating from the implementation of the 1999 decentralization. Concerning forestry affairs, the conflict is rooted in the authority to grant forest rights or permits as well as to issue official documents for transport and trade of forest products. The Kutai District government perceives that they are able to issue any rights or permits

90 The respective regulations are the Directive of the Minister of Home Affair No. 5 of 1995 and the Provincial Regulation No. 02 of 1995. The provisions of the two regulations that the Kutai District government had quoted to support their argument are very different from a higher regulation, Government Regulation No. 19 of 1995 saying that all technical implementation units of the Ministry of Forestry should be closed.

91 See those arguments in *Kaltim Post*, Lebih Serius Kelola Delta Mahakam, Pemkab Mohon Dukungan Pemprov Kaltim' 28 October 2008, and *Kaltim Post*, Syaukani: Kami Minta Kewenangan Itu, 22 September 2003.

after the passing of the Law No. 22/1999, whereas the Ministry of Forestry suggests that only part of the forestry affairs were devolved and regarding permits or rights issuance a district head could only issue permits on collection of forest products.

The ministry-district conflict spread further to a regional level. Most of district government across East Kalimantan province perceived that the Provincial government had no longer any authority over all Forest Areas situated in the district administrative areas. On the basis of this argument they therefore suggested to the Provincial government to close all their regional officess as well as service units. In response to that, the Provincial government refused to do so, arguing that they still had authority over all Forest Areas situated across more than one district/municipality. Together with two other districts the Kutai District government refused the re-establishment of provincial technical implementation units which had been officially closed in 1995. The conflict moved from the Province up to Jakarta when both the Provincial government and some District Governments of East Kalimantan met separately with some ministry officers in an attempt to mobilize support. The conflict ended with an oral statement of the Minister of Forestry saying that the provincial forestry service units were still legal and therefore able to issue the documents for transport and trading of forest products.[92]

Based on the perception that the Forest Areas still belong to the Provincial government, the Kutai District government does not dare to carry out forest protection through law enforcement as they believe that it may be beyond their authority and therefore against the laws and regulations. The laws and regulations give them limited authorization to advise pond owners and undertake rehabilitation to limit forest damage. Therefore in dealing with forest clearance for ponds the forestry district officials have not been forbidding the clearance, but rather controlling the existing situations through rehabilitation. The careful stance of the Kutai District government can be understood in the light of a 2003 incident. In that year, a technical implementation unit of the Kutai Forestry Agency called on the Forest Protection and Forest Product Protection (Ind. *Perlindungan Hutan dan Hasil Hutan* abbrev. PH3) carried out law enforcement over some Banjarese people who entered and occupied Bukit Soeharto Grand Forest Park illegally. Four years later the head of the Provincial Forestry Agency sent a letter to the governor explaining that the Kutai Forestry officials did not have the authority to carry out law enforcement, as the Bukit Soeharto Grand Forest Park still fell under the authority of the Provincial government.

Following the above arguments developed by the Kutai District officers, some Provincial government officers expressed their surprise. They said that they believed the Provincial government already shared authority and respons-

92 Interview SDU, 22/4/2008.

ibility for the Forest Areas. They gave two reasons for this view. First, in 1998 the Ministry of Forestry handed a total of nine forestry responsibilities over to the Kutai District government, and one of these concerned forest protection. Second, the Delta's production forest is wholly located within Kutai territory, and the provincial officers argued that according to existing laws and regulations, this means that the production forest is under the authority and responsibility of a Kutai District government. In addition to the legal arguments, they suggested that the Kutai District government had to carry out the protection for they were much closer to the village population. Meanwhile, even though the head of the Provincial Forestry Agency had sent a letter to his technical implementation units, saying that they still had authority over the nine Forest Areas in accordance with existing laws and regulations, the actual behaviour of the officials of the TUFPC showed they were not convinced by the letter. Instead of opposing the presence of the officials of the local office of the Kutai Forestry Agency, they decided to accept and further withdraw most of their field officers to be merely concentrated in Samarinda city in the end. It seems that they did so in an attempt to stay away from potential overlap.

Another fierce administrative competition is between the TUFPS, and a division of the Provincial Forestry Agency called Division on Mapping and Forest Planning (Ind. *Perpetaan dan Tata Guna Hutan* abbrev. PTGH). As said (see page 105-106) the competition is more concerned with access to the Provincial Annual Budget. The PTGH officials, whose officials used to work at the TUFPS, were not willing to share the budget with the TUFPS. As the acting head of TUFPS said:

> Some of the officials of the Provincial Forestry Agency obviously know that our office has staff skilled in inventarization and mapping. Yet, when they were arranging the annual budget, they did not think that budget for inventarization and mapping should go to our office. That was because they were afraid of getting the remnant (Ind. *makan ikan asin*).[93]

Personal influence in accessing the budget is evidently important. They pleaded with their former colleagues who are working at the Provincial Forestry Agency office but it had no result. However in 2011 they received part of the budget to carry out inventarization through the help of one of their former colleagues who is working at the Provincial Planning Agency.

External factors

(a) Long existing local use rights

The fact that villagers had resided in certain locations in the Delta for a long time before the local officials were appointed in the area, has been mentioned

93 Interview AN, 2 and 5/12/2011.

as a reason for the officials not to prohibit the villagers to clear the production forest. Using that argument the officials perceived the pond owners to be entitled to live in as well as utilize the production forest. This justification did not only refer to the historical background, but also to the possession of a land letter that entitles shrimp farmers to hold ponds (see Chapter 8 for the accounts of the position of the land letter in Indonesia's land law). Some officials even considered the land letter equal to the use rights that the oil and gas companies have obtained from the central government.

The local officials' understanding of the local rules on land rights were formed through experiences in the past, when the shrimp farmers argued that they had land rights, because they and their fellow villagers had resided in the Delta for generations and inherited the land from their predecessors. They pursued the officials to prove that their land was located within the Forest Area. Instead of countering the villagers' argument with reference to the forestry laws and regulations which officially state that the Delta's mangrove forest is a production forest, the local officials preferred not to react to it. In a recent meeting taking place in two sub-district offices, a former deputy of the Kutai Forestry Agency told the shrimp farmers that they would not expel the shrimp farmers despite their activities being against the existing formal forestry laws and regulations. In return they were urged to rehabilitate the degraded production forest for they had caused the degradation.

(b) Shrimp farmers' livelihood and economic interests

When the officials explained why they had not prohibited the shrimp farmers to occupy and convert the forest land into ponds, they strongly emphasized the economic advantages that the shrimp farmers could gain. Due to the rising price of shrimp exports at the time, the Kutai District officials believed that the shrimp ponds could generate economic prosperity for the farmers.[94] Not only did the ponds benefit the farmers through the high prices but they also provided job opportunities for the local villagers as well as migrants. Given the potential economic advantage of the shrimp ponds, the efforts to label the farmers as illegal occupiers or initiatives to expel them from the production forest would be considered as useless.[95]

94 Yet some of the officials of the Provincial government and the Ministry of Forestry doubted whether the ponds could generate economic prosperity for they suspected the District officials of intentionally capitalizing the issue for their personal interests. The issue is related to the proposal of the Kutai District government to convert the production forest into non-Forest Area. Interview SBT, a Head of Division for Forestry Planning of the Provincial Forestry Agency, 21/4/2008, and Gagah Dalimunthe, 2/5/2008.

95 See McCarthy (2006, p. 106) on how the same argument was used in Aceh to not enforce forest law on illegal loggers. One respondent, the former head of Kutai Forestry Agency argued that if trying to enforce the law they would be regarded as '*pahlawan kesiangan*', which means 'a fake hero'.

Besides the economic advantage, the Kutai officials also considered the investment that the shrimp farmers had made to construct and operate the ponds. To be able to expel the farmers from the production forest, the government would probably have to compensate all expenses. With the limited budget, the government was unable to do so.

Having prioritised the economic advantage of the shrimp ponds above the protection of the production forest the village heads favoured to have investors from outside. As the head of Muara Pantuan village stated:

> I like outside investors (people who want to buy land in the Mahakam Delta for ponds) coming to our village, as they will bring money so that the villagers' economic position will improve.

The fact that Kutai officials unlikely tell a lie about the economic importance of the shrimp ponds is confirmed by some research.[96] The research points at two indicators of economic importance namely the number of shrimp farmers and annual profits. The number of shrimp farmers in the Delta is larger than of any other profession such as fishermen, traders or government employees.[97] This is not surprising, as, for one thing, shrimp farming has turned out to be more lucrative than fishing. There appears to be the perception amongst villagers that shrimp farmers earn a moderate income, whereas fishermen earn very little (Hidayati et al. 2005, p. 60).

5.4 Legislation: identification of some problematic issues

Rather than describing all the legal problems of the forestry legislation as it has been applied to the production forest of the Delta, this section will focus on the legal problematic issues that: (i) affect the implementation of the forestry laws and legislation; and (ii) have an effect on the rights of natural resource users, particularly those who had used resources prior to the 1983 designation. The discussion of the former presumes that the legal problems hampered the local officials in effectively implementing forestry laws and regulations. It occurred not only because the provisions of the legal rules failed to clearly regulate particular matters but also because there was confusion through the simultaneous existence of contradictory rules. The discussion of the latter issue examines the extent to which the forest designation and delineation secured the use rights of the right holders or did the very opposite.

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96 To mention some of the research: Bourgeois et al. (2002), Sandjatmiko et al. (2005, p. 73-74), Bapedalda Kutai Kartanegara and PKSPL IPB (2002, p. III-48), and Hidayati et al. (2005).

97 For instance, a research published in 2002 stated that 2,963 people from seven villages of the Delta worked as shrimp farmers. This is twice the number of fishermen (1,223). See Bapedalda Kutai Kartanegara and PKSPL IPB (2002, p. III-48).

The legal problems of implementation as well as of right holders seem to be two kinds. Firstly, when the provisions of forestry laws and regulations are internally vague, incompatible, inconsistent and/or overlapping with one another. Secondly, when the forestry rules are incompatible, inconsistent and/or overlap with other rules concerning, for instance, petroleum, fishery, land and spatial planning. This includes rules which regulate the organizational structure of forestry management.

5.4.1 Affecting implementation

The abovementioned factors that are internal and external to the administrative institutions have significantly hampered forest protection in the Delta. Since 1965 up to the present there have been legal rules with which the government needs to comply for the sake of forest protection. Nevertheless the introduction of some following regulations and the fact that there have never been any rights or permits issued in the Delta's production forest have made the provisions less clear.

Government Regulation No. 33/1970 on Forest Planning (see Section 5.3) paved the way for later regulations to overlook those production forests where government never granted any permits or rights, as what happened in the Delta. The government regulation called for immediate delineation of the concession forest. The government regulation of 1985 concerning forest protection actually declined the tendency to favour the concession areas by treating all the Forest Areas which were to be protected equally. Yet, regulations concerning the organizational structure of the TUFPC reintroduced the old bias. The type of terms and conditions of the establishment of resorts and checkpoints as well as the way in which staff expertise was prioritised, suggest favouritism toward forest concessions particularly of trees, which the timber companies wanted to transport and trade. From 2001, as an impact of the 1999 decentralization, the new organizational structure of the TUFPC has considerably favoured forest concessions. A governor decree of 2001 states that the functions of this unit merely concern forest exploitation.[98] In an effort to adjust to the preceding Forestry Law of 1999 which nearly moved the entire obligation of forest protection to permit holders, the unit was no longer charged with the protection of concession forest.

Given the strong focus of the regulations on forest concessions, a legal vacuum emerged concerning to which specific forestry staff or unit the protection of the production forest, such as in the Delta would be assigned. Not only the provisions concerning organizational structure generated the legal vacuum but also provisions concerning people's participation in forest protection. The latter has not been followed up by any forestry provision regula-

98 East Kalimantan Governor Decree No. 16/2001.

ting how people's participation should take place. This vacuum likely increased after the Forestry Law of 1999 and its subsequent organic regulations shifted the obligation of forest protection towards the permit holders. Who then was expected to be in charge of protection of the Delta's production forest when there was no permit holder?

The heads of sub-districts were critically approached by the land holders, once they refused to support the proposal of land registration arguing that the land was situated in Forest Area. The land holders, in return, asked the heads of the sub-district to show them boundary markers as a way to prove the Forest Area existed (Syafrudin 2005: 87). Regarding this conflict it must be noted that the forestry laws and regulations did not distinguish between forest protection for delineated forest and non-delineated forest. Yet, the forest laws and regulations rely considerably on the delineation process to provide a definite status for Forest Area. As a result, the local officials were hesitant to carry out forest protection despite the fact that the Delta's mangrove forest had officially been designated as Forest Area. Accordingly, the presence of specific provisions which would have enabled the local officials to refuse the proposal of the land holders despite the fact there had not been delineation or boundary markers, could have helped.

Provisions concerning forest management authority are rather confusing. They affect the Ministry of Forestry, Provincial and Kutai District government the most when carrying out forest protection in the Delta. As already mentioned, both the Provincial Forestry Agency e.g. TUFPC and the Kutai District government e.g. Forestry Agency concomitantly claimed to have management authority over the nine Forest Areas which included the Delta's production forest. Both sides based their opinion on particular laws and regulations to support their respective claims. In general the Kutai District government have based its claim on laws and regulations concerning decentralization, whereas the Provincial government have based its claim on laws and regulations concerning forestry as well as decentralization. The forestry rules were not only based on national laws and regulations, they also took into account an international declaration.[99]

For their claim the Kutai District government mentioned Government Regulation 8/1995 concerning the Transfer of Some Government Affairs to 26 Districts/Municipalities and the directive of the Minister of Home Affairs No. 5/1995. It is important to underline that the government regulation of 1995 did not order the closure of any technical implementation units of the Provincial Forestry Agency, rather it ordered the closure of any technical implementation units of the Ministry of Forestry.[100] The Kutai District govern-

99 The international declaration is the 1983 World Forestry Conference. One of the important points made during this conference was that forest management should be strongly integrated into watershed management rather than fixing it with administrative division.

100 See Article 5 (3) of the Government Regulation No. 8/1995.

ment therefore referred to a provincial regulation and decree of the head of Provincial Forestry Agency.[101] One article of the provincial regulation states:

> Following the establishment of the Kutai Forestry Agency any technical implementation units of the Provincial Forestry Agency must be closed as part of the devolvement of authority to the Kutai District.

Another article of the decree of the head of Provincial Forestry Agency states that if the provincial technical implementation units would be closed, the entire work area would have to be handed over to the Kutai Forestry Agency together with their staff, equipment as well as funds. After the conditions required by the regulations, ie. the establishment of the Kutai Forestry Agency in 1995 and the closure of the Regional Office of Mahakam Ulu of the Provincial Forestry Agency in 2001, were realized, the Kutai District government also believed that the TUFPC should be closed.

As mentioned earlier, instead of fulfilling the promise to the Kutai District government of handing over the nine Forest Areas and implementing what was written in the regulations, the Provincial government still argued that the TUFPC had a legal basis to exist and therefore the nine Forest Areas remained their work area. There is one main and two supporting pieces of legislation that are raised as justification. The main piece of legislation concerns the organizational structure of the Provincial government, which determines the legal basis for the TUFPC. The two supporting pieces of legislation concern forestry matters handed over to district and ecosystem-based forest management.

In response to the Kutai District government's argument that the TUFPC should have been closed because it did no longer have a legal basis, the Provincial government in contrast pointed out the TUFPC still had a legal basis, which could be found in a Provincial Regulation of 2001. One article of the regulation states that two previous Provincial Regulations on the organizational structure of the Provincial government are still in force. Given that the two previous Provincial Regulations were the legal basis for the establishment of the TUFPC, the Provincial Forestry Agency interpreted the article as a recent legal basis for the existence of TUFPC. Furthermore, the change of its name from local office to technical implementation unit did not mean that the local office had been closed; in essence it was still there despite the change of name.

Another legal argument that the Provincial government raised was that they were not supposed to hand over the nine Forest Areas because some of them were located on the border of district and city. They were both located in Kutai Kartanegara district and Samarinda city. Following the 1999 law on decentralization and its subsequent regulations, any Forest Areas located on

101 Provincial Regulation No. 02/1995 and Decree of the Head of Provincial Forestry Agency No. 5223/579/DK-IV/1998.

such borders would fall under the authority of the Provincial government (see Section 5.2).[102] The Provincial government actually made an undue generalization in raising the argument because not all the nine Forest Areas are located on the border. In the case of Mahakam Delta, it is in fact located entirely in the Kutai District administrative territory. Nor is another argument, which prematurely concluded that the Forest Areas could not be handed over because the Bukit Soeharto Grand Forest Park is included in the nine Forest Areas, valid. This argument was based on legislation that held that any grand forest park is still under the authority of provincial government.[103] Again, the argument relied on a generalization for the size of the Bukit Soeharto Grand Forest Park takes up only 58,200 ha of the 676,528 total work area of the TUFPC.[104]

Apart from misleading interpretations of the provisions by the Provincial and Kutai District government, the laws and regulation on which their argument is based are correct. However, seeing that the abovementioned legislations have led to conflicting claims there must be an inconsistency (see Section 1.3.2). The inconsistency is most visible in the provincial legislation. Whereas the 1995 provincial regulation followed the 1998 decree of the head of the Provincial Forestry Agency in supporting the hand-over, the 2001 provincial regulation instead suspended it.

5.4.2 Effect on the resource users

Prior to the years of the designation of the Delta's mangrove forest as Forest Area, several forms of use had already occurred. Two main resource uses were land utilization and oil and gas extraction. Earlier resource uses included coconut plantations and additionally a few shrimp ponds. Together with rattan gathering, coconut plantation had appeared already in the period of the Kutai Sultanate (late 15th century-1844). In the late 1960s the first oil and gas extraction appeared, which started to operate effectively in the early 1970s. Land use for shrimp ponds sporadically commenced in the second part of 1970s and gradually increased in the early 1980s.

Different regulatory rules, both formal and informal, were applied to each of those main resource uses. Only after the New Order (1966-1998) land use started to be governed by national formal rules. Prior to it, from the period

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102 Law No. 22/1999 as superseded by Law No. 32/2004 on Regional Autonomy. To name some of the subsequent regulations: Government Regulation No. 25/2000 and the Decree of the Minister of Forestry No. 051/Kpts-II/2000.

103 Government Regulation No. 62/1998 and the Decree of the Minister of Forestry No. 05.1/Kpts-II/2000.

104 The Bukit Soeharto Grand Forest Park was founded in 1991 when the Minister of Forestry designated it through a decree No. 270./1991. Its current size was smaller that its original size which was 61,850 ha. See Dinas Kehutanan UPTD. Peredaran Hasil Hutan (2006, p. xiv).

of the Kutai Sultanate, customary, sultanate and colonial rules simultaneously governed resource use. Unlike the rules on land use, oil and gas extraction had been ruled by national laws and regulations from the moment it started.

Given that these main resource uses existed prior to the forest designation, the question arises as to how the forest designation affected prior resource uses in terms of rights security? The designation and delineation apparently affected the land resource users and oil and gas resource users differently.

In accordance with the Government Regulation No. 28/1985 as superseded by No. 45/2004 on Forest Protection Total E&P Indonesie, an oil and gas contractor, could operate despite the enactment of those two Government Regulations. Nevertheless, the two Government Regulations and subsequent implementing ministerial decrees required the company to adjust itself to those enacted regulations (see Section 5.2). Later, the Ministry of Forestry decided that a forest use permit issued by the Minister of Forestry would be the only way for the company to adjust to the enacted regulation.[105] That permit would enable the company to use the production forest land, as well as to cut trees if necessary. Not only did the company thus obtain certainty regarding its operations, they were also ensured that they would be able to use the forest until their contract ended. However although those abovementioned regulations stated clearly what the company was supposed to do after the designation and delineation, they have not obtained the permit yet.[106] At the time of this research the company employees were arranging a proposal that would be submitted to the Ministry of Forestry.[107] Yet they arrange the permit only after 40 years of operating in the Delta, and 25 years after the enactment of the 1985 Government Regulation.

Despite the fact that the Government Regulation No. 28/1985 and No. 45/2004 explicitly guaranteed the legal security of oil and gas extraction, the ministerial regulation of 2006 further ensured this by formulating a policy, which favored mining and petroleum. As mentioned before (Section 5.2), the policy included mining e.g. oil and gas extraction on the list of strategic non-forest resource use. The list excludes aquaculture as well as agriculture. Those provisions rendered the coconut and shrimp farmers whose lands were located inside the designated and delineated production Forest Area, illegal. The provisions prohibit access, utilization and use of the Forest Area unless a

105 The Ministry of Forestry regulated forest use permits in several decrees and regulations. In chronological order they are No. 55/Kpts-II/1994, No. 41/Kpts-II/1995, No. 614/Kpts-II/1997, No. 720/Kpts-II/1998, and 14/Menhut-II/2006. Recently the forest use has been more strongly regulated through the enactment of Government Regulation No. 24/2010.

106 On an official website of the UIM, Total E&P Indonesie is not currently on the list of companies which have obtained a permit. See http://UFAE4samarinda.net/index.php?option=com_content&view=article&id=13&Itemid=16 (accessed on 28 April 2011).

107 Interview Fm, a staff of the Directorate for Forestry Planning of the Forestry Ministry, 6/4/2009.

permit has been issued by either the Minister of Forestry, governor or district head.

However apart from their illegal status, the designation does not totally neglect the land users. According to regulations concerning forest planning and demarcation, a committee established by a district head, should take care of the right claim by third parties, when carrying out the demarcation of a designated forest.[108] The rights claim of third parties could concern rights to land or rights to crops and buildings on the land. Only if the rights claim is resolved, the designated forest can be mapped and endorsed as definite state forest land (Fay and Sirait 1999; Fay and Sirait 2005, p. 8).

However to understand legal security of the farmers' land rights is not simple. Even after the designation had officially taken place and the delineation had nearly been completed, the legal impact on the land-holders still remained an issue because the officials missed some requirements. One of the missed requirements was that they should have taken into account the interests of the people who live inside and around the Forest Areas. Is the 1983 and 2001 designation legally valid if neither of them were based on the required truthing check? Could the fact that the committee on forest boundary delineation did not publicly announce the provisional demarcation nor obtain consent and acceptance from the people mean that the delineation does not have any legal binding and that therefore the Forest Department has not obtained jurisdiction over the Delta's mangrove forest? If the Ministry of Forestry disregards them as illegal occupants, what would be its legal argument given that the farmers have an ownership document proving their rights over the land? Yet if they are legal occupants, would it mean that they are allowed to register their land with the land agencies to get land entitlement?

Despite the fact that the TUFPC delineated 93,86% of the production forest of the Delta, and given that the Committee on Forest Boundary Delineation did not resolve the private land right claims, in my view the mangrove forest is yet unlikely to be state property. It still belongs to private land. It should be added that the fact that the Committee did not settle the claims of the third parties is related to reports by the technical team of the TUFPS which on the one hand stated that the team discovered shrimp ponds for which their owners had land letters (*surat penggunaan lahan*), yet on the other hand that the team did not recognise the land letters as possessory evidence (see Section 8.2 on possessory evidence). Moreover, the technical team of the TUFPS thought that the shrimp farmers would only settle temporarily in the Mahakam Delta. As a result, the reports made by the technical team advised the Committee on

108 The members of the committee comprise of district agencies dealing with issues of development planning, land and forest, the service units of the Ministry of Forestry, heads of sub-district, village heads and local elders.

Forest Boundary Delineation to not necessarily take the shrimp ponds out of the Forest Area.[109]

The claim of state property over the Delta's mangrove forest is even weaker given the TUFPS has not yet submitted all of the delineated results to the Minister of Forestry for official endorsement. A verdict of Tenggarong district court of 2003 which has been upheld by a verdict of Samarinda appeal court of 2006, stating that the land letter is a legal land ownership document, has further weakened the ownership rights of the Ministry of Forestry over the production forest (see Chapter 8 for an account of the land letter).

A recent decision of the Constitutional Court of 2012 as mentioned above (Section 5.2, p. 98) which determined that Article 1(3) of Law No. 41/1999 on Forestry is against the Constitution, confirms the view that the Production Forest of the Delta does not belong to state property. That is the case because, according to the decision, the step of designation is not (yet) sufficient to claim a particular area as a Forest Area unless it proceeds to the three other steps namely delineation, mapping and endorsement. This is formulated well in their own strong statement:

> It should have not have occurred that areas on which many people's livelihood is dependent, were declared as state forest only by designation.[110]

5.5 INTERACTION BETWEEN STATE AND RESOURCE USERS

It is obvious that the abovementioned five internal and external factors have constrained the officials to carry out delineation and protection, and the problematic legal issues will eventually shape the way the government officers interact with the users. All the factors combined have created a mixed feeling of empathy, respect, fear as well as pragmatism among the officials. They are empathic and respectful vis-a-vis the shrimp farmers who have been living in the Delta for decades, and have spent a lot of money to establish the ponds. They fear that thousands of shrimp farmers will get angry if they are asked to leave the production forest. These feelings have not only arisen out of the consideration for the shrimp farmers, they have also derived from the legal and administrative problems as well as the personal interests of the officials. The rangers feared that they would get harmed, if they enforced the law on the illegal loggers. The Kutai District government was afraid and hesitant to issue local regulations that aimed at enforcing the law over the shrimp farmers as it might have been beyond their authority. They also feared that the villagers

109 See for instance in UPTD Planologi Kehutanan Samarinda (2002, p. 12) and Badan Planologi Kehutanan (2004).

110 See verdict No. 45/PUU-IX/2011, p. 158.

might consider to establish a new separate district if they disappointed the villagers.

Among street-level bureaucrats the feelings of empathy, respect and fear were mixed up with a sense of pragmatism as they considered their personal interests as civil servants. They have to ensure that their planned activities are running well as part of their accountability to superiors, despite being neglected and looked down upon by their fellow officials who work at the office of the Kutai Fishery Agency (for a similar experience of fishery field officials see Section 7.3).

Having recounted and considered the abovementioned factors, government officials, and particularly street-level bureaucrats, have developed some behaviors in relation to the forest delineation and protection. Firstly, on one hand they tend to conceal their original purpose and the legal impact that their activities might have on the land holders, and on the other hand they tend to persuade the shrimp farmers or land holders not to be afraid of losing their use rights because of the activities of the officials. Secondly, they tend to find ways around existing laws and regulations to accommodate the shrimp farmers. Thirdly, they tend to not enforce the law but at the same time legitimate the actual forest resource use.

The field officials of the local office of the Kutai Forestry Agency tend to avoid discussion about the legal status of the Delta's ponds when they are conducting routine jobs such as assisting local people to plant mangrove trees. When pond owners or pond guards ask about the land's legal status, the officers have been reported as saying that it is not within their authority to answer such questions, because their job only deals with technical matters. When officers of the TUFPS were undertaking the long-awaited demarcation of the protected area, they deliberately avoided confrontations with land owners and pond workers. During the officers' work, whenever land owners or pond workers inquired about the purpose of the officers' visit, they avoided explaining the actual purpose of their activity, and instead claimed they were simply measuring and mapping the area. The officers even persuaded owners and workers that their activity would not affect the existence of the ponds, by saying that they would not measure the ponds themselves, but only the surrounding areas.

Not only did the officials avoid confrontation with the pond owners, they even involved the pond owners by asking them to assist with the demarcation. They hired the pond owners or other local inhabitants for US$12 (IDR 100,000) per day in the hope that they would not obstruct their work.[111]

In an attempt to avoid the economic and social cost caused by a rigid implementation of the laws and regulations, the government officers found ways around the laws and regulations. As a field officer of the local office of the Kutai Forestry Agency said:

111 Interview AN, IF and Spd, 2/12/2011.

> *Aturan harus disiasati yang penting tujuan tercapai. Soalnya kalau aturan betul-betul dipatuhi akan susah karena kondisi setiap tempat berbeda* (we must trick the law in order to meet our goals. It will soon get difficult if we implement the laws rigidly as the real situation is different).[112]

He mentioned the rehabilitation projects as an example, when making the above comment. In most cases the officials deliberately broke the laws to be able to respond to the farmers' demands or to make the law adaptive (see Section 3.1b on adaptability). They said that the growing mangrove seeds without plastic bags or polybags are accepted whilst the law states otherwise. They promised the farmers to lobby their superiors to convince them to allocate some money to the farmers even before they had started to plan the seedlings of new mangrove tress. They made these promises despite knowing that the law requires the farmers to have grown the seeds in advance in order to get a payment.

By not enforcing the law but providing legitimacy to the land holders the officials built up a relation with the shrimp farmers. A field officer of the Kutai Forestry Agency in Muara Badak sub-district, who is also a forest ranger, reported that he saw many instances of people cutting mangrove trees in the vicinity of Total installations. Although he confirmed that he knew this was illegal, he did not take any action. His explanation for this inaction was that he was borrowing a boat from a local fisherman and believed that if he detained the loggers and confiscated their chainsaw, they could potentially harm the boat owner in retribution, as they would recognize to whom the boat belonged.[113] Afraid of being attacked by the shrimp farmers is another excuse why the forestry officials did not prevent the pond opening. To describe the situation in the Delta, they often called it 'Texas'.[114]

Being aware of the obligation to financially compensate the land holders if they would be asked to leave the forest, the Kutai Forestry Agency officials vividly pleaded to not expel the land holders from the production forest. In exchange they urged the land holders to replant the deforested areas of the production forest. This kind of legitimacy did not only derive from the socio-economic conditions, but also from the situation that the forest occupants interpreted the law as if their use rights (see Section 8.2 for the accounts of use rights) were equal to legal rights or permits of natural resources use.

A former head of the TUFPC gave an interesting interpretation of the law. According to him, the ponds in the Mahakam Delta are not illegal for three reasons. First, he perceives the cultivated rights or permits as equal to timber or mining concessions; according to this point of view, the legal status of the land resource use is similar to the legal status of a forest or mining concession.

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112 Interview I, 7/8/2008.
113 Interview Gnw, a forest ranger of Muara Badak office of Kutai Forestry Agency, 7/8/2008.
114 In Indonesia, the term 'Texas' refers to a situation where rules do not exist.

Second, when constructing the ponds, the local people only cut palm trees. Palm trees are not included in the Ministry of Forestry's list of "forest products", which means that the land owners were not violating any formal rules. Third, the palm trees cut by the local people are not sold. Thus the people are not engaged in any kind of illegal forest trade.[115]

5.6 Concluding remarks

Both legal factors and non-legal factors have influenced law-making as well as the implementation of law on forestry management in the Delta's production forest after the 1983 designation. One of those legal factors, the status of the Delta's mangrove forest as a production forest, has considerably influenced any subsequent policy initiatives aimed at overcoming problems in the Delta. For the Kutai District government, the legal status has narrowed down its jurisdiction, as it does not have the authority to enforce the law in respect of forest occupants, and fears a conflict between the Kutai and the Provincial government. As a result, as appeared in the circular letter mentioned in Section 5.1, the Kutai District government has only been able to carry out limited activities such as prevention and rehabilitation.

Two other legal problems are the lack of clarity and incoherence within the legal norms on forestry management. A lack of clarity has made the local officials hardly count the Delta's mangrove forest as a state-owned forest that should be protected in accordance with law and regulation. This could occur as the law does not clearly regulate protection in a production forest like in the Mahakam Delta, with regard to which the government has never issued any rights or permits. This may be the case because the Delta's production forest is not interesting because it does not have valuable commercial trees. Another factor adding to a lack of clarity is that the law and regulations do not clearly regulate what should be people's involvement in the forest protection. In the end, neither regional and local government officials nor local people carry out any form of forest protection of the Delta's production forest.

Next to the problems regarding the legal status of the Delta's mangrove forest there appears to be administrative competition mainly between the Provincial and Kutai District government. The fact that the different government units have raised similar as well as different legal foundations for their respective claims, indicates there is a degree of incoherence within the forestry laws and legislation (see Section 1.3.2 on coherence). The incoherence has emerged from two sources. Firstly, laws and regulations of the different departments do not refer to each other. Secondly, recent laws and regulations

115 Interview IB, 27 and 28/5/2008. In this regards the former official provided perceived security from which shrimp farmers obtained tenure security (see Section 1.3.3 on tenure security).

are not compatible with the previous ones. Interestingly, unlike other commercial Forest Areas, the administrative competition about the Delta does not lead to a competition between the two levels of government for real control on the field. By contrast, the competition results in a lack of protection and delayed delineation.

Meanwhile the Agreed Forest Plan of 1983 itself, apart from its contribution to eventually confirm the size of the Forest Area, had already brought forward a further lack of clarity for existing land uses. For a place like the Mahakam Delta, which the Agreed Forest Plan entirely designated as Forest Area, the plan has generated a serious problem because there is a long tradition of other resource use in the area. The present problems regarding tenure by villagers, is actually a logical effect of the desk study method of the Agreed Forest Plan. Missing truthing checks as well as failing to involve other related regional agencies, particularly regional land agencies, has led to an Agreed Forest Plan which does not reflect well the real ecological and land use activities on the field. The 2001 revision blatantly repeated the desk study method despite the fact that resources might have enabled them to carry out truthing checks. Also, they had been informed about the immense forest occupation that had been taking place. As a result, instead of securing legal clarity with regards to the forest occupations, the renewed designation left thousands of land holders in uncertainty as far as forestry laws and regulations were concerned.

The uncertainty (see Section 1.3.2 on certainty) is still there even though regional government officials nearly completed the forest delineation in 2005. In fact, the delineation failed to define the borders, the size or inventory of the production forest or settle any private land claims. Due to the poor compliance of the forest delineation with the forestry laws and regulations, there is left the large legal question of whether the Delta's mangrove forest is presently under state jurisdiction.

Alongside the lack of clarity and incoherence of the forestry legislations, there have been factors that internal and external to the administrative institutions that have contributed to the reluctance of the Kutai officials, the administrative competition and failing compliance. Interestingly, the internal and external factors have provided legitimacy to actual resource use on one hand but generated new legal uncertainty concerning tenure on the other hand. The legitimacy resulted from respect and empathy of the regional and district officials, whereas the legal uncertainty has been the result of pragmatism and fear.

In the end, neither the legitimacy nor legal uncertainty has had a positive impact on the fate of the mangrove ecosystem. They have both contributed to a depletion of the mangrove forest. The legitimacy gave more tenure security to the land holders so they continued opening new ponds and recently sold some to outsiders. At the same time legal uncertainty continues to hinder the forestry agency officials in exercising state jurisdiction over the Delta's production forest.

6 The treasure of oil and gas: offshore and onshore mining

'Total's first principle is to respect the law and regulations'.
(Juli Rusjanto, Total's Head of Operations).

6.1 INTRODUCTION

On 28 August and 1 September 2011 members of the so-called Kutai Kartanegara District's Committee on Conflict Resolution (KKDCCR) gathered in the office of the District government. The meetings were also attended by a.o. some officials of Kutai agencies and offices, the official of the Port Administration Office, and local police officers. During both meetings, they discussed the functioning of ten tidal traps, locally called *julu*, which were installed across a river in Sepatin village of Anggana sub-district.[1] The disagreement started when a boat of Total crashed into one of the tidal traps. Suggesting that the installation of the tidal trap had violated the law on fishery and public navigation, the company sent separate letters of complaint to the regional police office and the Kutai District government. In the letter sent to the regional police office, the company reported that there had been a legal violation in the Mahakam Delta, which had disrupted their extraction operations. With legal violation they specifically referred to the fact that the tidal trap installation was not in accordance with a circular letter of the District Head from 2004 that forbids the instalment of any fishing gear which could obstruct public navigation and/or which is too close to installations of oil and gas companies (see below). According to Total's employees, the tidal trap gears were closely situated to their Gathering and Testing Satellite (GTS) G and TN G19. Meanwhile in a letter sent to the District government, in case KKDCCR, the company employees asked the officials to find a solution to the case, preferably through law enforcement.

Even though the meetings rested on the decision to take legal action, the KKDCCR actually failed to determine to which extent the instalment of the tidal trap had violated the law. Some participants of the meeting, in particular the

1 A tidal trap is a passive trap, which relies on the tide. A net, tied around poles, is dropped in the water during high tide and pulled up during low tide with trapped fish in it. Usually one long *julu* comprises of many *julus* which belong to a number of owners. It can therefore be larger than 50 meters long and four meters wide.

company's employees, argued that the instalment had violated District Regulation No. 03/1999 concerning Fishing within the Administrative Area of Kutai Kartanegara District, and a circular letter of the District Head from 2004 concerning the prohibition of gear instalment along a public shipping lane.[2] Both regulations prohibit any fishing gear instalment which could endanger public interest/a public shipping lane. The 2004 circular letter specifically added oil and gas exploration to the list of things that are not supposed to be endangered by any fishing gear instalment. In addition to these two legal documents, it was also suggested that the tidal trap instalment had violated another District Regulation: No. 36/2000 concerning Fishery Enterprise in Kutai Kartanegara District. This regulation requires that every traditional fisherman and farmer have a so-called registration letter on fishery in order to be allowed to fish and cultivate shrimp.

However, some participants of the meeting, notably the officials of the Kutai Secretariat, doubted that the tidal trap owners had really violated the regulations mentioned. The doubt rose when during inspection those participants did not see any clear boundary marks indicating a marine zone division. Given the absence of boundary marks, it was unclear whether the tidal trap instalment was situated on the public shipping lane or inside the fishing grounds. In addition, when the company employees were asked by the regional local officials which areas would have to be free from any fishing gear instalments, they could not answer that question.

Doubts as to the legitimacy of legal sanctions rose further when the participants of the meetings also found that the company's off-shore installations likely violated the law as well. It was apparent that the company did not hold any permit issued by a Port Administration Office, a regional technical implementation unit of the Ministry of Public Transportation (see Section 4.2 on technical implementation unit). An official of the Regional Agency therefore appealed to the participants to pay attention to the matter, saying:

> Before we come up with a decision whether to carry out legal sanctions or not, it is good to advise the company to arrange and obtain the permit ahead. The tidal trap owners will otherwise fight back by arguing the company had violated the law as well.[3]

Besides questioning as to whether the tidal trap had been installed illegally or not, the participants of the meetings also drew in the question as to whether the fishermen were sufficiently informed on related existing fishery regulations. This view suggested that the legal violation committed by the tidal trap owners had happened simply due to a lack of knowledge among the fishermen of

2 No. 100/287/Pem.A/VI/2004.
3 This was said during the meeting of 28 August 2009.

the prevailing law. According to this point of view, the trap owners could not fully be blamed for breaking the law, if they had indeed done so.

Even though the participants of the meetings could not find satisfying answers to the question of (il)legality of the tidal trap instalment, and at the same time questioned the (il)legality of the company's installations, the meetings ended in the decision to carry out legal sanctions over the tidal traps. This decision seems to have been taken with an eye on the interests of the oil and gas extraction company, which boosted the revenue of the District substantially. In the introduction of a third meeting on 7 September 2011, the head of the KKDCCR emphasised that the company is the largest contributor to regional revenue. Any disturbance in its operations would therefore certainly imply a decline of the District's annual budget.

All stakeholders in the Mahakam Delta have long perceived the oil and gas extraction as an important source of income. Therefore, any discussion concerning the Delta usually ends with the conclusion that extraction activity should be sustained. That also explains why legislation and its implementation mostly favour oil and gas extraction. In the Mahakam Delta, the story about oil and gas extraction is a story about a resource use which most of the time is prioritised by state officials. Yet, given its commercial nature, its story is about vulnerability at the same time. The degree of certainty with which the company can run the extraction very much depends on the extent to which they can benefit other stakeholders, notably in terms of financial payments.

This chapter does not discuss the drafting or content of the oil and gas laws and regulations in a way as detailed as is the case in Chapter 5, 7, 8 and 9. With reference to the above tidal trap case this chapter examines the extent to which prioritization of oil and gas resource use has affected the drafting process as well as content of the legislation concerning oil and gas extraction. Has the prioritized status also affected the implementation of the law and/or the way in which local officers interact with private users? To what extent could the prioritized status have led to (in)consistence and (in-)coherence in relation to other sectoral regulations?

It should be underlined that the prioritization is not the only factor that may have influenced the drafting, content and implementation of the oil and gas legislation. Another factor is the fact that, according to the legislation, extracted and transported oil and gas should be regarded as state property, whereas contractors can only undertake exploration and exploitation. This state ownership over the extracted and transported petroleum is often used to effectively implement legislation on oil and gas resources.

6.2 LAW MAKING AND LEGISLATION: MAIN LAWS AND PROVISIONS

Rather than focusing exclusively on the legislation concerning the relationship between state agencies and oil and gas resource users, this chapter focuses

more on oil and gas legislation related to other resources users, notably land and fishery resource users. Departing from the main idea of this chapter, namely that oil and gas use has been prioritized, this chapter tries to figure out the extent to which the prioritized policy has affected the use rights of farmers and fishermen. Nevertheless, it is first necessary to turn to the description of the designation of state mining zone (Ind. *wilayah kuasa pertambangan* or *wilayah pertambangan*) or work area (Ind. *wilayah kerja*) in the Mahakam Delta. The designation is a legal instrument for the government to be able to apply oil and gas laws and regulations across the Mahakam Delta including the issuance of rights over the oil and gas resources. Only if the Ministry of Mining, presently the Ministry of Energy and Mineral Resources, has determined an area as a state mining zone or work area and has awarded a contractor, then formal rules on oil and gas apply.

One important background detail, which needs to be mentioned, is that in 2001, Law 22/2001 on Oil and Gas superseded Law 44 Prp/1960. Two changes occurred when the central government enacted Law 22/2001. First, the right to control mining resources was transferred from Pertamina to the central government, e.g. the Ministry of Energy and Mineral Resources. Second, a new supporting division of the Ministry of Energy and Mineral Resources, the Executive Agency for Upstream Oil and Gas Activities (Ind. *Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi*, henceforth Executive Agency) was introduced to take over some of the tasks traditionally performed by Pertamina (see Section 4.2 on the supporting division).[4] These tasks included representing the government in negotiating PSCs and supervising the operational management of oil and gas contractors.

In relation to the administration, the changes ended a 30 year-period (1971-2011), during which Pertamina held mining rights and economic rights combined. As the Law 21/2001 introduced liberalization in the oil and gas sector, the Ministry of Energy and Mineral Resources now shares the economic rights with a contractor (Patmosukismo 2011, p. 116). This explains why a contractor such as Total recently handled complaints from local pople in the way which will be described in the next sections as well as in Chapter 7 and 8.

6.2.1 The making of a mining zone or work area

Before describing formal procedures on determining state mining zones and work areas, I will first explain the two terms. The two terms, state mining zone and work area, have, in fact, the same meaning. They are areas that, based on surveys sponsored by the Ministry of Energy and Mineral Resources, contain mineral reserves. The term 'state mining zone' has been used since

4 The Executive Agency was established through the enactment of Government Regulation No. 42/2002.

the enactment of Law No. 44 Prp/1960 on Oil and Gas and was replaced by the term 'work area' following the enactment of Law No. 22/2001, which superseded Law No. 44 Prp/1960. In other words, the term 'work area' can also be defined as an area where oil and gas exploration and exploitation can take place.[5] During the period of Law 44 Prp/1960, the state mining zone was divided into: the state mining zone of Pertamina and the state mining zone of Pertamina's contractors.[6]

Provisions concerning the designation of state mining zones are not as detailed as in the forestry sector. Under Law No. 44 Prp/1960 on Oil and Gas and Law No. 8/1971 on Pertamina, it is clear that the Minister of Mining should declare (*penunjukan*) state mining zones before handing them over to Pertamina, a state-owned oil company.[7] According to Law No. 22/2001, the Minister of Energy and Mineral Resources shall declare the work areas before they are offered to companies to be explored and exploited.[8] To prepare the designation, the Minister of Mining has to carry out a general survey to figure out the potential reserves of oil and gas in particular areas. The Ministry of Mining can pass on the task of the general survey to particular companies.[9]

According to the abovementioned laws and regulations the designation of state mining zones or work areas is not necessarily followed by ground demarcation or delineation. It suffices to mark the boundaries of the zones or areas on paper; there is no need for actual boundary marks on the ground. However, over the designated zones and work areas, the state is already able to exercise its jurisdiction in which it determines who will obtain rights to explore and exploit oil and gas resources in those zones or areas.

This is still the case despite the fact that, according to the current oil and gas legislation, all the land in Indonesia has been arbitrarily designated 'legal administrative mining zones' (Ind. *wilayah hukum pertambangan Indonesia*).[10] A legal administrative mining zone is defined as an area where mining activities could be carried out. Such definition means that the whole of Indonesia is basically a legal administrative mining zone. It could encompass more land than merely Indonesia, because it could also apply to areas beyond the Indonesian maritime borders (Abdurrahman 1979, p. 105, Saleng 2004, p. 84) due to development of mining extraction technology. In any case, the legal

5 Article 1(16) of Law No. 22/2001.

6 By way of illustration, in 1974 the Minister of Mining awarded Pertamina state mining zones consisting of 224,000 km² (Tim Sejarah 1985, p. 87).

7 See Article 5 (2) of Law No. 44 Prp/1960 and Article 11(1) of Law No. 8/1971. Law No. 8/1971 has been superseded by Law No. 31/2003 concerning the change of legal status of Pertamina from a fully state-owned into a semi state-owned company.

8 Article 12(1) of Law No. 22/2001, and Article 2(2) of Government Regulation No. 35/2004 concerning Upstream Oil and Gas Activities.

9 Article 11,12 and 13 of Government Regulation No. 35/2004.

10 See Article 1(15) of Law No. 22/2001, and Article 1k of Law No. 11/1967 on Basic Provisions of Mining.

administrative mining zone does not automatically become a state mining zone or work area, only if the areas are expected to deposit oil and gas resources based on a general survey. According to Law No. 22/2001, work areas are located within a legal administrative mining zone.[11]

As for the general survey, there are no provisions concerning local people's involvement in the survey. This is different from Law No. 4/2009 on Coal and Mineral Mining which stipulates that people's opinions must be heard before the mining zone is finally designated (Sudrajat 2010, p. 61).[12] To conduct a general survey of potential oil and gas extraction, the regulations require that the Ministry of Mining consults with provincial governors ahead of when the work areas are located. The consultation does not need approval from the governors, but it should notify the governors that there are particular areas within the province which may deposit oil and gas and which would probably be designated as work areas.[13]

The absence of people's engagement in the general survey or in the making of a mining zone could probably be linked to the status of oil and gas as 'strategic mining' as stated in Law on Basic Provisions of Mining No. 11/1967. Oil and gas are regarded as strategic for the state economy and therefore are considered to affect the livelihood of the greatest number of Indonesian people (Saleng 2004, p. 86). Oil and gas are also important sources of energy and state revenue as well as raw materials for the chemical industry (Simamora 2000, p. 81).

The exercise of state jurisdiction over oil and gas resources in the Mahakam Delta commenced later than on the mainland: in the mid-1960s.[14] In 1967 the Indonesian central government e.g. the Minister of Mining awarded to the company Japan Petroleum Exploration (hereafter Japex) a large offshore area of the Mahakam Delta, including the small island of Bunyu, adjacent to Tarakan Island. The area comprised of 34,125 km², and was called the Mahakam-Bunyu block (Idham 1974, p.125, de Janvry and Loiret 1992). The award included an exploration contract between Japex and the state-owned company Pertamina. Based on this contract, from 1966 onwards Japex undertook an exploration of the work area, but failed to discover any oil (Idham 1974, p.125). In 1970, Japex (now renamed Inpex Corporation) handed over the work area to the French company Total E&P Indonesie, with an agreement between Inpex Corporation and Total E&P Indonesie that the latter would be the operator and each company would have a 50% share.

11 Article 1(16) of Law No. 21/2001.
12 Sudrajat (2010).
13 Article 2 (2 and 3) of Government Regulation No. 35/2004.
14 On the mainland, petroleum exploration commenced in the late nineteenth century (Lindblad 1988, p. 32; Lindblad 1989, p. 53; Magenda 1991, p. 10). In 1888 the Sultan of Kutai granted a large concession to a Dutch engineer, J.H. Menten, which was later split into three concessions, situated in the Sanga-Sanga district (Wortmann 1971, p. 6; Idham 1974, p. 119).

Up to 2011 Total has been awarded four production sharing contracts (PSC) by the Indonesian government: Mahakam PSC (1970); Tengah JOB PSC (1988); Saliki PSC (1997); and Southeast Mahakam PSC (1998), covering an area of 5,962km². In accordance with laws concerning foreign investment[15] each of the PSCs is valid for thirty years with the option of renewal for another twenty years.

On what legal grounds did Japex and Total obtain the contracts according to Indonesian law? As the contracts were signed before 2001, the way they obtained the contracts was mainly ruled by Law No. 44/1960 on Oil and Gas and Law No. 11/1967 on Basic Provisions of Mining. According to the Oil and Gas Law of 1960, the companies were contracted by a state-owned oil company, in this case Pertamina.[16] The Minister of Mining at the time appointed the contractors. Not only was it governed by legislation, the relation between Pertamina and its contractors was also governed by a contract (*kontrak kerjasama or perjanjian karya).* Pertamina signed different types of contracts with Japex and Total, a 'contract of work' with the former and a PSC with the latter.[17]

As a contractor in production sharing, Total basically has two rights: to carry out exploration and exploitation in a specific work area, as stipulated in the contract, and to get reimbursement of all operational costs (popularly named cost recovery) as well as share the profits. In this respect, as a contractor, Total is entitled to obtain economic rights (see footnote 18). Thus, Total is not entitled to either mineral rights or mining rights (Saleng 2004, p.159).[18] Cost recovery is generally defined as including all expenditures that contractors

15 Law No. 1/1967 as has been replaced by Law No. 25/2007.

16 Pertamina actually originates from a merger between PN Pertamin and PN Permina, two other state-owned oil and gas companies. The merger was detailed in Government Decree No. 27/1968. See Tim Sejarah (1985, p. 85); Simamora (2000, p. 30), and Hasan (2009, p. 73).

17 Basically, contracts between a state and an oil and gas company are based on two schemes. The first is a concession, and the second is a contract. A PSC is one type of contract besides a service contract. A PSC is known as a concept adopted from *adat* law (Simamora 2000, p. 59, Hasan 2009, p. 54). Indonesia formally applied a PSC just when the central government founded Pertamina in 1971. However, in practice, the PSC had been practiced as of 1966 when Permina signed a contract with the Independent Indonesian American Oil and gas Company Organization (IIAPCO). Before that Indonesia applied another type of contract, called 'contract of work'. In practice, the 'contract of work' had been gradually changed into a PSC because it was perceived as disguised concession. The concession itself was a Dutch government legacy which was abolished by the Oil and Gas Law of 1960 due to state sovereignty reasons (Salim 2005, Hasan 2009).

18 Conceptually, mineral rights (*kuasa mineral*) are rights to control oil and gas resources. According to the Indonesian oil and gas law, these rights belong to the state and are closely related to the country's sovereignty. The state awarded the executive with mining rights (*kuasa pertambangan*) to administer, namely to regulate and supervise, oil and gas exploration. To carry out oil and gas exploration and exploitation, the executive established a state-owned company and granted it economic rights (*kuasa usaha pertambangan*). See Patmosukismo (2011, p. 41 and 115-117).

have made to carry out the exploration and exploitation. More specifically, cost recovery should not exceed 40% of the value of the extracted oil and gas. The revenue from selling the oil and gas, which excludes cost recovery, is shared between the Government of Indonesia and the contractor. Revenue on oil is divided 85:15 between the Government of Indonesia and the contractor respectively, while revenue on gas is shared on a 65:35 basis.

In this particular case, however, Pertamina enjoyed broader rights than the contractors. Pursuant to the Oil and Gas Law of 1960 and Law No. 8/1971 on Pertamina, the Indonesian government awarded Pertamina so-called rights to carry out mining (*kuasa pertambangan)*. With these rights Pertamina was entitled to carry out all activities associated with mining, namely undertaking a general survey, exploration, exploitation, refinery, transportation and sale (Ascher 1999, p. 60; Salim 2005, p. 63). Yet, according to Simamora giving such *kuasa pertambangan* did not mean that the state also granted Pertamina the right to control oil and gas resources (mineral rights).[19] The *kuasa pertambangan* allowed Pertamina to carry out mining activities but not to control or own the oil and gas resources (Tim Sejarah 1985, p. 36; Simamora 2000, p. 78-79). Those rights were still with the state, because Pertamina only had mining rights (Hasan 2009, p. 72-73; Patmosukismo 2011, p. 41).[20]

Despite the limited scope of the *kuasa pertambangan*, it paved a way for Pertamina to play a role as a regulatory and supervisory body. The fact that Pertamina in reality evolved to be a regulatory and supervisory body suggests that the rights that the government awarded to Pertamina were not merely economic rights, but were combined with mining rights (see footnote 18).

6.2.2 Some main provisions

Related to Land Resource Use

According to the 1960 and 2001 Acts on Oil and Gas, rights to explore and exploit oil and gas resources (economic rights) do not include rights over land. If the land, which is to be used by contractors, is privately owned or state land that is being cultivated, the Act stipulates that contractors shall acquire the land through purchase, exchange, compensation, recognition, or another form of exchange, in negotiation with the land rights holders (*pemegang hak atas*

19 See also General Elucidation of Law No. 44/1960.

20 State ownership over resources would end only if the extracted resources are at the point of export or sale. See the Indonesian Constitutional Court verdict No. 002/PUU-I/2003 concerning judicial review on Oil Gas Act No. 22/2001, p. 153. See also Simamora (2000, p. 97), and (Hasan 2000, p. 55).

tanah) or users of state land (*pemakai tanah negara*).[21] For the process of acquiring land the contractors, working supposedly on behalf of the government, need a letter of authorization from the Executive Agency.

Government Regulation No. 35/2004 on Upstream Oil and Gas Activities broadly defines the concepts of land rights holders and users. These terms do not only include those who have certificate and possessory evidence (on possessory evidence see Section 8.2), but also those who have actual control over particular state and private land.[22] The regulation gave different names to those two groups, using the words 'owner' or 'holder' (*pemegang*) for those who have written evidence, namely certificate and possessory evidence, and 'user' (*pemakai*) for those who have no written evidence. In this book, I use the word 'possessor' to refer to those who have written evidence of land rights but not a certificate. Those who have a certificate, I call 'land owner'. I realize that this is different from some Indonesian literatures which call those who have possessory evidence, 'land owners'.[23] Following the concepts defined in previous literatures, I here understand 'possession' as actual control over a piece of land or other form of natural resources with or without someone necessarily having a legal right. Yet 'possession' may have legal consequences when someone possesses land for a long time with or without the owner's permission and acts like the owner. In this respect, someone would obtain ownership of land through prescription (Bruce 1998; FAO 2002).[24]

According to Law 11/1967 on Basic Provisions of Mining and Law 22/2001 on Oil and Gas no land owner/holder can refuse to sell his land to contractors or to receive compensation. There have been legal scholars who argue that the provision indicates that a land owner/holder is only obliged to hand over the land to the contractors if the contractor commits to do two things (Salim 2005, p. 251). First, he needs to present the valid original or copy of the PSC to the land owner/holder, explain the objective and point out in which areas the extraction would take place. Second, he needs to acquire the land that

21 These provisions can also be found in Presidential Directive No. 1/1976 concerning synchronization of land affairs with respect to forestry, mining, transmigration and public works, Government Regulation No. 35/2004, and the decree of the head of the Executive Agency No. KEP-0113/BP00000/2007/S0.

22 Elucidation Article 62(1) Government Regulation No. 35/2004.

23 An example of this literature is Sutedi (2007, p. 79, 129 and 130).

24 There is literature which perceives 'possession' as similar to 'holding' (see Bruce 1998 for instance). Yet, I here distinguish between these two terms, for I understand 'holding' or 'holdership' as what Indonesian land law as well as practices recognize as '*garapan*' or '*penyakapan*'. Indonesian land law uses the term 'holdership' to refer to a contract between an owner and user (*penggarap*) in which they agree on sharing the benefits of utilizing the land. See Law No. 2/1960 on Contract of Sharing of Benefits and Government Regulation No. 224/1961 on Land Distribution and Compensation. Yet, recent Indonesian land law regulations use the term without linking it to the mere sharing of benefits. It now refers to a situation where someone utilizes land with or without the owner's permission. See the Letter of the Head of National Land Agency No. 2/2003.

would be used or at least provide a guarantee that the land would be acquired at a later stage. The land can only be acquired with the consent of the land owner/holder. Deliberate consultation (*musyawarah*) between the contractor and land owner/holder is strongly suggested to acquire the land succesfully. A third party consultation is not needed.

As to what should be done if the consultation fails, Law 1967 on Basic Provisions of Mining and Law 2001 on Oil and Gas differ. According to Law 2001 on Oil and Gas, an attempt to come to an agreement can be made with the help of a third party. The third party consists of a team or committee established by the regional government. A lower regulation by the Head of the Executive Agency of 2007 concerning guidance for a PSC contractor in acquiring land seems to have interpreted the provision of Law 2001 on Oil and Gas differently.[25] According to this document, the contractor can invite the heads of the sub-district to mediate the dispute in case the consultation has failed. If the mediation fails too, the contractor can invite the district head/mayor or governor to mediate. If all government officials fail, the contractor can report the dispute to the Executive Agency, asking for necessary follow up. Thus, rather than stipulating the mediation to take place with the help of a local team or committee, the lower regulation relies on individual government officials to settle the dispute.

Unlike Law 2001 on Oil and Gas and the 2007 regulation, Law 1967 on Basic Provisions of Mining neither suggests the establishment of a local team or committee nor does it stipulate to bring the dispute to higher government levels, if the consultation has failed. Instead it states that the Minister of Mining will take a decision on the dispute. If the land owner/holder does not accept the decision of the Minister, district courts will make the final judgment. This means that the dispute will be settled through a judicial process.

With an eye to the side of the land owner/holder, he/she is required to present three documents to be able to obtain compensation. First, land documents, e.g. a certificate in the case of a land ownership and a land letter (*surat tanah*) in the case of a land possession. Second, a letter declaring that the land is not disputed. Third, an identity card and family card (*kartu keluarga*). Only after a land owner/holder has presented all the necessary documents, the contractor provides compensation.

If the land owner/holder can present the necessary documents, and the consultation leads to an agreement on the amount or type of compensation, the land rights will be transferred from the land owner/holder to the government. That means the land is now state property.[26] As far as the oil and gas legislation is concerned, the acquired land becomes state land because the contractor will account for the expenses of land compensation as cost re-

25 See the decree of the head of Executive Agency No. KEP-0113/BP00000/2007/S0.

26 This is different from Law 1960 on Oil and Gas which states that the land shall be returned to the original owner/holder after the PSC expires.

covery.[27] After the acquired land has become state land, the contractor is required to apply for the use rights from the National Land Agency (Salim 2005, p. 251).

Related to Fishery Resource Use

It is interesting that, whereas the oil and gas regulations address land use specifically, they do not do so with regards to fishery resource use. The regulations only concern the protection of the coastal environment by prohibiting any oil and gas exploration and exploitation in areas with a nursery and/or coral reefs.[28] This 'gap' may come from the perception that the sea is open access. Therefore, the oil and gas legal framework mostly uses policy rules to refer to fishery regulations instead of using legislation.

On a national level, the first policy rule concerning petroleum-fishery resource use was put in place in 1975, two years after Total started its first exploitation, when a circular letter of the Directorate-General for Fishery of the Ministry of Agriculture No. E.V/2/4/15/1975 concerning the Prohibition to Sail or Fish in the Ficinity of Oil and Gas Platforms was passed. The circular letter stipulated that within a radius of 500 meters from the installation it was forbidden to sail or to fish, and that within 1 mile sailing and fishing were restricted. Ships or boats were totally prohibited to enter the inside area, yet in the restricted area ships or boats were still allowed to pass by as long as they did not drop their anchor in the area.

After the 1975 circular letter was in force for 29 years, the Deputy Head of Kutai District reiterated its content in 2004 by issuing a new circular letter No. 1000/287/Pem.A/VI/2004, which prohibited the installation of a fishing gear across a public navigation zone. According to the circular letter, the KKDCCR had noticed that in some coastal areas of Kutai the fishing gear instalments had endangered public navigation zones. Interestingly, even though the 1975 circular letter did not mention oil and gas platforms as places that had been endangered by the fishing gear installations, the 2004 circular letter included the platforms as places that shall not be endangered by such installations.

27 For the list of expenditures that cannot be included in cost recovery see the decree of the Minister of Energy and Mineral Resources No. 22/2008 concerning the list of expenditures that cannot be reimbursed by contractors.

28 The provision is stated in Government Regulation No. 17/1974 concerning the Implementation of Monitoring of Offshore Oil and Gas Exploration and Exploitation.

Related to Forest Resource Use

Law 1960 on Basic Provisions of Mining introduced the principle that mining use had to be prioritized in case it conflicted with another resource use. This provision was subsequently reiterated by a 1976 President Directive:

> The Minister of Mining and governors have to avoid overlapping with other resource uses when issuing a mining permit. Yet if the overlapping can not be avoided the mining permit issuance should be prioritized.[29]

The above principle further influenced subsequent regulations on oil and gas and forests. Government Regulation 1985 on Forest Protection is an example. This regulation guaranteed the continuation of mining exploration and exploitation which had existed before a forest designation was undertaken.[30] As mentioned before, for the continuation of such oil and gas extraction, the contractor was required to have a forest permit use from the Minister of Forestry (see Section 5.2).

6.3 Legislation: identification of some problematic issues

Whilst forestry legislation was made compatible with already existing oil and gas regulations, this is not the case the other way around. Petroleum regulations which were enacted after 1983, the year of the forest designation for the Mahakam Delta, seemed to be unaware of the difference between forest and non-forest area. In Law 2001 on Oil and Gas and its following implementing regulations there is no article which stipulates that for land, which is situated inside forest area, there is no right to compensation given that the land is state property. The provisions of the oil and gas regulations are aimed to apply to the whole of Indonesia, regardless of whether the area is located inside or outside a forest area.

In the case of the Mahakam Delta the vagueness of the provisions casts doubts on whether Total's employees and officials of the Ministry of Mining and the Executive Agency truly acknowledge the 1983 forest designation or not. Some behaviour shows acknowledgement of the designation, whereas other behaviour shows denial. Looking at the Forest Area as state land and recent arrangements to obtain a forest use license from the Minister of Forestry are two examples showing that the company's employees acknowledge the designation. Meanwhile the common perception that all land which is located in the Mahakam Block belongs to the Ministry of Mining points rather to a

29 Section II (11) President Directive No. 1/1976. See also Abdurrahman (1979, p. 115) and Saleng (2004, p. 94).

30 Article 7(2) Government Regulation No. 28/1985.

denial. This claim of ownership mainly emerged when Pertamina was at its most successful period (1968-2002). In the mid 1980s, Pertamina persuaded a company, which intended to construct large-scale shrimp ponds on two islands of Muara Badak sub-district, to cancel its plan. Pertamina suggested that the land of the islands belonged to them. However, Pertamina advised the company to apply for use rights on the condition that the company would allow Pertamina to take back the land any time Pertamina needed it, with no obligation for Pertamina to pay compensation to the company.[31]

Even if the oil and gas regulations and the behaviour of Total's employees and central government officials to some extent acknowledge the jurisdiction of forestry regulations over the Mahakam Delta, this is not the case for the jurisdiction of fishery regulations. In the tidal trap nets case as described earlier, few of the participants of the meetings were aware of the fishery regulations which actually allow tidal trap owners to fish within 0-3 miles, known as the traditional fishing zone (see Section 7.2). The lack of clear acknowledgement leads to uncertainty amongst the fishermen, as they are told that on one hand they are allowed to fish within the 0-3 mile zone, but on the other hand they are not allowed to do so if there are oil and gas platforms within the traditional zone. The uncertainty of the fishermen's rights increases when regulations concerning public navigation are taken into consideration as well. Given that there are no marks signing the boundaries yet, separating the fishing area from the zones of public navigation and work area of the oil and gas extraction, certainty is almost impossible to obtain (see Section 1.3.2 on certainty).

The effort to reduce the uncertainty through issuing the 1975 and 2004 circular letters was not very successful. The situation might derive from the fact that the circular letters are policy rules. From the point of view of the hierarchy of legislation, the circular letters have weak legitimacy (see Section 4.3). The fact they are only circular letters had another implication for the extent to which the letter was publically legally binding. It is true that in terms of the content, the circular letters were meant to be generally binding (Ind. *mengikat secara umum*), not just to a particular individual. Yet, the form of a circular letter which in public administration practices became a legal instrument to carry out administrative duties, meant that the circular letters were merely publically binding in an indirect way.

Given its weak legal binding it is not surprising that the subsequent regulations, whether on oil and gas or fishery, did not conform to the two circular letters. Law 2001 on Oil and Gas and its subsequent regulations do not have any provisions concerning the forbidden and restricted areas. The same applies to the Fishery Law No. 31/2004, and its subsequent implementing regulations.

31 The names of the two islands are Letung and Lerong. Interview MK, a Head of Section for the Fishery Resource Survaillance of the Kutai Fishery Agency, 11/8/2008.

None of the Kutai fishery regulations issued in the course of 1978-2000 recall the 1975 circular letter (see Section 7.2).

Though the oil and gas regulations are incompatible with forestry protection regulations, this does not seem to apply to land regulations. As already mentioned, this is due mainly to the exclusion of land rights from mining rights. As a result, any plot of land which is located within the work area of a PSC is under the jurisdiction of land regulations. These stipulations provide certainty to land owners/holders in the sense that their rights over land are acknowledged. In addition, the land owners/holders are also authorized to exercise their rights such as to utilize, sell, rent, inherit or grant their plot of land. Nevertheless, in terms of procedural law, as was discussed in Section 6.2, the land owners/holders still suffer from legal uncertainty concerning the process of consultation. The uncertainty has emerged from two sources. Firstly, on the one hand the law and regulation require the establishment of a committee, if the consultation has failed. Yet on the other hand, the law and regulation state the team is unnecessary. Secondly, Law 2001 on Oil and Gas maintained the private nature of the consultation by stipulating that the participation of the regional government is only required when the consultation has failed. The decree of the Head of the Executive Agency of 2007, an implementing regulation of the Law of 2001 on Law and Gas, has changed the private nature of the consultation as it allowed contractors to invite village heads and subdistrict heads to the consultation as facilitators.

The private nature of the consultation decreased further, when Total was allowed to invite local police and military officers to the consultation meetings. As one of the nine national vital objects of East Kalimantan, Total's installations can be protected by local officers as a back up.[32] A national vital object is defined as an area/location, building/installation or enterprise which influences the livelihood of the majority of people in the area and the national interest, or functions as a strategic source of state revenue.[33] A middle-ranking employee of Total revealed that the presence of local and military officers has made the consultation meetings more effective.[34] Apart from the difference concerning the time when government officials should be invited and which forum the dispute should be brought to, if the consultation fails, all oil and gas regulations mention the state courts as the ultimate forum for land disputes.

The above descriptions of some of the problematic legal issues show the legal restrictions and vagueness that Total's employees and central government

32 Those provisions are stated in the Presidential Directive No. 63/2004 concerning the Security of a National Vital Object, and the decree of the Minister of Energy and Mineral Resources No. 1762/K/07/MEM/2007 concerning the Security of National Vital Objects within the Ministry of Energy and Mineral Resources.

33 See Article 1 (2) of Presediential Directive No. 63/2004.

34 Interview DH, a Head of Support Operation Department of Total E&P Indonesie, 14/9/2009.

officials may encounter whilst exercising use rights over the oil and gas resources. Whereas some regulations prioritize oil and gas extraction, there are also forestry, land and fishery regulations which (partly) restrict it. Equally, the forestry and land regulations provide the oil and gas resource users a degree of certainty by allowing the use of forest land and introducing an acquirement mechanism. Yet, at the same time, it is unclear which area of land can be acquired and how the consultation process should be conducted. Given these restrictions and vagueness, it is therefore interesting to know to which extent and how the oil and gas regulations have achieved their main goals. Reviewing the implementation of the oil and gas regulations may help to figure out an answer to this question.

6.4 Implementation of law by national and regional officials

Even though forestry law prescribes that any contractor should have a permit from the Forestry Minister in order to use the Forest Areas, 26 years after this provision was passed Total or Virginia Indonesia Company (Vico) Indonesia still do not hold a permit.[35] Officers of the Provincial Forestry Agency sent official letters to both Total and Vico Indonesia asking whether they held a permit or not. Total did not reply, while Vico Indonesia responded that they did not need a permit because they had been operational before the so-called Agreed Forest Use was declared in 1983.[36] In other words the company argued that they were not affected by the forest regulations concerning forest permit use. The argument goes actually against Government Regulation 1985 which had specific provisions about mining exploration and exploitation commencing before 1983.

As both companies resisted, the Provincial Forestry officials did not pursue the matter. A higher-ranking official of the Provincial Forestry Agency, when asked why the agency was not willing to conduct an inquiry, stated:

> There is a risk of losing our position if we conduct the inquiry. For us, Total and Vico are giant companies that have huge influential power.[37]

35 This information was provided by two higher-ranking officials at the Provincial Forestry Agency, and by an official at the Ministry of Forestry. When I visited the Ministry of Forestry in 2009 to confirm this information, two of Total's employees were also visiting the ministry to request terms and conditions for arranging the permit. It appears that Total may have started to arrange a license.

36 Interview SBT, 11/3/2009.

37 In Ind. '*Ada resiko bila pejabat akan mengurus masalah izin pinjam pakai ini karena bisa kehilangan jabatannya karena Vico dianggap sebagai perusahaan besar yang memiliki pengaruh*'. Interview SBT, 11/3/2009.

The officer instanced a recent case where a giant coal mining company illegally trespassed a concession area of a timber company. Having asked the coal company to temporarily halt the operations while the local police was carrying out an investigation, the chief of the Provincial Police Office was suddenly replaced.[38] The officer speculated that the coal company had been behind the replacement. Another high-ranking official suggested that Total and Vico were able to use the Delta's production forest without a permit because they possessed strong national backing. In the course of 1968-2002 the national backing was mostly provided by Pertamina who had been appointed the *kuasa pertambangan* by the central government (see Section 6.2). Having such a powerful authority Pertamina took the responsibility to build relations with government officers as well as with communities. Pertamina handled all matters concerning licences or permits that contractors needed, and land acquisition. Therefore, at the time, contractors could fully concentrate on extraction activities whilst Pertamina dealt with all administrative and social matters. As Khong (1986, p.163) points out, in that time Pertamina was a powerful institution as it was not only a company, but also a regulatory body.

Given that the Executive Agency, as the replacement of Pertamina, does not enjoy the same authority as Pertamina and lacks human resources, since 2002 Total has had to arrange its own permits or licenses.[39] This can be illustrated by a case when Total's employees tried to arrange a forest permit use at the Ministry of Forestry and suggested that the ministry should take action against the shrimp farmers who had been illegally occupying the production forest, the official of the ministry asked Total to solve it by providing compensation to the shrimp farmers. Even more surprising for the Total employees was that the ministry officials advised Total's employees to 'forget' (*memutihkan*) about all prior plots of forest land that had been used by Total without a permit.[40] Here the term 'forget' meant to pretend that Total had never used any plots of Forest Land in the Delta's production forest. This

38 The coal company is Kaltim Prima Coal, which operates internationally. The timber company is PT Porodisa which obtained a timber concession license in 1968. PT Porodisa had reportedly accused Kaltim Prima Coal of illegally occupying its concession of 37,000 hectares, which is located in East Kutai District. Kaltim Prima Coal occupied the area without a permit from the Minister of Forestry or approval from PT Porodisa. See several reports of *Kaltim Post*, 'Porodisa Siap Beber Penyerobotan KPC', 14/4/2008; 'KPC Bantah Rambah Lahan Porodisa', 11/4/2008; and KPC Hentikan Kegiatannya', 7/8/2008.

39 Total and Vico Indonesia are under the supervision of the Executive Agency of Kalimantan and Sulawesi region. At the time of field work, this regional office only had six officials including several part-time employees. These officials are responsible for supervising around 40 contractors. Interview YH, a Head of Division for Administration Matters and License of the Executive Agency for Upstream Oil and Gas Activities of the Regions of Kalimantan and Sulawesi, 15/12/2009.

40 Interview DH, 14/12/2009.

pretension enabled Total to apply for a permit without being bothered by the fact that they had already used parts of the production forest illegally.[41]

Even though the forestry regulations qualify most shrimp farmers of the Mahakam Delta as illegal forest occupants, Total was still able to acquire the land they needed. This diverts from their first principle which is 'to respect the law and regulations'. Total did not strictly comply with the forestry regulations. According to those regulations, they should have rejected the land rights of the shrimp farmers by arguing that the ponds were located within production forest. Total's stance to this matter is properly summarized by a middle-level employee of Total, who said:

> Even though the pond owners are illegal in accordance with forestry regulations, yet we cannot be blatantly legal-minded by expelling them. Besides, the pond owners are legal for they are members of registered villages and furthermore they have land letters issued by sub-district heads.

Saleng (2004, p. 201) found the rise of a dual or ambiguous legal culture amongst mining companies. The mining companies practice strict enforcement when they are dealing with security procedures, work safety as well as traffic lights. However, they often disobey formal rules and even the provisions of contracts, when they encounter claims from community members. They behave in this way since their priority is that their operations are kept running.

However, even though Total's employees acknowledged the land rights of the shrimp farmers, they still argued that the compensation they paid to the land holders should not include the land price. This implies they only acknowledged farmers' rights to get compensation for their expenses, but not for their land rights. They added that the land belonged to the state, and they could not buy state land from a private party by using state money. Thus the compensation only included the expenditures of the shrimp farmers for the construction and cultivation of the ponds, namely for dikes, huts, and breeding. This list of expenditures actually refers to a Decree of Kutai District Head No. 180.188/HK-630/2008 concerning the Basic Amount of Compensation.[42]

The above description looks contradictory, as the decree of the head of the Executive Agency of 2007 states that land acquisition should constitute a transfer of land rights from the original land owner/holder to the state.

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41 Interview R and R, employees of Total E&P Indonesie who were in charge for service claim and land acquisition, 17/12/2009 and 21/1/2010. Interview DH, 14/12/2009.

42 Yet, there are different views with regards to the status of land holders with land letters. Total's officials regarded the occupants of the Delta production forest as legal on account of the land letter. Yet, a company like Mahakam Sumber Jaya, a coal mining company which has a mining concession area in Samarinda and Kutai District, viewed those who occupied forest areas as illegal despite having a land letter. See 'MSJ Siap Berikan Kompensasi Soal Tuntutan 300 Petani Pelita Makmur 3', *Kaltim Post*, 6/5/2010, and 'Bupati Kukar Resmikan Tambang Batu Bara PT Mahakam Sumber Jaya', http://www.kutaikartanegara.com/news.php?id=710, downloaded on 10/6/2011.

Accordingly, there cannot be a transfer of land rights if the land is already perceived as state land, even if the price of the land is not included in the compensation. Moreover, in practice, Total marked the land for which compensation had been paid, to indicate which areas now belonged to the Executive Agency/Total (see Picture 6.1). The marks seem to be meant to distinguish between the compensated land and the surrounding land which was still privately owned.

Picture 6.1: A land boundary mark owned by the Executive Agency/Total E&P

As mentioned before, the involvement of Kutai agency officials, local police and military officers in the Mahakam Delta has led to consultations being run more effectively. Through the active involvement of the officials and officers the consultation has moved from the private into the public sphere. Total needed the Kutai agency officials because the villagers perceived them as neutral and, most importantly, as people with authority.[43] In this process the land owners/holders usually accepted the amount of compensation that Total offered them.

The fact that Total offered a fairly high sum in terms of compensation is another reason why Total could easily acquire land. Total paid around US$

43 Across Indonesia many oil companies have employed professional security personnel due to the tense relation with the local people in the work area of the company (Saleng 2004, p. 100-101).

950 (IDR 10 million) per hectare and the price would go up to US$ 1,800 (20 million IDR) per hectare, when Total needed the land urgently.[44] The amount of compensation is about the same as what Vico paid for land holders in inland Muara Badak, while the Kutai District government could only offer around US$ 177 (IDR 1,500,000) per hectare. At such a high price, it is not surprising that many shrimp farmers sold their land to Total, particularly after pond productivity decreased sharply in 2003 (Rachmawati 2003, p. 61; Hidayati et al. 2004, p. 61; Noryadi et al. 2006).

Making a profit from land acquirement is also an important reason for local officials and officers[45] to be willing to engage in consultations. For every time they were present at the consultation meetings they received a lump sum from Total. They preferred the meetings to take place in Samarinda, where they received a larger payment.[46] For, according to the regulations, the more remote the meeting place from the offices of the officials, the higher the payment. For sub-district officials and officers, attending the meetings was even more attractive, because they received a fixed share of the compensation.[47] The fixed share constitutes of 2.5 % of the total amount of compensation for each land transaction. Of this share, 1.5% goes to the sub-district head (*camat*) in his formal role of authorized local notary (Ind. *Pejabat Pembuat Akta Tanah*). The remaining 1% goes to the sub-district office. Yet, in practice, the full 2.5% was usually given to the sub-district head in the hope that he/she would share it with the members of the Sub-District Leaders Consultation Forum (*Musyawarah Pimpinan Kecamatan,* abbrev. Muspika*)* as well as with the village heads.[48] In some cases village heads demanded a larger share of up to US$ 9,500 (10 millions IDR) for each land transaction.[49]

Based on the provisions mentioned in Section 6.2 it could be concludeded that Total does not have a strong legal backing to forbid fishermen to fish in the areas in close proximity of the oil and gas installations. This is not only

44 The amount of compensation offered by the two oil and gas companies is higher than the amount that coal and oil palm companies offered to land holders who lived inland. The coal companies offered an amount ranging from US$ 1,000 to US$ 1,300 (11 to 14 million IDR) while the oil palm companies could only offer US$ 110 (2.5 million IDR). Interview Hrs, a village head of Saliki, 9/2/2010, and EM, a Head of a technical section of Sepatin village, 10/2/2010.

45 I use the term 'local officers' to refer to local police and local military officers. For more see Chapter 8.

46 Interview Hdt, an employee of Total E&P Indonesie, 16/12/2009.

47 A lump sum for participating in consultation meetings or a fixed share of land transactions are only two examples of financial benefit that the local offials and officers could receive from the oil and gas companies. It also happened that periodical payments to a number of high-ranking officials of the Kutai District government were made by Total for serving the company with administrative matters. Interview AR, an employee of Total E&P Indonesie, 15/12/2011.

48 The members of Muspika consist of the sub-district head, and chief of sub-district-based military and police officers.

49 Interview RNP, Rd and Rn, officers of Local Police Office of Aggana sub-district, 1/7/2008.

because the circular letters are legally weak, but also because the letters are not harmonized with the fishery regulations which allow the fishermen to fish in the traditional zone (see Section 1.3.2 on harmonization). In the tidal trap net case Total's employees did not accuse the tidal trap owners of illegally entering mining zones, because they did not claim them as exclusive territories. Total's middle-level employee whom was mentioned earlier, said that Total could not forbid fishermen to fish in the vicinity of their installations given that there is open access to the sea. On Total's notification boards that were installed nearby the installations, was only written, 'Sub-marine pipeline, do not anchor, do not dredge!', or 'Sailing at full speed is prohibited to avoid beating of the waves!'. It is clear that these notices did not refer to any notion of possession of the surrounding areas by Total or even the Executive Agency. Taking that into consideration, the Executive Agency of the Kalimantan-Sulawesi Region suggested that Total would not prioritize legal enforcement on the fishermen as it could generate unexpected resistance.

In fact, the main concern of Total when asking fishermen to stay away from their installations is security. Security, as said, contributes to ensuring that their operations are kept running. For example, security officers of the oil and gas companies – who could be local officials hired by the companies on a part time basis – made sure that there were no unstatic gears installed in Zone II of the Fishing Ground Division (see Section 7.2), before the companies carried out seismic explorations.[50] When an official of the Port Administration Office of the Ministry of Public Transportation questioned whether Total had obtained a permit to install their installations, there was an emotional response from the Executive Agency officials saying Total's operations had to continue because of compliance with an agreement with international buyers. In addition, they said, 'Total was not criminal and, more importantly, that the Kutai District government would loose revenue if the extraction activities faced any further delay'.[51] Given that the Kutai District government partly depends on the revenue made on petroleum, most officials agreed that oil and gas extraction should be prioritized.[52]

6.5 Concluding remarks

If the volume of oil and gas production in the Delta would be the only indicator with which to assess the effectiveness of oil and gas regulations, one could say that the regulations were effectively implemented. To give a concrete example: at the time of writing, Total undertakes 30% of all Indonesian gas

50 Interview Agg, a staff of Muara Badak office of Kutai Fishery Agency, 3/12/2011.
51 Interview YH, 15/12/2009.
52 Interview RBS, a former Head of Kutai Environmental Agency, 24/4 and 7/5/2008. See also Simarmata (2010, p. 191).

production and 9% of all oil production. Together with Vico Indonesia, which mostly operates onshore, Total provides 45% of Indonesian gas production. These figures are interesting, given the legal ambiguity which the oil and gas resource users have faced in the Mahakam Delta, both in terms of overlap as well as restrictions. At this point it is important to realize that some oil and gas, fishery and forestry regulations actually facilitate oil and gas resource users in exercising their exploitation rights. Even if those regulations are legally weak and contain internal contradictions, favouritism of oil and gas resource use in the implementation of the law has successfully removed some of the weaknesses and contradictions.

Favouritism of oil and gas resource use originally comes from a common awareness that it contributes significantly to state revenue. The importance of this income has often led government officials at different administrative levels as well as legal officers to prioritize the interest of oil and gas companies, despite the lack of a strong legal argument. The decisions are sometimes ultimately made to ensure that oil and gas extraction are kept running.

Yet, oil and gas resource use has also been favoured because the oil and gas companies benefited the officials and officers themselves in real terms. The willingness of the local officials and officers to engage in the consultation meetings as well as in dispute settlement might have been more due to the direct financial benefits than to the more distant knowledge that oil and gas resource use provide a substantial contribution to state revenue. This argument is confirmed by the increasing levels of jealousy among officials and officers, about the question of who should be invited to which meeting. They even chose distant places to meet and fixed the amounts of their shares to earn more money. To them as well as to land owners/holders who expected to receive large amounts of compensation, the oil and gas resources have constantly looked like treasures with a constant supply of cash money.

7 The sea: open or exclusive?

7.1 INTRODUCTION

The productivity of the shrimp ponds of the Mahakam Delta started to decrease in 2001, after a remarkable period of four or five years of good harvests. As a result some people returned to their former profession of fishing. Yet, they soon realized that there was less fishing ground available than before due to the growing number of oil and gas platforms, which occupied some of the traditional fishing grounds. These developments led the former shrimp farmers to seek an opportunity to earn money elsewhere. They regarded the petroleum exploration as a source of money of which they sought to obtain a small part for themselves. They believed that the oil company, as a rich business had the moral obligation to share a small part of its fortune with the less fortunate villagers. This belief led to devising a trick. They installed a tidal trap (*julu*) in the vicinity of the companies' platforms[1] on the assumption that one day the companies' transport would crash into their gear. This would suffice to claim compensation for the damage they caused.

As the trick initially succeeded, the number of new gear installations gradually increased. The Kutai District Team on Dispute Settlement which was actively involved in settling disputes concerning fisheries had observed this trend. In order to control the situation, the team introduced a regulation. However, instead of forming a whole new set of norms, the new regulation largely referred to existing legal norms and only added one small provision which was specifically meant to control the increase of gear instalments. It states that any gear installation in the vicinity of the companies' platforms is prohibited (see Section 6.2 on an earlier account of the new regulation).

It was not the first time that the Kutai District government added a new provision to its regulations to enhance its control over fishery resource use. It happened before in 1999 and 2000. In some aspects, as we will see below (see Section 7.4), the new provisions contradicted the provisions of national fishery regulations. However, due to a variety of factors the Kutai District

1 Mini trawls and tidal traps are the most common fishing methods in the Mahakam Delta. Other types of gears, that are used more rarely in the Mahakam Delta are trammel net (*gondrong*), shore-operated stationary lift net (*bagan*), pot (*bubu*) and hook and line (*pancing*). See Sandjatmiko et al. (2005, p. 114-120) and Dinas Perikanan dan Kelautan Kutai Kartanegara (2008b, p. 13).

government was not really able to exercise control over fishery resource use. Some research done in 2002, 2003 and 2008 revealed the widespread inefficiency in the implementation of the Kutai fishing regulations and policies in the Mahakam Delta.

The abovementioned ambiguity, whereby the Kutai District government on paper continued to gain greater control over the fishery resource use, whilst in reality this control was not effectively implemented has traditionally been a feature in the Kutai fishery regulation system. The situation has resulted in only a few fisheries in the Mahakam Delta complying with formal fishery regulations. Within that situation, dispute settlements over natural resources use led by the Kutai District government are characterized by an *ad hoc* approach and most of the time depend on a situational bargaining relation between companies and fishermen or farmers.

At the same time, in the locations where the regulations were meant to serve the interests of oil and gas extraction (see Chapter 6), the prohibition of gear installations nearby companies' platforms was also meant to diminish open access to fishery resources. Particular forms of fishery resource use were restricted to ensure that forms of non-fishery resource use could be run without being endangered by fishery resource use, notably catching fish. This policy has certainly affected fishing which has long practiced open access which coexits with common and private property.

7.2 Law-making and legislation: main laws and provisions

Unlike the case of forestry but similar to regulation of oil and gas resource use in the Mahakam Delta, the state has not exercised control over fishery resource use through a territorial strategy.[2] As is generally the case across Indonesian waters, formal state control over the use of fishery resource in the Mahakam Delta has been run through a combination of input and output control. Input control has placed restrictions amongst others upon the number and size of fishing vessels (fishing capacity control), the maximum amount of time fishing vessels are allowed to fish (vessel usage control). Output control has been conducted through direct limitations on the total amount of fish leaving a fishery, which in other words, equals the total amount of fish that

2 Territorial strategy in essence is a spatial organization of state control by physically delineating particular geographic areas or zones as state property followed by the passage of state jurisdiction over the delineated areas/zones. The passage of the jurisdiction subsequently implies the exercise of state rules which determine how and by whom the resources within the delineated areas/zones could be used. For an extensive account of territorial strategy see Vandergeest and Peluso (1995, p. 387); Kumar and Choudary (2006).

can be caught (Pope 2002, p. 76).[3] In a simple formulation Satria and Matsuda (2004) point out that state control over fishery management in Indonesia has always occurred through licenses and zone restrictions. As a result the state never practiced a territorial strategy in exercising control over fishery resource use.

The way in which the state exercises formal control over fishery resource use in the Mahakam Delta has remained unchanged, despite the introduction in 2007 of exclusive rights through territorial use rights in Indonesian fishery legislation after the enactment of Law No. 22/2007 on Coastal Zones and Small Island Management.[4] This is mainly due to a lack of implementing regulations of the law. Moreover, the implementation of the law has encountered the acute problem current in Indonesian public administration that respective departments have their own laws which leads to sectoral manner (Patlis et al. 2001, p. 28; Patlis 2005, p 451-452; Waddell 2009, p. 190). The most recent challenge to the implementation of the law is a verdict of the Indonesian Constitutional Court which declared thirteen articles of the law void.[5]

According to Saad (2003) the absence of a territorial strategy in fishery resource management is inevitable due to the application of the common property doctrine in Indonesian fishery laws. Under the common property regime anyone is free to fish in Indonesian marine territories once they have obtained a fishing permit on the condition that they fish in permitted fishing zones as well as use proper gear and vessel (Saad 2003, p. 95 and 99). Hence, unlike in forestry management, in fishery management the state does not delineate particular marine areas as state or private property to determine who would be allowed to utilize fishery resource in the designated areas.

After independence, the common property doctrine in fishery affairs was first regulated in the Decree of the Minister of Agriculture No. 607/Kpts/UM/

3 Referring to state control over fishery management has often been used to contest notions in which it was incorrectly concluded that Indonesian fishery management falls under an open access regime (Bailey 1997, p. 234; Saad 2003, p. 95 and 105). According to the opposite view, Indonesian fishery resource management is open access *de facto*, but not *de jure* (Satria and Matsuda 2004, Patlis 2007, p. 205).

4 Territorial use rights are defined as the exclusive rights of a person or community to the use of fishery resources within a certain area (Christy 1982; Christy 1997, p. 42). In Law No. 22/2007 the introduction of the concept of territorial use rights can be seen in coastal water use rights (*Hak Pengusahaan Perairan Pesisir*, abbrev. HP3). A former legal scholar who became a bureaucrat suggested that the introduction of exclusive territorial rights in the law is a breakthrough for it has released the Indonesian fishery rule regime from the open access doctrine. See further, Saad at http://lautmenyapa.blogspot.com/2008/11/hak-pengusahaan-perairan-pesisir.html (accessed on 15 July 2010).

5 See verdict of the Indonesian Constitutional Court No. 3/PUU-VIII/2010. The verdict was made in response to a judicial review application of several NGOs and fishermen who had argued those provisions were in contradiction with the 1945 Constitution.

9/1976 on Fishing Zones Division (Saad 2003, p. 97).[6] The decree basically regulated the division of fishing zones, and the types and sizes of vessels and gear which could be used. The decree divided the Indonesian marine territory into four fishing zones. Zone I (0-3 nautical miles from the coast) was meant for small-scale fishermen; boats with an inboard engine of more than 5 Gross Tonnage and trawl were prohibited. Zone II-IV were meant for large-scale fishing with a larger size vessel and engine. Apart from regulating the division of fishing zones and types and sizes of vessel and gear, the 1976 Decree also implicitly stipulated the requirement of a fishery permit to be allowed to fish.

The way the 1976 Decree administered fishery resource use has largely inspired subsequent fishery regulations including Law No. 9/1985 on Fisheries.[7] The decree has also impacted local regulations of East Kalimantan Province and Kutai District concerning fisheries. The following sections describe the extent to which this principle from the 1976 Decree has affected the main provisions of subsequent fishery regulations in later decades. Besides describing some main provisions, the following sections also seek to examine how the local fishery regulations have been formulated. For this purpose special attention will be paid to the drafting process of six Kutai regulations which took place in the course of 2004-2009.

7.2.1 Some Main Provisions

Even though independent Indonesia had its first own-produced Fisheries Law in 1985, state control over fishery management had been officially exercised since the 1950s. A Government Regulation on the Partial Devolution of Government Affairs concerning Marine Fisheries, Forest and Small Timber Plantations to Regional Government in 1957 stated that regional governments could issue fishery permits.[8] During the 1970s, the Ministry of Agriculture passed eleven decrees concerning fisheries. Given that those eleven decrees applied the common property doctrine, they only regulated the division of fishing zones,[9] types and size of gear, fishery levies, seasonal closures as well as fishery conservation (Saad 2003, p. 96-97).[10] From literature on fishery it can be con-

6 The decree has been amended by the Decree of the Minister of Marine Affairs and Fisheries No. 392/1999, and recently by the Regulation of the Minister of Marine Affairs and Fisheries No. PER.02/MEN/2011. In the recent regulation, the marine zones are divided into three fishing zones as an attempt to adjust to the provision of Law No. 32/2004 on Regional Autonomy. The issuance of the decree aims at protecting small-scale fishermen from large-scale fishermen who usually use large boats. By specifically allocating Zone I to small-scale fishermen, the decree intended to refrain large-scale fishermen from entering Zone I. See Bailey (1988), Bailey (1997), Tribawono (2002), and Jhamtani (2003).

7 The 1985 Law on Fisheries has been replaced by Law No. 31/2004.

8 Government Regulation No. 64/1957.

9 See the Decree of the Minister of Agriculture No. 01/1975, and No. 123/1975.

10 See the Decree of the Minister of Agriculture No. 327/1972, and No. 35/1975.

cluded that quota, seasonal closures, gear restrictions, taxes or licenses have become the most accepted means in government policies to resolve over-exploitation of fishery resource use (Keen 1983, p. 199-201; Smith and Panayotou 1984, p. 351). The means of control of fishery management as stipulated in those eleven regulations have been reasserted and reproduced by later fishery regulations including by the East Kalimantan Province and Kutai District fishery regulations.

In East Kalimantan the exercise of state control over fishery resource use during the 1960s through to the early 1970s was even more visible compared to the situation at the national level. During a period of State Emergency (1957-1963) local military officers issued some fishing permits. Under the New Order regime, in 1969 the Provincial government enacted Regional Regulation No. DPRGR-Prop/08/PD/1969 concerning Fishery Permits. The regulation provided legal certainty to any fisherman who held a fishing permit issued by the Provincial government. Interestingly, in 1973 the Head of the Provincial Fisheries Agency issued a decree stating that all former fishing permits which had been issued by other provincial agencies other than the Fisheries Agency, were no longer valid from the day the decree was officially issued.[11] In 2005, on the basis of the decree, in the case *Seven Fishermen v. PT. ITCI Kartika and the Ministry of Public Transportation of the Republic of Indonesia*, the Supreme Court's decision was in favour of PT. ITCI Kartika and the Ministry of Public Transportation. The judges argued that the fishery permits that the seven fishermen had obtained from the colonial rulers in 1931 which was later supported by a permit issued by a local military officer in 1960, and a letter issued by a head of an urban-quarter (*lurah*) in 1984 were no longer valid in accordance with the 1973 Decree.[12] Another Provincial Regulation issued during the period was the Decree of the Governor of East Kalimantan No. 75/1973 concerning the Prohibition of the Use of Shore-Operated Stationary Lift Nets.

In an attempt to implement the 1976 Decree, the Kutai District government promulgated Regional Regulation No. 18/1978 concerning Fishing within the Administrative Territory of Kutai District. Kutai Regulation No. 18/1978 reiterated two matters that had been stated in the 1976 Decree, namely that the fishing territory would be divided into four fishing zones, and that any use of fishery resources should be undertaken through a Fishery Business License (FBL) and a license for using a vessel. Another important provision in the 1978 Kutai Regulation concerns fishery sanctuaries where fishing was

11 The Decree is number 2002/3/1973, dated 1 February 1973.

12 This case arose when PT. ITCI Kartika used the fishing zone of the seven fishermen which was located in Balikpapan Seberang sub-district as a log pond without prior consultation with the fishermen. The timber company did not believe they violated the law as they obtained a permit to use the area from a Regional Agency of the Ministry of Public Transportation. See Supreme Court Verdict No. 1300 K/Pdt/2005.

totally forbidden. The Kutai Regulation designated eleven fishery sanctuaries, but none of these were located in the marine part of the Mahakam Delta (Hartoto 1997, p. 78; Sumaryono, Kreb and Budiono n.d., p. 3). In an effort to protect the fishery sanctuaries the Kutai District Head subsequently issued a decree concerning a Sub-District Committee on Fishery Resources Conservation.[13] The members of the committee comprised of local police, a military officer, a village head and a sub-district head. The committee was authorized to carry out supervision and surveillance in the fishery sanctuaries as well as to detain those who illegally fished in the sanctuaries.

Meanwhile on the national level the 1985 Fisheries Law was enacted, followed by regulations of implementation.[14] Yet with regard to substance, the change was not significant as all means of control mentioned in those regulations were still based on the former fishery regulations. What had been done successfully by the new fishery regulations was the organisation of norms into a structured order. In addition, the regulations provided some further detail such as adding two other types of fishery permits, the length of validity of the fishery permits, obligations of permit holders as well as sanctions. Besides the two preceding fishery permits (FBL and a license for using a vessel), the Fishing License (FL) and a license for transporting the catch were introduced.[15] With regard to sanctions, the regulations stated that any fisherman who fished on a large scale without a permit could receive a maximum of 2.5 years imprisonment or a maximum fine of IDR 250,000,000-IDR 500,000,000 (equal to US$ 2,940-US$ 5,880),[16] whereas small-scale fishermen could receive a maximum of six months imprisonment or a maximum fine of IDR 5,000,000. An implementing government regulation also set a maximum fine of IDR 250,000,000 (equal to US$ 2,940) for any non-compliance with the provisions on gear type and size, fishing zone, quota as well as fish disease prevention.

Meanwhile, the 1985 Law on Fisheries and its subsequent implementing regulations also introduced a few new provisions. Firstly, they contained

13 No. 79/1978 as has been replaced by a Decree of the Head of the Kutai Fisheries Agency No. E.1.5234/137A/SP/V/2009.

14 Some of those implementing regulations are Government Regulation No. 15/1990 on Fisheries Business as has been amended several times and recently superseded by Government Regulation No. 54/2002; the Decree of the Minister of Agriculture No. 815/Kpts/IK.120/11/90 on Fisheries Business; and No. 815/Kpts/IK.210/1990 on Fishing in Indonesia's Fishery Territory and Exclusive Economic Zone.

15 In brief FBL is given to allow anyone to maintain a fishery business either by capture, farm, collect or preserve fish. FBL is given to any fishing boat which bears the Indonesian flag and will be used for fishing. Meanwhile FL is a part of FBL. Any fishing boat, either using an Indonesian or a foreign flag, is allowed to transport a catch with this license. The 2002 Government Regulation No. 54/2002 made a change to the fishery permits by reducing its number from four to three. This change of fishery permits remained until a new Fishery Law was enacted in 2004. In terms of length of validity, FBL is the only type of fishery permit which does not have a time limit, while a Fishing License and license for boat which is used to transport the catch, expire.

16 US$ 1 is equivalent to IDR 8,500.

provisions on aquaculture – an issue that the previous fishery regulations had missed. Secondly, with regard to state protection of small-scale fishermen and fish farmers, the new fishery regulations assigned government the task to keep records of small-scale fishing and aquaculture in the hope that the recorded information could be used to carry out control and supervision.[17] In addition, those regulations defined small-scale fishermen and aquaculture farmers as the group of people who had a boat of less than 5 Gross Tonnage or who cultivated fish in an area of no more than 2 ha for inland aquaculture, 0.5 ha for sea water, and 4 ha for brackish water. The new law also prohibited 'destructive and monopolistic' gears in an effort to limit large aggressive types of equipment.

The Kutai District government reacted to the changes on the national level by dissolving the 1978 Regional Regulation and replacing it with Kutai Regulation No. 3/1999. In drafting this regulation, Kutai District government was assisted by some lecturers from the Faculty of Fisheries and Marine Science, University of Mulawarman, in Samarinda, the Provincial capital. The provisions of the Kutai Regulation No. 3/1999 are actually a mix between provisions taken from the 1978 Kutai Regulation and the 1985 Fisheries Law. Reiterating what had been stated in the 1985 Law, Kutai Regulation No. 3/1999 prohibits the use of destructive and monopolistic gears as well as catching breeding fish and trading fish eggs. In addition, the Kutai Regulation reiterates that the use of permitted gears should be in accordance with the rules on a fishing zone division.

Similar to the 1978 Regulation, the 1999 Kutai Regulation regulates fish sanctuaries as well. Yet the 1999 Regulation reduces the number of sanctuaries from eleven to nine. As was the case in the 1978 Regulation, the 1999 Regulation does not include any part of the Mahakam Delta in the list of designated sanctuaries. All the nine fish sanctuaries are situated up-stream from the Mahakam River. Any fishery resource use is prohibited in the sanctuaries unless it does not harm or destruct its fishery resources. The 1999 Regulation added another prohibition which existed neither in the 1978 Regulation nor in the 1985 Fisheries Law, stipulating that the installation of gear which could possibly endanger a public shipping line (Ind. *alur pelayaran*) would be prohibited.[18] Anyone offending this rule could receive a maximum of three months imprisonment or a maximum fine of IDR 1,000,000 (equal to US$ 115).

It is interesting to note that the 1999 Regulation does not have a single provision concerning fishing permits on capturing fish as had been stipulated in the 1985 Fisheries Law and its subsequent implementing regulations. Rather the 1999 Regulation introduces a new fishing permit. It is said that any fisher-

17 See 1985 on Fisheries, the Elucidation of Article 10 (2), Government Regulation No. 15/1990 on Fishery Business, article 14(3) elucidation and General Elucidation, and Government Regulation No. 54/2002 on Fishery Business, article 6 (3) and General Elucidation.

18 Article 8 of the Kutai Regulation No. 3/1999.

man who wishes to fish outside his village or sub-district should obtain a written letter from the village head and sub-district head of where the fishing grounds are situated.[19] This provision is not only confusing, it is also in contradiction with the 1985 Fisheries Law and its subsequent implementing regulations which did not recognize fishing territory based on administrative boundaries. Nevertheless, the above provision is unlikely to be enforceable given that it is not accompanied by any sanctions.

Meanwhile, through Law No. 22/1999 on Regional Autonomy districts in Indonesia were given a much higher degree of regional autonomy. In order to implement this far-reaching law as soon as possible, the Kutai District government promulgated the regulation concerning the Authority of Kutai District government.[20] In particular with regard to marine affairs, the Kutai Regulation was inspired by a provision of the Law on Regional Autonomy which granted broader authority to provincial and district/municipal governments to manage their respective sea territories.[21] The Law on Regional Autonomy of 1999 together with a subsequent government regulation gave the district and municipal government full authority to supervise and monitor any exploration, exploitation, conservation and management of marine resource use taking place within 0-3 nautical miles from the coast (Tribawono 2002; Saad 2003). The provision affected central government jurisdiction over the sea, which now applied to 12 nautical miles and beyond, leaving 0-12 nautical miles under district (0-3) and province jurisdiction (3-12) (Saad 2003, p.110-112). Like the Law on Regional Autonomy Kutai Regulation No. 27/2000 granted broad authority to Kutai District government in managing fishery affairs. The Kutai District government has the authority to issue a permit on both capture and fish farming. At the same day of the promulgation of the Kutai Regulation concerning the Authority of Kutai District government, two other Kutai regulations concerning fisheries were promulgated. The two Kutai regulations are respectively No. 34/2000 concerning Quality Control of Milkfish Fry[22] and Fish Seeds, and No. 37/2000 concerning Organoleptic[23] Quality Control.

In addition, it enacted Kutai Regulation No. 36/2000 on Fishery Business, which due to its broader scope, could be considered as the most important of the above three regulations. Kutai Regulation No. 36/2000 regulates both

19 Article 3 and its Elucidation.

20 No. 27/2000 as has been amended by Kutai District Regulation No. 11/2008.

21 Article 10(2 and 3) of Law No. 22/1999.

22 Milkfish fry (Ind. *benur*) is the larvae of milkfish (Ind. *bandeng*) which grows in hatcheries. Milkfish fry has been developed to substitute wild-caught fry. See http://www.larvalbase.org/MiniEssay.htm and http://en.wikipedia.org/wiki/Milkfish (downloaded on 18 July 2012).

23 The term 'organoleptic' points to the sensory properties of a particular food or chemical as experienced by the senses, including taste, sight, smell, and touch to detect signs of disease or contamination. See http://en.wikipedia.org/wiki/Organoleptic (downloaded on 18 July 2012.

capture and aquaculture making it the first Kutai Regulation since the 1960s to regulate fishery resource use comprehensively. Nevertheless, in terms of norms most of its provisions repeated what had been stipulated in the1985 Fisheries Law and its implementing regulations. To give an example, it recalled that every applicant of a fishery permit should provide in advance a location permit, an environmental impact assessment, a certificate of company establishment, a tax registration number, a business plan and a letter of declaration explaining that the applicant is willing to establish a branch office in the capital town of Kutai Kartanegara District. The last condition is that the applicant holds the so-called Small Scale Fisheries Registration Certificate (Ind. *Tanda Pencatatan Kegiatan Perikanan* abbrev. SSFRC), which is valid for one year with the possibility of renewing it for another year.

Even though most of the provisions of the 2000 Kutai Regulation on Fishery Business are similar to higher national legislation on fishery, it also invented some new provisions which the higher national legislation did not stipulate. Firstly, the Kutai Regulation sets almost the same requirements for obtaining a FBL as a SSFRC. Three of the requirements are permit location, business plan, and letter of recommendation from the Kutai Fisheries Agency. Secondly, it restricts the length of validity of a FBL to thirty years with the possibility of another twenty years of extension. Later in 2008 national fishery legislation adopted the invented norm by revising the length of validity to sixty years including one extension.[24] Thirdly, it elevated SSFRC to the same status as FBL.

Meanwhile the enactment of two other Kutai regulations in 2000 enhanced government formal control over fishery resource use. Apart from controlling the capturing of fish and aquaculture, the Kutai District government now extended its control to any transported and traded fish seeds, particularly shrimp and milkfish seeds, and processed-fish product. The examination is aimed at preventing the rise of pests and diseases that may affect the fish. A laboratory, operated by the Kutai Fisheries Agency, is expected to carry out an examination of the transported and traded fish seeds and processed-fish products in an attempt to measure whether they meet the quality standards. The Kutai Fisheries Agency issues a certificate when someone or a legal body meets the criteria.

The drafting and enactment of Kutai regulations on fishery resource use from 2004 onwards show a new dynamic when compared with the previous periods. Not only the dynamic differs, but also the volume. During 2004-2009, Kutai District government initiated four Kutai Draft Regulations, one Draft Regulation of the Kutai District Head and one circular letter. Prior to that period, in 2003 the Kutai District government had only issued the Circular Letter concerning Illegal Ponds and Digging Machines (see Section 5.1 for an

24 See the Regulation of the Minister of Marine Affairs and Fisheries No. Per.05/Men/2008 on Capturing Fish Business.

account of this letter). Agencies involved in the drafting process in this period varied, and so are the subject matters which are regulated. The Kutai Fisheries Agency is no longer the only agency which initiated draft regulations on fishery because other agencies took initiatives as well. The reasons for drafting and enacting the Kutai regulations are diverse, ranging from technical and incidental to substantial and future-oriented. The diversity of reasons eventually translates into various subject matters and goals of the enacted and drafted regulations.

7.2.2 Law-Making in Kutai District

The following section describes the six initiatives of regional law-making of fisheries regulations in Kutai District. It pays attention to reasons, input gathering methods as well as substance. In terms of the initiating agency the six initiatives could be divided into three groups. The first agency to initiate the drafting of regulations was Kutai Fisheries Agency. This agency undertook three initiatives which resulted in the Draft Regulation on Fisheries Levy, the revision of Kutai Regulation No. 3/1999 on Fishing, and the Draft Regulation on Fisheries and Marine Management of the Mahakam Delta. Secondly, some regional law-making was initiated by other agencies beside the Fishery Agency. This included the Kutai Draft Regulation on Fishery Business. Thirdly, some regional law-making was the result from a joint collaboration. This applies to the Decree of the Kutai District Head on the Prohibition of the Installation of Gears on Public Shipping Line, and the Draft Regulation of the Kutai District Head on Standardized Pond.

Initiated by the Kutai Fisheries Agency

Since 2005, the Kutai Fisheries Agency has experienced quite a stable leadership. A few years before 2005, most of the staff was opposed to their former head which led to resistance.[25] Apart from the issue of leadership, another issue arose at the time, namely that their head did not have a degree in fishery. Interestingly, the new head who was appointed in 2005 did not have a degree in fishery either. He is a forester by training and has spent most of his time working at the Kutai Agricultural Agency. His longstanding work at the Agricultural Agency which office is located right next to the office of the Fisheries Agency apparently helped him to be smoothly accepted by the staff of the Fisheries Agency. With an increased budget from an equivalent of ten thousand dollars to a million dollars per year, the new head successfully

25 Interview Mnt, a staff of Division for Control and Survaillance of Kutai Fishery Agency, 19/8/2009.

stabilized the internal office politics of the Fisheries Agency.[26] In any case, with such annual budget it is not surprising that during 2005-2009 the Fisheries Agency was able to yield three Kutai Draft Regulations, even if none of them were eventually enacted.

Where did the demand for these three Kutai Draft Regulations come from? Only one draft was demanded by the fishing communities, whereas the other two drafts derived from outside these community groups. The demand to make the Draft Regulation on Fishery Levy originated from a call made by the Secretariat Office of the Kutai District government in 2005 asking all agencies to explore as many of their potential local revenue sources as possible.[27] Incidently, a senior staff member of the Fisheries Agency joined a 2005 comparative study trip of the Kutai District government in Banyuwangi District in East Java. During the study trip the senior staff member was informed that in Banyuwangi District there was a local regulation concerning a Local Fisheries Levy. On the basis of the information and in response to the call of the Secretariat Office, a year later, a legal drafting team was appointed by the head of the Fisheries Agency to prepare draft regulations for Kutai District.[28]

The influence from other districts in Java was also the reason for the Fisheries Agency to draft the Regulation on Fisheries and Marine Management in the Mahakam Delta. It started with the participation of the Fisheries Agency staff in two workshops on mangrove rehabilitation held by Total E&P Indonesie in 2006. A year later, the head of the Fisheries Agency attended a workshop organized by the Ministry of Fisheries and Marine Affairs. Coincidently, the head of the agency had a conversation with a delegation from Cilacap District of Central Java Province. He was informed that Cilacap District had a local regulation on managing Segara Anakan, an area which still has a large area of mangrove forest.[29] Following this example, the head asked his staff to draft

26 In 2005 the Kutai Fisheries Agency managed an annual budget of US$59,000. In the following years, this rose to US$ 470,000 (2006), US$ 1,760,000 in 2007 and US$ 3,760,000 in 2008. In 2009 and 2010, the amount dropped to US$ 2,825,000. The rise and fall of the annual budget automatically followed the rise and fall of the annual budget of the Kutai District.

27 The call was made due to the small contribution of local revenue to the Kutai annual budget. Between 2001-2005, Kutai earned a local revenue of a mere US$ 2,576,000 (approx.) each year. In 2011 the total sum increased significantly to US$ 11,240,000. See 'APBD Kukar 2011 Didominasi Dana Perimbangan Diprediksi Mencapai Rp 3,446 T. *Kaltim Post*, 6/1/2011.

28 The appointment was made through issuing the Decree of the Head of Kutai Fisheries Agency No. A.3/523.800/117/III/2006. Indeed, besides being assigned to draft a regulation on Local Fisheries Levy in Kutai District, the team was also assigned to revise four existing regulations concerning fisheries.

29 Segara Anakan is a unique lagoon which lodges the largest mangrove forest in Java. The lagoon hosts some endangered fish species. Due to fast sedimentation and illegal logging, by 2008 the mangrove forest of Segara Anakan had drastically decreased from 2,900 ha in 1984 to less than 800 ha. In this respect the Mahakam Delta resembles Segara Anakan as the latter also faced ongoing environmental degradation as well as conflict between different resource users. See at http://nasional.kompas.com/read/2008/12/14/17274064/

a regulation for managing the Mahakam Delta. However, he did not officially establish a legal drafting team, nor did he make the necessary budgetary arrangements.

Meanwhile demand had risen to revise Kutai Regulation No. 3/1999 on Fishing as the implementation of the regulation had turned out to be ineffective. Many small-scale fishermen had complained about large-scale fishermen who used prohibited gears such as trawl nets in the 0-3 nautical mile zone. Not only did the large-scale fishermen use prohibited gears, they also used trawl during the day which is against a traditional fishery custom, prescribing trawl shall be used at night (Hidayati et al. 2005). Beside the use of trawl, there were complaints about other destructive fishing practices, such as the use of chemical, poisonous and explosive substances. The small fishermen had actually tried to curb the destructive fishing practices by warning and sometimes expelling the destructive fishermen, but the latter contested the legitimacy of the small fishermen to undertake action. Being aware of not having adequate legal legitimacy, the small fishermen asked the officials of the Fisheries Agency to revise the prevailing legislation in order to allow them to take action against those breaking the law.

It seems that the diverse reasons for drafting the abovementioned regulations have affected the extent to which the drafting processes involved target groups, notably fishing and farming communities. The drafting committee of the Regulation on Local Fishery Levy and on Fisheries and Marine Management of the Mahakam Delta hardly listened to the input from target groups. To prepare the drafts the appointed members of the legal drafting team relied heavily on their own knowledge. They conducted four or five internal meetings to share knowledge internally. They did not gather or consult with the field officials who had more adequate knowledge about the fishing and farming communities. In the case of the Draft Regulation on Fishery Levy, the team gathered input from outside by conducting two comparative studies, one in Banyuwangi District of Central Java, and one in Pasir District, a southern district of East Kalimantan province. Those two comparative study trips took place in 2006.

Each of these study trips offers some interesting stories. The agency chose Banyuwangi District because one of the senior staff members had visited the region in 2005. However, during the 2006 comparative study they were surprised to be informed that to be able to collect fishery levy, the Agency should first construct a so-called fish market (Tempat Pelelangan Ikan abbrev. TPI) and fish port (Pangkalan Pendaratan Ikan abbrev. PPI). At that time, the Kutai District government had neither. Having learned about this condition, the

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luas.segara.anakan.tinggal.kurang.dari.800.hektar (accessed on 26 July 2011), and Christian Reichel, Urte Undire Fromming and Marion Glaser (2009).

Fisheries Agency changed its priorities and took the first steps to build the two required public facilities.

The comparative study trip to Pasir District took place towards the end of 2006 (22-26 December).[30] The fact that the last two days of the study coincided with the Christmas holidays rise the question of how effective the study was.

Meanwhile, those drafting the Regulation on Fishing gathered inputs from outside by carrying out a comparative study trip, consulting related ministries and the Legal Bureau of the Provincial government, as well as holding serial discussions with fishing and farming communities. In addition, the appointed Legal Drafting Team held five internal meetings. All abovementioned activities took place in 2008. Again, the comparative study trip went to Java, in this particular case to Pati, another District of Central Java Province. Meanwhile, consultation with ministries and the Legal Bureau of the Provincial government was aimed to get input concerning three matters. First, how to properly revise Kutai Regulation No. 3/1999? Second, how to make a local regulation in a short period of time? Third, how to draft a local regulation which would not contradict (see Section 1.3.2 and Section 4.3 on contradiction) with higher national regulations? Initially, the Agency also wanted to ask lecturers from the Faculty of Marine Science and Fisheries, University of Mulawarnan, for assistance, but the idea was cast aside when a senior officer of the agency said it was not necessary as he had enough experience to be involved in the drafting of Kutai Regulation No. 3/1999.[31]

Initially, it was proposed to gather input from fishing and farming communities in two ways, namely by a survey and a series of discussions. Yet the survey was cancelled due to time constraints and the fact that the model that was supposed to be used to develop a questionnaire for the survey, disappeared. Due to budgetary restraints, the Fisheries Agency could only organize one discussion in each of the six sub-districts. The available budget for each sub-district was only US$ 1,000. Each meeting lasted for two to two and half hours with around thirty participants on average. At the meetings, the Fisheries Agency officials circulated a copy of Kutai Regulation No. 3/1999. The participants were asked to read a copy of the regulation before they could propose which provision(s) needed revision.

Even though there were no systematic minutes of the six discussions, the team members assumed that they would take into account the input from the participants of the meetings. However, an official of the Kutai Fisheries Agency who was the secretary of the team commented:

> If the input from the fishermen and farmers differs from the agency's view, the team will use the agency's view. That is because the agency's view is scientific while

30 See 'Dinas Perikanan dan Kelautan Kabupaten Kutai Kartanegara (2007).
31 Interview Mnt, 7/8/2008.

> the input from the fishermen and farmers is unscientific given they are less-well educated.[32]

Of the three initiatives during 2005-2009, two ended up as Kutai Draft Regulation. The two drafts are the Kutai Draft Regulation on Fishery Levy, and the Kutai Draft Regulation on Fisheries and Marine Management in the Mahakam Delta.

In essence, the content of the Kutai Draft Regulation on Fisheries Levy is a continuation of what was stipulated in the two 2000 Kutai Regulations. As already mentioned, these two regulations required that any transported and traded shrimp and milkfish seeds as well as processed fish products had to undergo a quality test. The products that would pass, would receive a certificate issued by the Fisheries Agency. These two regulations did not oblige fishermen, farmers or traders to pay a levy if they passed the test and received the certificate. The Kutai Draft Regulation on Fishery Levy stipulated that any quality test followed by a certificate should be completed with a levy payment. Yet the draft regulation led to confusion because it introduced a new name for the word 'certificate' which had not been used in the previous two regulations.[33]

Even though the drafting of the Kutai Regulation on Fisheries and Marine Management in the Mahakam Delta was triggered by a coincidental meeting between the head of the Kutai Fisheries Agency and the delegation from Cilacap District, the increasing awareness of the Kutai District government officials of the environmental deterioration of the Mahakam Delta affected the making of the draft significantly.[34]

Concern for protection as well as conservation in the fishery management of the Mahakam Delta is strongly reflected in the draft. The draft suggests that fishery management of the Mahakam Delta shall be on the basis of the carrying capacity of the environment. It points out that the goal of fishery management of the Mahakam Delta is to ensure the sustainability of fish production. The draft regulation formulates comprehensive prohibitions and restrictions in order to meet that goal. Concerning the capture of fish, the draft lists the gears that are totally prohibited in the Delta and forbids the use of chemical, poisoned and explosive substances. At the same time it lists environmentally-friendly gear that is advised to be used. Concerning aquaculture, the draft stipulates traditional shrimp ponds (Ind. *budidaya tambak tradisional*) as the only model that could be developed in the Mahakam Delta though there are several conditions. Semi-intensive shrimp farming is still allowed under

32 Interview Mnt, 7/8/2008.

33 The Kutai Draft Regulation on Local Fisheries Levy introduced the so-called Certificate for Transported Fish, whereas the two existing Kutai Regulations respectively introduced the so-called Certificate for Quality and Certificate for Organoleptic Examination.

34 For an account of the increasing awareness of the Kutai District government officials about the environmental deterioration of the Mahakam Delta see Section 9.2.

strict conditions. With regard to a fishing permit, the draft formulates stricter conditions for a permit application and even mentions the possibility of putting a halt to issuing new permits, if necessary.

In addition to those prohibitions and restrictions, the Kutai Draft Regulation on Fisheries and Marine Management of the Mahakam Delta states that the district government would designate marine protected areas in the Mahakam Delta where any installation of static or passive gear is prohibited. To make sure that environmentally-friendly fishery management would be effectively implemented in the Mahakam Delta the draft proposed the establishment of a management body, a proposal that had been strongly advocated over the previous five years (Bourgeois et al. 2002, p. 95; LAPI ITB and Bappeda Kutai Kartanegara 2003; Hidayati et al. 2005, p. 160; Syafrudin 2005).

The way of law-making in these three initiatives differed from one another. There were different reasons for drafting the initiatives, and most importantly, factors that are internal and external to the administrative institutions hindered a follow up. For example, the drafting process of the Regulation on Fisheries and Marine Management of the Mahakam Delta ceased prematurely, when the Agency Head who had initially been the motivating factor behind the process, lost his personal interest in the regulation. The halting of the drafting process was also connected with the situational mood of the Fishery Agency officials who at time of the drafting process were in high spirits given they had just moved to a new office.[35] It explains why there was no division within the Fisheries Agency which was willing to take responsibility for continuing the drafting.

Meanwhile the fishing community continued to exert pressure on the continuation of the drafting of the Kutai Draft Regulation on Fishing. Yet, after a one-year program was run in 2008, the drafting process of this regulation too ceased. A lower member of staff of the agency who was in charge of the draft and who acted also as a Secretary of the Legal Drafting Team actually set up a program proposal for 2009. Through the program he projected a final draft would be accomplished in 2009 which was to be sent to the Legal Bureau of the Kutai District government. He believed that the process in the Legal Bureau would not take long given the Secretary of the Fisheries Agency was known to be capable of lobbying the Legal Bureau officials. Yet the superior of the lower member of staff rejected and later fully cancelled the program proposal. This superior was thought to have done so, because he was about to move to another agency and he probably felt that he would not benefit from the program proposal.[36]

Ideas to continue the formulation of the Draft Regulation on Fishing rose again in 2010. In the same way as the previous year, the lower member of

35 Interview Sji, a Head of Division for Control and Survaillance of Kutai Fishery Agency, 11/8/2008.

36 Interview Mnt, 19/8/2008.

staff prepared a program proposal. Yet this time it was unclear whether his new superior had passed the program proposal on to the Head of Division, another higher superior.[37] He suspected that his new superior was not interested in the program proposal simply because he was not happy with his new position as he used to be assigned to another division of the Agency where his main task was to handle issues related to the marketing of fish products.[38] Recognising that the drafting process was stagnant the Agency Head suggested to the lower member of staff to continue the process by only inserting minor points of revision such as adding the new name of the District to the draft.[39] Yet the lower member of staff refused to do so, given there was no budget allocation for the minor revision.

In the same year as the composing of the Kutai Draft Regulation on Fishing commenced, a proposal to continue the making of the Kutai Draft Regulation on Fisheries Levy appeared. The proposal came from another division of the Fisheries Agency.[40]As there were two proposals for drafting regulation at that time, the Agency Head decided to prioritize the Kutai Draft Regulation on Fishing. It is not clear why the Agency Head came up with that decision, yet the membership composition of the Legal Drafting Team suggested that the Agency Head came up with a compromise. The Legal Drafting Team was comprised of staff from four various divisions of the Agency. Not only did they have to revise Kutai Draft Regulation No. 3/1999 on Fishing, the Team also had to revise three other Kutai Regulations, No. 34, 36 and 37 of 2000.[41]

Initiated by Another Agency

The Kutai Draft Regulation on Fishery Business was initiated by a newly established agency called Bureau of Natural Resources. The Bureau was the result of a reorganization of the Kutai District government in 2008. The Bureau had effectively started running in 2009. According to a Decree of the Kutai District Head one of the duties of the Bureau was to formulate policies concern-

37 'Superior' here means a Head of Section. Apart from a Head of Section, the lower members of staff had two other higher superiors, a Head of Division and the Agency Head (see Section 4.1 on how the section, division and agency are located in regional government structure). The section, to which the lower members of staff were assigned, was the Fisheries and Marine Surveillance, under the Division of Coastal, Small Island and Fishery Resources.

38 The new Head of Section has an educational background in economics. As far as the lower member of staff is concerned, his superior is supposed to be a strong leader since his section deals with surveillance matters. The lower member of staff found that his new Head of Section did not have sufficient leadership capacity.

39 The minor update is the change from Kabupaten Kutai Tingkat II into Kabupaten Kutai Kartanegara.

40 The name of the division was Bisa Usaha Perikanan dan Kelautan.

41 The composition and tasks of the members of the Legal Drafting Team were described in the Letter of the Kutai Fishery Agency Head No. C.4/523.2/138.A.9/IV/2008.

ing natural resources.[42] Two others duties of the Bureau were to establish coordination among Kutai agencies around the issue of natural resources management as well as to take stock of the problems related to natural resources.

The officials of the new bureau seemed to regard drafting regulations as one of their favourite activities in their first year in office. The bureau aimed to make three Kutai Draft Regulations, one of which was the Kutai Regulation on Fishery Business.[43] To start the legislation making process, a Legal Drafting Team was established by the Kutai District Head.[44] There were eleven officials in the team, one from the Fisheries Agency, one from the Legal Bureau and the remaining nine from the Bureau of Natural Resources itself.

However, the formal intention of the Bureau of Natural Resources to engage with other related agencies in the drafting process was disturbed by the behaviour of the bureau officials both in establishing and running the team. The bureau never informed the Fisheries Agency and Legal Bureau that their staff had been included in the drafting team. The appointment of the two agencies as members of the Legal Drafting Team was made by the bureau without asking the two agencies for consent. In addition, the bureau did not involve the other two agencies in the drafting process from an early stage. They involved the two agencies only after the bureau had already prepared a rough version of the Draft Regulation on Fisheries Business. The officials of the Fisheries Agency were surprised to find out that they were not involved in the first round of drafting. They were not only surprised by the late notification, but also because they thought that the Natural Resource Bureau was only supposed to make a draft regulation concerning natural resources in general.

The Kutai Draft Regulation on Fisheries Business had diverse objectives. It was said that the prevailing Kutai Regulation concerning fisheries, and in particular Kutai Regulation No. 36/2000 on Fishery Business, were out of date and that large-scale natural resources extraction formed a new threat to fishery resource use. The Kutai Regulation No. 36/2000 was considered out of date and needing adjustment, since the new Fishery Law No. 31/2004 and Government Regulation No. 54/2002 had been enacted.[45] However, the Kutai Draft Regulation on Fishery Business seemed to contain very general goals. Apart from the two above objectives, the making of the Kutai Draft Regulation was also said to be undertaken to generate the use of renewable resources, local revenue as well as to create conducive environment for investment. However the Kutai Fisheries Agency officials suspected that the abovementioned reasons

42 The decree is No. 31/2008, Article 33.

43 The other two Kutai Draft Regulations respectively concerning Animal Husbandry and Health, and the Utilization of Non-Timber Forest Products.

44 The decree is No. 180.188/HK-207/2009.

45 See the minutes of a seminar held on 29 June 2010 on the making of the Kutai Draft Regulation on Fishery Business.

were fake. As a new agency, the Bureau of Natural Resources needed to create programs and activities in order to secure their budget. The bureau officials' motive to get funds rather than genuinely being interested in the new regulation can be concluded from the fact that they set up a three-year program to make the Kutai Draft Regulation on Fishery Business, which according to the Fisheries Agency officials, is longer than necessary.[46]

As said, only after they prepared a rough draft, the Bureau of Natural Resources invited the two other agencies at a first meeting where all eleven members of the team were present. This took place in 2009. Having experience in making regulations, the team members from the Fisheries Agency shared two things during the meeting. Firstly, they let the other team members know that the Fisheries Agency had prepared two draft regulations concerning fisheries. Secondly, they shared their past experiences of the difficulty of pursuing discussion sessions with the Legal Bureau about the draft regulations that particular agencies had submitted. They specifically referred to their experience with the Kutai Draft Regulation on Fisheries Levy which had not been granted any discussion time since 2006. They also reminded the team members that the Secretariat Office of Kutai District government had recently tightened their control on any submission of a draft regulation concerning levy. The tighter control had emerged after the Minister of Home Affairs annulled two Kutai Regulations given they were in contradiction with higher national regulation concerning local tax and revenue.[47]

However, even though the team members were informed about the previous initiatives of the Fisheries Agency, there was no willingness to figure out the similarities and differences between the rough drafts prepared by the Bureau of Natural Resources and the two draft regulations previously prepared by the Fisheries Agency. Being told that the Kutai Fisheries Agency had prepared two draft regulations concerning fisheries, the Head of the Bureau of Natural Resources simply commented:

> Any agency could take an initiative to draft a regulation as long as it is for the sake of the people.

46 The Kutai Fisheries Agency officials suspected that the three-year program was intended to enable the officials of the Bureau of Natural Resources to conduct more travelling. A larger budget for travelling has recently emerged as source of additional income.

47 The two regulations which were nullified were Kutai Regulation No. 12/2001 on Permits for Foreign Workers, and No. 2/2001 on Permits for Local Mining. The former was officially nullified in 2004 while the latter was in 2008. The common reason for the nullification of the local regulations is because they added extra levies to some activities on which the Central Government also collected levies. See http://www.djpk.depkeu.go.id/pdrd/pdrd_list2.php?kdpemda=2003 (accessed on 18 August 2010).

One of the heads of the sub-division of the Bureau of Natural Resources reiterated the above pragmatic notion during the regional law-making process. He said:

> It would not be a problem if our bureau is preparing regional draft regulations even though other agencies or offices have prepared or are preparing similar drafts. We have two options if such situation emerges. Firstly, we will ask other agencies or offices to incorporate the contents of their regional draft regulations in ours, or secondly we just discontinue preparing our drafts, and let other agencies or offices continue theirs.[48]

Although they suspected a narrow interest of the Bureau of Natural Resources, the Fisheries Agency officials still expected and reckoned that the Bureau of Natural Resources would be more likely to be successful in pursuing the draft regulation. This was mainly because the Bureau had a closer formal line with the Kutai Secretariat Office as well as the Kutai District Head. Moreover, the Bureau had informal political access to some members of Kutai House of Representative since the Head of the Bureau was close to several members of the Kutai House of Representatives.[49]

Following an administrative tradition in regional law-making, the Bureau of Natural Resources consulted with the Provincial government and two ministries notably the Ministry of Home Affairs and the Ministry of Marines and Fisheries Affairs. Once again, they did not engage the two other district agencies in the consultation despite having promised to do so. The Bureau had another chance to get input from the two ministries when the Bureau invited two officials of the two ministries as speakers during a one-day seminar held by the Bureau in June 2010 (see footnote 45). Together with the officials of the two ministries, the Bureau also invited lecturers from the local university and the University of Indonesia.

The Bureau of Natural Resources did fulfil its promise to involve the Fishery Agency when they organized two comparative study trips to Riau

48 Pragmatism, which can turn into competition in regional law-making also emerged in the making of an academic draft of the natural resources management of the Mahakam Delta. In 2011, the Bureau of Natural Resources arranged the making of the academic draft. The Bureau kept on re-arranging this, despite the fact that they knew that the Provincial government was arranging a draft as well. The head of the sub-division as mentioned above said that it is good that the Provincial government steps ahead so that the bureau knew what the Provincial government wished to have, and it would help the Kutai District government to determine what should be the content of the district policy. Interview Thd, a Head of Sub-Division of the Bureau of Natural Resources Administration of Kutai District government, 9/12/2011.

49 The close relation of the Bureau Head with some parliament members originates from the time when he used to be an activist in two prominent youth organizations. Traditionally the two youth organizations have produced successful politicians as well as high-ranking government officials.

Province in 2011. During the first trip, joined by officials from the Kutai Fishery Agency, the Bureau of Natural Resources of Kutai District, and the Legal Bureau of the Provincial government, they met the officials of Riau Provincial government. During the second trip, some members of the Kutai House of Representatives joined. The second trip was initially set up to meet the government of Riau Island Province. Yet, due to miscommunication, they changed the trip to Pekanbaru city of Riau Province.[50]

The expectation of the Kutai Fishery Agency concerning the law-making came true. The failure of the Kutai Fishery Agency to propose the Kutai Draft Regulation on Fishery Levy since 2006 turned out into a success of the Bureau of Natural Resources to propose the Kutai Draft Regulation on Fishery Business to become Kutai Regulation No. 15/2011 on Fishery Business.

Not only did the Bureau of Natural Resources succeed in proposing the regulation, the regulation contains provisions concerning a fishing levy. As already said, in 2006, the Kutai Fishery Agency ceased to make the Kutai Draft Regulation on Fishery Levy when they were told that Kutai District is required to have the so-called fish market and fish port to be able to collect a fishery levy. At the time of the enactment of Kutai Regulation No. 15/2011, the two required public facilities had not been constructed yet.

Thus, by having provisions on a fishery levy, Kutai Regulation No. 15/2011 has broadened and superseded Kutai Regulation No. 26/2000. Nevertheless, the rest of the content of Kutai Regulation No. 15/2011 resembles No. 26/2000. In that respect, its primary legal objective, namely to supersede the old regulation, is achieved. Meanwhile, to its other original objective, namely to couple increasing threats from other large-scale natural resources use to fishery resource use, has been responded by making a new separate Kutai Draft Regulation on Fishery Resources Conservation. As had happened when of the Kutai Draft Regulation on Fisheries Business was made, the Bureau of Natural Resources formed a Legal Drafting Team in which an official from the Kutai Fisheries Agency and Legal Bureau were included. For this law-making initiative, the Bureau of Natural Resources held two consultations with the Ministry of Marine Affairs, and with the Faculty of Fishery and Marine Science of Mulawarman University, and met with related Kutai agencies and local offices of the Kutai Fishery Agency.

Initiated by Joint Collaboration

Kutai District collaboration in regional law-making initiatives concerning fisheries was usually suggested by the Kutai Kartanegara District's Committee on Conflict Resolution (KKDCCR). This made sense, given that KKDCCR members came from various agencies of the Kutai District government. Such varied

50 Interview M (a staf of Kutai Fishery Agency) and H (a staff of Bureau of Natural Resources Administration of Kutai District government), 8/12/2011.

composition of members enabled the KKDCCR to establish collaboration among the agencies. The following two initiatives of regional law-making are instances of such collaboration.

The drafting of the Circular Letter of the Head of Kutai District government on the Prohibition of the Installation of Gear on Public Shipping lanes came at a time when the number of gear installations in the vicinity of companies' platforms increased.[51] Some Kutai bureaucrats including field officials had long suspected that the reason behind the emerging gear instalments was not purely for fishing. Instead they suspected that it was a trick to get compensation from the company. As two of the officials said:

> Once fishermen found out that a company was planning to undertake activities in a particular area of the sea of the Mahakam Delta, they would quickly install a tidal trap nearby the area where the activity would take place. By doing so, they expected the companies' transportation would crash into the installed gear one day, which would be a reason to ask compensation from the company.[52]

Due to the growing number of such tidal trap installations, a new name for tidal trap emerged i.e. *julu jebakan*.[53] As the emerging tidal trap installations caused conflicts, the KKDCCR became more actively involved. Their active role in the whole affair led to the KKDCCR suggesting that the Kutai District government needed to make a particular rule dealing with that matter. They suggested introducing a circular letter, which eventually resulted in Circular Letter No. 100/287/Pem.A/VI/2004 on the Prohibition of the Installation of Gear on Public Sipping lanes. The fact that the KKDCCR played an important role in this initiative can be seen in the first few sentences of the circular letter. The start of the letter states that observation of the KKDCCR, ie. that in many parts of the District's marine water the gear instalments had endangered public shipping lanes, is a consideration to draft the circular letter.

As already mentioned in Section 6.2, the 2004 Circular Letter actually recalled what had been regulated in both Kutai Regulation No. 3/1999 and the 1975 Circular Letter of the Directorate General for Fishery of the Ministry of Agriculture. The 2004 Circular Letter actually combined the content of the two previous Kutai Regulations so that gear instalments were not only pro-

51 Interview ED, a Head of Bureau of Governance of Kutai District government, 8/12/2011.

52 Interview Sun, a staff of Kutai Environmental Agency, 18/6/2008, A, 19/6/2008, and ES, 30/1 and 1/7/2008. See also Simarmata (2011). However, this accusation was disputed by some fishermen and confirmed by village government officials saying that the number of tidal trap instalments near platforms increased due to a growing number of platforms. Given that platform constructions occupied fishing zones, fishermen became more limited in the areas, where they could still fish. Interview, Amr, a Secretary of Sepatin village government, 19/2/2010.

53 For the local people of the Mahakam Delta the name refers to any tidal trap which is consciously installed to be crashed into by companies' ships in order to be able to claim compensation.

hibited on public sailing lanes as stipulated in Kutai Regulation No. 3/1999 but also in the vicinity of companies' platforms as stipulated in the 1975 Circular Letter.

Similarly, the Draft Regulation of Kutai District Head on Standardized Ponds was born from the experiences of the KKDCCR. With regard to fishery disputes, the KKDCCR had long encountered a common pattern whereby shrimp farmers complained that company activities had contaminated the water in the ponds and damaged pond constructions. For any loss resulting from the contamination and damage, the farmers asked the company for compensation. The success of earlier complaints for compensation actually inspired other farmers to behave similarly so that the number of complaints increased gradually.

In response to the growing number of complaints the KKDCCR had to think of a way to control them. The team therefore decided that it was best to select complaints that really needed settling, which meant that they could refuse complaints that did not meet approved formal criteria. The team eventually came up with a definition of a 'standardized pond'. The basic idea was that only the complaints of farmers whose shrimp ponds met the criteria of a 'standardized pond' would be taken into account. Like other fishery policies and regulations of the Kutai District, the standard definition aimed at developing sustainable shrimp ponds which at the same time added to local income.

After half a year of occasional meetings, the KKDCCR organized several further more regular meetings. To make use of all insights that had arisen during the meetings, two lecturers from the Faculty of Fishery and Marine Science of Mulawarman University were brought in to digest and write the remarks down in a draft concept paper. Once the draft was finished the KKDCCR carried out some activities to get input from outside. First they asked feedback from the Bogor Agricultural Institute who had carried out some research as well as served consultancies in the Mahakam Delta. Second, they consulted with the Ministry of Marines and Fisheries Affairs. Third, they carried out comparative studies in two districts in Java.

The KKDCCR did not deem necessary to consult with the shrimp farmers or even the *punggawas* for input on the concept paper, as they regarded the scientific input from academics as more reliable. Besides, in their view the concept paper contained rather technical matters which the farmers would probably find difficult to understand. What the farmers needed to do at the time of interviewing, was to develop their ponds in accordance with the 'standardized pond'. In any case, the KKDCCR felt that they already knew what the farmers were thinking for they had met the farmers many times.[54]

After the concept paper was completed, the KKDCCR asked the Legal Bureau of the Kutai District government to convert it into a legal text. They opted

54 Interview FI, a lecturer at the Faculty of Fisheries and Marine Science of Mulawarman University, 1/3/2010.

for a Regulation of the Kutai District Head instead of a Kutai Regulation. Yet as of 2009 the drafting process of the regulation stagnated due to two factors. First, the Deputy Head of Kutai District was detained by Indonesia's Commission on the Eradication of Corruption in 2008 for corruption charges, making it difficult to ask for his signature.[55] Second, some key actors who used to actively engage in the formulation of the concept paper had been moved to other agencies, which did not deal with the issue of the Mahakam Delta. As a result, they could no longer engage in the drafting process. Meanwhile, officials who took over the position of the previous key actors were not as concerned about the issue of the Mahakam Delta as their predecessors.

Following its title, the provisions of the Draft Regulation of the Kutai District Head on Standardized Ponds chiefly determine the standards for ponds with regard to the following three matters: location, construction and management. With regard to location, the draft regulation stipulates one thing which is in direct contrast with what has actually been happening on the ground: it forbids all ponds which do not comply with land use planning. An instance of non-compliance is if a pond is located along a green belt (*sabuk hijau*). Concerning construction, the draft regulation states that the size of an ideal shrimp pond can not exceed 2 hectares. In addition, the pond shall not be badly constructed to avoid it from being easily damaged by sea waves. Last, the draft regulation prohibits the use of chemical fertilizer in an attempt to prevent environmental destruction.

Looking at the content of Kutai Regulation No. 3/1999, the three Kutai Regulations of 2000, the 2004 Circular Letter, and Kutai Regulation No. 15/2011, we can conclude that the scope of Kutai District government's formal control over the management of fishery resource use expanded over time. They added new provisions which were not part of the national legislation by increasing input control. They limited fishing zones where fishing could take place. They increased control over fishing by requiring fishermen to obtain permits from local authorities as well to pay fishery levy. The enhanced scope of formal control raises the larger question to what extent the Kutai District government has been able to effectively exercise control in practice. The following section deals with that question.

7.3 Implementation of law by regional and local officials

To examine the extent to which the Kutai District government has effectively implemented fishery regulations, this section will focus first on control, notably control over fishery permits, and then discuss the issue of gear restrictions.

55 At that time the Deputy Head of Kutai District actually acted as District Head after the formerly appointed Kutai District Head had been detained on account of corruption charges in late 2007. See footnote 95.

As the Kutai fishery regulations have eventually turned the SSFRC from a mere recording instrument into a permit, the description of control over the permit also includes an account of the SSFRC. Another matter that will be examined is the development of environmentally-friendly shrimp ponds, something that is not yet regulated but for which the Kutai District government has been developing a regulation since 2002. In describing the extent to which the Kutai fishery regulations have been effectively implemented, an account of the factors that have influenced implementation is also given.

7.3.1 Control

The term 'ineffectiveness' has been widely used and mentioned by a number of research reports and forums when trying to connect the Kutai fishery regulations/policies with the 'real' problems or issues. Some researchers even said that the government is absent in the Mahakam Delta or it is a place where no government regulations exist (Timmer 2010, p. 711; Timmer forthcoming, p. 29). The ineffectiveness has been strongly associated with government incapability to implement and enforce the law (Bourgeois at al. 2002, p. 2 and 27; Rachmawati 2003, p. 34; Hidayati et al. 2004, p. 79).

Some research reports base their findings and conclusions on the peoples' perspectives obtained from surveys. A survey held in 2002 found that 45% of the fishermen and farmers who lived in four villages of the Mahakam Delta knew nothing about the existing policies.[56] The most striking answer was that 81% of this group had no idea about the government's role in the Mahakam Delta. In line with the answers of the respondents, the report says:

> Despite a long list of actual or planned activities, it is important to mention that until now, the government has had little control over what happens in the Delta. Most of the aquaculture developments have taken place at the initiative of migrants and local people, without much government intervention… It means that the above government activities have had little visibility and little impact.

One year later, another piece of research reaffirmed the 2002 findings discovering that of 324 households in the Mahakam Delta 73.3% confessed to know nothing about formal rules on mangrove. Only 13% said to know about the existing formal rules (Rachmawati 2003, p. 82). A recent piece of research, funded by a multi-stakeholder project, reiterates the 2002 findings. Having held a survey in three main villages in the Mahakam Delta, the research found

56 The survey was conducted by the French research institute CIRAD, collaborating with some local NGO activists. Total E&P Indonesie and Inpex supported the research financially. The survey included 100 household respondents who worked as fishermen or shrimp farmers. See Bourgeois et al. (2002, p.15).

that between 40% and 80% of the respondents did not see any effect from the activities carried out by the Kutai Fisheries Agency. As a result, when they were asked whether the Kutai District government should continue their activities in the Mahakam Delta, the majority said they should not (PMD Mahakam 2008, p. III36-58). To a large extent the discrepancy between the Kutai fishery regulations and policies on one hand and the real problems on the other, is actually visible.

With regard to the FBL, only two permits were issued up to 2008 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008a, p. 34-35). These two permits were neither concerning the capture of fish nor aquaculture. They were permits on seeds of and breeding milkfish and collecting crab in areas which were not located in the Mahakam Delta.[57] A Kutai Fisheries Agency official revealed that no fisherman or farmer from the Mahakam Delta has applied for a fishery permit.[58] Large-scale fishermen who came from upstream of the Mahakam River (Muara Muntai, Samarinda) and South Kalimantan (Hidayati et al. 2005, p. 52-62) only had ship certificates without a fishery permit.[59] Regarding permit non-compliance, the Kutai Fisheries Agency even confessed, as can be found in their annual reports, that control of permits was not effective yet, given there was still a great number of fishermen, farmers and traders who had no idea about the permit.[60]

Nevertheless, the imposition of the SSFRC had worked pretty effectively during 1995-1997, when 500 fishermen and pond owners obtained a SSFRC. However, after the authority to issue a SSFRC was transferred to the sub-district head in 2001, only a few SSFRC's have been reported.[61] To address the decreasing compliance, the Kutai Fisheries Agency set up a program on boat registration in collaboration with the Kutai Public Transportation Agency, in 2007 and 2008. The aim of the program was to help fishermen to obtain a boat certificate as a way to proceed to applying for a SSFRC. This two-year joint program led to the issuance of 1,700 boat certificates. Nevertheless, only 100 SSFRC's were reported to have been issued in 2008, so the registration program hardly achieved its aim (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 49). The number of issued SSFRC's is particularly low when compared

57 The first FBL was given to CV. Undayana and the second to PT. Bone Teknik. The first was located outside the Mahakam Delta, while the second was located in the hinterland of the Mahakam Delta.

58 Interview Sfd, a Head of Division of Kutai Fishery Agency,17/6/2008.

59 Interview SH, a Head of Anggana office of Kutai Fishery Agency, 30/7/2008. The large-scale fishermen have larger vessels with a machine capacity of no less than 100 horse power, whereas the local fishermen of the Mahakam Delta have vessels with a machine capacity of no more than 32 horse power (Hidayati at al. 2005, p. 59).

60 See Dinas Perikanan dan Kelautan Kutai Kartanegara (2008a, p. 36) and Dinas Perikanan dan Kelautan Kutai Kartanegara (2009, p. 50).

61 The transfer of authority was officially carried out through Decree of Kutai District Head No. 180.188/HK-537/2001 on the Transfer of Authority of Kutai District Head to Sub-District Heads.

to the number of vessels being used in the Mahakam Delta which is estimated at approximately 6,000 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 35; Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 39).

Meanwhile, the Kutai Fisheries Agency intention to carry out quality control over transported and traded milkfish and processed-fish products met its goal to some extent, despite the fact that the test laboratory had not yet been constructed, forcing the Kutai Fisheries Agency to rent the Province's laboratory. In the course of 2007, the Kutai Fisheries Agency issued 164 Certificates for Quality, while in 2008 the number decreased to 124 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008a, p. 2; Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 45).

Going back to the 1970s the implementation of the 1976 Decree on Fishing Zones Division prohibiting the use of trawl in Zone I was not effective given that many small and large-scale fishermen still operated and used trawl in the zone. Large-scale fishermen fished in Zone I because the shallow waters were richer in shrimps (Bailey 1988, p. 34; Tribawono 2002, p. 68). As a result, conflicts between small and large-scale fishermen arose (Bailey 1988, p.13 and 36; Jhamtani 2003, p. 27). To prevent conflict, the Central Government then promulgated a total ban for the use of trawl across Indonesian marine waters except in the Arafura Sea (Bailey 1988, p. 13; Jhamtani 2003, p. 27).[62] Nevertheless due to the widespread use of trawl at that time, the Central Government implemented the policy gradually and it only came into full force in 1983.

In the Mahakam Delta, in the early years, the implementation of the trawl ban seemed to be effective, which resulted in a gradual shift in fishery resource use from capturing fish to aquaculture. Some researchers even view the trawl ban as a significant trigger of the initial establishments of ponds (Bapedalda Kutai Kartanegara and PKSPL IBP 2002, p. III-66, and Hidayati et al. 2005, p. 63). Moreover an active involvement of local military officers had enabled the implementation of the ban to run effectively.[63] Yet, in general and in the years after reformation era, the implementation of the regulation ceased to be effective, despite various efforts such as dissemination of the regulation, the introduction of new recommended gear as well as the establishment of a provincial and district inter-agency team (Herlindah 2008, p. 7-8).

The use of the trawl net in the Mahakam Delta re-emerged after the fall of the authoritarian New Order Regime in 1998 (Buorgeois et al. 2002, p. 36; Hidayati et al. 2004, p. 77; Hidayati et al. 2005, p. 53-59; Sandjatmiko et al. 2005, p. 115; Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 13).

62 The ban was stated in Presidential Decree No. 39/1980 on the Eradication of Trawl Fishing. Later the Presidential Decree was followed by Decree of the Minister of Agriculture No.503/Kpts/Um/7/1980 concerning measures to carry out the first ban on trawl use, and Presidential Directive No. 11/1982.

63 In 1983, local military officers mobilized the fishermen to gather at the Governor's office. The Governor urged the fishermen to develop ponds as an alternative to trawling. Interview Smr, an elder of Muara Badak Ulu village, 11/8/2008.

From this time onwards, many local fishermen reverted back to using trawls after they had failed to compete successfully with later immigrants in aquaculture development (Hidayati et al. 2005). Compared to the Mahakam Delta the use of trawl in the upstream areas of the Mahakam River is limited because efforts to enforce rules on the use of trawls have been more effective.[64] In the course of 2001-2005, Kutai District was even the region in which trawl was most used compared to other districts across East Kalimantan. The use of trawl increased around 20.2% each year during that period (Herlindah 2008, p. 9-10). Given that approximately 50% of the fish production of the Kutai District came from three sub-districts of the Mahakam Delta (Anggana, Muara Badak, Muara Jawa) it can be assumed that most of the trawl use took place in the Mahakam Delta (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 8).

It is important to note that the use of the trawl in the Mahakam Delta re-emerged despite the fact that the Kutai Fishery Agency supported the establishment of the so-called Community Group for Surveillance (abbrev. CGS, Ind. *Kelompok Pengawas Masyarakat*).[65] Since 2008, across Kutai Kartanegara 48 CGS have been established.[66] Eleven of them are located in some villages of the Mahakam Delta.[67] Pursuant to the Decree of the Minister of Marine Affairs and Fishery of 2001,[68] a CGS is a community-based organization whose members consist of community leaders, religious leaders, adat leaders, fishermen and fish farmers (*petani ikan*). In practice, the members of the CGS are elected in a village meeting. A village regulation is made to endorse the elected CGS's members which is then submitted to Kutai Fishery Agency for registration.

Concerning authority, the CGS can only report (*melaporkan*) to the PPNS, the district fishery agency or the local police and military officers if they

64 Interview Mnt, 7/8/2008. Stronger enforcement of the ban on trawl use up-stream of the Mahakam River was due to over-fishing caused by a wide use of trawl. The strong enforcement then led the up-stream fishermen to come down to the Mahakam Delta. In the Mahakam Delta they found that the prohibition of trawl use hardly existed (Hidayati et al. 2005, p. 62).

65 A CGS is different from a Sub-District Committee on Fishery Resources Conservation (see Section 7.2). The members of the latter are the Leaders of the Sub-District Consultation Forum whereas the members of the former are local inhabitants. Concerning authority, the latter is authorized to carry out prosecution, whereas the former can only do reporting. Interview MK, 6/12/2011.

66 Seehttp://humas.kutaikartanegarakab.go.id/read/news/2012/6338/pokmaswas-menjaga-kelestarian-sumber-perikanan.html (downloaded on 15 July 2012).

67 Nationwide there were 1,419 CGS's in 2010, 48 of which were in East Kalimantan. Kementerian Kelautan dan Perikanan (2010, p. 139-140). Another figure said that the number of CGS's in East Kalimantan was 113, with 45 in Kutai Kartanegara. See 'DKP Kaltim Optimalkan Peranan Pokwasmas' (http://www.kaltimprov.go.id/kaltim.php?page=detailberita&id=4433, accessed on 28 July 2011).

68 No. KEP.58/MEN/2001 concerning Guidance for a Community-Based Monitoring System on Marine and Fishery Resource Management

suspect or witness a violation of law. However, in practice the CGS also expelled (*mengusir*) those are not complying with the law.[69]

In relation to efforts to control the use of destructive fishing, the Kutai Fishery Agency installed warning boards in some places. The signs issued warnings such as 'Stop!! Illegal Fishing', written in large print. The small print reminded people that the use of chemical and explosive gear was prohibited and that they could receive a punishment of maximum ten years imprisonment and a fine of IDR 2 billion (US$ 235,000).

7.3.2 Development

The policy of the Kutai Fisheries Agency to develop environmentally-friendly shrimp ponds in the Mahakam Delta which lasted from 2002 up to 2009 was widely perceived as ineffective, despite the fact that the Agency had funded several pilot projects as of 2002 and had undertaken several training sessions and comparative studies.[70] All pilot projects of environmentally-friendly shrimp ponds had ended tragically with shrimp farmers cutting the trees, which had been planted near or inside their ponds, after two or three years. Shrimp farmers did so because they found that the productivity of their ponds did not increase while they were told that the planting of the mangrove trees would increase their pond productivity. The pilot projects often failed because the Kutai Fisheries Agency arranged pilot projects that only targeted planting mangrove seeds around or inside shrimp ponds, without any follow-up. The Agency never arranged activities to maintain the ponds where mangrove seeds had been planted. This happened exactly to a pilot project located in Muara Pantuan village, which was pioneered by the Provincial Fisheries Agency in the 1980s. Due to the decentralization of 1999, the Provincial Fisheries Agency handed over a 3 ha shrimp pond to be owned and managed by the Kutai Fisheries Agency. Yet, ever since the Kutai Fisheries Agency hardly paid attention to it with the exceptional glance from a senior field staff member of the Kutai Fisheries Agency. The senior field staff member could keep an eye on it, because he held a 1.3 ha pond, which was located next to the pilot

69 Interview Mnt, 19/9/2009.

70 For a place like the Mahakam Delta which has a mangrove forest, the most environmentally-friendly type of shrimp pond is known as a silfo-fishery. The term refers to the use of a forest area for aquacultural purposes. There are generally two types of silfo-fishery which in Indonesian are popularly known as *empang* and *komplangan*. The basic difference between the two types is that in the former mangrove and pond are in the same place, while in the latter mangrove and pond are split and separated by a dike (Bappeda Kutai Kartanegara and LAPI ITB 2003, p. VI-7-8). The Kutai Fisheries Agency is at the time of writing in favour of the *komplangan*.

project.[71] A local academic who had been hired by the Fisheries Agency to carry out many research projects, commented on the planning management of the Kutai Fisheries Agency:

> The Agency did not set up serial activities. They usually set up completely new activities or repeated the former ones. If arranged activities were completely new, they preferred to ask new parties to implement the arranged activities to prevent any criticism of the discontinuation of some other activities. The Agency simply did not have the capacity to set up comprehensive activities.[72]

7.3.3 Explanatory factors

The Kutai Fisheries Agency on the one hand claimed that programs and activities that they carried out met their 2000-2010 primary goal, namely to improve the skills of its officials to be able to carry out control over fishery resource use as well as to develop fishery business, in an attempt to generate income for fishing and farming communities.[73] However, the Agency on the other hand, also admitted to not having yet fully achieved its goals due to some unexpected setbacks. This leads to the question why the multitude of programs and activities of the agency have not (yet) resulted in and have contributed so little to an effective implementation of the fishery regulations and policies.

The next section describes some factors that have hindered the implementation of the many policies, programs and regulations of the Kutai Fisheries Agency. Similar to factors pointed out by local forestry officials which stopped them from carrying out effective forest protection in the Mahakam Delta (see Section 5.3), the next section describes prominent factors as related by local fishery officials. The factors are divided into (a) factors that are internal and (b) factors that are external to the administrative institutions. Factors that are internal to the administrative institutions, in this case, include a lack of

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71 The senior field staff member used to be head of a fish port in Muara Pantuan village. When the fish port was closed he chose to remain in the village while taking care of the 3 ha shrimp pond of the Provincial Fisheries Agency. Later the Provincial Fisheries Agency cut the budget for maintaining the shrimp pond. The senior staff member continued to maintain the pond with his own money. When it was handed over to the Kutai Fisheries Agency, including the maintenance, he insisted on a compensation from the Kutai Fisheries Agency of IDR 7,000,000 to IDR 10,000,000 (US$ 825 to US$ 1,170) ie. the amount that he had spent to maintain the shrimp pond. The Agency refused his request and decided to rent ponds from other villagers.

72 Interview IS, a lecturer at the Faculty of Fisheries and Marine Science of Mulawarman University, 15/2/2010.

73 See Dinas Perikanan dan Kelautan Kabupaten Kutai Kartanegara (2007, p. 20-21), and http://www.kutaikartanegarakab.go.id/index.php/gov/dinas_perikanan_dan_kelautan (accessed on June 23, 2010).

resources, problems with the budget spending mechanism, other agencies' concerns, leadership and the local officials' perception of fishermen and farmers. Whereas, factors that are external to the administrative institutions include the fishermen's and farmers' expectations of formal rules and local power.

Internal factors

(a) Lack of resources

In the first five years of their presence starting in 2000, the Kutai Fisheries Agency managed a relatively small annual budget of approx. 10.000 US$ (see Section 7.2.2, footnote 26). Yet during the second five years the annual budget increased significantly to some 100.000 US$ each year.[74] The annual budget was to serve 36,515 fishery households covering an area of around 244,557 ha.[75] In the second five years, the agency did not encounter a budget shortage. For the last four years, the agency was not even able to spend the allocated budget fully.[76]Apparently, the annual budget was not allocated proportionally, so that some programs lacked a budget, important infrastructures were not available yet, and some field officials suffered from severe budget shortages.

Most of the Kutai Fishery Agency officials still pointed to a lack of budget as one of the reasons for the ineffective implementation of fishery regulations and policies. They specifically pointed to the CGS's. In practice, the Kutai Fisheries Agency could only prepare a budget for establishing a CGS, together with a budget for providing supporting equipment such as a boat. They could not finance the daily operations of a CGS.[77] Meanwhile, a CGS needed approximately US$ 2,350 per month to be able to carry out regular surveillance.[78] The budget shortage that the 48 CGS's of the Kutai District encountered could have actually been solved from 2009 onwards by allocating part of the annual village budget (Ind. *Alokasi Dana Desa*) to surveillance. Yet, sometimes particu-

74 The increase of the agency's annual budget was linked to an increase in the Kutai annual budget. Due to the enactment of Law No. 25/2000 on the Financial Balance, the Kutai annual budget increased significantly as of 2001. It was the first time in 2001 that the Kutai annual budget reached hundred million dollar (US$ 150 million). It was US$170 million in 2002, US$ 273 in 2003, US$ 264 million in 2005, US$420 million in 2006, US$488 million in 2007, US$ 550 million in 2008, US$ 499 million in 2009, US$ 444 million in 2010, and US$ 344 million in 2011.

75 The number of fishery households is nearing 50% of total fishery households in East Kalimantan. See in Dinas Perikanan dan Kelautan Kutai Kartanegara (2009).

76 For instance in 2007 the agency could only spend US$132,000 of the total budget of US$ 183,000, whereas in 2008 they could spend US$ 220,000 of a total of US$ 368,000.

77 According to the decree of the Minister of Marine Affairs and Fisheries of 2001 concerning Guidance for a Community-Based Monitoring System on Marine and Fishery Resource Management, district and municipality governments could provide donations (*bantuan*) to the CGSs to buy equipment.

78 The number is based on an estimate made by a field official of the Kutai Fisheries Agency. Interview Agg, 8 and 9/2/2010.

lar CGS's found it difficult to access the annual village budget when some of their members had not voted for the elected village head.[79]

Due to a budget shortage, the Kutai Fisheries Agency's plan to construct a laboratory for quality control of transported and traded milkfish and processed-fish products could not be realized. As a result, the agency did also not construct check points for surveillance over the transported and traded products. This implied that the Agency could only do a small number of quality control tests, given they had to rent the laboratory of the Provincial Fisheries Agency (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 47).

The field officials of the Kutai Fisheries Agency who were based in the sub-district and village suffered more from a budget shortage and dislocation. The lack of resources led to two problems in particular. Firstly, there was no budget to make regular village visits, especially because there were limited funds to pay for the transportation to cover the distance of 120km between the Agency and the villages. Secondly, there was no budget to pay for supporting equipment. Given the agency's central office could only provide funds for two village visits per year, the field officials could only hope to be invited to cooperate with Total E&P Indonesie, which could enable them to carry out more frequent village visits.[80] A research project supported by Total E&P Indonesie during 2005-2007 had enabled the field officials of Anggana, Muara Badak and Muara Jawa sub-district fishery offices to visit villages in the Mahakam Delta twice a week. Opportunities to carry out village visits arose also when the field officials were involved in dispute settlements, whereby they could get a chance to travel around the villages. Since the Agency's central office did not provide their branch offices with a boat, the field officials often borrowed fishermen's boats.[81] Likewise, the Agency's central office did not provide the field officials with motorcycles for daily activities. As a result the field officials used their own motorcycles or took them from the agency's central office without permission.[82]

Not only the budget shortage and the lack of supporting equipment were a concern, a lack of resources also affected the number of skilled officials. One recent example is the fact that the agency at the time of writing only had one *Pegawai Penyidik Negeri Sipil* (abbrev. PPNS), a civil servant authorized to carry out investigations over a potentially legal case.[83] The only PPNS that the agency had was also the treasurer of the agency. The double position made

79 Interview Agg, 8 and 9/2/2010.

80 Interview Snt, a staff of Anggana office of Kutai Fishery Agency, 30 June 2008.

81 Interview Agg, 8 and 9/2/2010.

82 An official of Anggana local office of the Kutai Fishery Agency took a motorbike from the Agency's central office without getting formal approval from the office. The Agency's central office did not take any action and actually let the local official use it until present.

83 See the Decree of the Minister of Home Affair No. 6/2003 concerning *Pedoman Pembinaan Penyidik Pegawai Negeri Sipil di Lingkungan Pemerintah Daerah*.

it impossible for him to carry out investigations. Meanwhile, other officials of the agency refused to undergo PPNS training, arguing that they could not spend three months away from their families for the training. As a result, the Agency involved provincial PPNS, local police and military officers to undertake the investigations on the condition that the Agency members had all their expenses paid. Traditionally the Agency only has a regular budget for surveillance (*pengawasan*) and not for investigation. As a result, investigation is usually paid for by redirecting the budgets of other activities, such as extension (*pembinaan*). Meanwhile, the annual budget for surveillance usually consists of one or two trips for the whole 18 sub-districts of the Kutai District.[84]

The weak capacity of the field officials has also been linked with the low SSFRC record. Not only did they have a weak capacity, the field officials were also considered as badly-motivated by the agency's central office. The Agency's central office suspected that the sub-district officials (*kecamatan*) were reluctant to take care of recording the number of SSFRCs since it does not generate income unlike, for example, permit applications. Moreover, the transfer of issuing SSFRCs from the district head to the heads of the sub-districts in 2001 had not been followed by a budget increase to the sub-district offices. To deal with the matter, the Agency Head repeatedly reminded the field officials recording the SSFRCs. He did so when the field officials visited the agency's central office to collect their salary.[85]

(b) Planning and budgeting procedure

The planning and budgeting procedures have also contributed to ineffective implementation of the fishery regulations and policies. Existing planning procedures impeded the formation of a serial program while budgeting procedures impeded fruitful field visits.

In 2009 the Kutai Fisheries Agency proposed an annual budget of IDR 90 billions (US$ 1,060,000) to the Development Planning Agency of the Kutai District government. The Development Planning Agency who is in charge of preparing Kutai Annual Budget, refused the request deciding that the Kutai Fisheries Agency would only receive IDR 24 billions (US$ 282,000). In response to the significant reduction, the Kutai Fisheries Agency deleted some of the proposed programs and activities to meet the limits of the Development Planning Agency. Proposed programs and activities were cancelled just before a deadline given by the Development Planning Agency. The deadlines were originally set by the Development Planning Agency, which informed other agencies only very late. Due to limited available time, processes to cut budgets and cancel programs and activities did not widely involve divisions and units within the Kutai Fisheries Agency, as occurred when the proposed budget was first drafted. Instead, the final steps of the process would exclusively

84 Interview MK, 6/12/2011.

85 Interview Shrn, a Head of Kutai Fishery Agency, 1/2/2010.

involve the Agency Head together with officials who were in charge of planning. In practice, it was the Agency Head who took the final decision about which program or activity would continue or be cancelled.[86]

Another factor that hindered the forming of serial program was the self-interest of high-ranking officers, who were the decision makers in their respective division or unit. In many cases, the high-ranking officers would not be enthusiastic about the proposed programs or activities suggested by their staff, simply because they were about to move to another agency and did not think that they would gain any benefit from the arranged programs or activities. A similar behaviour could be seen amongst the senior staff, who were about to retire.

Some Kutai Fisheries Agency officials complained that the rigid official procedure for budget planning and spending left them insufficient time to carry out village visits. Budget rules determined that an official of the agency's central office could spend a maximum of three days away travelling (Ind. *perjalanan dinas*). For field officials the travelling allowance was even shorter: one day. Under the formal procedure of budget planning and spending, Kutai Fisheries Agency officials usually proposed on Monday and Thursday a budget for travelling twice a week. When they received money on Monday, they would travel on Tuesday and Wednesday. On Thursday they proposed another budget to be used for travelling on Friday, Saturday and Sunday if necessary. Hence, they actually only had two days for each journey. Nevertheless this was actually a system for the Agency to save some money so that they could pay their 106 (2008) part-time staff members.[87] By proposing three days of travelling but spending it in only two days, they could allocate money for paying their part time staff members. Thus, on one hand, some Kutai Fisheries Agency officials were complaining about not having sufficient days for village visits, yet, on the other hand, some benefited from it.

(c) Other agencies' concerns

Some Kutai Fisheries Agency officials also connected their failure to achieve effective implementation with the minimal concern and self interest of other agencies.[88] The Kutai Fisheries Agency officials blamed the Kutai Forestry

86 Interview Mnt, 19/8/2009, and M, 6/8/2009.

87 In that year, the Kutai Fishery Agency employed 101 full-time staff members. In Kutai District it is common that some agencies and offices have more part-time officials than full-time officials, which is also the case at the Kutai Planning Agency, Education Agency and Secretariat Office. In 2007, the Kutai District employed 10,523 officials including around 9,000 part-time officials. This means that of the total population in Kutai District 2,08% number are employed by the government – the largest percentage in East Kalimantan Province (Badan Penelitian dan Pengembangan Daerah Kabupaten Kutai Kartanegara 2008, p. 17-18).

88 At the same time other agencies blamed the Kutai Fisheries Agency for only caring about pond development, and less about the environment and land use.

Agency officials for not being concerned with rehabilitation of the Mahakam Delta. Moreover, they blamed the Kutai Forestry Agency for reluctantly supporting the idea to rezone the Mahakam Delta. They were reluctant because re-zoning meant a reduction of the size of the Forest Area. The Kutai Fisheries Agency officials suspected that the Kutai Environmental Agency was reluctant to support the idea of establishing a new management body for the Mahakam Delta. Again, the reluctance was probably closely related to the self interest of the Environmental Agency officials, who worried that the new management body would take over some of their roles.

The Kutai Fisheries Agency officials mentioned a recent case to show how other agencies deliberately dramatized the deforestation of the Mahakam Delta. The Kutai Fisheries Agency suspected that other agencies intentionally used pessimistic deforestation figures of the Mahakam Delta in order to secure programs on mangrove replanting. The worse the deforestation, the longer the reforestation program would be. This explanation helped the Kutai Fisheries Agency to understand why the Kutai Environmental Agency kept using the 2002 research report, saying that deforestation has reached 85% of the land of the Mahakam Delta. It also explains why the Kutai Development Planning Agency, at a workshop in late 2009, mentioned that deforestation of the Mahakam Delta added up to 120,000 hectares (see Section 2.2 on the figures of deforestation of the Mahakam Delta).

Suspicion and blame of other agencies inevitably affected any effort to coordinate with other Kutai District government agencies. An attempt was made with a multi-stakeholder team, the so-called Team for Integrated and Sustainable Management of the Mahakam Delta (TISMMD).[89] Beside civil society members, all related Kutai agencies were represented in the TISMMD.[90] The TISMMD had difficulty establishing coordination among the Kutai agencies. Meanwhile, once the TISMMD was able to organize joint meetings, decisions could not be made, as the agencies sent their junior staff members who were not authorized to take a decision.[91] Consequently when the Kutai agencies allocated their respective budgets in respect of the Mahakam Delta, instead of merging the different budgets into one, the agencies used and spent their own budgets separately.[92]

Not only with other agencies, the Kutai Fisheries Agency also encountered serious internal problems of coordination. With regard to the SSFRC, alongside weak capacity, a lack of coordination among field officials led to fewer SSFRC applications than hoped for (Dinas Perikanan dan Kelautan Kutai Kartanegara

89 The Team was officially established through the Decree of the Kutai District Head No. 180.188/HK-458/2001 on The Establishment of a Team on Integrated and Sustainable Management of the Mahakam Delta.

90 The civil society members were companies, NGOs and academics.

91 Interview HT, a former Secretary of Kutai District government, 31/1/2010.

92 Interview RBS, 24/4 and 7/5/2008.

2009: 50). With regard to law-making, the lack of internal coordination was an even greater problem. The making of the Kutai Draft Regulation on Fishing as a revision of Kutai Regulation No. 3/1999 on Fishing hardly took into account the previous making of the Kutai Draft Regulation on Fishery Levy. As a result, the Legal Drafting Team of the initiative overlooked what had been produced by the Legal Drafting Team of the Kutai Regulation on Fishery Levy.

(d) Leadership

There exists a strong belief among Kutai District government officials that the extent to which the Kutai District government is concerned with the Mahakam Delta environment is influenced by persons who occupy leadership positions both in the secretariat, agencies and offices (see Section 4.1 on the difference between secretariat, agency and office). If leadership is in the hands of people, who are personally concerned with the environment or social issues, policies concerning the Mahakam Delta are better implemented. The opposite situation occurs, if the people are less concerned. A former Head of Kutai Environmental Agency said:

> One of the factors that has added to the destruction of the environment of the Mahakam Delta is that only a few Kutai higher or lower officials were concerned about the environment. There are mostly short-terms views in seeking how environmental destruction should be resolved.[93]

The local officials made a comparison between the period before and after 2001-2005 to point to the importance of the individual or personal concern. The period of 2001-2005 was seen as period when some important positions were occupied by persons who were highly committed to the Mahakam Delta's environment. Three key positions that were occupied by concerned high-ranking officials at that time were the Head of the Environmental Agency, the Head of the Fisheries Agency and the Head of the Government Bureau of the Secretariat. This resulted in the undertaking of various activities, such as mangrove replanting, organisation of workshops, formulation of legislation, and carrying out (comparative) research. Initiatives to formulate legislation on the management of the Mahakam Delta even led to the establishment of a Special Committee of Kutai Parliament in 2005.[94]

Yet, the way the positions were filled ended in 2005 following the election of 2004. The elected Kutai District Head 'toppled down' around 400 high and

93 Interview RBS, 24/4/2008.

94 The Special Committee of Kutai Parliament was dismissed after delivering a report in a plenary session of the Kutai Parliament. In its report, the committee recommended two things. First, to establish a special management body for the Mahakam Delta. Second, to develop sustainable shrimp ponds. Interview MA, a member of Kutai House of Representative, 14/6/2008.

middle ranking officials without giving them a clear new position.[95] The former Head of the Environmental Agency was one of the victims of what she called a 'political government'.[96] Her new position as an advisor of the Kutai District Head left her unable to be involved in the Mahakam Delta any longer. The Head of the Government Bureau of the Secretariat could also be no longer involved, as he was moved to another agency in 2009.[97] Their successors were less concerned with the issue of the Mahakam Delta.

External factors

To understand why fishery regulations and policies were not effectively implemented, the Kutai Fisheries Agency officials also pointed to the behaviour and life of the fishing and farming communities. They perceived the failure of environmentally-friendly shrimp ponds as caused also by bad attitudes of the fishermen and farmers.

As said, a lack of budget was mentioned as a factor preventing the Kutai Fisheries Agency officials from effectively enforcing rules on destructive fishing. Yet, they pointed also to the importance of fish capture for the livelihood of the small-scale fishermen of the Mahakam Delta. The fishery officials were reluctant to ask fishermen not to use trawls, given that fishermen were dependent on fishing for their subsistence. It is therefore that the fishery officials felt they had to come up with alternative ways of generating income, if they wanted to be successful in enforcing the law upon the small- scale fishermen.[98]

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95 'To topple down' is in Indonesian popularly called *pe-non-joban.* It should simply be understood as taking away an assignment from a civil servant, even when he or she officially still holds the position of civil servant. A worse implication of *pe-non-joban* is that someone's name disappears of the list of the agency where someone was last registered. The act of *pe-non-joban* came into being after the elected Kutai District Head and Campaign Team were hostile to the 400 officials given that they attended a meeting held by the acting Kutai District Head. The elected Kutai District Head refused to acknowledge the acting Kutai District Head, whom was appointed by the Governor. At that time, the elected Kutai District Head urged all Kutai District government officials to not go to office by way of protest. The 400 officials rejected the invitation and continued to go to work due to reasons of professionalism. The massive *pe-non-joban* actually de-stabilized the Kutai District government, because many positions were not occupied. It got worse from 2005 onwards, when the Kutai District Head was detained by Indonesia's Corruption Eradication Commission in 2007. As already said (see footnote 55), one year later, the Deputy Head of Kutai District was detained as well by Indonesia's Corruption Eradication Commission. .

96 The former Head of the Kutai Environmental Agency found two basic elements of political government. First, that selection and appointment were based on favoritism. Second, that people who were selected and appointed were those, who used to support the elected district head. Interview RBS, 24/4, and 7/5/2008.

97 In 2009, the former head of the Government Bureau was moved to the Office of Civil Registration and Population. Yet, in 2010 he was promoted to a higher position to become an assistant to the District Head.

98 Interview Sji and MK, 11/8/2008.

On the whole, the Kutai District government officials perceived the inhabitants of the Mahakam Delta as tricky, stubborn as well as short-sighted and money-oriented. One official even perceived the inhabitants as cannibals.[99] In addition, they also regarded the fishermen and farmers as poorly-educated people. As mentioned before, when the Kutai Fisheries Agency rented their ponds, the farmers would let their ponds be used as a trial for environmentally-friendly shrimp ponds. The agency even had to pay the farmers to plant mangrove around and in their ponds. Often the farmers planned as many mangrove trees as possible, so they would earn more money. For each seed of mangrove tree they planted, farmers would receive US$ 0.03 and the amount would go up to US$ 0.05, if the planted seeds grew. As a result the seeds were planted too closely together.

The Kutai Fisheries Agency officials found that the fishermen and farmers of the Mahakam Delta favoured instant means to catch and cultivate fish, despite potentially causing environmental damage. Their traditional practices hampered the introduction of new technologies as well as knowledge of environmentally-friendly shrimp ponds (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 62-63). To illustrate how rooted the tradition was, the local fishery officials said that they had invited many experts from national and local universities to meetings with the villagers, but that they still could not change the socially-embedded practice.

In addition, the Kutai Fisheries Agency officials mentioned two other factors that made the implementation of regulations and policies ineffective. First, fishermen's and farmers' expectations of the implications of complying or not complying with the laws and regulations. Second, the village political dynamics.

The officials observed two other reasons why the fishermen and farmers were not willing to register their fishing activity to either the agency office or sub-district office. First, they found that they were not going to be punished for not having a SSFRC. In addition, the Kutai Public Transportation Agency did not forbid them to use their boats, if they did not have a boat certificate. Second, the fishermen and farmers were afraid of having to pay tax if their fishing activities were officially registered. The fishermen perceived the SSFRC as a kind of permit, which would make their business subject to tax collection.[100]

Meanwhile the reason why many fishermen, and in particular fishermen from outside, continued to use destructive gear despite the fact that a few fishermen had been prosecuted, was that the punishment stipulated in Kutai Regulation No. 3/1999 was not very severe. Instead of imprisonment, fisher-

99 Interview ES, a head of technical section of Aggana sub-district, 30/6 and 1/7/2008. Some researchers also associated the fishermen and farmers with particular character-traits, such as greed. See Hidayati (2004, p.101-102).

100 Interview Shrn, 1/2/2010, and Sfd, 17/6/2008.

men favoured to pay a fine which was less than the profit they made on fishing. Because they could earn more money than the amount of the fine, they decided to continue using destructive gear (see Section 1.3.2 on adequacy of legislation). This explains why the warning boards displayed sanctions stipulated in Law 2004 on Fisheries, rather than the sanctions stipulated in Kutai Regulation No. 3/1999, which were milder. Moreover, it was sometimes difficult to enforce the rule forbidding the use of destructive gear, as in some villages elected village heads had bravely promised to voters to hinder any enforcement, if he or she was elected.[101] The situation, where local political power hinders formal rules to work, also occurred when fishermen who were allegedly carrying out destructive fishing, were the relatives of a member of the CGSs or sub-district head. To deal with the situation, the officials conducted sudden investigations so that the suspected fishermen would be caught unaware.[102]

It is apparent that the factors affecting the implementation of the Kutai fishery regulations are manifold. The factors range from the governmental system to individual interests and actions. It is true that the ineffective implementation has been caused by the government system (staffing, planning, budgeting and coordination), but individual concerns and interests of local officials also contributed. We also found a remarkable variation and ambiguity in administrative attitudes. On one hand, the local officials perceived the fishermen and farmers as tricky, short-sighted and stubborn, yet, on the other hand, the local fishery officials were sympathetic to the fishermen and farmers given their poor economic conditions. This ambivalent attitude can, to some extent, be explained by ambiguities in the agency's strategies and policies, which have translated into different roles played by the local fishery officials.

7.4 Legislation: identification of some problematic issues

There are at least three main problematic legal issues at stake in fishery management in the Mahakam Delta. First, the excessive formal control of the Kutai District government over fishery management, which eventually turns to be in contrast with higher national fishery regulations. Second, vagueness or a lack of clarity in regulating other non-fishery resources. Third, incoherence among the Kutai fishery regulations due to incompatibility. Each of these three legal issues affect tenure security of the various resource users.

101 Interview Mnt, 19/8/2009.
102 Interview Iw and Akh, staffs of Kutai Fishery Agency, 8/12/2011.

7.4.1 Excessive formal control

As already mentioned (Section 7.2) the Kutai District government has the tendency to enhance formal control of fishery resource use through input control as reflected in some Kutai regulations. It started with Kutai Regulation No. 3/1999 and continued in 2000 and 2004 through respectively Kutai Regulation No. 36/2000 and the 2004 Circular Letter No. 100/287/Pem.A/VI/2004. The intention to widen the scope of formal control can also be seen in the Kutai draft fishery regulations. In the name of sustainability of biodiversity and conservation, the Kutai Draft Regulation on Fishery and Marine Management of the Mahakam Delta imposes strict prohibitions and restrictions on the type of gear, pond construction and fishing zones. The Kutai District government wanted to exercise specific control over shrimp ponds through imposing 'standard shrimp ponds', as reflected in the Draft Regulation of Kutai District Head on Standard Ponds.

As already described (Section 6.2 and Section 7.2), the implementation of the new regulatory norm that gear installation was no longer allowed in the vicinity of a company's platforms abolished the pre-existing rights of small-scale fishermen to fish in Zone I. The implementation of this new norm has been strongly linked with other excessive rules, which transferred three requirements of a FBL to the application for a SSFRC. One of the three requirements is that one should obtain a location permit first issued by the Kutai Land Bureau. During a meeting on the tidal trap case as described in Section 6.1, a high ranking official of the Kutai Fisheries Agency pointed out that the installation of ten tidal traps in GTS G and TN G19, which is situated in Sepatin village, was illegal given that the owners of the tidal traps had not obtained a location permit.[103] Not only the Kutai Fisheries Agency officials held this perception, the head of the neighbourhood (see Section 4.1 on neighbourhood) did so too.[104]As a result the SSFRC changed from a means of supervision to a means of control.

7.4.2 Overlooking non-fishery resource use

Fishing legislation, both national and local, has intensively regulated fishing resource use in the Mahakam Delta over the last few decades. Yet, it has not adequately regulated how non-fishery resource use activities, namely oil and

103 The meeting was held on 7 September 2009.

104 A head of a neighbourhood of Sepatin village sent a letter to the Head of the Kutai Fisheries Agency, asking him for clear information (*petunjuk*) on the formal rules on installing a tidal trap. He made the request, as he saw an increase in installments of tidal traps by outside inhabitants. The new tidal trap installments covered almost half of the river, which disturbed regular shipping activities.

gas and sailing taking place across sea and marine waters, should exist alongside fishing. The situation is different with regard to legislation on aquaculture or shrimp cultivation, which has limited links with land use. Pursuant to the legislation, applicants of FBLs and SSFRCs should have obtained a so-called location permit (see Section 8.2 on permit location) ahead of applying for a permit. Above all, a FBL can only be issued if there are clear rights over land that is to be used for aquaculture. Another provision states that small-scale farmers who carry out aquaculture on their private land will not be required to pay a fishery levy.

As said, there have been fishery regulations which manage to bridge fishery resource use and non-fishery resource use. These regulations are (i) Kutai Regulation No. 3/1999 on Fishing; and (ii) The Circular Letter of Directorate General for Fishery of the Ministry of Agriculture No. E.V/2/4/15/1975, which was later implemented by a letter of the Special Directorate (*Sub Direktorat Khusus*) of Kutai District No. Pal-902/VI/2.d/75. A Circular Letter of the Kutai District Head No. 1000/287/Pem.A/VI/2004 recalled the content of the two previous letters from 1975. The former letter bridged fishing and sailing, whereas the latter letter bridged fishing and sailing as well as petroleum resource use.

Yet, the above regulations have suffered from the following weaknesses. First, they are so general that it is unclear which sailing lanes and petroleum platforms they mean. Until the time of writing, the Kutai District government has not further elaborated either Kutai Regulation No. 3/1999 or the 1975 and 2004 circular letters, thus keeping the provisions general in nature. With regard to the fishery-sailing relation, several fishery regulations have been made separately to deal specifically with the type of gear that is prohibited to stop it from endangering a public shipping lane. At the time of writing, shore-operated stationary lift nets (*bagan*) and fish aggregating devices (*rumpon)* were the only types of gear mentioned.[105] However, as already said, since 2000 shore-operated stationary lift nets in East Kalimantan were permitted again after a twenty-five year ban. This ban was included in the Decree of East Kalimantan Governor No. 75/1973. One of the two reasons for the ban was that the shore-operated stationary lift nets were seen as a potential danger to public shipping lanes. After the Letter of East Kalimantan Governor No 523/1133/Proda.2/EK was passed in 2000, the ban was officially lifted. The letter allowed fishermen to install shore-operated stationary lift nets on strict conditions, such as having a license from either the Governor or District/ Municipality Head and install the nets within 0-3 nautical miles from the coast.

105 For more detailed provisions of the two decrees, see the Regulation of the Minister of Marine Affairs and Fisheries No. PER.02/MEN/2011 concerning Fishing Zones and the Use of Fishing Gear in Indonesia's Fishery Territories, and the Decree of the Minister of Agriculture No. 51/Kpts/IK.250/1/97 on the Installment and Use of Fish Aggregating Device.

However, with regards to the fishery-sailing relation, the Kutai fishery regulations did not refer to the 1975 Governor Decree nor to the 1997 Ministerial Decree. In the case of the Mahakam Delta, this could be the result from the fact that the tidal trap, the most common gear in the region, was not mentioned in the regulations.

Second, for the regulations that managed to bridge fishery with non-fishery resource use there is no higher legislation as a legal foundation. No national fishery regulation has included any stipulation on sailing or petroleum resource use. Due to their binding force, the enforceability of the abovementioned three letters is weak (see Section 4.3 and Section 6.3 on the binding force of policy rule).

Third, the regulations narrowly regulate fishing when encountering sailing or petroleum resource use. Yet, the other way around, the way in which sailing or petroleum resource use should be regulated, when they occur in the same area as where fishing takes place, does not seem to be stipulated anywhere. Considering the principles of legal drafting, such technique of legal drafting is correct. Yet, since neither petroleum nor shipping regulations, at the time of writing, have any provisions on fishing, there is still a lack of coherence.[106] The incoherence brings forward an imbalance, which sometimes appears as discrimination of different resource users with prohibitions and obligations for fishermen, whilst those involved in sailing and petroleum resource use are not subject to the same rules. Rules on compensation are unlikely to lift the imbalance, given that the compensation scheme does not really concern fishing rights which have temporarily or permanently disappeared when the companies' activities were taking place. Some officials from both the Executive Agency and Total E&P Indonesie have never recognized the rights of fishermen, arguing that sea and marine resources are open access.[107] Therefore, as is the case regarding compensation over land, compensation over fishing would only apply to expenses of fishermen rather than to the opportunity to exercise their fishing rights.[108]

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106 There is not single provision in a regulation on Shipping which either explicitly or implicitly stipulates prohibition of installing fishing gear, which could endanger public shipping lanes. See Law No. 21/1992 on Sailing, replaced by Law. No. 17/2008, and Government Regulation No. 82/1999 on Water Shipping, replaced by No. 20/2010. Meanwhile, Government Regulation No. 17/1974 concerning the Implementation of Monitoring Offshore Oil and Gas Exploration and Exploitation is the only regulation on petroleum regulatory rules. Nevertheless, this Government Regulation has an article relating to fishing, which states that petroleum resource use cannot be carried out in area with a nursery ground and/or coral reefs.

107 Interview DH, 19/12/2009.

108 The Decree of Kutai District Head No. 180.188/HK-630/2008 concerning the Basic Price of Compensation Lists. Apart from compensating damaged boats or gear, Total E&P Indonesie usually offered fishermen, who could no longer fish (temporarily or permanently), to become security officers of the company. As a security officer, one would earn US$ 6 per day.

7.4.3 Internal incompatibility

There are only a few instances of incompatibility between the different Kutai fishery regulations. In fact, only Kutai Regulation No. 3/1999 on Fishing and the 2004 Circular Letter of the Kutai District Head contradict each other. The incompatibility between these two regulations emerged when the 2004 Circular Letter added oil and gas platforms as areas where gear installation was forbidden (see Section 6.2 and Section 7.2). Oil and gas platforms were not included in Kutai Regulation No. 3/1999. Public shipping lanes were the only object that this regulation explicitly mentioned as a forbidden area for gear installations.

A former head of section on fishery resource surveillance of the Kutai Fishery Agency, acknowledged that the 500 meter forbidden zone is located within the 0-3 miles zone in which small-scale fishermen are allowed to fish as existing fishery regulations clearly state (see Section 7.2). Thus the implementation of the 2004 Circular Letter has decreased fishing grounds for small scale fishermen. Even though no fisherman who has broken the rules has ever been detained, the security officers of the oil and gas companies still warned and asked them to stay away from the zone.[109]

The above regulations also state that gear installation which could endanger public interest is prohibited as well. However at the time of writing there were no subsequent regulations defining 'public interest'. Even though Presidential Directive No. 63/2004 concerning the Security of National Vital Objects classified a 'national vital object' – which included oil and gas extraction – as anything concerning the livelihood of the majority of people and national interest, there are as yet no regulatory rules, dispute settlements, or court decisions which explicitly explain what is meant by 'public interest'. Nor have the Executive Agency or Total E&P Indonesia used the 2004 Presidential Directive to accuse fishermen or farmers of having broken the law.

7.5 Interaction between the state and resource users

Various factors have shaped the interaction between the Kutai District government officials and the fishery and aquaculture resource users in the Mahakam Delta. Similar to what happened in the case of the forestry regulations (see Section 5.5), the local officials had mixed feelings of sympathy, respect as well as pragmatism in interacting with the local resource users. However, one should say that two other attitudes of the local officials can be discerned, which specifically arise in the implementation of fishery regulations. The first concerns oil and gas resource use where the local officials are required to impose regulations repressively. The second is their attitude as 'defender' of the shrimp

109 Interview MK, 6/12/2011.

farmers, when the local users are accused of breaking the law by other regional agencies.

As mentioned before, local fishery officials showed empathy when they did not enforce the law on those who used damaging gear, taking into consideration the economic subsistence of small-scale fishermen. Sympathy also played a role, when the fishery local officials settled disputes between fishermen or farmers and Total E&P Indonesie. In dispute settlements concerning environmental pollution, the local fishery officials always expected the company to be willing to pay compensation to the fishermen or farmers, even when investigation proved that the companies' operations had not caused the environmental pollution, which fishermen or farmers suggested. In a way, the officials acted in this manner to prevent resistance from fishermen or farmers after the dispute settlement, but the motive was mixed with a sense of humanitarianism. For the local fishery officials, the sum that the company donated, would be nothing in comparison with what the company has earned from the Mahakam Delta.

Pragmatism also caused the local fishery officials to overlook formal fishery legislation, when they favoured the realization of planned programs and activities. For instance, in dealing with aquaculture farmers, the Kutai Fisheries Agency officials continued to supervise the farmers by organising a high number of meetings on how to develop environmentally-friendly shrimp ponds as well as mangrove replanting, despite them being aware of the illegality of the ponds in the Mahakam Delta.[110] The Kutai Fisheries Agency even officially rented several ponds, to demonstrate how to farm an environmentally-friendly pond, turning illegal pond owners into formal occupants. With regard to the legal status of the land of the pond, local fishery officials would rely on information given by the village head. The following comment from an official of the Kutai Fisheries Agency reflects the pragmatism.

> If our agency questioned the legal status of the land, it would only stop the government from ever doing anything. It would be useless for our agency to continue discussing the land's legal status, and it would take a lot of time. Moreover, it would make our agency do nothing.[111]

The field officials of the Kutai Fisheries Agency often practiced pragmatism when they found themselves in a dilemma, with the fishermen and farmers being very sceptical about the programs of the Kutai Fisheries Agency on one hand, whilst they continued to demand programs, on the other. The solution was often that they continued with the programs and activities, whilst knowing full and well that they were rather meaningless. Similarly, in various meetings

110 Interview Shrn, M, SR and DS, 11 and 12 June 2008.
111 Interview Mnt, 12/11/2008.

the field officials kept reminding the fishermen of the fishery regulations, despite knowing that the fishermen would not adhere to them.[112]

Meanwhile in settling disputes, the local fishery officials could be repressive instead of showing sympathy to the fishermen and farmers. This occurred when the pressure to prioritize the continued operations of the companies combined with a negative, paternalistic approach stereotyping the fishermen's and farmer's attitudes as stubborn and backward. In such situations, the local officials could bluntly apply legal norms. A statement of a senior official of the Kutai Fisheries Agency during a meeting in 2009, saying that all tidal trap instalments without a location permit were illegal, is a perfect instance of it. Actually, the provision requiring the SSFRC applicant to have a location permit ahead of applying for the SSFRC is actually incorrect given that a permit location would only be given to a legal body which needs land to carry out its business activities.[113] A SSFRC applicant is an individual who does not need land for his/her fishing.

In the end, the repression of fishermen and farmers by local fishery officials went hand in hand with favouritism of petroleum companies. In some cases, favouritism led to the local fishery officials deliberately ignoring the legal incompliance of companies. For instance, the local fishery officials did not ask whether the companies' platforms were really located outside public shipping lanes, for which they needed a permit issued by the Port Administration Office of the Ministry of Public Transportation.

Meanwhile, the local fishery officials shifted their role as defenders of the shrimp farmers when the latter were contesting information and policy by the village government and sub-district government when they were not willing to process land letter applications. As of 2009, the village government and sub-district government officials refused to process the application of a land letter if the proposed land was located in Forest Areas. This occurred after the officials of a regional technical implementation unit called the Unit of Forest Area Establishment of the Ministry of Forestry and the officials of the office of the District Head told the village government and sub-district officials to not issue land letters on land, which is located inside Forest Areas. They were told in a meeting attended by the Kutai District Head.

In response to the situation where the validity of land ownership of the shrimp farmers was questioned, the local fishery officials argued that the land ownership was valid. By way of argument, the local fishery officials showed old official documents, which had been issued and produced by the local office

112 Interview Snt, 30/6/2008.

113 See a Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 2/1999 on Location Permit. Article 2 (1).

of the Kutai Fishery Agency, in a interview that I conducted in 2011.[114] The fishery local officials showed a so-called Shrimp Pond Registration Certificate (Ind. *Tanda Bukti Pendaftaran Usaha Pertambakan*). The document primarily contains personal data of the shrimp pond owners as well as the size of land and year the land is reclaimed.[115]

By showing the old document, the local officials argued that land ownership of the shrimp farmers was legal. In an effort to delegitimize the claim of Forest Areas – in addition to the legal argument by showing the old documents – the local officials suggested that there might be a conspiracy behind the order to not serve the land letter applications. They suspected that the oil and gas company had lobbied the higher officials to raise the rules on the Forest Areas in the hope that the company would only need to pay a small amount of compensation to the shrimp farmers for they would not be the owners, but merely the users (see Section 6.4).

7.6 Concluding remarks

As pointed out by the 2002 research report, plenty of programs and activities have been carried out by the Kutai District government in and for the Mahakam Delta. Not only did they enlarge their programs and activities, the Kutai District government also extended their formal control over fishery resource use which initially started in 1999. Yet, due to a number of factors that are internal and external to the administrative institutions, in spite of the long list of actual and planned programs and activities as well as the excessive formal control, the implementation of fishery regulations and policies has not been very effective. Using the definition of effectiveness as set out in Section 1.3.1, the lack of effectiveness is indicated by the fact that the fishermen and shrimp farmers hardly behaved as the legal rules prescribed with regards to fishery permits and the use of destructive gear.

When discussing prominent factors that have left the implementation ineffective, we can not simply say that the lack of effectiveness has been caused by government inability. Rather than corresponding to one factor, it is the result of a complex amalgamation of factors. One cannot solely speak of inability, because the Kutai District government officials partly did not do everything to implement fishery regulations and policies because they were empathic to the poor economic conditions of the fishing and farming commun-

114 Interview MT (a resident of Sepatin village), HTR (a Head of Muara Badak office of Kutai Fishery Agency), Agg and Whd (a staff of Muara Badak office of Kutai Fishery Agency), 3/12/2011.

115 The local office of the Kutai Fishery Agency issued the certificates in a way to implement the policy of the Ministry of Agriculture and the Provincial government to boost the development of small-scale aquaculture (Ind. *Tambak Inti Rakyat*) after the ban on the use of trawl in 1980 (see Section 7.3).

ities. Their reluctance to strictly follow certain provisions of the regulations also derived from their perception of the huge income disparity between the petroleum companies and the fishermen and farmers.

Moreover it is incorrect to say that the exercise of state control over fishery resources in the Mahakam Delta has always or wholly been weak or absent. In this region, where the concept of a 'national vital object' exists, the Kutai District government officials together with local law enforcers have occasionally exercised effective control on fishing. In this regard, the state did not only exercise ordinary control as stated in the national fishery regulations, but also excessive control, as stipulated in some of the Kutai fishery regulations. It is important to underline that repressive behaviour of the local officials and officers usually derived from the importance of petroleum extraction for the state on one hand, and their prejudices about fishermen's and farmers' attitudes, on the other.

To some extent, the root of the formal and actual excessive state control over fishery resources use as can be seen in the Mahakam Delta is laid down in national legislation. National legislation, notably on fisheries, has long required fishery resource use to respect non-fishery resource use. Not only has this legislation restricted fishing rights, it has also abolished rights which are legally recognized.

With regards to the process of drafting legislation, the Kutai Fishery Agency officials perceived fishermen and farmers as objects, as can also be seen in the implementation of the law. Given that they are less-well educated, the officials believed that the fishermen did not need to be engaged in law-making. Through this opinion, most draft and enacted regulations have been made overwhelmingly with input from the outside. Personal concerns and interests of officials coinciding with pursuing legal legitimacy in the eyes of higher government units have turned regional law-making into something much more concerned with outsiders than with the inhabitants as stakeholders of the Mahakam Delta.

8 The status of the forest: how legal is forest land use?

8.1 INTRODUCTION

When mangrove forest in the Mahakam Delta was increasingly converted into shrimp ponds during the period 1997-2002, some pond owners came to the District Office of the National Land Agency (DONLA) to apply for a land title with the eventual aim to obtain a land certificate. Knowing that most of the Mahakam Delta is state forest, the DONLA officials refused to process the applications. They refused the applications, despite being aware that some of the land to which the pond owners applied was not located in the Forest Area but in the 6,000 ha of non-forest area over which they were actually allowed to issue land certificates. Given that few parts of the Mahakam Delta are non-forest area, the DONLA officials were supposed to figure out in which area the applied-for land was located, before deciding on refusal or acceptance. Even when the pond owners brought them letters that were officially signed by village heads and sub-district heads, the DONLA officials still refused to process the applications. The overarching reason why the DONLA officials refused to consider the applications was that they were afraid of being accused of taking part in the deforestation of the Mahakam Delta.

When a local journalist asked whether the Kutai Land Office (2000-2009), a supporting division of Kutai District government, had issued any land certificates in the Mahakam Delta, the former Head immediately answered that his institution had never done so. He said:

> As we clearly know that the mangrove forest of the Mahakam Delta is a Protected Forest, we never issued any land certificate in the area. If, in fact, there are pond owners who hold a certificate, I can assure you that they must be illegal land certificates.[1]

The illegality of land possession (see Section 6.2 for the reason why I use the term 'possession' in this book) in the Mahakam Delta has long been discussed. Nevertheless, the discussions on illegality have not led to law enforcement in case of illegal land possession. Instead, the discussions moved to administrative justifications self-defence, where the concerned provincial and district agencies argued that they did not provide any support or legitimacy to man-

1 'Tidak Ada Sertifikat'. *Kaltim Post*, 14/6/2004.

grove conversion. In fact, the officials have been unwilling to further figure out whether the alleged issuance of land certificates in the Mahakam Delta really had taken place or not. The officials' responses to queries about the issuance of land certificates were without adequate knowledge of how many land certificates on the Production Forest had actually been issued. They, therefore, merely responded to rumours.[2]

The DONLA officials had often used legal arguments in refusing the land title application, saying that the Production Forest of the Mahakam Delta was not under their jurisdiction. Yet, it should be noted that through this argument, the officials accordingly considered any land possession in the Mahakam Delta as illegal. However, the former Head of the Kutai Land Office, whose statement was quoted earlier, did not call the land possession illegal, because the pond owners still had use rights, even when they did not have ownership rights. Not only regional and local government officials have had this opinion, so have central government officials and companies' employees. Legal professionals such as judges and solicitors have similarly regarded land possession in the Mahakam Delta as legal.

Like many millions ha of land possession in Forest Areas across Indonesia, land ownership and land possession in the Production Forest of the Mahakam Delta have a history of questions on legality (Fay and Sirait 1999). The unclear legal framework on land ownership and land possession in Forest Areas has resulted in continually changing behaviour of local officials in treating land owners or land possessors. Their behaviour has varied according to time and situation. However, there seems to be a pattern in their behaviour that the closer they are to land possessors, the more they tend to perceive the possession as legal.

This chapter discusses how formal and semi-formal rules govern land possession in the Mahakam Delta. Emphasis is on the formal and semi-formal rules concerning state land which is occupied and cultivated by private parties. The way in which regional and local government officials as well as legal professionals have dealt with legal matters surrounding this type of land possession is also discussed.

2 The Head of the Provincial Environmental Agency told a local journalist that they would take the necessary measures to stop the issuance of land certificates in the Mahakam Delta. Yet, when he was asked whether land certificates really had been issued in the Mahakam Delta, he simply said, 'I do not know, but it seems that many pond owners have land certificates, since control is weak'. See 'Dilarang Keluarkan Sertifikat Tanah, Dampak Kerusakan Delta Mahakam'. *Kaltim Post* (N.d.).

8.2 LEGISLATION: MAIN LAWS AND PROVISIONS

Chapter 5 and 6 extensively discussed forestry and petroleum laws and regulations, and included short accounts of land regulations. Chapter 5 on forestry regulations (Section 5.2) mentioned a few things about land possession when forest delineation processes were described. In sum, it was stated that the Committee on Forest Boundary Delineation, which was carrying out forest delineation, was to make an inventory of all instances of land ownership and land possession, and buildings and crops that existed on the forest land that was to be delineated. If the inventory found either land ownership or possession, the committee had to resolve any rights claims of the owners or possessors, notably by providing compensation. Only if the right claim had been wholly resolved, then the Ministry of Forestry could claim that a particular Forest Area now belonged to the state, for it would be free from any private property rights. Chapter 6 (Section 6.2) informed us on the rules regarding the process of land acquisition, which guided oil and gas companies in their negotiations with land possessors. It was said that any petroleum company, which would acquire land for extraction, had to provide compensation to any land owner or holder, who owned or used this land. The companies also had to provide compensation to land owners or possessors, who could not exercise their rights over their land temporarily due to the companies' extraction activities.

Yet, since those two chapters discussed the rules on land from a specific angle, they could not provide a broader picture of land regulations. This, therefore, leaves the following basic question: how do land regulations actually regulate land in a specific situation like in the Mahakam Delta? The question is, more specifically, how formal and semi-formal rules govern the use of forest land for non-forest use, which is carried out by private parties who do not have a land certificate as evidence of ownership.

8.2.1 The origin of the recognition of possessory evidence

Indonesian land law recognizes three types of land ownership evidence and land possession (Ind. *bukti hak*), namely a written document, a testimony and a self-declaration. Of the written documents, a certificate is regarded as the strongest type of evidence of ownership (Perangin 1986, p. 108; Parlindungan 1999, p. 127; Soerodjo 2002; Harsono 2007, p. 478,).[3] A certificate is also the only form of ownership evidence that provides a land title as recognized by

3 See Soerodjo (2002).

land law.[4] Other forms of written evidence of ownership include tax receipts, sale receipts, notary deed of land transaction, and a letter of rights issued by a government official.[5] Those different types of written evidence could be named forms of 'possessory evidence'. Yet, as provisional evidence, possessory evidence should be complemented by other forms of evidence (Aryanto 2006, p. 26). To what extent does formal land law recognize possessory evidence?

In general, it could be said that the origin of the recognition of possessory evidence came from their function as provisional support that was needed for two purposes, namely to issue land titles and licenses for other natural resources use, and to provide compensation in case of land acquisition (*pengadaan tanah*). Although ending up with different final processes, land titling, a license issuance or land acquisition turned possessory evidence into a means of determining whether the holder was entitled to a land title, license or compensation.

Possessory evidence has not only been used in public law, but also in private law. Law 1996 on Land Mortgage over Land and Related Properties is one such example. In principle, the law stipulated that only registered and certified land could be proposed as mortgage. Yet, the law would allow a mortgage, in which the land was unregistered and uncertified on the condition that those who would like to borrow money from a bank would apply for a certificate, shortly after they and the bank had officially signed a bank loan contract.[6]

With regard to land titling, regulations on land conversion (*konversi tanah*) treat possessory evidence as a recognized written document, besides the certificate which is required to apply for land conversion.[7] It is stipulated that possessory evidence could be either a tax assessment (Ind. *Surat Pemberitahuan Pajak Terutang* abbrev. SPPT), a letter of declaration signed by a village head

4 The recognized land titles are ownership rights, long-lease rights (*hak guna usaha*), building rights (*hak guna bangunan*), use rights (*hak pakai*), lease rights (*hak sewa*), land reclamation rights (*hak membuka tanah*), and rights to collect forest products (*hak memungut hasil hutan*). There are also several temporary land rights, such as *hak gadai, hak bagi hasil, hak menumpang and hak sewa tanah pertanian*, which the BAL suggested to be abolished in the future due to their exploitative character. Besides those rights, *hak pengelolaan* is a new land right, which is not stipulated in the BAL but became a new official land right in 1965 (Parlindungan 1999, p. 86 and 104).

5 In this regard land law is subject to Indonesia's Civil Law Code (Article 1866), which determines that a written document, testimony, *persangkaan*, letter of declaration and pledge are forms of legal evidence.

6 Article 10 of Law No. 4/1996 on Land Mortgage over Land and Related Properties. See also Effendi (2009).

7 Part II of BAL is the foundation for all legislation on land conversion. It was further elaborated by two organic regulations, namely the Decree of the Minister of Agriculture and Agrarian Affairs No. 2/1962 and the Decree of the Minister of Home Affairs No. Sk. 26/DDA/1970 on *Penegasan Konversi dan Pendaftaran Bekas Hak-Hak Indonesia Atas Tanah*. In Indonesia, land conversion is defined as any policy or action to convert former land rights into land rights as recognized in the BAL (Harsono 2007).

and sub-district head, a receipt of a land transaction (sale, grant, exchange) or a decree issued by authorized officials awarding a particular right to someone. If someone does not have a complete set of possessory evidence or no evidence at all, he or she may still apply for conversion by providing a letter of self-declaration stating that the land belongs to him or her, supported by a testimony of those who have knowledge of the ownership history of the land in question (Ilyas 2005; Harsono 2007, p. 494-495, Sabillah 2008, p. lxvi-ix). Likewise, regulations on land registration require possessory evidence for the application for a particular land title. It is stipulated that all those applying for a land title should present either written or unwritten evidence to prove their actual control (Ind. *dasar penguasaan)* over the applied-for land.

Concerning land acquisition, although higher land regulations stipulate that only certificate holders are entitled to compensation, some lower land regulations stipulate differently.[8] Lower land regulations state that possessory evidence should be presented by those who apply for compensation.[9] Regulations on land acquisition, which is not for public interest but for private development, stipulate the strict need for possessory evidence. The Decree of the Executive Agency of 2007 concerning land acquisition in the petroleum sector, for instance, emphasises the requiirement that any land possessor should present a land letter signed by the village head and sub-district head (see Section 6.2).

Not only for land conversion, registration and acquisition, Indonesian land law also uses possessory evidence for license issuance. The provisions can be found in legislation concerning a Land Reclamation License (LRL). According to Abdurrahman (1995, p. 99), the LRL derived from Land Reclamation Rights as stipulated in the 1960 Basic Agrarian Law. Land Reclamation Rights themselves originated from *adat* customary law, where they are referred to as forest reclamation rights (Parlindungan 1986, p.121, Harsono 2007). Forest reclamation rights were granted by an *adat* community leader, either to a member of the community, or to an outsider, to clear a piece of forest for agriculture and further utilize it. In the subsequent regulations, Land Reclamation Rights were converted into a license instead of rights, as already indicatively existed in the BAL (Article 46). This marked a shift in regulation of Land Reclamation Rights, whereby the authority moved from the customary *adat* community to state administration (Azam 2003:12).[10]

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8 The higher legislations are Presidential Regulation No. 36/2005 as amended by Presidential Regulation No. 65/2006 on Land Acquisition for Development in Public Interest, and the Regulation of the Head of National Land Agency No. 3/2007.

9 See Article 51 (1 b and d) of the Regulation of the Head of National Land Agency No. 3/2007.

10 Reclamation is not completely new, for it had existed during Dutch colonial rule. In 1896 and amended in 1925, Dutch colonial rule enacted regulations concerning land reclamation. The regulations stated that any land reclamation should be on the basis of a license issued by a village head or sub-district head. The license was given for a particular size of land

After the enactment of the BAL, legal norms on LRL first appeared in a Regulation of the Minister of Home Affairs of 1972.[11] The Regulation authorizes a head of sub-district to issue a permit called a Land Reclamation License. According to the regulation, the maximum size of a piece of land that a sub-district head could give a LRL for was 2 ha, whereas a head of district/mayor could grant a LRL for an area between 2 and 10 ha. The regulation also stated that in issuing the license, a head of sub-district should take into consideration the advice from the village head. In practice, however, this advice turned into a standard land letter (see Picture 8.1) which was also popularly known as a *leges* letter or *segel* letter (Simarmata 2010b, p.124). Due to problems caused by the issuance of LRLs, in 1984 the Minister of Home Affairs instructed to abolish the authority of heads of sub-districts to issue a LRL.[12]

Apart from its official role as provisional evidence of land possession, some scholars have suggested other sociological and administrative explanations for why possessory evidence still exists and is still recognized by Indonesian land law. One explanation is the slow process of land titling organized by national, regional and local land agencies. Another scholar suggests that the government is aware of the plurality of normative orders of Indonesian land law (Fitzpatrick 1997, Fitzpatrick 2007; Warman 2010; Safitri and Moeliono 2010, p. 15). There is even the suggestion that the pervasive existence of customary land law, in which possessory evidence has increasingly been used, has made the formal land registration system dysfunctional (Haverfield in Lindsey 1999, p. 57).

As said, regulations on other natural resources use also include rules about possessory evidence. The regulations chiefly stipulate that possessory evidence is needed to carry out land acquisition as well as to issue licenses. The next sub-section will examine what forestry regulations say about possessory evidence.

8.2.2 Possessory evidence in Forest Areas

As said (Section 5.2), pursuant to current forestry legislation concerning forest delineation, members of the Committee on Forest Boundary Delineation are assigned to make an inventory of existing private land rights and resolve any

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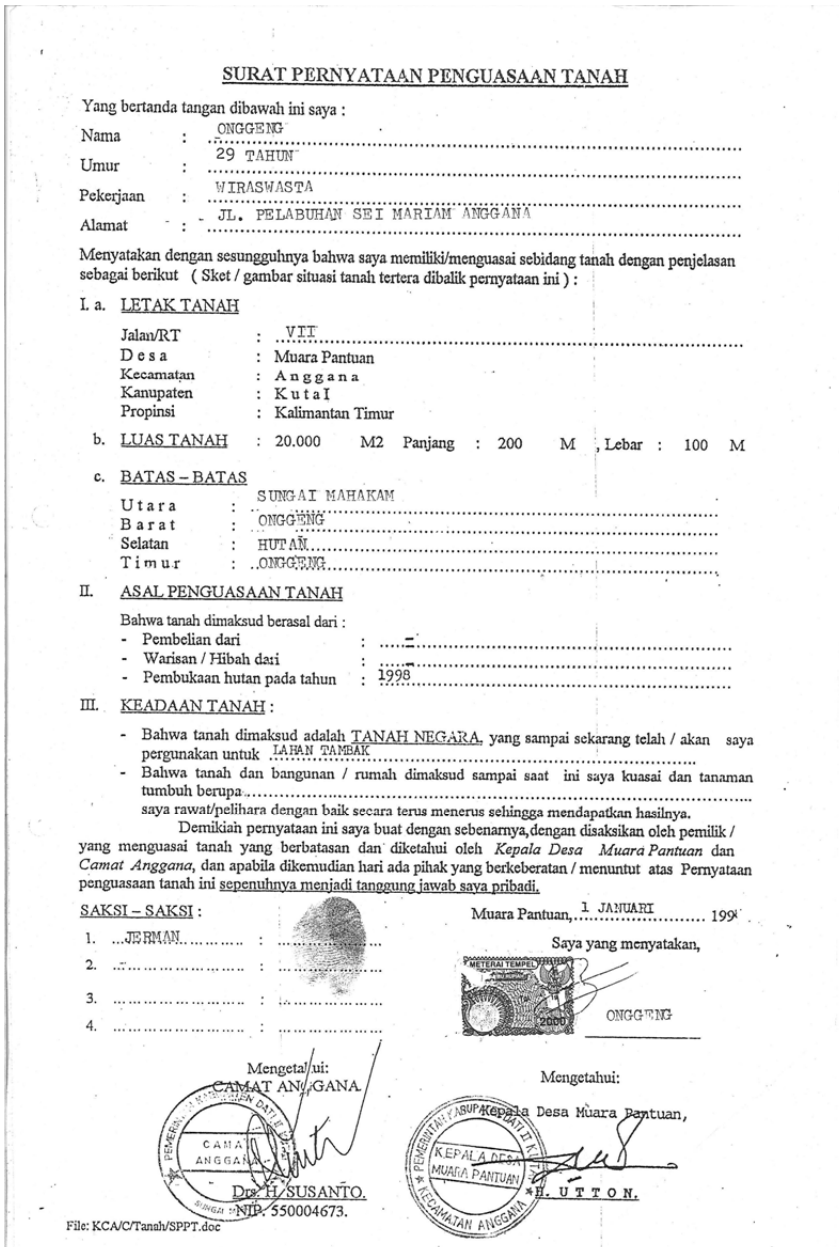
and time period. Any offence was charged with imprisonment or a fine. At that time, the license was popularly known as *cap singa* (literally translated as 'lion brand'). See Wiradiputra (1951, p. 4-6), and Susanto (1980, p. 29-32).

11 Regulation No. 6/1972 on the Transfer of Authority to Issue Land Titles. It has been superseded by the Regulation of the Head of National Land Agency No. 3/1999 concerning the Transfer of Authority on the Issuance of Land Title on State Land and its Annulment.

12 The instruction dated from 22 May 1984. Problems arose because the issuances often concerned the same plots, and the licenses were sold to others instead of being used by the applicants. See Simarmata (2010a:10).

Picture 8.1: Land letter



SURAT PERNYATAAN PENGUASAAN TANAH

Yang bertanda tangan dibawah ini saya :

Nama : ONGGENG

Umur : 29 TAHUN

Pekerjaan : WIRASWASTA

Alamat : JL. PELABUHAN SEI MARIAM ANGGANA

Menyatakan dengan sesungguhnya bahwa saya memiliki/menguasai sebidang tanah dengan penjelasan sebagai berikut (Sket / gambar situasi tanah tertera dibalik pernyataan ini) :

I. a. LETAK TANAH

Jalan/RT : VII
Desa : Muara Pantuan
Kecamatan : Anggana
Kanupaten : KutaI
Propinsi : Kalimantan Timur

b. LUAS TANAH : 20.000 M2 Panjang : 200 M , Lebar : 100 M

c. BATAS – BATAS

Utara : SUNGAI MAHAKAM
Barat : ONGGENG
Selatan : HUTAN
Timur : ONGGENG

II. ASAL PENGUASAAN TANAH

Bahwa tanah dimaksud berasal dari :
- Pembelian dari : -
- Warisan / Hibah dari : -
- Pembukaan hutan pada tahun : 1998

III. KEADAAN TANAH :

- Bahwa tanah dimaksud adalah TANAH NEGARA, yang sampai sekarang telah / akan saya pergunakan untuk LAHAN TAMBAK
- Bahwa tanah dan bangunan / rumah dimaksud sampai saat ini saya kuasai dan tanaman tumbuh berupa ..... saya rawat/pelihara dengan baik secara terus menerus sehingga mendapatkan hasilnya.

Demikiah pernyataan ini saya buat dengan sebenarnya,dengan disaksikan oleh pemilik / yang menguasai tanah yang berbatasan dan diketahui oleh *Kepala Desa Muara Pantuan* dan *Camat Anggana*, dan apabila dikemudian hari ada pihak yang berkeberatan / menuntut atas Pernyataan penguasaan tanah ini sepenuhnya menjadi tanggung jawab saya pribadi.

SAKSI – SAKSI :

1. JERMAN : .....
2. ..... : .....
3. ..... : .....
4. ..... : .....

Muara Pantuan, 1 JANUARI 199

Saya yang menyatakan,

METERAI TEMPEL 2000

ONGGENG

Mengetahui:
CAMAT ANGGANA

Dra. H. SUSANTO.
NIP. 550004673.

Mengetahui:
Kepala Desa Muara Pantuan,

H. UTTON.

File: KCA/C/Tanah/SPPT.doc

rights claims.[13] The norm implies that the definite status of Forest Area can only be gained, if there are no longer any existing private land rights (Fay and Sirait 1999; Fay and Sirait 2005, p. 8). Nevertheless, the norm does not further specify the term 'private land rights'. Thus, it is necessary to look at other forest regulations, which contain provisions concerning the matter.

First, we could go to the Forestry Law of 1999 to find out what forestry regulations say about private land rights. Like other Indonesian legislation on natural resources, the Forestry Law stipulates that private land rights are identical to land rights as stipulated in the BAL. The law refers to ownership rights (*hak milik*), long-lease rights (*hak guna usaha*) and use right (*hak pakai*) as examples of private land rights.[14] The law emphasizes that those who lose their land rights because of forest designation and delineation, are to be compensated (Article 68 (4).[15] Thus, in this respect, following the logic of the BAL and some other lower land regulations, we might think that the law requires implicitly that someone has to present a certificate to prove his or her ownership over a particular piece of land.

Thus, on the basis of systematic interpretation it could be assumed that 'land rights', in the way that the abovementioned forestry regulations understand the concept, include land which is proved by possessory evidence. However, some forest policy experts suggest an opposite interpretation of 'land rights' in these forestry legislations. According to them, the way 'land rights' is meant, includes land title based on certificates only, and therefore excludes possessory evidence (Fay and Sirait 1999, p.14; Fay and Sirait 2005, p. 8; Fay, Sirait and Kusworo n.d, p.12). The proponents of this view refer to the insight of some legal staff members of the Ministry of Forestry, who insisted that a certificate is the only written land title document that forestry regulations include (Fay and Sirait 1999, p. 14; Fay, Sirait and Kusworo n.d, p. 12).[16]

In sum, it appears that private land rights stipulated in forestry legislation on forest designation and delineation include possessory evidence. Yet, this only seems to apply to possessory evidence, which existed before delineation. What applies to private land rights which come into being, after delineation

13 The owners of forest concessions were also asked to resolve rights claims. Such provision is not mentioned in forestry legislation, but it is stipulated in President Directive No. 1/1976 concerning Synchronization of Agrarian Affairs, Forestry, Mining, Transmigration and Public Sector Works.

14 General Elucidation of Law No. 41/1999 on Forestry. See also Article 2(1) of the Regulation of the Minister of Forestry No. P. 26 /Menhut-II/2005 on Guidance for the Management of Private Forest.

15 Same provision can be found in Article 22(2) of the Government Regulation of 2004 on Forestry Planning. Meanwhile, the law defines private forest as forest in which private land titles exist (Article 1 (5) and General Elucidation).

16 Given that the officials of the Ministry of Forestry merely recognized certified land titles, of 108 million ha or 90% of all delineated forest area it is unclear whether it is considered as private land or not (Fay and Sirait 2005, p. 10).

is completed? And in the specific case of the Mahakam Delta, what applies if delineation did not assess and resolve land right claims?

8.2.3 What rights does possessory evidence include?

Given that the BAL does not recognise that the possessor of possessory evidence has any kind of formal land right (Sihombing 2005; Supriadi 2007, p. 23), subsequent lower land regulations have constructed the relation between the possessor of possessory evidence and land. The lower regulations regard possessory evidence as the foundation of rights (Ind. *alas hak*),[17] which proves someone's actual control over as well as the relation with particular land (Effendi 2009, p. 35-36). This brings us to the following questions: what rights does the possessor of possessory evidence actually have, and from which normative order do such rights come?

Attempts to figure out what rights the possessor of possessory evidence has, lead us to its origin. Originally, the land with possessory evidence was customary *adat* land, even if in some cases the land rights can presently not be identified with a particular customary *adat* norm, given the land rights did not develop in a relatively coherent *adat* law community (Fitzpatrick 2005, p. 131; Bedner 2011). Land with possessory evidence originated from Land Reclamation Rights. As said, the rights were granted by an *adat* community leader either to a member of the community, or to an outsider, to clear a piece of forest for agriculture and further utilize it. Pursuant to *adat* law, Land Reclamation Rights allowed its owners to use and alienate (sale, rent, inherit) land (Susanto 1980, p. 31; Wignjodipuro 1982, p. 201-202; Kartasapoetra et al. 1985, p. 91-92).

Currently, instead of naming these rights Land Reclamation Rights, village inhabitants favour the name cultivation rights or 'use rights' (*hak garap, hak pakai*). The term means that the possessors are only entitled to use (*memakai*) the land (Sihombing 2004, p. 80). The name seems appropriate, because the land is actually owned by other parties, whether state or private. When the possessors of land with possessory evidence transfer their land, they merely transfer use rights, instead of ownership rights (Effendi 2009, p. 57).

In practice, however, the possessor of possessory evidence often behaves like the owner, who could transfer and use the land. Thus from a practical point of view, the land does not belong to the state anymore, since it seems

17 Literally, *alas hak* refers to all written documents, except a certificate, which prove someone's possession or control (*penguasaan*) over particular plots of land. As said above, all written documents can be used as the basis for land holders to either register their land, apply for a permit or obtain compensation.

now to be privately owned.[18] Unofficial as well as official rules and actors justify the practice to alienate land. Pursuant to the 2004 Government Regulation on Land Registration, notaries and sub-district heads can endorse the transfer of land with possessory evidence, on the condition that the possessor provides a letter from DONLA stating that the land is not certified yet, ahead of the transfer (Article 39 [1b]). The other provision of the Government Regulation is even more tolerant in that it includes any deed of land transaction signed by either a village head, *adat* chief or notary as evidence for land registration.[19]

Indonesia's Supreme Court through a number of verdicts has long recognized possessory evidence to prove ownership (Ind. *bukti hak*). In this respect, the Supreme Court has not only accepted possessory evidence as valid evidence, but it has also applied *adat* law to settle land disputes. For specific forms of possessory evidence, like a land letter signed by a village head, the Supreme Court has established stable case law (Ind. *yurisprudensi tetap*). The judge-made rule states that the court can not dissolve any document on land that a village head has composed.[20] The recognition of possessory evidence by the Supreme Court actually derived from another verdict of the Supreme Court, which stated that *adat* law should be applied to the transfer of land. In this verdict the Supreme Court stated that *adat*-based land transactions, in which the rights transfer occurs at the moment of the transaction, are recognized. At the same time, the official registration of the transaction in accordance with rules on land registration is a mere administrative procedure.[21]

8.2.4 Formal local rules on possessory evidence

In the East Kalimantan region, regulations on possessory evidence were largely aimed at administering the use of state land by a private possessor. From a legal point of view, the regional regulations were formed in an attempt to implement the Regulation of the Minister of Home Affairs of 1972 on the Transfer of Authority to Issue Land Titles. Nevertheless, the regulations were also set up, because regional governments were dealing with widespread occupation of state land – both Forest Area and non-forest area – mostly by

18 Given that the land possessor actually behaves like the owner, some land law experts have concluded that possessory evidence resembles a certificate (Sutedi 2007, p. 79 and 129-130).

19 See Government Regulation No. 24/1997, the Elucidation of Article 24 (1), and Article 60(2) of the Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 3/1997 on Land Registration.

20 This was also the case in, for instance, the verdict of the Supreme Court No. 361 K/Sip/1958. See Ali (1979, p. 172-176).

21 Supreme Court Verdict No. 123/K/Sip/1970. See also Effendi (2009, p. 4). For the recent use of *adat* law in settling a land dispute in East Kalimantan, see the Supreme Court Verdict No. 28 PK/TUN/2006.

migrants and local people. The grand-scale occupation had been triggered by the opening of Forest Areas to the cultivation of cash crops, which were in demand due to the increasing price of exported cash crops. The occupation was mostly undertaken by migrants from South Sulawesi and South Kalimantan.[22]

A second motive for the large-scale occupation was land speculation, in which new immigrants and local people competed for new plots of land or reclaimed land that had long been abandoned. They hoped that companies or government projects would possibly want to use the land they occupied, so that they would obtain compensation.[23] Some government projects, such as transmigration, and private company projects, which needed land, had been hampered considerably by the occupation. In Samarinda city, due to the uncontrolled new occupation, the mayor of Samarinda municipality released a circular letter asking the heads of urban-quarters *(lurah)* to not issue new land letters.[24] Given this background, the regulations on the use of state forest land, which was supported by possessory evidence, were primarily aimed at controlling land use, so that the public and private projects could run without interruption.

At the provincial level, in addition to regulation, an administrative document was also composed to govern possessory evidence.[25] In contrast with the drafting of other regulations, which barely involved non-state actors, the drafting of the administrative document engaged both state and non-state actors.

Provincial Level

(a) Regulation Making

At the provincial level, there are three regulations, which to some extent deal with the occupation and use of state land. Two specifically concern possessory evidence, while the third concerns compensation for land acquisition.[26] Only the first two are described because the third one I have no access to. The first

22 For accounts of the opening of forest land to migrants from South Sulawesi see Daroesman (1979); Vayda et al. (1980, p.182); Poffenberger and McGean (1993); Vayda and Sahur (1985) and Vayda and Sahur (1996), and to migrants from South Kalimantan see Lindblad (1988); Magenda (1991); Knapen (2001).

23 For accounts of this type of land occupation see Vayda and Sahur (1996); Hidayati, Djohan and Yogaswara (2008); Simarmata (2010b); Urano (2010, p. 211).

24 Interview PI, a retired staff the Provincial Office of the National Land Agency, 11/3/2008. For a similar story in Muara Badak sub-district of Kutai District see Hidayati, Djohan and Yogaswara (2008, p. 59).

25 By referring to administrative document I mean a form which applicants for a permit or rights required to fill out.

26 The third local regulation is the Decree of the Governor of East Kalimantan No. 183/1977 concerning the guidance for the compensation of land acquisition for the projects of regional government in East Kalimantan.

two regulations are respectively the Decree of the Governor of East Kalimantan of 1974[27] and the Decree of the Governor of East Kalimantan of 1995.[28]

As said, the initiative for the first two regulations stemmed from the observation that private parties had started using state land without recognized formal land titles in an uncontrolled manner. The regulations, therefore, aimed at controlling the land use. The 1974 decree contained very simple provisions. It stated that any occupation and use of state land for agriculture, husbandry and fishery purposes should be taken through a LRL issued by a sub-district head, as stated in the Regulationof the Minister of Home Affairs of 1972.[29] Occupation and use of state land without a license would be considered as unlicensed use of state land, which could face criminal charges, as stipulated in a law of 1960.[30]

The expiry date of an LRL was not determined, but the decree stipulated that if its possessor did not use or abandoned the land for three consecutive years, the land would automatically become state land. For any prior land use, which had taken place before the decree was promulgated, the occupants or users were required to register their land with DONLA via a village head and sub-district head to be awarded a LRL. In implementing the regulation, the Provincial government issued a subsequent policy, requiring farmers to organize themselves in local peasant associations (*kelompok tani*) rather than acting individually. Members of the peasant groups, which were officially recognized by village heads and reclaimed the forest, would be granted 2 ha each (Vayda and Sahur 1985, p. 101, 1996, p. 31; Hidayati et al. 2008).

As only a small number of LRLs were issued and the occupation of state land was still pervasive, we may conclude that the implementation of the 1974

27 Decree No. 237/1974 on the Cultivation of State-Owned Agricultural Land.

28 Decree No. 31/1995 on the Guidance to Control Land Letters and Control and Ownership over Buildings/Plans on State Land.

29 Some norms in the 1974 Governor Decree and subsequent regional regulations included stipulations on how to obtain possession rights over land, that had applied in former territory of the Kutai Sultanate since the middle of the nineteenth century. The norms were formed by the Kutai Sultanate (1605-1950), after the Sultan officially declared himself to be the owner of all land and resources in the Kutai Sultanate. Since, any land use in the Kutai Sultanate should be on the basis of a license issued by a village head (*petinggi/demang*) in the name of the Sultan. Likewise, the norms were applied to mining extraction and the collection of forest products (Kanwil Depdikbud Kalimantan Barat 1990, p. 119-120 and 132). Nevertheless, such norms of land possession are unlikely to have applied to the Dayak indigenous groups as their members could convert forests into farms without necessarily getting a license from a village head or *adat* chief. In addition, once the forest has been converted into a farm, it is considered to be permanently owned, even when its owner temporarily abandons it. The abandoned land does not automatically return to the community. For detailed accounts of *adat* rules on land possession of the Dayak indigenous groups see Vargas (1985); Potter (1998); Bakker (2009); Urano (2010).

30 The criminal charge was three months imprisonment and/or a fine of maximum 5,000 IDR. See Article 6(1) of Law No. 51 Prp/1960 on the Prohibition of Land Use without Prior Permission of the Right Holder or His Representative.

Decree largely failed. Rather than creating uniformity in possessory evidence as well as reducing land conflicts, the Decree was followed by two developments. Firstly, village heads hardly carried out a thorough examination of the applications for land letters as they skipped some measures, required by the 1974 Decree. This occurred, because outsiders who acted as land speculators, were able to bribe village heads. In addition, village heads issued land letters to family and relatives. Secondly, the 'name' of land letter signed by village heads and later by sub-district heads varied from one place to another, despite the content being the same.[31]

These practices inevitably led to an abuse of power by many village heads. More than one land letter could appear for the same plot of land. Another common practice was that the applicants were not those who had used the land for several years, before they applied for a land letter. They were often indeed land speculators who reclaimed the forest or started cultivating the land, shortly before applying for a land letter (Petocz et al. in Vayda and Sahur 1996, p. 24 and 25; Simarmata 2010a, p.11). Worse than that, there were also people, who came to the village heads and presented a rough sketch of the area, which they claimed they had reclaimed. As village heads hardly ever carried out a ground check, they signed the land letters without really knowing the location or condition of the particular plot of land. This tempted some people to reclaim the forest area, only after they obtained a land letter.[32]

In the Muara Badak sub-district, where the oil company VICO acquired plots of land in the 1970s and 1980s, many land speculators came to VICO asking for land compensation by only bringing rough sketches of maps with them. They were not actually the real owners of the claimed land. Given that, at the time, the land claimed was still heavily forested, the company hardly ever undertook any field visits. The absence of the field visits then tempted some land speculators to increase the size of the land on paper in an attempt to gain more compensation. As a result, the company often found that the land was still occupied or used, when they were about the start a project. When in certain cases the real possessor contested the company's claim over

31 Some of the the various names of the land letter are: self-declaration letter of land possession (*surat pernyataan penguasaan hak atas tanah),* self-declaration letter to have a plot of land *(surat pernyataan memiliki sebidang tanah),* letter of forest reclaim *(surat pembukaan hutan),* clarification letter (*surat keterangan),* self-declaration letter *(surat pernyataan),* self-declaration letter of land ownership/possession *(surat pernyataan pemilikan/penguasaan tanah),* self-declaration letter of land use and land utilization *(surat pernyataan penggunaan dan pemanfaatan tanah),*clarification letter of ownership/possession over buildings/plans existing on state land *(surat keterangan penguasaan dan pemilikan bangunan/tanaman di atas tanah negara),* clarification letter of land *(surat keterangan tanah),* clarification letter of possession of cultivation of land *(surat keterangan pemilikan tanah garapan) or* self-declaration letter of land possession *(surat pernyataan penguasaan tanah).*

32 Interview ED, 9/6/2008.

the land and asked the company to show the rough sketches of the maps, the company was unable to do so.[33]

As a result, many private companies which ran government projects, went up to the regional government, reporting that their projects had temporarily ceased. The complaints raised by the private companies were further voiced by district and municipality governments in several coordinating meetings with the Provincial government. The regional governments' inability on one hand, and the speed at which land letters were issued by village heads on the other, made effective implementation of the provincial regulations hardly possible.

In response to the above developments, the Provincial government was in favour of making a new provincial regulation, instead of systematically evaluating what went wrong in the existing regulations. The new provincial regulation was primarily based on oral reports delivered by district and municipality governments during meetings held by the Provincial government. In one coordinating meeting, the Provincial Office of the National Land Agency (PONLA) was assigned to draft a Governor Decree. After the PONLA completed a draft decree, it was discussed in several meetings attended by various provincial agencies. It was also discussed in a meeting, where all DONLAs were invited.

The drafting process was completed by the issuance of the Governor's Decree of 1994 on the Guidance to Reorganize Land Letters with regards to Control and Ownership over Buildings/Plans on State Land, which was followed by a Governor's Directive a week later.[34] It took only a year, before the Provincial government decided to revise the 1994 Decree, which led to a Governor Decree of 1995. Similar to 1974, the 1995 Decree ordered lower government officials, notably village heads, to undertake the registration of any use of state land by private parties. Yet, whilst the 1974 Decree formalised the registration with the LRL issuance, the 1995 Decree led to a land letter issuance. Yet, it stipulated that the land letter could be used to apply for a LRL. Because the 1995 Decree did not have a provision on sanctions, state land occupation or use without a LRL was no longer a criminal offense in contrast with the 1974 Decree.

Other provisions that differ between the 1974 and 1995 Decree concern restrictions to as well as the prohibition of land letter issuances. The 1995 Decree states that a land letter is only valid for three years and it does not prove any formal land rights as recognized by Indonesia's land law. However, a land letter can be used as a supporting written document to apply for a particular formal land title. Any application for a land letter should be pro-

33 Interview IY, KA and Abd, staffs of Muara Badak sub-district, 17/3/2009.

34 Governor's Decree No. 97 A/1994, and Governor's Directive No. 03/1994 on Guidance to Control Land Letters with regard to Control and Ownership over Buildings/Plans on State Land.

cessed unless: (i) the land is in dispute; (ii) the land is situated in a protected zone or green belt; (iii) its size exceeds the maximum allowed size for land ownership; (iv) it is absentee land possession; (v) the land is considered subject to public interest (*kepentingan umum*); and (vi) the land is on the list of land that is to be used for other government purposes.

The procedure to obtain a land letter is another important provision in the 1995 Decree. The head of the neighbourhood (*rukun tetangga*) has to give a letter of introduction (*surat pengantar*), which the land possessor needs to bring to the village government office. To be able to get the letter of introduction, the land possessor can either present written documents or explain to the head of the neighbourhood how they obtained the land, in case they do not have sufficient written documents. After receiving the letter of introduction, the village head has to assign a member of staff to carry out a ground check. If during the ground check someone raises objection to the land claim, the village head should facilitate a dispute settlement. If the settlement fails, the dispute can be brought up to higher government units to be settled by sub-district heads and the DONLA. If this level of dispute settlement also fails, the disputing parties are recommended to proceed to court.

If there is no any objection from anyone else, the village government is allowed to register the applied-for land in the Village Land Registration Book. In addition to the registration, the village head has to provide the applicant with a land letter.

(b) Administrative Document

Meanwhile, due to the ending of the authority of the sub-district to award LRLs in 1984 and before the enactment of the 1995 Governor Decree, those who were occupying and using land without possessory evidence sought for another form of written possessory evidence. The form had to be legally stronger than the land letter signed by the village head. Some stakeholder meetings as well as training sessions hosted and organized by the PONLA tried to respond to this need. The meetings were attended by the staff of PONLA and DONLA, other concerned provincial agencies, some sub-district as well as village heads. In these meetings, the different parties agreed on two important changes, namely to introduce a uniform land letter and to change to it from a clarification letter (*surat keterangan*) into a letter of self-declaration (*surat pernyataan*).[35] With

35 The name of the new land letter is Letter of Self-Declaration concerning Land Possession, which is, again, popularly known as 'land letter' (*surat tanah*). Three other uniform documents are 'letter to declare that there is no dispute' (*surat pernyataan tidak sengketa),* 'letter to declare the transfer of land rights (*surat keterangan untuk melepaskan hak atas tanah*) and 'report of ground check' *(berita acara peninjauan tanah/perwatasan).* The 'report of ground check' is needed to apply for a land letter, whereas the 'letter to declare that there is no dispute' and the 'letter to declare the transfer of land rights' are needed for land transactions. Except the 'report of ground check', the other three documents are signed by the

regard to the content, the new uniform land letter was no different from the old one. However, the change from a clarification letter to letter of self-declaration implied that the village heads were no longer responsible for the reliability of the information in the land letter. The change meant that the responsibility now went to the land possessor. Consequently, the land possessor would be charged for any fake information in the land letter. The change was deliberately aimed to increase the reliability of the information in land letter. Moreover, removing the responsibility from the village head would prevent possible sanctions for providing fake information in land letter.

To some extent, the land letter and the associated land documents resemble possessory evidence, as stipulated in Indonesia's land law. Yet, the change from declaration letter to letter of self-declaration created a greater distance between the land letter introduced by the 1995 Governor Decree and the land letter formed as a result of the meetings. In the former, the village head is the highest official and the one who signs, whereas in the latter, this role is ascribed to the sub-district head. The signature from the sub-district head in the land letter is something that the land possessor hoped for, because they sought a legally stronger written possessory document. Moreover, that kind of form fitted with regulations on land registration and acquisition, which require a land letter signed by the sub-district head.[36]

In an effort to let regional and local officials know about the content of the 1995 Governor's Decree, the Provincial government organized some short meetings in several districts and sub-districts where they also circulated the format of the declaration letter. By conducting the meetings, the Provincial government officials expected that the officials of village and sub-district governments would further socialize the decree to a wider audience in their respective villages or sub-districts. However, the expectation was not met, as the local officials did not really make an attempt to increase awareness of the new declaration letter. As a result, only very few of the village and sub-district government officials whom I interviewed, knew much about the 1995 Governor Decree. When the Head of Anggana sub-district showed a bundle of land regulations that his office had been referring to, the 1995 Governor Decree was not included. In practice, sub-district governments circulated the format of the letter of self-declaration in the villages, before it was copied by the village government.

Learning about the above efforts to govern the use of state land by private parties where possessory evidence is recognized, we soon realize that neither of the 1974 nor of the 1995 Governor Decree it is clear whether they were enacted with regard to both forest and non-forest area or merely with regard to non-forest area. As a research report points out:

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sub-district head, while all four documents require signatures from the land holder, head of neighbourhood, village head and two witnesses.

36 Interview Kmd, a retired staff of Muara Badak sub-district, 18/8/2009.

> The 1995 Governor Decree does not distinguish between forest and non-forest area, instead it generally classifies each as state land. It is in contrast with reality, where there is obviously a division between forest and non-forest area. Each of the areas is under different authorities.[37]

In the list in the 1995 Decree, where the conditions for refusing the application of a land letter are mentioned, 'being a Forest Area' is not included. This then brings us to the questions which in essence resemble previous questions: are the Provincial Regulations applicable to a Forest Area? Do they merely apply to the approximately 6,000 ha of non-forest state land or to the 81,180.80 ha of Production Forest of the Mahakam Delta as well?

District Level

As of the 1990s Kutai District government has been clear in regulating land with possessory evidence, particularly in cases of land acquisition. Not only did they recognize possessory evidence, Kutai's District also created, by regulation, a detailed classification of land on the basis of different types of evidence. The regulation governed the compensation for land as well as crops and buildings which existed on the land, including costs already spent. The details of the provision can be found in the Decree of the Head of Kutai District of 1993.[38] The Decree was deliberately formed to implement the Governor Decree of 1977 as already mentioned.

Several types of land based on ownership and possessory evidence were clearly distinguished by the 1993 Decree of Kutai District Head. Firstly, it distinguished as well as recognized private customary *adat* land from private land rights. The holder of private land rights has a land certificate. According to the decree, private customary land is land which was continuously or temporarily occupied and used by individuals in accordance with local rules. This definition of private customary land led to three categories of private customary land. One of the three categories is land, which was occupied and used after the enactment of BAL in 1960.

The aim of formulating categories was to determine different rates or amounts of compensation that land owners or possessors would obtain. For instance those, who owned or held certified agriculture land, would obtain compensation amounting to 100% of the minimum price, as determined by the decree, whereas those who held cultivated land supported by possessory evidence would only obtain 40%. Meanwhile, those who had neither a certificate nor possessory evidence would only obtain 20% of the basic price.

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37 Hidayati et al. (2008, p. 26-27).

38 No. 083/1993 on the Minimum Amount of the Compensation for Land and Crops in Kutai. It has been superseded by the Decree of the Head of Kutai District Government No. 180.188/HK-630/2008.

Location and recent physical condition of the land are two other factors in determining the amount of compensation.

The most interesting part of the 1993 Decree is a provision on forest land as well as land which was used for pond construction. The provisions state that the level of compensation for forest land and pond land should be determined by engaging Kutai agencies which deal with forest and fishery affairs. Yet, the decree notes that the compensation should still be subject to its provisions. However, the decree's table of minimum amounts based on area division, does not determine clearly the minimum amount for frontier forest land, like the Mahakam Delta. Apart from the fact that the minimum amount for owning a plot in a forest like the Mahakam Delta is not listed, the mention of forest land in the decree seems to have strengthened forestry regulations on forest delineation. The Committee on Forest Boundary Delineation could have used the minimum amounts, as stated in the decree, to provide compensation for those who occupied and used forest land. Not only did it strengthen the forestry regulations, the 1993 Decree also implicitly legitimized ownership or possession over land in Forest Areas.

After the 1999 Decentralization, the Kutai District government regulations have, on the one hand, strengthened the recognition of possessory evidences, yet on the other hand they have slowly put it aside. The Kutai Regulation of 2000 on Location Permits still implicitly recognizes the existence of possessory evidence, when it asks companies which have already obtained a Location Permit to also provide compensation for those who only have possessory evidence (Article 7d).[39] The Kutai District government just recently explicitly recognized possessory evidence, by issuing two Circular Letters of the Kutai District Head in late 2010.[40]

Yet, even though the two Circular Letters recognize the existence of land rights, supported by possessory evidence, they have some remarks about it. Firstly, unlike the national and provincial land regulations, one Circular Letter regards the land letter not as provisional evidence of land ownership. Instead, it regards it merely as a document, which informs us of the physical dimensions as well as the possessors of the land. Moreover, with regard to land acquisition, the second Circular Letter advises that those who have land certificates should be prioritized for obtaining compensation. The change to the Kutai regulations might be related to the requirement that the Audit Board of the Republic of Indonesia (Ind. *Badan Pemeriksa Keuangan*) sets, which states that land compensation can only be given to those who have land certificates.

39 No. 32/2000.

40 The two Circular Letters are respectively No. 590/651/A.Ptn-Prc/SE on Guidance of Land Administration and No. 590/652/A.Ptn-Prc/SE on Land Acquisition for Small-Scale Public Projects.

That means that any compensation for land acquisition to those who have possessory evidence given by government agencies is unjustified.[41]

8.3 Legislation: identification of some problematic issues

Through our examination of national forestry, provincial and district regulations on possessory evidence, we are brought to the central question: is possessory evidence which was issued over the land in the Production Forest of the Mahakam Delta, really legal? The question is central not only because the answer to the question would determine whether the forest occupation and use was legal or not, but it would also determine whether the actions of petroleum companies together with the Executive Agency and many other public services, which were provided by the provincial and district agencies, were legally justified or not.

By referring to the account in Sections 5.2 and 5.4 we now can easily answer the above question. Many legal and socio-legal arguments support the conclusion that possessory evidence which was issued in the Forest Area of the Mahakam Delta is legal. From a legal point of view, the legality is not merely due to a decision of the 2012 Constitutional Court which basically stated that in order to determine Forest Areas, the Ministry of Forestry has to carry out the four cumulative steps, but also due to the previous national and regional regulations and court decisions which had stated that possessory evidence in Forest Areas is legal. In a situation where the Ministry of Forestry has carried out the steps of designation, forestry regulation concerning planning and demarcation recognizes the possessory evidence when they asked the so-called Committee on Forest Boundary Delineation to settle any arising land rights claims from third parties (see Section 5.2 and Section 5.4).

The Decree of the Kutai District Head of 1993 concerning the Minimum Amount of Compensation for Land And Crops in Kutai, case law from the Tenggarong District Court and Samarinda High Court decisions in 2003 and 2006 recognized the legality of possessory evidence in Forest Areas regardless of the steps of forest establishment that have been taken. In other words, on the basis of these statutory rules and court decisions possessory evidence in the Forest Areas of the Mahakam Delta is still legal despite the fact that the Minister of Forestry has designated the Forest Area.

The legal answer to the above question has become especially clear after the 2012 Constitutional Court verdict. As said in Section 5.2 and Section 5.4, pursuant to the verdict the mangrove forest of the Mahakam Delta is not yet

41 Interview Mjd, a Head of Sub-Division of Bureau on Land Administration of Kutai District Government, 18/6/2012. Nevertheless, he then added that the Audit Board of the Republic of Indonesia recently did not apply the requirement as they were told that only 10% of the land in the Kutai District had been certified.

a Forest Area and as a result it is not yet state property. As I mentioned in Section 5.4, in my view, the fact that the technical team formed by the Head of TUFPS did not assess the existence of any private rights and the so-called Committee on Forest Boundary Delineation did not settle the claims of the third parties during the delineation and mapping of the Forest Area of the Mahakaham Delta, has made state claims over the Forest Area weaker.

However, even though the above accounts confirm the legality of possessory evidence in Forest Areas, its should be underlined that the picture of Indonesian law on this matter is still not fully clear yet, as there remain some case laws and legislation that contest the above accounts of the legality of possessory evidence. Concerning case law, as said (Section 5.2), the Supreme Court cassation verdict of 2006 stated that particular areas were already officially Forest Area, despite the fact that the Ministry of Forestry had not yet taken all the steps of the process.

After the 2006 Supreme Court verdict, the Minister of Forestry made one letter and issued one regulation that both stipulated that the four steps of forest establishment are not cumulative, but optional. Yet, one should not forget that the legislation which states that land law and therefore possessory evidence does not apply to Forest Areas has a long history. It goes back to the 1970s when the central government issued the Presidential Directive of 1976 concerning the synchronization of land affairs with respect to forestry, mining, transmigration and public works. The Directive appeared in order to resolve a conflict of jurisdiction between the ministries. As they were dealing with the issues of mining, forestry, transmigration and land, they laid claim on the same areas. In relation to the non-application of land law in Forest Areas the Directive stipulates that the possessors of forest concessions are not required to have particular land rights when they use forest land to exercise their rights of forest utilization. Only if the concession holders use the forest land for any activities which are not directly related to these main activities, they are required to apply for particular land rights with the Minister of Agrarian Affairs/Head of National Land Agency. The provisions are obviously different in the case of oil and gas regulations whereby contractors are required to have use rights (*hak pakai*) when they use land within their work area (see Section 6.2).

In East Kalimantan, the issuance of the Directive was followed by meetings attended by related provincial agencies. The Provincial Forestry Agency and PONLA came to the agreement that the Provincial Forestry Agency had jurisdiction over Forest Areas and PONLA over non-forest areas.

Not only those who occupy and use the Production Forest of the Mahakam Delta have encountered legal issues on tenure, but also those who occupy and

use the surrounding 6,000 ha of non-forest area.[42] On the one hand, they were not regarded as land owners, given that they do not have certificates. Therefore, the land belongs to the state. This means that, in case of payment of compensation to the land holder, the land price would not be included. Yet, on the other hand, formal rules regard land possessors as owners in as far as they are allowed to transfer and use their land as mortgage. To some extent, the lack of clarity is deeply rooted in an unclear definition of state land. Pursuant to a Government Regulation of 1953,[43] land of which the ownership is based on customary law, either individual or communal, is not state land (Soemardjono 2007, p. 61-62). Yet, some Supreme Court decisions and legal scholars suggest that communal land rights together with *tanah wakaf* and forest land is included in the state land definition. According to this view, only individual customary land rights are excluded from state land (Harsono 2007, p. 290). Some legal professionals and government officials even regard individual customary *adat* land rights to be part of state land, leaving private land rights recognized by formal land law as the only type of land rights excluded from state land.

8.4 Implementation of law by regional and local officials

As referred to in Section 8.1, the fact that officials of the DONLA refused to process any application for land certificates for the Mahakam Delta, arguing that the Forest Area was not under their jurisdiction, does not mean that they regarded the occupation and use of the Forest Area as completely illegal. Chapter 5 and to a lesser extent Chapter 6 describe the complex factors, causing the local officials to not effectively implement the laws and regulations. This includes, for example, the motivation of the local officials or what Lipsky (1980) names 'street-level bureaucrats', when they interacted with fishermen and farmers.[44]

This section, therefore, specifically looks at the extent to which local officials perceived the occupation and use of the Forest Area as legal or illegal. Besides, the description also includes the perception of legal professionals and private companies. This book argues that perceptions eventually affect the way, in which local officials and legal professionals implement laws and regulations on land.

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42 Of 6,000 ha of non-forest area of the Mahakam Delta, only 891 ha have been certified. This land certification resulted from a project on land consolidation and redistribution held by the District Office of the National Land Agency in 1986 and 1991 which took place in Sepatin and Muara Pantuan village of Anggana sub-district.

43 No. 8/1953 on the Control over State Land.

44 Lipsky (1980, p. 3) defines street-level bureaucrats as public service workers who interact directly with citizens in the course of their jobs, and who have substantial discretion in the execution of their work.

8.4.1 Regional and local government officials

Although not many, yet a number of government officials, in particular the officials of the regional technical units of the Ministry of Forestry as well as the National Land Agency, strictly perceived the occupation and the use of the Production Forest as illegal. In the eye of these officials, the land possessors were simply squatters (*perambah hutan*) and therefore illegal.[45] In a meeting held in mid-2007, DONLA officials warned the officials of the Kutai Fishery Agency to not continue to provide services to the fishermen and farmers of the Mahakam Delta, for they were illegal occupants.

However, the officials never openly called the land possessors illegal occupants when they had face-to-face meetings with them. In two meetings aiming to 'socialize' relevant laws and regulations concerning the Mahakam Delta in August 2008, some representatives of the shrimp farmers of the Mahakam Delta were present. The DONLA officials did not call them illegal occupants, but they quoted an article of the Forestry Law of 1999 prohibiting any illegal occupation and use of Forest Areas.[46] The quotation of the Forestry Law was meant to explain why the DONLA refused to issue land certificates on the Mahakam Delta. However, during these occasions the DONLA officials did not call a land letter an illegal document (Tim Sosialisasi Kawasan Delta Mahakam 2008, p.18).

Even though these regional and local officials did not openly call the land possessors illegal occupants, the way they implemented the formal land law still indicated that they regarded these land possessors as illegal, or at least having limited rights. For the local officials, the illegality and limits affected the way the land possessors could exercise their rights as well as the obligations imposed on them. In the Mahakam Delta, two concrete examples of repercussions of perception can be shown, one on land acquisition and the other one on tax (Hidayati, Djohan and Yogaswara 2008, p. 57). With regard to land acquisition, the local officials excluded the land price from the compensation. This meant that they only included those expenses incurred by land possession for business development (for example the construction of ponds and huts, and seeding of shrimps). They preferred to refer to any compensation

45 Interview GBD, a staff of Regional Technical Implementation Unit of Watershed Management of the Ministry of Forestry, 2/5/2008, Shr, a Head of Division of the Ministry of Forestry, 6/4/2009, and SDU, 22/4/2008.

46 The two meetings for 'socialization' were held in Anggana and Muara Jawa sub-district. They were organized by a committee which was officially established by the Head of Kutai District government. The main aim of the meetings was to respond to the long-standing farmers' query of whether there were formal rules which prohibited the opening of ponds in Forest Areas. The committee expected that socialization would inform the farmers about the existing formal rules, so that the remaining forested parts of the Mahakam Delta could be preserved. See Tim Sosialisasi Kawasan Delta Mahakam (2008), and interview ED and KA, a Deputy Head of Kutai Fishery Agency, 9/6/2008.

money they paid to the land possessor as a 'donation' (in Indonesian, variously *uang keperdulian, pengganti jasa, pengakuan atas jerih payah, imbalan or sikap kasihan pemerintah).*

The legal concept on compensation may influence the local concept on compensation or the other way around. For Buginese, the traditional conception of compensation merely encompasses pioneering labour and/or expenses in clearing land (Ind. *ganti rugi merintis*, in Buginese *passelle ma'bela*).[47] In the Mahakam Delta the traditional concept appeared, when the land possessor did not take into consideration whether they had certificate or possessory evidence when they were negotiating the amount of compensation they wished to obtain from the companies.

In administrative practices, elsewhere in East Kalimantan, local officials made a price distinction between land with a certificate and land with possessory evidence. The latter is further divided into: land with a title deed (*akta*) and land with a land letter (*surat keterangan tanah*). The category determines the land price. For land with a certificate, compensation would be 100% of the going market rate, while cultivated land with a title deed would be compensated for 90% of the going market rate, and compensation for cultivated land with a land letter would be based on a tax rate (Ind. *Nilai Jual Objek Pajak* abbrev. NJOP). On average, NJOP is 30% of the going market rate. This, for example, applies to land with a land letter, which is authorized by a sub-district head. The tax rate for cultivated land which is authorized by a village head or head of an urban neighbourhood would be less than 30%. Recently, across the Province, a common flat rate of NJOP on cultivated land has been introduced. For cultivated land which has been cultivated for one or two seasons, the compensation is approximately between IDR 2,300 (US$ 0.27) up to 2,750 (US$ 0.32) per m². Cultivated land which yields good harvests is priced at IDR 4,500 per hectare.[48]

Meanwhile, the officials of the Kutai Regional Revenue Agency and the District Office of the Directorate General of Tax of the Ministry of Finance were not willing to collect tax on land and buildings.[49] These two government offices did not think they had the authority to collect tax on land and buildings from the pond owners, given that their business was illegal (Hidayati et al. 2008, p. 115).

Recent developments, as already said in Section 7.5, suggest that as of late 2009, some village governments and the sub-district government of Muara Badak have been very selective or even refused to process any land letter

47 See Vayda and Sahur (1996, p. 19).

48 Personal communication with Abdullah Madjidi, 10 and 19/6/2011, and 18/6/2012.

49 Pursuant to Law No. 12/1985 on Tax on Land and Buildings, tax on land and buildings is state tax imposed on the land and or buildings. The tax on land and buildings is material in the sense that the amount of tax payable is determined by the state of the object, ie. the land and or buildings. Circumstances or subject (the payee) do not determine the amount of tax.

registration, as requested by the officials of the Secretariat Office and the technical implementation unit called the Unit of Forest Area Establishment of the Ministry of Forestry, in a meeting in 2009. Only if the land possessor applies for a use permit with the Minister of Forestry, the village and sub-district officials can respond to the application of the possessor.[50] However, as the land possessors came to the sub-district office of Muara Badak in the course of 2009-2011, and asked the officials about the policy, the officials told the land possessors to keep using their land. For those who did not have possessory evidence yet, the officials told them the same with the condition that the officials would not process any land letter applications.[51]

The officials' suggestion to land possessors and those who did not have possessory evidence resembles the suggestion of some members of Kutai's House of Representatives to some villagers of Nilam, Saliki village of Muara Badak sub-district in 2011. In a hearing, the members of Kutai's House of Representatives said, 'Please keep on using the land and reclaiming new plots of land. We can take care of the land letters later. If you need funds to buy seeds and fertilizer, please feel free to send us proposals'.[52]

However, the bulk of the Kutai District government officials perceived the occupation and use of the Production Forest of the Mahakam Delta when supported by a land letter, as legal. A very basic argument, which the officials pointed at, was that the land possessors owned the land letter, which could clearly function as official evidence of someone's rights over a particular plot of land. Therefore, for example, a local official suggested that the land letter was equal to a timber or mining concession (see Section 5.3). Although they considered the land possession as legal, they differed in their ideas on how

50 In telling land possessors that they are not allowed to process the land letter application, the officials of village and sub-district governments showed the land possessors a map of the Agreed Forest Land Use Plan that the officials of the Unit of Forest Area Establishment of the Ministry of Forestry had given them in 2009. Interview Nur (a Head of Section for Governance of Muara Badak sub-district) and Secretary of Muara Badak sub-district office, 13/12/2011.

51 After the 2009 meeting and the Unit of Forest Area Establishment of the Ministry of Forestry gave a map of the Agreed Forest Land Use Plan, the Muara Badak sub-district office received many questions from land possessors particularly from those who resided in Saliki village. Since the map did not exactly indicate the boundaries of the Forest Area clearly, the sub-district officials found it difficult to answer when the villagers asked whether the land they had been using was inside the Forest Area or not.To cope with the situation, the sub-district officials sent official letters twice to the Unit of Forest Area Establishment of the Ministry of Forestry in 2009 and 2011. In the letters, they asked the Unit of Forest Area Establishment to carry out field visits to mark the forest boundaries (*pelacakan/penin-jauan batas*). However, they never got any replies to their letters. As a result, one day the Secretary of the Muara Badak office phoned the office of the Unit of Forest Area Establish-ment but only got the answer that the Unit could not do anything, since the authority on forest establishment still belonged to the central government, i.e. the Ministry of Forestry. Interview Nur and Secretary of Muara Badak sub-district office, 13/12/2011.

52 Interview MT, 3/12/2011.

that related to the legality of the Forest Area. Some said that, as the land possession was legal then as a consequence the legality of the Forest Area should be questioned. Yet, others said that the rights of both the Forest Area and the land possessor were legally recognized, for they had different kinds of tenure rights.

The local officials, who perceived the land possession as legal but not the Forest Area, used the prior long-standing period of residence of the local inhabitants as the main argument. The argument chiefly stated that the occupation and use was legal, given the fact that the land possessors had resided in the Mahakam Delta for generations, even before the forest designation came. A former Head of Muara Badak sub-district experienced this, when he disseminated the 1995 Governor Decree on the Guidance with regard to Control Land Letters and Control and Ownership over Buildings/Plans on State Land to some local residents. When he quoted the decree to explain that building shrimp ponds in the Protected Zone was prohibited, the participants immediately pointed at the date of the enactment of the Decree to prove that the Decree came after they had settled in the Mahakam Delta.[53]

Both the officials of the Provincial Forestry Agency and Kutai Forestry Agency emphasized the length of time that the local inhabitants had resided in the Mahakam Delta to conclude that the occupant could not be named a squatter. The acting head of the TUFPS, as mentioned in Section 5.3, commented:

> The shrimp farmers have been in the Mahakam Delta for a long time before the Forest Area was designated. We cannot blame the shrimp farmers for being in the Forest Area because they have never been told about the existence of the Forest Area. Besides, the government carried out the delineation of the Forest Area very late. Thus, legally speaking we may say that the shrimp farmers are illegal but first let us see the history of their settlements there.[54]

A middle-ranking official of the Kutai Forestry Agency added to the above comment:

> We cannot name the pond owners illegal occupants given they were born there. We therefore did not give them any status.[55]

Even though the local officials did not explicitly pointed this out, their reference to the long period of residence of the land possessor seems actually a recognition of local rules concerning land. Although the officials did not perceive the local inhabitants of the Mahakam Delta as a customary community

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53 Interview Sbd, a former Head of Muara Badak sub-district, 17/3/2008. For how this argument was similarly used by forest settlers in Kutai National Park of East Kutai see Vayda and Sahur (1996) and Arnscheidt (2009, p. 350).

54 Interview AN, 2 and 5/12/2011.

55 Interview AM, an Interim Head of Division of Kutai Forestry Agency, 24/4/2008.

(*masyarakat adat*), they still seemed to believe in the existence of local rules (see also Section 5.3).[56]

For local officials, who recognized the long residence of the local inhabitants, it was obvious that the land price had to be included in any compensation of land with possessory evidence. The reason they put forward was that the land possessors also had a land title, although it was not being supported by a certificate. Nevertheless, in line with those local officials who believed that the land price should be excluded from compensation, they also suggested that the land price for certified land should be higher than land with possessory evidence.[57]

Meanwhile, local officials who regarded the Forest Area and land possessor as legal suggested that the state has ownership rights, whereas land possessors have use rights. The officials of the sub-district governments developed this insight in an effort to justify their issuances of land letters in the Mahakam Delta. The head of Anggana sub-district claimed that his signing of land letters did not constitute an act of violating existing laws and regulations. He pointed at two reasons to justify his view. Firstly, he claimed that, in his perception, signing the document did not mean that land possessors had ownership rights. Instead, land possessors were only granted the rights to use the land. As the existing laws and regulations only forbade granting ownership rights, he believed that he did not break the law. Secondly, he claimed that by signing the document he did not "issue" or authorize any license or rights, because his role in signing the document was only that of a witness.[58]

However, such interpretation was disputed by an officer of Muara Badak sub-district, who acknowledged that the signing of a land letter by a sub-district head means that he or she does issue and authorize a permit, or at least provides a strong recommendation. Interestingly, this official stated that she did not believe that signing land documents was a violation of existing laws and regulations. She gave two reasons for this. First, there had been no objection from superior officers from either the Kutai District government or the National Land Agency, nor was there any reminder from the officials not

56 For an account of how local rule formed land rights in the Mahakam Delta see Simarmata (2010b). In governing fishery resource use, the officials of the Kutai Fishery Agency sometimes assumed that local rules were stronger than formal rules. In 2004 the officials of the Kutai Fishery Agency asked the fishermen's local association of Muara Badak sub-district to form local rules, which prohibited the use of trawl nets in shallow waters, arguing that fishermen would probably be more willing to comply with local rules instead of formal rules. Interview Agg, 8 and 9/2/2010.

57 Interview Kmd, 18/8/2009.

58 Interview ATH, a Head of Anggana sub-district, 26/7/2007. Other officials of Anggana and Muara Badak sub-district have developed similar interpretations. Interview ES, 30/6 and 1/7/2008 and Kmd, 18/8/2009.

to sign the document.[59] Second, the practice continued because the officials felt they had built a consensus with the local villagers. Beside those two reasons, the official stated:

> If we ask the land possessors to comply with all legal requirements, the process will take a long time. Moreover, the land possessors will possibly protest, asking why the government officers had not informed them in advance about the requirements. Besides, we also feel that strictly imposing the existing laws and regulations would sometimes be culturally improper, when the applicants are older men or community leaders.[60]

Field officials referred to two other arguments for not calling the land possessors squatters. The first is the absence of earlier notification. The second is a lack of law enforcement with regards to occupation and utilization of the Forest Area. In this respect, the officials blamed the officials of TUFPC for not taking earlier precautionary and repressive action, before the scale of the occupation had become as large as in 2010.

8.4.2 Legal professionals and private companies

This sub-section will discuss a land dispute between two land possessors notably two big *punggawas* in the Mahakam Delta. It will shed light not only on the case itself but also on the perception of the legal professionals included, i.e. the solicitors and judges. The case is known as *Haji Maming and 57 other plaintiffs vs. Haji Latief and Haji Onggeng*.[61]

Not only did the dispute result in violence and intimidation, it also led to the involvement of some important politicians as well as military and police

59 This claim was refuted by a statement from a high-ranking officer of the Kutai District government, who stated that they had warned the sub-district head several times not to sign any land letters for land located within a Forest Area. He added that sub-district heads claimed they had difficulty following this directive, because land owners would ask them to point out the physical signs of the borders of the state forest, which they were unable to do.

60 Interview Nur, 19/3/2009.

61 Haji Maming was aged 73 and Haji Onggeng 29, when the case was in process in 2003. Haji Maming and Haji Onggeng actually had family ties, since Haji Onggeng's wife had kinship ties with Haji Maming. Due to the family relationship, some mediation efforts had been initiated before and during the court sessions. In November 2002, the Kutai District government officials held a mediation meeting in the office of sub-district government, in which local military and police officers were present as well. The dispute settlers proposed the two conflicting parties to come to a solution by equally sharing the disputed land. The Tenggarong District Court advised the parties twice to have an out-off-court settlement. Yet, all mediation efforts were fruitless, for Haji Onggeng consistently refused.

officers.[62] Haji Onggeng was accused of hiring and sending some local army officers to the disputed land in order to intimidate Haji Maming's men, pretending it to be a regular military training. Meanwhile, Haji Maming was accused of sending some local bandits from Samarinda city to the disputed land, who confiscated the digging machines rented by Haji Onggeng and damaged his property. The Head of Kutai District government even officially asked the two disputing *punggawas* to calm down.[63] The dispute was tried twice by Tenggarong District Court. The first trial took place from January to August 2003 and the second trial from November 2003 to January 2005.[64] The first trial resulted in the refusal of the Haji Maming file (in Dutch *niet onvankelijk verklaard* abbrev. NO), as the Court found that the legal status of Haji Maming as a plaintiff was unclear. The High Court of Samarinda needed two years to examine the case, before it eventually reached a decision in April 2007.[65] The following is a brief account of the case.

> H. Maming and 57 other plaintiffs filed a case with Tenggarong District Court, accusing Haji Latief together with Haji Onggeng of illegally occupying 500 ha of land in Muara Pantuan village, Anggana sub-district. The illegal occupation was said to have started in November 2002. According to the plaintiffs, they themselves had cleared up the forest land in 1984 and began to grow around 500 trees of various crops, mainly coconut and lemongrass, as of 1992. They had cleared up the forest land by forming a local peasant organization, which they had asked Haji Maming to chair. In 1994 Haji Maming obtained a Letter of Forest Reclamation signed by the former village head (1991-1999). The letter declared that the land was controlled and owned by Haji Maming. For the illegal occupation, Haji Maming and other plaintiffs sued the defendants for tort (in Dutch onrechtmatige daad).
>
> Haji Latief and Haji Onggeng denied the allegation, saying that, when they began to clear up the forest land in 1994, they found the land was fully covered with nypa trees. There were no crops, as the plaintiffs had claimed. To support his claim of ownership over the disputed land, Haji Onggeng presented a number of land letters signed by the village head and sub-district head. The land letters stated that the way Haji Onggeng had become the owner of the disputed land was by clearing up a forest, similar to what Haji Maming had done. One request that both the

62 Haji Maming was known to be close to the Deputy of the District Office of the Indonesian Police Department. Haji Onggeng was close to a high officer of the District Office of the Indonesian Army. Haji Onggeng was also known to have a close relation with the former Head of Kutai District government, as during his leadership Haji Onggeng took care of some of his shrimp ponds. Haji Onggeng's lawyer, who used to be a member of the Provincial House of Representatives, first introduced Haji Onggeng to the Head of Kutai District government.

63 The call was made in a Circular Letter No. 100/175/Pem.A/IV/2003, dated 14 April 2003. See also in Section 5.1.

64 The verdict of the first trial is No. 03/Pdt.G/2003/PN.Tgr, and of the second trial is No. 44/Pdt.G/2003/PN Tgr.

65 Verdict No. 132/PDT/2006/PT.KT.SMDA.

> plaintiffs and defendants made to the courts was to decide whether the land letter they presented was valid. In that way, it would become clear which person legally owned the disputed land, thereby making the other party's land letter automatically invalid. In addition, the plaintiffs requested the court to also fine the defendants an amount of approximately US$ 7 million (IDR 58,037,500,000) as compensation.

During the court sessions neither the solicitors of the plaintiffs, defendants or judges asked whether the disputed land was located inside or outside a Forest Area, even though the solicitors and judges undertook a field visit (*pemeriksaan setempat*) of the disputed land together. The solicitors perceived the disputed land as privately owned and had two reasons for that. Firstly, their clients showed a land letter, which proved their property rights over the land. The land letters proved that the possessors held a particular land title, which the solicitors of the plaintiffs called use rights (*hak garapan*).[66] Secondly, during the field visit they discovered that there were no forest trees, but instead some crops.

When the judges examined which party was the actual original holder of the disputed land, they probably presumed that the disputed land was not situated in a Forest Area, despite the fact that they thought the land belonged to the state.[67] Thus, they thought that the land was state land, which was not situated in a Forest Area and used by private parties. With regard to the land letter, the judges undoubtedly recognized it as legal evidence of land possession.[68]

In spite of recognizing the land letter as possessory evidence there appeared to be different views among the solicitors and judges in deciding whether land with a land letter is either state or private. The lawyers of the plaintiffs regarded the land as privately owned. However, the solicitors of the defendants and judges regarded it as state land. This meant that the possessor of the land

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66 Interview BR, a practice lawyer, 28/8/2009, and SB, 2/9/2009.

67 A senior official of Anggana sub-district expressed his disappointment to the court for not inviting the official of Kutai Forestry Agency as a witness during the court sessions. He envisaged that, if the official of the Kutai Forestry Agency had been a witness to the court, this official would have made the decision that both disputing parties had illegally occupied and used the forest land. Further, such verdict could have been used by government officials to enforce the law with regard to any illegal occupation and use of the Forest Area. Interview ES, 30/6/2008.

68 In their verdict of the second trial, the judges eventually accepted the land letter presented by the defendants. The judges came to the decision, as the plaintiffs could only present one letter, which stated Haji Maming as the possessor of the disputed land, while the other 57 plaintiffs could not present a similar land letter. In addition, according to the judges, the rough map of the disputed land, which the plaintiffs showed, was not authorized, given it was not issued by either the DONLA or PONLA. Meanwhile, the judges thought that the land letter presented by the defendants was convincing, given it was signed by the village head and sub-district head. Throughout the hearing, the judges refused the requests of the plaintiffs. The Samarinda High Court of East Kalimantan simply upheld the decision of the Tenggarong District Court without making additional notes.

letters would only be granted use rights, and, therefore, only be granted compensation for the expenses, but not for the price of land. To give a concrete example of how this view affects the way the case is handled, a solicitor of the defendant explained that every time his office handled a land dispute involving a company and the community, they would first figure out whether the disputed land was located in a Forest Area or not. If yes, they would advise their clients to not pay any compensation for land to the community members making rights claims, given they were illegal occupants.[69]

As said, pursuant to the Government Regulation and the Decree of the Head of the National Land Agency of 1997 on Land Registration, notaries and sub-district heads are allowed to make a title deed on land transactions, even if it is only supported by possessory evidence. The formal rules have been effectively implemented in the Mahakam Delta. As Land Deed Officials (*Pejabat Pembuat Akta Tanah*), sub-district heads of the Mahakam Delta did make title deeds for any land transaction by asking the land possessor to sign two necessary documents, namely a letter declaring the land to be free from disputes and a letter of land title transfer.[70] Some companies, like VICO, also registered the land they acquired with a notary, besides the letter of land title transfer.

As already said, the 1996 Law on Land Mortgage over Land and Related Properties stipulates that non-registered and non-certified land is accepted as a mortgage on the condition that the land is prepared for a land titling application shortly after the loan agreement is signed. However, in the Mahakam Delta these provisions were only partly complied with. Two state-owned banks, Bank Rakyat Indonesia and Bank Pembangunan Daerah, did not require borrowers with a land letter to arrange land titling shortly after receiving the loan. In other words, the bank considered the land letter as sufficient. In addition to the land letter, the banks did require some other documents, such as a feasibility study, field visit report, identity card, and letter certifying the level of income (Bourgeois et al. 2002, p. 50; Hidayati et al. 2008, p. 63).

As already described in Section 6.4, like many local officials and legal professionals, the employees of Total E&P Indonesie recognized the land letter as one of several empirical facts that give legitimacy to occupants of land in the Forest Area. The company's officials were aware that, in accordance with forestry regulations, the land possessors were illegal. However, they found

69 Interview SB, a practice lawyer, 2/9/2009.

70 According to Article 5(3) and 23(2) of Government Regulation No. 37/1998 on the Regulation of Official Certifiers of Title Deeds, in regions where the number of Official Certifiers of Title Deeds is not sufficient, the Head of the National Land Agency can appoint a sub-district head and village head as temporary Official Certifiers of Title Deeds. In regions which have only one notary and a temporary Official Certifier of Title Deeds, the sub-district head and village head can appoint their respective deputy and secretary to make deeds on land transaction.

that some villages of the Mahakam Delta were officially registered as administrative villages and above of all, that the land possessors had land letters.[71] The company with approval from the Executive Agency, therefore, required land possessors to present land letters to be able to obtain compensation. Nevertheless, with regard to the amount of compensation, they made a distinction between land located in and outside the Forest Area. The amount for the former would be primarily based on the NJOP, whereas for the latter on the market price. This practice was different from VICO's, which did not make a distinction between forest and non-forest area. VICO would normally negotiate with the land holder about the amount of compensation in each case.

As said in Section 6.4, the long practice of land acquisition by companies in the Forest Area of the Mahakam Delta has gained support from the Ministry of Forestry when in 2009 an official of the Directorate of Forestry Planning of the Ministry of Forestry advised two employees of Total E&P Indonesie to provide compensation to the forest occupants whose land would be acquired by the companies.

8.5 Concluding remarks

On the basis of the previous accounts, one may say that Indonesian legislation and case law recognize possessory evidence and therefore those who have possessory evidence have land rights. Both public and private laws recognize possessory evidence so that those who have it are allowed to register their land, obtain permits and compensation, use it as a mortgage, as well as to transfer their land. Thus, in that regard the rights of land possessors are similar to rights of ownership. In practice, therefore, some officials and legal professionals perceive land possession similar to land ownership. Nevertheless, as the rights that the land possessors have over their land do not resemble the rights that the BAL and implementing regulations recognize, public administration practices treat land possession and land ownership differently. In land acquisition, the different treatment is very visible.

Yet, in the case of the Production Forest of the Mahakam Delta where actual control of state is severely absent on the one hand, and local users have long resided before official forest designations on the other, government officials show two contrasting co-existing behaviours. The majority of the central, regional and local government officials whom I interviewed regarded the forest occupants in the Mahakam Delta as against the law. Yet, in practice, they did

71 In many cases which concern the legality of forest occupation, the regional and local officials or even private actors questioned the accusation of forest occupancy by raising the fact that the villages in which the accused illegal forest occupants were living were officially registered. Based on that argument, they would say that the forest occupancy is actually legal. Interview DH, 14/12/2009.

not show this perception when they had face-to-face meetings with the forest occupants.

The regional and local officials largely raised social legitimacy rather than legal legitimacy when looking at the legality of the land possessors or forest occupants. The officials were aware of the illegality of the land possessors from a legal point of view, but they found that the formal rules were not adequate and did not have external consistence through which the rules were not compatible with the external situation (see Section 1.3.2 on adequacy and external consistence). One may add that the local officials could have pointed to the factors of usefulness and desirability, when illustrating that the formal rules were not adequate. As said in Section 1.3.1, the extent to which a law is socially useful and desirable will influence its implementation. Not only the regional and local officials raised the social legitimacy of the land possessors, but also the company employees, legal professionals and members of the regional house of representatives.

From a legal point of view, the contrasting co-existing behaviours in looking at the legality of the land possessors should come to an end after the 2012 Constitutional Court decision. Even though in accordance with some legislation and case laws saying that the mangrove forest of the Mahakam Delta is Forest Area, yet the 2012 Constitutional Court decision has dismissed the constitutionality of the state claim over the mangrove forest. As a result it is now still private land.

9 Law-based management of space

9.1 INTRODUCTION

Many initiatives aimed at addressing the devastating environmental and social problems of the Mahakam Delta eventually led to spatial management as the ultimate solution. The initiatives suggested to (re)design the spatial (land use) planning of the Mahakam mainland and the Mahakam Delta, and to establish a management body alongside. The initiatives departed from the assumption that the existing spatial plan was inadequate to cope with the devastating environmental and social challenges. At some level, ideas to revise spatial planning for the Mahakam Delta derived from the perception that spatial management did not exist in this area, given that all resource users seemed to be free to carry out resource use regardless of the location.

Chapter 5, 7 and 8 of this book have extensively described how rights issuance and formal control over resource use did not occur in accordance with prevailing formal rules. The chapters explain why users were able to use the resources in almost any area of the Mahakam Delta rather than particular designated areas. The circumstances eventually tempted some local bureaucrats, researchers and local residents to think that there was no spatial plan yet for the Mahakam Delta. The insight is in line with the idea that, generally speaking, the Mahakam Delta lacks a full system of government and rules (Bourgeois et al. 2002; Timmer 2010). Therefore, initiatives which proposed new or redesigned spatial planning for the Mahakam Delta, often implied the idea of establishing a new body that would implement a new spatial plan.

From a spatial management point of view, Chapter 5-8 discussed the granting of rights, as one way through which control over resource use was exercised. Looking at another area of spatial management, this chapter focuses on the making of maps and zones. In that way, this chapter identifies another cause which has prevented right granting in the Mahakam Delta from being in accordance with existing formal rules, and which has led to confusion in dispute settlements.

To start, this chapter will present in Section 9.2 various major and minor spatial planning projects developed by different government agencies. The term 'major spatial plan' here refers to spatial planning of an area which covers large parts of the Mahakam mainland and Mahakam Delta. This includes an Agreed Forest Land Use Plan, State Mining Zone (SMZ), and Provincial Spatial Plan. Meanwhile, a 'minor spatial plan' refers to spatial planning regarding

a small part of the Mahakam Delta. This includes fishing zones/grounds and shipping lanes. Besides those already existing spatial planning projects, new or redesigned spatial planning proposals are also described. This includes the Detailed Spatial Planning of the Mahakam Delta (DSPMD) and two very recent initiatives on spatial planning, namely the provincial strategic zone (*kawasan strategis provinsi*) and the district marine protected area (*Kawasan Konservasi Laut Daerah* abbrev. KKLD).

Section 9.3 will discuss the extent to which spatial planning has been implemented by the central, provincial and district government through zoning programs and arrangements. The next section (Section 9.4) deals with some legal problems which emanate from the prevailing spatial planning projects and their realization. The chapter ends with some concluding remarks.

9.2 Various spatial planning projects in the Mahakam Delta

9.2.1 Officially declared spatial planning

As of the late 1960s the state has enacted some laws and regulations which have included stipulations concerning zoning in the Mahakam Delta. In the 1960s alone, both the central government e.g. the Ministry of Mining, and the Provincial government set up zones for mining areas and fishing grounds respectively. To implement the Law of 1960 on Oil and Gas, in 1967 the Minister of Mining designated 34,125 km² of the northern part of the eastern coast of East Kalimantan as a SMZ (Section 6.2). This popularly-called Mahakam-Bunyu SMZ included the Mahakam mainland and the Mahakam Delta. Likewise, as part of implementing national legislation, in the second half of the 1970s, the government of East Kalimantan Province and Kutai District reiterated the Fishing Zones Division of the national fishery regulations (see Section 7.2). As described in Section 7.2, besides reiterating the Fishing Zones Division, the Kutai Fishery Regulation of 1978 on Fishing within the Administrative Territory of Kutai District designated eleven fishery sanctuaries. As neither the fishing grounds nor sanctuaries fully excluded non-fishery resource use in the zones, conflicts between oil and gas companies and fishermen emerged immediately. To settle the conflicts, the Directorate-General of Fisheries of the Ministry of Agriculture, followed by the Governor and Kutai District Head, issued Circular Letters which introduced a certain degree of exclusion of fishing in the vicinity of the platforms of oil and gas companies.

The planning of the Mahakam Delta changed considerably in the 1980s following the 1983 forest designation. Whereas the spatial planning of oil and gas resource was not well-connected with the preceding fishery resource spatial planning, it was well lined up with the forest designation. The forest designation supported by some subsequent forest regulations determined that non-forest resource use, including the use which had existed prior to the designa-

tion, could still take place within the designated forest subject to a number of conditions. The forestry regulations listed oil and gas resource use as permitted forms of non-forest use, yet they excluded aquaculture particularly in the Production Forest or in any Forest Area situated on islands of less than 10 km² (see Section 5.2).

At the start of 1991, the Provincial government led by the Provincial Development Planning Agency, started to make a Provincial Spatial Plan (henceforth PSP). Due to the 1983 forest designation, which had declared the entire area of East Kalimantan as Forest Area, the making of the PSP met with resistance from the Ministry of Forestry. The following quote from a presentation of the Provincial government illustrates the uncomfortable situation that the Provincial government found itself in:

> The PSP aimed to cover the whole administrative territory of East Kalimantan, yet Forest Areas existed where forestry regulations were applied.[1]

As this seemed impossible to realize following resistance from the Ministry of Forestry, the Provincial government decided to only turn the entire conversion forest as stated in the 1983 forest designation into non-forest area. One significant legal consequence from introducing the 'non-forest area' would be that the building of offices, residential areas and estate plantation would not necessarily need a permit from the Minister of Forestry any longer.[2] The permit for the use of the non-forest area could now be obtained from either the Governor or District Head/Mayor. The reason why the capacity to issue a permit was transferred to them, is that a non-forest area is under the jurisdiction of the agencies responsible for land such as the National land Agency and its regional offices, PONLA and DONLA. The Provincial government eventually issued the PSP in 1993. It came into force officially in 1995, after the Provincial government obtained approval from the Minister of Home Affairs in the same year.[3]

As already described in Section 5.2, the Ministry of Forestry objected to the 1993 PSP, given that they found it incompatible with the 1983 forest designation. One point of incompatibility that they considered important concerned the use of the term 'non-forest area (Ind. *bukan kawasan hutan*)', over which they thought that the jurisdiction of forestry agencies could cease to apply. The Provincial government did not resist against this objection, and revised

1 The presentation was entitled, 'Rencana Tata Ruang Wilayah Provinsi Kalimantan Timur 2009-2027 (Spatial Plan of East Kalimantan Province 2009-2027)'. Presented at a consultation made by a Task Force of the Draft PSP with the Center for Gazettement and Forest Area Use Plan (Pusat Pengukuhan dan Penatagunaan Kawasan Hutan), the Ministry of Forestry, on 15 January 2008.

2 Interview HI, 26/6/2008.

3 The Provincial government endorsed the 1993 PSP through Provincial Regulation No. 12/1993. The Minister of Home Affairs approved of the PSP through Letter No. 63/1995.

the 1993 PSP in 1999 by dropping the disputed term and changing it into Non-Forest Cultivation Area (Ind. *Kawasan Budidaya Non-Kehutanan* abbrev. KBNK).[4] Although in essence there was not a distinctive difference between the two terms, the Ministry of Forestry still felt they kept their territorial control by using the term KBNK. After the revision, the 1999 PSP divided the space of East Kalimantan into three main zones, namely Forest Cultivation Area (KBK) (49.93%), protected zones (26.52%) and KBNK (23.55%).

There is no clear division yet between a KBK, protected zone and KBNK in the territory of Kutai District due to the long delays in drafting the Kutai Kartanegara Spatial Plan (KSP). At present, with regard to the size, the table below shows the differences between the KSP and the 2001 Agreed Forest Plan.

Table 9.1: Kutai Kartanegara Spatial Plan according to the PSP and 2001 Agreed Forest Plan

PSP 1999 (ha)	*2001 Agreed Forest Plan (ha)*
Protected zone (358,402.99)	Forest Area (2,637,657)
Forest Cultivation Area (1,321,841.54)	Other Use/APL/KBNK (88,653)
Non-Forest Cultivation Area (891,519.74)	
Total: 2.571.764.27	Total: 2.726.310

Meanwhile, as said, the PSP included five plots in the Mahakam Delta as KBNK, spread over five different small islands. The five plots originally came from a survey held by the PONLA in the late 1970s and early 1980s and rediscovered by the RePPProT in the 1980s (see Section 5.2). The two surveys found that the plots were used for residence, coconut plantations and a small number of shrimp ponds.

It should be noted that at the time the 1993 and 1999 PSPs were endorsed, the land use of the Mahakam Delta was different from the 1970s and 1980s, in the sense that the number of residential areas, plantations and shrimp ponds had increased. It was reported that in 1996 shrimp ponds in the Mahakam Delta covered 15,000 ha. If compared to a 1986 figure of only 420 ha, this is a tremendous increase. Between 1992 and 1994, the residential area increased from 73 ha in 1992 to 125 ha in 1996 (Kusumastanto et al. 2011, p. 22; LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. II-5). These figures even exclude land that was used by oil and gas companies for installations, office buildings as well as housing. By 2005, the oil and gas companies opera-

4 The revision was made through Decree of Governor No. 050/K.443/1999. The dispute on those terms is actually surprising, since Law No. 24/1992 on Spatial Planning did not recognize the term non-forest area as the 1993 PSP introduced. The law only recognized the terms 'protected zone' and 'cultivation zone'.

ting in the Kutai District combined, had used 2,834 ha of land or 2.5% of the total land area of the Mahakam Delta (LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. IV-28; Kabupaten Kutai Kartanegara 2005, p. 9). Yet, it is unlikely that the 1993 and 1999 PSP took into consideration the vast changes in land use.

In the tidal trap case as described in Section 6.1, Total E&P Indonesie sent a letter to the provincial police office, reporting that the owners of ten tidal traps had been endangering public shipping lanes. The company based its allegation on laws and regulations concerning sailing. Pursuant to shipping regulations, the central government e.g. the Ministry of Public Transportation is assigned to map public shipping lanes.[5] In order to produce the map, there is first need for a topographical survey. The shipping regulations define a public shipping lane as a marine area that has to be safe for sailing. However, the shipping regulations only prohibit the activities that can disable navigational devices to a limited extent. Any offender of the provision can face imprisonment or a fine.[6]

9.2.2 Proposed spatial planning

There have been some proposals aimed at redesigning the spatial planning of the Mahakam mainland, in addition to a proposal that suggested small conservation zones in the Mahakam Delta. A third, recent proposal deals with both the terrestrial and marine areas of the Mahakam Delta.

Redesigned spatial plan

Ideas to form a new spatial plan for the Mahakam Delta have existed for more than a decade. Although motivated by similar concerns about environmental depletion and conflicts among users, the various ideas provide different solutions on how to solve the problems of spatial planning in the Mahakam Delta. Earlier initiatives implied that there should be protected or conservation areas in the Mahakam Delta. However, recently policy-makers have no longer held that protected or conservation areas are necessary for the Mahakam Delta, despite their concern about sustainable management.

The initial idea of forming a new spatial plan for the Mahakam Delta dates back to the early decentralization period in 2000. An inter-sectoral meeting was held in Jakarta in November 2000 led by the Indonesian Institute of Sciences to discuss the continued environmental degradation of the Mahakam

5 Article 12 of Law No. 21/1992 on Shipping as replaced by Law. No. 17/2008 (Article 119[2] and 187 [1]), and Article 3 of the Regulation of the Minister of Public Transportation No. 68/2011 on Marine Public Shipping Lane.

6 Article 11 and 100 (1 and 2) of Law No. 21/1992, and Article 139 of Law No. 17/2008.

Delta. One of three follow-up activities which resulted from the meeting, was to review and reorganize the spatial planning arrangement of the Mahakam Delta. Two other recommendations were to establish protected areas and rehabilitate the deforested mangrove forest of the Mahakam Delta (Kusumastanto et al. 2001, p. 8). In the course of 2001 the wish for a new spatial plan for the Mahakam Delta was repeatedly voiced during some stakeholder gatherings in Jakarta and Balikpapan. After several meetings, two participatory workshops held in mid-2002 and organized by a research team whose research was jointly funded by Total E&P Indonesie and Inpex, successfully pressured the Kutai District government into converting the ideas into concrete action.[7] At a workshop which was attended by the First Assistant of the Kutai District Head, the participants of the meeting agreed to prioritize two actions, notably designing a land use scheme and creating a new permanent management body, whose members would consist of stakeholders' representatives (Bourgeois et al. 2002, p. 94).

Meanwhile the Head of Kutai District government had established an *ad hoc* task force, the so-called Task Force on Integrated and Sustainable Management of the Mahakam Delta.[8] The Task Force was assigned six tasks, namely policy formulation, law enforcement, public awareness, data collection and analysis, coordination, and recovering the basic ecological function of the Mahakam Delta. The Task Force's organization consisted of an advisory body, steering committee, working group, and facilitator. The Kutai District Head chaired the advisory body, while his deputy chaired the steering committee. All related Kutai agencies, sub-districts and village governments sat in three thematic working groups together with private companies, NGOs, and university lecturers, the latter playing a role as facilitator as well. The recovery of the basic ecological function of the Mahakam Delta – one the Task Force's main tasks – had to be done in accordance with the existing spatial plan.

The Kutai District government was also supposed to make the Detailed Spatial Plan of the Mahakam Delta (DSPMD).[9] Yet, to reduce the government's

7 During an international workshop in 2001, stakeholders of the Mahakam Delta could compare their knowledge on the Delta's issues with that from other South-East Asian countries. Besides discussing the current environmental condition of the Delta, the participants also discussed possible sustainable management options. Six months after the international workshop, a smaller follow-up meeting was held in Balikpapan. Here the Head of Kutai District government and the Minister of Marine Affairs and Fisheries signed a memorandum of understanding. See Badan Lingkungan Hidup Provinsi Kalimantan Timur (2011).

8 The Kutai District Head issued the Decree No. 180.188/HK-458/2001 to establish the Task Force.

9 Pursuant to Law No. 24/1992 as replaced by No. 26/2007 on Spatial Planning, spatial planning encompasses general and specific/detailed spatial plans. General spatial planning comprises of national, regional and district spatial planning, while specific/detailed spatial planning could be island spatial planning, spatial planning for strategic zones, and the detailed spatial planning of a district/municipality.

cost of such plan, Total E&P Indonesie eventually proposed to bear the costs of doing so. However, this suggestion led to such suspicion about the objectivity of the plan (Hidayati et al. 2008, p 76), that a consultancy agency from Bandung was hired to make the plan. After about two years, the draft DSPMD was finally accomplished.

The draft DSPMD had to balance several different interests. Firstly, a balance had to be found between the environment and human resource use. Secondly, it had to find a balance between various different resources use, namely housing, shrimp farming, and oil and gas exploration and extraction. In other words, the draft DSPMD had to facilitate various uses, so that they could take place alongside each other. Nonetheless, the draft also remarked that due to the relatively greater economic and social importance of the oil and gas exploration for the state, it had to be prioritized and treat other resource use as secondary (LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. I-1-2).

Having taken into account the abovementioned concerns, the draft DSPMD divided the space of the Mahakam Delta into three main uses or zones, namely a protected zone, KBK and KBNK. The 'protected zone' chiefly consists of the river and green belt. The KBK is concentrated in areas where mangrove trees are still growing. The KBNK, on the other hand, is located in areas where housing, shrimp ponds and oil and gas explorations exist. In terms of size, the first two zones cover approximately 40% of the total size of the Mahakam mainland and Mahakam Delta combined, leaving 60% for the KBNK. The table below illustrates the division in detail.

Table 9.2: Projected Land Use Plan of the Mahakam Delta

No.	*Land use plan*	*Size (Ha)*	*Percentage of total land area*	*Composition*
1	Protected zone			Mangrove does not cover less than 40%
	a. Coastal green belt	20,836.875	19	
	b. River green belt	5,164.525	5	
2	Cultivation Forest Area (KBK)			
	a.Brackish water mangrove	1,435.802	2	
	b.Seawater mangrove	17,187.498	15	
3	Non-Cultivation Forest Area (KBNK)	62,703.296	56	Cultivation cover not less than 60%
	a. Shrimp ponds	180	1	
	b. Residential area	2,194.041	2	
	c. Petroleum exploration			
	Total size	*109,702.038*	*100*	*100%*

The idea was that areas that were designated as residential would be also be suited for the development of public facilities (such as schools, health clinics, religious convention places, sport and recreational facilities, markets and public areas, roads and electric installations). It was envisaged that any resource use in the Protected Zone and KBK was prohibited, unless it would not change the natural function of the zones. As a result, resource use was only possible in the KBNK. The draft DSPMD did not only determine the spatial division, it also stipulated the rules on right granting as well as how to exercise rights. In addition, the draft DSPMD suggested ways on how to implement the Draft effectively. For instance, it recommended guidance for field officials to prevent confusion amongst them, the installation of boundary marks, and, last but not least, to encourage stakeholders to be actively involved in rehabilitation (LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. V-4-5). The draft DSPMD went even further by suggesting technical matters, such as criteria for ideal pond construction (LAPI ITB and Bappeda Kabupaten Kutai Kartanegara 2003, p. VI-3-6).

Meanwhile, apart from taking into account an equal balance between users as well as a conducive climate for investment, the draft DSPMD was also required to fit with a Draft Kutai Spatial Plan (DKSP), which was also being formulated.[10] Like the draft DSPMD, a recent DKSP (2007-2027) primarily divided Kutai District into a protected zone (28.67%), KBK (39.21%) and KBNK (32.13%).[11] It is clear that the draft DKSP proposed a different division than the draft DSPMD regarding the respective KBK and KBNK allocations. The DKSP divided the Mahakam Delta into a protected zone, production forest and aquaculture zone.

With regard to development, the DKSP divided Kutai District into five centers of economic growth. Each center had its own distinctive potential and environmental carrying capacity. Development was prioritized and advanced in those five economic centers. Economic growth in those centers was expected to trickle down to adjacent regions, ensuring more equality among regions.

The DKSP considered the Mahakam Delta as an important region and therefore gave it more attention than other areas of the Kutai District. Firstly, the DKSP designated that two of the abovementioned five centers of economic growth were placed in the Mahakam Delta. They were Muara Jawa and Muara

10 Since its foundation in 1959, Kutai District had never had its own spatial planning. Therefore, its development had been run through broader guidance from national and provincial spatial planning. The 1999 decentralization, which bestowed more power on district governments to make their own plans, apparently did not help the Kutai District government to realize their long-awaited spatial planning. The Kutai District government did not even accomplish this, when Law No. 26/2007 on Spatial Planning set a deadline for every district/municipality to have their own new spatial planning ready by April 2010. Since 2001 until recently, two attempts have been made to draft the DKPS: for the period of 2001-2011 and 2007-2027.

11 See Badan Perencanaan Pembangunan Daerah (2006, p. 4-10-25).

Badak sub-district. Secondly, the DKSP adopted the Mahakam Delta as a strategic area, thereby allowing for prioritization of the spatial plan (Badan Perencanaan Pembangunan Daerah 2006, p. 5-27). Great opportunities for development, on one hand, and environmental degradation on the other hand, were reasons why a spatial plan for the Mahakam Delta had to be prioritized. Although its environment is in a critical state, the DKSP still projected part of the Mahakam Delta as KBNK. Oil and gas, and fishery were envisaged as favorite sectors, which would receive support from other sectors such as agriculture, plantation, tourism, education and health.

Concern over the environmental depletion of the Mahakam Delta continued when in 2005 the 1999 PSP was revised. As a result, the Mahakam Delta was categorized as a provincial strategic zone, due to its depleted environmental condition as well as economic opportunities.[12] A 'provincial strategic zone' is defined as a zone that due to its important economic, social, cultural and environmental character is given priority for spatial planning. Applying the same definition, a Government Regulation of 2008 on National Spatial Planning determined that the Mahakam River which is a bigger area than the Mahakam Delta was a national strategic zone.

As said the draft DSPMD, DKSP and Draft Revised Provincial Spatial Plan proposed new designs of spatial planning of the Mahakam Delta. Whilst the 1999 PSP and 2001 Agreed Forest Plan only set aside around 6,000 ha for KBNK, the new designs proposed an area of 65,000 ha, more than ten times its size. This means that the proposed spatial planning suggested to convert around 60,000 ha of KBK into KBNK. The 60,000 ha was actually included in the 171,746 ha and 1,385,203 ha that the Kutai and Provincial government respectively proposed for forest conversion.[13] The proposal for the forest conversion was submitted to the Ministry of Forestry in 2006, after thirteen District Heads/ Mayors had agreed on the Draft Revised PSP earlier that year. Yet, at the time of writing, the Ministry of Forestry still rejects the proposal, arguing that the Ministry recently converted over one million hectares of Forest Area in East

12 Opportunities for economic growth, and underdevelopment or isolation are two other considerations to decide whether particular areas should become provincial strategic zones. See Provinsi Kalimantan Timur (2006, p. 64).

13 The thirteen districts/municipalities of East Kalimantan had similar reasons, when they proposed forest conversion. They argued that many parts of the Forest Area had been occupied, even before the Forest Area existed. This inevitably turned into conflicts between local people, the government and forest concessionaires. They also pointed at the vast development of some cities and their need for new land, as another reason for forest conversion. For a place like the Mahakam and Bulungan Delta particularly, the district government argued that they needed the forest conversion, because the status of Forest Area of the Delta did not allow them to control the vast development of shrimp ponds. It was assumed that if the proposed areas were converted into KBNK, the district governments would be able to exert control, for the area would fall under their authority (Kronologis Pembahasan 2007).

Kalimantan and that the Provincial and District governments have only awarded one-fourth to private companies (Kronologis Pembahasan 2006).

Another proposal

In 2009 the Kutai Fishery Agency started to develop a conservation zone for mangrove crab (*Scylla sp.*). The idea came from the fact that the number of mangrove crabs had declined due to large-scale conversion of mangrove forest and overexploitation. A research project funded by the Kutai Fishery Agency and run by local academics showed that during the period of February to August 2009, crab production had gone down from 19,950 kg to 12,760 kg (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. I-5). For a suitable area of crab conservation the researchers recommended Letung and Berau Kecil Island of Muara Badak sub-district. They recommended an area of around 3,900 ha (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. IV-42).

In accordance with the Law of 2004 on Fisheries and Government Regulation No. 60/2008 on Conservation of Fishery Resources, conservation of fishery resources aims at protecting endangered species, preserving biodiversity, keeping the ecosystem in balance, and establishing sustainable fishery resource use. A fishery conservation area can be divided into several zones, notably a primary zone, sustainable fishery zone and utilization zone. Fishery resource use is allowed in any zone, except in the primary zone. According to a formal procedure, the Minister of Marine Affairs and Fisheries is authorized to endorse fishery conservation, after receiving a proposal from the governor, district head or mayor. Once the plan is endorsed, a committee needs to be formed to carry out delineation.

Meanwhile, even though the 2009 research on the assessment of area for crab conservation was eventually carried out, different views arose on the significance of fishery conservation for the Mahakam Delta. A middle-ranking officer, who was in charge of conservation affairs, was reluctant to carry out the research at the beginning, arguing that in case of large-scale environmental depletion as in the Mahakam Delta, people needed real action rather than discussing concepts. Another practical reason, at which she pointed, was that she was new in her job, and therefore did not sufficiently comprehend the planned activities of her predecessor.[14]

9.3 Implementation of the rules regarding spatial plans

This section examines the extent to which spatial planning is visible on the ground, so that government officials can properly implement policies as well

14 Interview MEA, a head of Section for Conservation Issue of Kutai Fishery Agency, 19/8/2009.

as settle disputes between users, and so that users know in which particular area they can or can not exercise their rights. It also examines the extent to which officials comply with the declared spatial planning

The tidal trap case described in Section 6.1 is a perfect example to illustrate the extent to which all declared spatial planning proceeded to delineation in order to produce maps or boundary marks on the ground. The participants of meetings held in late August and early September 2009, who represented the Kutai District government, asked an official of the Port Administration of the Ministry of Public Transportation if traffic lights (Ind. *rambu-rambu*) had been installed to indicate the public shipping lanes. He could only respond that traffic lights had been installed in a few spots. However, he could not be certain if any traffic lights were located in the areas where the tidal traps were installed. Since that he could not give a convincing answer about the traffic lights, other participants of the meetings doubted whether the tidal traps were really located inside the public shipping lanes, as Total E&P claimed. A retired head of section on fishery resource surveillance of the Kutai Fishery Agency revealed that the traffic lights of shipping lanes did not exist in the field. What actually existed in the field were the traffic lights of Total E&P which they needed for the navigation of their transportation.[15]

Meanwhile, the Kutai District government officials strongly requested from the Total E&P Indonesie employees to deliver information on all the company's platforms and installations, where fishing was prohibited. The request came up, as the company's employees could not present the maps of the prohibited and restricted areas. The idea was that if the information was available, it could be used to settle upcoming disputes. The employees could not present a map of their work area, which was attached to their PSC, either. On the ground, instead of installing boundary marks lining off the prohibited and restricted areas, the company had merely installed notification boards, which did not indicate the areas. Safety had therefore been the primary reason for installing the notification boards. Moreover, as said, the company had not installed boundary marks, because they did not believe they had exclusive rights over the sea (see Section 6.4).

As said, both the designation and delineation of the Forest Area of the Mahakam Delta were hardly communicated to land holders. The officials of the TUFPS concealed their original purpose and the legal impact that their activities might have on the land holders (see Section 5.5). As a result, villagers removed most of the boundary marks, leaving the Forest Area to be hardly visible on the ground (Syafrudin 2005, p. 75). Likewise, hardly any notification boards could be found on the ground indicating it was Forest Area, as many field officials have long suggested. The idea to install notification boards came later in 2008, when a team formed by the Kutai District Head held two meet-

15 Interview MK, 6/12/2011.

ings with villagers to publicly announce the existence of the Forest Area. However, as the boundary marks were installed in the interest of securing oil and gas extraction, the installation of the boundary marks was only done on two islands where the company's installation and platforms were located.

Not only has the lack of boundary marks invited land holders to challenge the existence of the Forest Area, it has also caused some regional and local government officials and the employees of state-owned companies to behave as if there is no Forest Area in the Mahakam Delta. In the 1980s, Pertamina warned a private company which wished to construct 2,000 ha of shrimp ponds on two islands of Muara Badak sub-district, that the two islands were located within a state mining zone. Nevertheless, Pertamina was willing to award use rights to the company, on the condition that the company had to return the land, once Pertamina wanted to extract oil and gas in the area, without having to compensate the company in return.[16] Around the same year, the Provincial Fishery Agency bought three hectares of land from a villager of Muara Pantuan to be used as a demonstration plot. In 1987 and 1991 respectively, the National Land Agency sponsored land titling projects, which freed land holders from any fee. The land titling projects resulted in 891 ha of certified land.[17] The land purchase nor land titling took into account the prior existence of the Production Forest. Likewise, lawyers and judges who engaged in the land case trial, perceived that no Forest Area existed in the Mahakam Delta, because they found no trees growing on the disputed land during a field visit (see Section 8.4).

9.4 Legislation: identification of some problematic issues

It is generally recognized that different resource uses can jointly take place in the same area through partial utilization by different users. Indonesia's law on natural resources has actually adopted the recognition of different resource uses in the same area as a legal principle which, for instance, can be seen in forestry regulations. Indonesia's forestry law allows various different uses of forest resource in one particular area. For instance, authorities could issue a forest extraction permit in a Forest Area over which a permit for bee cultivation was already granted.[18] The application of the principle can result in coinciding regulations and natural resources use, without necessarily turning to incoherence. Legally speaking, the simultaneous existence of various forms of resource

16 Interview MK, 11/8/2008, and HI, 19/8/2009.

17 This land certification resulted from a project on land consolidation and redistribution held by the District Office of National Land Agency in 1986 and 1991 which took place in Sepatin and Muara Pantuan village of Anggana sub-district.

18 See Article 27 and 48(3) of Government Regulation No. 6/2007 concerning Forest Management, and the Formation of Forest Plans and Forest Utilization.

use, which are governed by different regulations have a legal basis through the Decision of the People's Consultative Assembly No. IX/2001 on Agrarian Reform and Natural Resources Management. Nonetheless, the Decree recommends synchronization as a necessary requirement to avoid disjunction between the different regulations on natural resources use (Patlis in Resosudarmo 2005, p. 240).

In contrast, spatial planning may turn to conflict under the following three conditions. Firstly, the regulations of different sectors do not mutually refer to one another in order to achieve what is called co-ordination in public administration literature. Secondly, designation and delineation aimed at implementing spatial planning do not take into account existing forms of resource use. Thirdly, there are hardly any boundary marks on the ground to indicate the delineation and designation.

As said, some national regulations have managed to refer to other regulations in relation to spatial planning. For instance, the forestry regulations refer to oil and gas regulations which were passed earlier (Section 5.2 and 5.4), and so do the fishery regulations to shipping regulations (Section 7.2 and 7.4). However, the regulations only included one-sided references. For example, forest regulations provide tenure security for oil and gas companies, but not the other way around, given that oil and gas regulations refer to land regulations on land, which in accordance with forest regulations are not enforceable in Forest Areas. Nor do shipping regulations refer to fishery regulations, when it concerns fishing zones. As a result, tenure security in one sector can coexist with insecurity in another sector.[19]

The fact that the oil and gas regulations did not refer to the 2001 Agreed Forest Plan, shows the disrespect of the oil and gas companies to the forestry spatial planning. As said in Section 6.4, Vico perceived itself not to be affected by the Agreed Forest Plan, given that they had been in the area before the designation had been issued. To some extent Pertamina also maintained the perception that it was not subject to the forestry regulations, when it claimed to be the owner of two islands in the Muara Badak sub-district. At present, when dealing with newly emerging land claims by local residents, Vico thinks that once it has acquired land from local holders through compensation, the government has granted them the acquired land (Hidayati et al. 2005, p. 43).

One important reason why cross-referencing has not been realized so that uncertainty remains with regard to particular spatial planning is the prioritization of particular sectors. Fishing zones and Agreed Forest Plans might not be fully implemented, given that they are supposed to advance oil and gas

19 Other authors regarded the non-mutual respect of the sectoral regulations as confusing. In this respect they also referred to the absence of a cadastral survey. In the cases that the sectoral departments were able to provide maps, confusion still arose given that their maps were based on different scales and detail. As a result, it is difficult to know the real status of land (RePPProt 1990, p. 50 and 185-186).

extraction. Similarly, the fishing zones have to consider public shipping lanes. It is true that the practice of prioritization respects rights by providing compensation to right holders, yet it has also led to barriers which restricted the ability of particular spatial planning projects to effectively achieve their goals. For example, the fishing zone could not protect the small-scale fishermen due to the presence of oil and gas installations in Zone I (Hidayati et al. 2005).

Due to the fact that the sectoral regulatory regimes and spatial planning lack cross-references, it is important to raise the question to what extent the above proposed spatial plans have addressed the one-sided references and attempted to provide a solution? The latter question is not solely concerned with the coordination between government agencies, but also with the extent to which fishermen and shrimp farmers are involved. To what extent has the proposed spatial planning been based on actual resource use in the Mahakam Delta versus an ideal-type or vested interests?

The absence of boundary marks on the ground has made compliance with the declared spatial planning with regards to right granting and control more difficult. As said, on some occasions the village heads were asked not to issue a land letter, if the land was located inside the Forest Areas. However, when village heads tried to implement the instruction, land holders spontaneously asked the village heads to show them the boundary marks indicating the borders of the Forest Area. Not only did the village heads fail to show the boundary marks, they were also unable to install marks as they did not have the authority to do so.

9.5 Concluding remarks

It is apparent that in the case of the Mahakam Delta the depletion of the environment and the conflicts over resource use do not result from an absence of formal spatial planning. Both for the Mahakam mainland and the Mahakam Delta a spatial plan exists. However, uncontrolled right granting which has generated environmental destruction and social conflicts, and a lack of cross-references in the existing regulations have tempted some key actors and scholars to believe that no spatial plan exists for the Mahakam Delta. This perception led to the suggestion of forming a new or redesigned spatial plan for the Mahakam Delta. Legal problems, such as the absence of cross-references in the existing sectoral regulations, and the absence of boundary marks are actually the most important reasons for people to disrespect the rights that have been granted in the making of spatial planning. Moreover, dispute settlement has been hampered considerably given that government officials have hardly ever been able to confirm in which zones the conflicts precisely took place, so that they could not determine if there had been a lack of compliance or not. In addition, the responsible government officials have not been

able to properly implement policies, because they themselves did not work in accordance with existing spatial plans.

Given that the makers of new or redesigned spatial planning have incorrectly assumed that hardly any spatial planning exists for the Mahakam Delta, we have reason to fear that such new plan might not be in accordance with and not even refer to existing spatial planning. Therefore a new spatial plan could easily lead to further problematic overlap.

10 Administrative implementation of law: a cause for concern

This final Chapter consists of two parts. The first part presents the key findings on legal inconsistency and incoherence in legislation (see Section 10.1) as well as on bureaucratic behaviour in law-making (see Section 10.2) and implementation of law (see Section 10.3). The second part sets out how the findings of this book contribute to the theoretical considerations set out in Section 1.3 and makes a number of suggestions for future research (see Section 10.4).

It is important to underline that the key findings explain the extent to which the substance of the laws and regulations and the processes of making, implementation and enforcement have provided legal security to the right holders, and clarity on authority and legality to the regional and local government officials. The processes of making, implementing and enforcing law are analysed in this book by taking a close look at the behaviour of a number of regional and local bureaucrats. This is done in the context of decentralization whereby this chapter suggests that decentralization has shaped the interpretations of the stakeholders, which eventually affected the way in which administrative power on resource management was exercised. To some extent, this book observes that decentralization also affected the working environment within the government agencies.

The second part of this chapter describes the contribution of this book to a wider theoretical debate within socio-legal discourse on the role of the bureaucracy in legal processes concerning natural resources management. In line with the theoretical contribution, there will be some suggestions for further research.

10.1 Legislative inconsistencies and incoherence

As already said (see Section 1.3.2) inconsistency occurs when there are contradictions between legal principles or legal rules, whereas legislation is incoherent when (sets of) legal principles and legal rules are not mutually interdependent or do not fit together. Inconsistency can appear in two ways: (sectoral) legislations contradict each other or are incompatible.[1] Meanwhile,

1 Concerning the second manifestation it is important to underline that incompatibility in this respect refers to a condition whereby a particular legislation constrains the validity of other legislation so that it leads to inconsistency (Hage 2000, p. 373-374).

there are two types of incoherence: the absence of mutual referencing between sectoral laws, or disharmony between statutory and case law.

10.1.1 Inconsistency

A good example of inconsistency in sectoral legislation is in the area of fishing zones, oil and gas platforms and shipping lanes. Fishery regulations aim at protecting small-scale fishermen, allowing fishing in Zone I (0-3 nautical miles from the coast) (Section 7.2). However, this is inconsistent with regulations which prohibit or restrict the use of the area in the vicinity of oil and gas platforms, as they limit the possibilities to fish in Zone I (Section 6.2; Section 7.4). A similar issue applies to the regulations on shipping lanes, which prohibit the installation of gears in public shipping lanes (Section 7.2; Section 7.4). This contradiction rests in the uncertainty of fishing rights of small-scale fishermen and above all impedes fishery regulations in meeting their desired goal, namely the protection of small-scale fishermen.

A similar problem occurs in regulations concerning management authority over the nine Forest Areas. On one hand, regulation on decentralization stipulates that all nine Forest Areas that are located in the administrative area of the Kutai District should be handed over to the Kutai District, but on the other hand regulation on forestry and the organizational structure of the regional government stipulates the opposite, stating that some of the Forest Areas are still under the authority of the Provincial government (Section 5.2). As said in Section 5.3, these contradictions in the sectoral legislation discouraged the Kutai Forestry Agency officials from enforcing the law, e.g. protecting the forest.

Meanwhile, incompatibility may generate inconsistency when lower regulations add new provisions which are not mentioned in the higher regulations. In the Mahakam Delta this occurred when the Kutai Regulation on Fishery Business of 2000 included a provision that changed the nature of the Small Scale Fisheries Registration Certificate (SSFRC) from a mere record to a permit (Section 7.4). As shown in the *julu* case (Section 7.4), an official of the Kutai Fishery Agency referred to the provision in accusing the *julu* installation of being against the law. Another example of such incompatibility is the 2004 circular letter in which the original provisions of the Kutai Regulation on Fishing were extended (Section 7.4). The extension restricted the small-scale fishermen in exercising their formal fishing rights.

10.1.2 Incoherence

Absence of mutual-referencing

Even though sectoral legislation does show a level of mutual-referencing concerning the resource management of the Mahakam Delta (Section 5.4; Section 6.3), there are few pieces of sectoral legislation that mutually support each other (Section 6.3; Section 9.4). Due to the absence of mutually-supporting legislation certain sectoral legislation has lost its legitimacy. In the Mahakam Delta, this occurred in the case of the forestry rules when resource users and even government officials rejected the legitimacy of the Forest Area. This confirms one of the assumptions as set out in the conceptual background (Section 1.3.1): due to the illegitimacy, the implementation of the forestry law and regulations was ineffective.

It is obvious that the absence of mutually referencing or mutually supporting sectoral legislation generates uncertainty: instead of creating unity, the sectoral legislation creates overlap so that some legislation cancels each other out. In the case of the Mahakam Delta, one good example is the management of marine resources. Central to this issue is that each government department, which has a spatial plan, claims authority over its respective work areas.[2] Each government agency claims to have a spatial plan that they propose to be taken into account in settling cases. As Yusuf (2003, p. 64) has pointed out, the difference between spatial plans causes confusion among private parties who have applied for a permit location, since they do not know what is legal or not.

Disharmony between statutory and case law

As said (Section 1.3.2), disharmony can occur between statutory and case law. In the Mahakam Delta case, a good example is that both Tenggarong District Court and Samarinda High Court acknowledged the possessory evidence that the plaintiffs and defendants presented (Section 8.4). In this respect, the courts complied with the 1957 precedent on possessory land evidence (Section 8.2). However, forestry legislation did not acknowledge the possessory evidence. In the Mahakam Delta, the non-recognition in the forestry legislation of possessory evidence resulted in the absence of a settlement of third parties' rights (Section 5.4) as well as the refusal by the village and sub-district officials to process land letter applications (Section 8.4). This disharmony between statutory and case law certainly brings about inequality amongst the possession

2 In the discussions on coastal resource management, it is often said that each sector has its own legal basis which pursues different goals (Idris 2001, p. 19; Patlis et al. 2001, p. 28; Arnscheidt 2003, p. 53-55; Patlis et al. 2005; Patlis 2005, p. 451-2; Waddell 2009, p. 190).

holders: despite the fact that they all had possessory evidence, the law treated them unequally.

10.2 Addressing the behaviour of bureaucrats in law-making

This concluding chapter agrees with socio-legal scholars who argue that implementability and enforceability are not solely related to the implementation of law, but to law-making as well.[3] Nonetheless, because this book only examines the *making* of draft regulation, this concluding chapter cannot examine the extent to which the *content* of these draft regulations affects the effectiveness of implementation.

In an effort to examine how regulations and policy rules on resource management were made in Kutai District,[4] this Chapter proposes to look at three specific parts of the process. Firstly, reasons to make draft regulations. Secondly, coordination among and within the local agencies. This also includes the coordination with higher government levels. Thirdly, the involvement of affected people in the process. Accordingly, the type of law-making that this Chapter discusses is one in which the District legislators are not involved.

10.2.1 Reasons for law-making

As far as the local officials are concerned, the reasons they gave for making regulations varied. They ranged from carrying out an assigned task, pursuing local revenue or settling a conflict, to copying other regions' regulations, or responding to ineffective implementation of law. However, one should add one other important reason. The fact that the largest amount of the budget which was allocated for regulation making went to the pockets of the local officials through allowances shows that the officials also had personal financial interests. In addition to the allowance, for higher ranking officials, regulation making appeared to be an opportunity to develop close personal relations with local legislators. It is also important to highlight what incentivized the officials to make a regulation. These reasons vary as well, ranging from a brief talk with someone, a superior's oral instruction, observing a particular local situation, to individual complaints by a regulated group. According to the interviews, the initiative was never prompted by a systematic evaluation of the implementation of law. Since local officials' motives were mostly based on

3 For the accounts of this argument see Seidman (1978a); Seidman (1978b); Seidman and Seidman (1994); Van Rooij (2006), and Arnscheidt, Van Rooij and Otto (2008).

4 The opportunity to closely observe the processes of law-making has a reason during field works in the Fishery Agency therefore the conclusions on law-making in the final chapter are based on finding in this sector only.

their individual experiences, they were hardly ever written down. As a result, it often occurred that a draft regulation was already redundant when one particular agency had prepared a draft regulation, despite the fact that other agencies had arranged similar drafts.

10.2.2 Intra- and inter-agency coordination

Among the Kutai District administrative officials, there is a tendency to perceive coordination as a matter of 'listing names' and getting legitimacy. The former means the inclusion of names of officials of other agencies/bodies/offices/divisions, whilst these people do not play an actual role in reality. The latter is to consult with higher government levels to avoid annulment of regulations, planned by the District. 'The listing names' strategy allows the agencies/bodies/offices/divisions which have initiated the regulation to feel that they have attempted sufficient administrative coordination. For example, the Regional Office of the Ministry of Agriculture (POMA) felt that they had sufficiently engaged the Provincial Office of the National land Agency (PONLA) in making the so-called Agreed Forest Land Use Plan by listing some PONLA officials' names in the team commissioned by PONLA. A similar argument was used by a division of the Kutai Fishery Agency in making the Kutai Draft Regulation on Fishing. The same also applied to the making of the Kutai Draft Regulation on Fishery Business, in which the Natural Resources Bureau put down two officials' names of the District Fishery Agency without asking their permission.

This type of quasi-engagement can lead to an ambiguous situation and can have serious implications. In the case of the Mahakam Delta it happened that the officials whose names were listed in the team or committee were not informed beforehand. As a result they were often only involved midway through the process. Meanwhile, a serious implication is that the coordination may not be able to meet its primary goal of avoiding overlap or confusion (*kesimpangsiuran*) among the agencies/bodies/offices/divisions. In the Mahakam Delta this happened when the initiating agency, body or office was not willing to figure out what initiatives and progress the other agencies, bodies or offices had made so far, and therefore could not use the progress as a point of departure. The strategy was used in order to hide something while avoiding criticism from other agencies/bodies/offices/divisions; and out of an arrogance of particular agencies/bodies/offices/divisions, which could lead to neglecting other agencies' capabilities.

It is important to note that the poor coordination does not always derive from the agencies/bodies/offices/divisions, which have initiated the regulation making. They can also come from the invited agencies/bodies/offices/divisions as well. A factor that could hamper the coordination is when the invitees suspect the initiating agencies/bodies/offices/divisions of having narrow

vested interests in organizing the regulation making. Sometimes, no extensive coordination was needed. It happened, for instance, that the invited agencies/bodies/offices/divisions had previously attempted to make regulations, yet failed due to a lack of access to the Legal Bureau or local legislators. In those cases, they hoped that the new initiating agencies/bodies/offices/divisions would succeed. Such expectations would rise, when they knew that the new initiating agencies had closer political ties with the local legislators. In that situation, the invitees were unlikely to object, if the regulation making process was carried out without thorough coordination.

Meanwhile, coordination or what the local officials commonly call 'consultation' with the Provincial government and relevant departments of the central government usually takes place. This occurs due to two reasons. The first reason, often mentioned by the officials, is to avoid annulment by the Minister of Home Affairs, as already happened in the case of two Kutai Regulations in 2004 and 2008. Annulment, it was said, can be avoided by getting initial inputs from departments, where the consultations are held. Yet for some reason, this seems implausible. Firstly, in practice the local officials who undertook the consultation did not only meet the Ministry of Home Affairs yet also other sectoral departments which did not bear any relation to the annulment process of local regulation. Secondly, the officials hardly made any minutes of the consultations, to which they could have referred when they were drafting the planned regulations. Another impact of the absence of minutes was that an agency could carry out a new consultation despite the subject matter being similar to matters that they had consulted on before. Such futile consultations could have been avoided if minutes had been made. Thirdly, they undertook the consultations despite the fact that the draft of the regulation at hand was often not ready yet, allowing them to only orally present general ideas during the consultation. Fourthly, they usually preferred to carry out the consultations in person, eventhough consultations by phone, especially with the officials of the Provincial Legal Bureau, would have been an easier option.

The abovementioned doubts with regards to the first reason of the importance of the consultation leads to a second reason: a vested interest to get additional income through allowances. Recently, the opportunity to get additional income from allowances has increased due to increased supervision over project management (in Indonesian popularly named as *proyek*)[5] which used

5 Project management points to the implementation of planned programs as stated in the Short-Term Working Development Plan and Annual Budget Plan of the regional government (see Section 4.4). Administratively, when the agencies of the regional government implement their planned programs, the head of the agencies appoint his particular officials to implement the planned programs. The appointed officials are popularly called as project head (in Indonesian popularly known as *kepala proyek*). When the central government carries out a financial audit of the implementation of the planned programs, the appointed officials are responsible for any corruption allegations found besides their superiors. See Section 4.4.

to be a favourable source of getting additional income. Of the several activities for which an allowance can be obtained, travelling out of town is one of the favourites.

10.2.3 Public Input

For some of the Kutai draft regulations efforts were made to invite the public to participate. The local officials asked the affected groups – in this case fishermen and farmers – what they thought was needed in the draft regulations. Nonetheless, the public hearings were rarely carried out. According to the officials, this was due to three reasons. Firstly, the officials thought that what the fishermen and farmers raised during the hearings was not reliable knowledge because they were less well educated. Moreover, the officials claimed to know what the fishermen and farmers aspired to as the officials had for long interacted with them. Secondly, the draft regulations concerned practical matters so what the officials required was to have the fishermen and farmers willing to implement the regulations, instead of getting an input from them during the law-making process. Thirdly, budget constraints did not allow for public hearings.

Nonetheless, the last reason for not sufficiently carrying out public hearing seems to be unreasonable when looking at the amount of money that was spent on carrying out other methods to gather input. Comparative study and consultation with higher government units are the two methods on which most money was spent. Not only was much money spent on these two methods, they also turned out to be rather inefficient and ineffective. The local officials carried out the comparative studies on holidays and in regions which they had visited before. Thus, it seems that rather than a budget *constraint*, the lack of engagement with the affected groups in the regulation making was caused by a budget *displacement*. The legislation-makers mostly spent money on travelling rather than asking reliable sources of information, such as the fishermen, farmers and field officials.

Having described what incentivized the officials to draft a regulation and how the coordination and public consultation were carried out, it is interesting to assess the extent to which these processes have influenced the contents of the Kutai draft and enacted regulations. It is interesting to note that due to a lack of public hearings the contents of the draft and enacted regulations were not in favour of the fishermen and farmers. However, this does not make the content of the draft and enacted regulations defective in terms of environmentally-sound policies. It is apparent that the individual concerns of the local officials regarding the environmental deterioration affected the content of the regulations. However, at the same time, the process was also hijacked by vested

interests. In such cases the actual rationale of a regulation got lost. As occurred in the case of the Kutai Draft Regulation on Fishery Business, the content only constituted a compilation of enacted and draft regulations making it unlikely that they were able to protect fishery resources from large-scale resource extraction, as was its original objective.

10.3 Administrative behaviour in the implementation of law

As has been described extensively in Chapter 5 and 7, in response to factors that are internal and external to administrative institution, the local officials and legal enforcers behaved in such a way that it subsequently affected the implementation of laws and regulations. The behaviours of the officials and legal enforcers brought the implementation of law into two contrasting situations: on most occasions the implementation of law was ineffective, but sometimes the implementation of law was effective.

10.3.1 Behaviours that led to ineffectiveness

Economic advantage, long residence, justice concerns and internal conditions

The officials and enforcers frequently mentioned the following reasons in arguing why the implementation of law was ineffective: economic advantage and settlement history as well as political power of the resource users that would cause the government to have to spend a lot of money if they implemented the law, justice concerns, resource shortage, and bureaucratic administrative culture. In addition, they mentioned the rationality of resource users in legal compliance and the exercise of local power. Of those reasons, economic advantage and long residence of the resource users seem to be the primary factors that impeded the effective implementation of law. In all natural resource sectors, these two reasons have been advanced as a reason not to carry out law enforcement despite the resource users obviously violating the formal rules.[6] In the forestry sector, law enforcement was feared to worsen the livelihood of the local people.[7] It is suggested that in a situation whereby law breaking in the form of forest occupancy is widespread, enforcing the law strictly would only generate large-scale violation that would make enforcement

6 On how economic advancement has influenced effective implementation and enforcement of the law see Kubo (2010, p. 246). For other accounts of the argument of long residence see Arnscheidt (2009, p. 354) and Kubo (2010, p. 244).

7 See Kaimowitz (2003: 2004) on how law enforcement of forestry laws and regulations can worsen the livelihood of local people.

unfeasible.[8] Legal enforcers in the forestry sector, therefore, thought that their response to the violation of formal rules should not necessarily rest on prosecution or legal punishment, but on creating a sense of legal obligation instead.[9] Thus, in this case, as exactly occurred in the protection of the Production Forest of the Mahakam Delta, the legal obligation could be perceived as an exchange for the deliberately missed legal punishment. The idea behind the exchange was an invitation from the local forestry officials to the shrimp farmers to conduct a partnership in protecting the Forest Area.

Economic advantage and long residence of the resource users do not stand alone. The cost of enforcing the law and justice concerns, are two corresponding reasons which the local officials raised. The officials were aware that if they would enforce the law, they would need to provide alternative sources of income or compensation for the subsistent resource users.[10] Apart from the concrete repercussions of implementing the law, the local officials tried to link the minimal presence of law enforcement over the Productive Forest with justice concerns. They pointed to two unfair situations to illustrate those concerns.

Firstly, on one hand the local users had lived in the area for a long period, even prior to the 1983 designation, and had spent much money to construct ponds and cultivate fish. On the other hand, the Provincial government and the MoF hardly protected or guarded the forest. Giving a concrete example of the absence of higher government levels, the local officials blamed the Provincial government and MoF for not socializing the official status of the Delta's forest to the local people. It should be underlined that the local officials' criticism on the unjust situation partly needs to be set against the context, namely a competition between Kutai District government, and the Provincial government and MoF regarding the authority to manage the forest. Secondly, whilst the oil and gas companies earned a huge amount of money from the oil and gas extraction, the larger-scale local fishermen and shrimp farmers earned only a small amount of money. The abovementioned reasons caused the local officials and legal enforcers to think that legal punishment was unfair and therefore unnecessary.

Apart from the abovementioned reasons, the local officials also pointed to the regulated groups. Their argument that the fishermen and shrimp farmers were short-sighted was not only pointed out as factor that led to a decline in people's participation in law-making, it was also mentioned as a factor that

8 See Wasserman (1992) about the relation between the cost of compliance and enforceability, and Gezelius and Hauck (2011, p. 461) for how a deterrence-oriented enforcement of fishery regulation has strengthened resistance through increasing illegal fishing.

9 According to Kubo (2010, p. 246) the decision to not control and punish 'illegal' forest occupants is in order to maintain a credible social relationship so that the officials can work together with the communities. See also Kajembe and Monela (2000, p. 383).

10 Other scholars examined the decision to not enforce formal rules in order to avoid political risk. See for instance Fisher et al. (2005).

stopped the local officials from carrying out effective implementation of law. In stressing the importance of character, the local officials and legal enforcers sometimes added other associated character traits such as being greedy, tricky or stubborn (Hidayati 2004; Simarmata 2011, p. 177-196). With this characterization, the local officials and legal enforcers actually depicted two different sides of the fishermen and shrimp farmers. On one hand they saw the fishermen and shrimp farmers as vulnerable groups that needed to be understood, but on the other hand they saw the fishermen and shrimp farmers as those who have a determining influence over the implementation of law. This determining influence seemed even stronger because the fishermen and shrimp farmers complied (or not) with the laws and regulations on the basis of an estimation of the cost and benefit they might get.[11]

Concerning factors derived from conditions internal to the administrative institutions, the local officials and legal enforcers pointed to the lack of resources and coordination as well as political interference. Carrying out implementation and enforcement of law in a remote area such the Mahakam Delta is extremely expensive, and budget displacement did not make the job easier.[12]

Legitimacy delivery

It is interesting that local officials and legal enforcers did not only point to non-legal factors, they also pointed to legal factors. They used the legal factors to justify both inaction and action. They did not carry out effective implementation because the shrimp farmers were legal. They provided legitimacy to the shrimp farmers, because they thought that their action of issuing or recognizing the land letter did not violate the existing formal rules. They came up with such perception by developing a particular interpretation of the law.[13]

The fact that some of the local officials thought that there was no illegality in the actual resource use in the Mahakam Delta may suggest two things. Firstly, an ambivalence had clearly emerged among the local bureaucrats in looking at the legality of the actual resource use. Secondly, a heterogeneous legal understanding emerged within the local bureaucracy from which different legal meanings and actions could arise.[14]

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11 Scholars with an economic approach to law and regulatory studies have pointed at the influence of a cost and benefit calculation on legal compliance. See for instance Becker (1968), and Baldwin, G.R., and Veljanovski, C.G (1984).

12 See Hyden, Court and Mease (2004, p. 136) and McCarthy (2006, p. 14) on how distance really matters for public service provision in Indonesia.

13 On how forest users developed legal interpretations in an attempt to justify their actions in utilizing Forest Areas see Safitri (2010, p. 213-215).

14 Santos (1995; 2006, p. 46) suggests that plural or heterogeneous legal meaning and action could be the result from the co-existence of different or even contradictory legal orders or cultures. Other literature on legal pluralism names the phenomenon as state law plural-

Social distance

Meanwhile, the field officials are often members of the fishermen's and farmers' neighbourhoods as they live in the same villages. This means that they are socially attached to the community, and therefore maintaining social relationships is unavoidable. It is a strategy for them to secure social backing for playing their official role.[15] For officials who are ethnic, kinship or family members of a regulated group, the social attachment is stronger given they also have to comply with traditional authorities.[16] Together with the acknowledgement of the economic advantage and long residence of the fishermen and shrimp farmers, the social ties generated behaviours that led to field officials favouring the regulated groups. They sometimes shifted their role to become a defender of the regulated groups against the higher government level officials or the officials of other agencies. In cases concerning the formal status of the Delta's forest, the field officials of the District Forestry Agency most of the time acted as defenders of the shrimp farmers by showing old documents that they had issued to prove the prior existence of the ponds. When their sense of sympathy met with pragmatism, they shifted their role to being a legal problem solver in which they discovered how actual use could be fitted within the legal requirements.

However, the local officials as well as legal enforcers who were socially distant from the fishing and farming communities, were mostly pragmatic and cynical despite their understanding of the economic and social aspects of the actual resource use. Their pragmatism often led to the concealment of their official mission in front of the shrimp farmers. Meanwhile, their negative characterization of the fishermen and shrimp farmers and favouritism of the oil and gas extraction companies led these local officials and legal enforcers to overlook the economic and social reality and as a result apply formal deductive logic.[17]

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ism. For accounts of state law pluralism see for instance Hooker (1975) and Woodman (1998).

15 For literature which perceives the avoidance of law enforcement as a survival strategy see Kajembe and Monela (2000, p. 383).

16 The implementation of formal rules in which informal rule is taken into consideration is seen as a strategy to balance two normative orders. See Fleming (1966) and Kiggundu, Jorgensen and Hafsi (1983, p. 77). Other literature sees it as cultural influence on the attitude or behaviour of bureaucrats (Harris and Kearney 1963; Pizam, Abraham and Reichel 1977; Haque 1997, p. 445). For how kinship, family and friend ties have considerably influenced the way bureaucrats carry out public services see Riggs (1964, p. 274-276) and Conkling (1975).

17 Eisendstadt (1969, p. 356-366) pointed out that in an effort to maintain relations with the external environment, bureaucrats establish a continuous equilibrium in which they are subversive of their desired goals on one hand, and maintain their autonomy by means of strict implementation of law on the other hand.

The effects of decentralization

In Section 3.3 it was shown that there is hardly a difference between the ways in which natural resources of the Mahakam mainland and Mahakam Delta were governed before and after the 1999 decentralization. This, of course, stands in sharp contrast with the status of the Kutai District which has long been seen as an icon of decentralization.[18] Not only because of the position, the Kutai District indeed made many local regulations and established some new agencies in a way to decentralize. It is apparent that decentralization has affected the administration of resource management in the Mahakam Delta as can be seen in the perceptions and actual behaviours of local bureaucrats and local users. When the changing perceptions and behaviours affected the administrative resource management, they subsequently influenced how the central government perceived as well as exercised their authority in the Delta. Decentralization was not only reflected in the perception and behaviour of the local officials, its effects were also reflected in the administrative competition between the different levels of government. The economic advancement of the fishermen and shrimp farmers, to which the local officials pointed, is actually a logical consequence of the District Government's general insight on decentralization. They believed that people's prosperity is a final destination where decentralization should head (see Section 3.3). In this respect, we could say that the District Government advanced the goal of economic development by temporarily overlooking the implementation of law. As a result, in dispute settlements, instead of advancing the imposition of law, the local officials and legal enforcers sought for a 'win-win solution'.[19]

The way in which the local officials viewed decentralization in the Mahakam Delta was not only based on their personal views, they also took into account local users' perceptions of decentralization. The central government transferred the authority to issue permits to the district/municipality government in a response to the emerging social conflicts regarding natural resources use. Not only did the central government respond to the emerging situation through administrative means, it also refrained from imposing laws upon those who illegally occupied and utilized Forest Areas as happened in the Delta. Moreover, the MoF even advised the companies to compensate the forest occupants.

Meanwhile, given there is no powerful oil and gas regulatory agency left since the great repositioning of Pertamina in the early 2000s, the exercise of administrative power on oil and gas resource use in the Mahakam Delta has

18 Kutai District has been an icon of decentralization due to two advantages. Firstly, it has the largest District Annual Budget Plan of all districts in Indonesia. Secondly, it used to have a District Head who was famous and chaired the Indonesian Association of District Governments (2000-2004).

19 Interview NUS, 26/8/2009.

changed. The new regulatory agency, the Executive Agency, which received authority on the basis of deconcentration, does not have the same amount of power as Pertamina. As a result, the Executive Agency advised the oil and gas companies to refrain from advancing legal enforcement for it could disrupt extraction. Hence, the change in administrative authority which occurred alongside the emergence of the resource user's perception on decentralization seems to have led to law playing its former role: to integrate various interests of groups of society.

10.3.2 Behaviours that led to effectiveness

Meanwhile, in the instances when the implementation of law has been effective, this has been largely influenced by the interest to ensure continued oil and gas exploration. As mentioned in Section 3.2, in the past on the Mahakam mainland, the implementation of law had been effective in the forestry sector due to its important contribution to the District's revenues. Throughout the periods of state intervention, it is evident that oil and gas regulations were fairly effectively implemented, making it difficult to implement the regulations of other resource sectors effectively at the same time. Apart from favouring the oil and gas extraction, another factor that has allowed for effective implementation is the characterization in which the local officials and legal enforcers saw the fishermen and shrimp farmers as profit seekers. In that situation, the local officials and legal officers did no longer see the fishermen and shrimp farmers as a vulnerable group who needed an 'understanding policy'. They, instead, saw the fishermen and shrimp farmers as those whose behaviour should be controlled in order to be in line with the existing laws and regulations.

10.4 Theoretical considerations and suggestions for research

As said the second part of this chapter shows how this book is placed in and contributes to the wider academic debate on legal processes of administrative management of natural resources. Finally, this section also makes a number of suggestions for further research both to enrich academic discussion and provide reliable input that can be used for any law and policy reform initiative.

10.4.1 Theoretical considerations

The reasons and factors that the local officials in the Mahakam Delta mentioned to explain why they did not implement and enforce the formal rules as officially desired, again confirm views which suggest that the bureaucracy is not

always a threat for society (see Section 1.3.1). The incongruence between the administrative practices in natural resources management and the formal rules is not a result of self-interest or corrupt behaviour despite the fact that, as Auer et al. (2006) and McCarthy (2006) point out, it could risk natural resources. In the Mahakam Delta, the incongruence has emerged on account of both rational and emotional considerations. The rational consideration is to avoid conflict and a larger workload, and to maintain credible social relationships. The emotional consideration is sympathy or respect as an expression of social concern.

Some literature as cited in Section 1.3.1 points out that when actions to violate formal rules constitute a main or sole source of income to sustain the livelihood of the resource users, the bureaucrats often prefer to only warn the law-breakers instead of imposing the formal rules (Kubo 2012; Chhteri, Larsen and Smith-Hall 2012). This book found that the imposition of a non-legal obligation on law-breakers as an alternative administrative punishment was used besides the warning. As said, the Kutai District officials asked the shrimp farmers to plant mangrove trees as an exchange for their unlawful occupation and use of the Forest Area.

The concerns of the local officials with the people's livelihood alongside other historical and socio-cultural considerations, have been suggested to be a manifestation of rational and emotional considerations on behalf of the local officials. As Van Rooij (2006) points out, the imposition of law, which regulated groups find demanding, might generate conflict or larger violations. As Gezelius and Hauck (2011) have shown, deterrence-oriented enforcement of fishery regulations could result in resistance through increased illegal fishing. In a situation where the bureaucracy is lacking resources, the imposition of the formal rules could increase their workload, for they have to provide compensation or other employment opportunities. Kajembe and Monela (2003) and Kubo (2010) have pointed to the importance of maintaining credible social relationships which enables the bureaucrats to work together with the affected communities as another rational motive. Moreover, for a place like the Mahakam Delta, in which the *punggawas* are considerably powerful due to their economic and social role (see Section 2.4), maintaining credible social relationships is even more important.

Nevertheless, as I mostly found in the Mahakam Delta, the attention to livelihood seems to be an expression of what some literature names 'social concern' or 'non-maximizing behaviour' (Barnard in Milne 1970; North 1990; Dixit 1997). The social concern which manifested in sympathy and respect also included concern about the fact that the local users had spent money to sustain their source of income and the fact that they only carried out subsistent resource use. The imposition of the formal rules was therefore believed to potentially worsen the livelihood of the local resource users (Kaimowitz 2003).

This book found that the concern with local users was greater when the local officials had real justice concerns. In the era of decentralization, such

concern emerged when the local officials noted the unfairness and inequality that the central government authority had created in the regions. When such justice concerns were at play, the local officials were not merely compromising, cooperative, responsive or inclusive like the existing literature has pointed out (Thomson 1964; Milne 1970; Ayres and Braithwaite 1992; Aalders and Wilthagen 1997), but they would shift their role to become the defender of the local users causing them object against formal rules.

However, the social concerns that the local officials showed, do not merely originate from objective facts that they had observed. It also originates from their self-perceived role as a social group which has a higher status than the ordinary people (Abueva 1970). Regarding origin, some say that this culture of paternalism stems from the post-colonial period when, due to the small size of an entrepreneurial class, bureaucrats emerged as the elite (Hirschmann 1981; Haque 1997; Hirschmann 1999). According to the concept of the 'bureaucratic clect' in which the bureaucracy is formed and functions on the basis of communal exclusiveness, as Riggs (1965, p. 276) suggests, the feeling might derive from a perception of bureaucrats who regards themselves as a leader or father (Ind. *bapak*) on whom the regulated communities rely. In that role, the local officials may have felt the duty to guide (*membina*) the fishermen and shrimp farmers. At that point, the local officials were possibly not thinking about carrying out legal duties, but instead about helping (*membantu*) and giving (*memberi*). As Gray (1985: 55) notes, that feeling may come from Indonesian legal culture in which citizens are concerned with a wise exercise of power. In that culture, generosity of the state administrators is more valuable than their attitude towards the law.[20]

Apart from the rational and emotional considerations, this book adds the interpretation of the formal rules by local bureaucrats as another motive used to explain why they did not impose the formal rules. Not only did the legal interpretation justify their decision to legitimize the actual resource use, it also resulted in their opinion that the actual resource use was not illegal. This of course contributes to a higher level of perceived tenure security (Safitri 2010; Reerink 2011). As was described in Section 8.4, the legal professionals and company employees shared the same perception on the legality of forest use.

This study of the Mahakam Delta shows two more factors which enhanced perceived tenure security. The first is that due to severe incoherence and inconsistency of the formal rules, the bureaucrats undertook legal interpretations which overlooked the principle of the hierarchy of legislation and justified the actual resource use. The second is the bureaucrats' perception of the actual implementation of law. Having found that some regional government agencies and private companies had illegally used the forest but had not been prosecuted, the local bureaucrats concluded that the shrimp ponds were also

20 See also Lev (1972, p. 305).

legal. Thus in the Mahakam Delta, these two factors complement long residence and land-related documents, as Reerink has noted before (2011), to form perceived land tenure security.

However, as some literature has pointed out, in a situation where implementation and enforcement of law hardly exist, sometimes formal rules are strictly imposed. Yet, rather than regarding this development as a means for bureaucrats to pursue personal gain, I would rather see the imposition as a matter of what Eisenstadt (1969) called 'maintaining a continuous equilibrium'. As a frontier area where 'national vital objects' exist, it is important to maintain the credibility of threat in order to keep the oil and gas extraction running (Braithwaite 2002). For the field officials, the responsive and repressive attitudes could be a consequence of playing a role as intermediary to keep both the superiors and affected groups satisfied (Arce 1993).

Another aspect of the legal process, namely that the local officials hardly took into consideration the fishermen and shrimp farmers' opinions, is more visible in the law-making process. Similar to the implementation of law, in the law-making process the officials considered themselves as an educated elite or father and believed they knew what the local users were thinking and demanding. They therefore thought that listening to the affected groups in the law-making process was unnecessary. Consequently, this led to top-down law-making, in which bureaucrats who closely worked together with local university lecturers dominated (Riggs 1964; Seidman 1978). During the making of the 1983 Agreed Forest Land Use and 1975 and 2004 Circular Letter concerning fishing ground restrictions, the bureaucrats served the interests of the oil and gas companies.

On other occasions the legislation making also appeared as an arena in which the various district agencies competed. Yet it should be noted that in the Mahakam Delta, the competition cannot be regarded as a result of the agencies' rivalry, as the bureau-political theory points out, or the need to put their own organizational interests ahead of other agencies' interests.[21] It is evident that the competition was rather influenced by the pursuit of personal interests, namely additional income and pursuing access to political institutions. Thus, unlike what the incrementalist theory on policy making suggests, namely that during such competition the agencies fight for their own coherent and clear goals and ideologies, in the Mahakam Delta decisions and choices concerning law making were also based on fluid personal preferences making it difficult for organizational cohesion to exist (Cohen, March and Olsen 1972; Tanner 1995).

21 For the accounts of the bureau-political theory see Arnscheidt, Van Rooij and Otto (2008).

10.4.2 Some suggestions for further research

The suggestions for further research that this book would like to make are not merely for scientific development, but also in an effort to better understand the legal and administrative aspects of the Mahakam Delta in order to formulate knowledge-based policies.

This book points to the recommendations of previous research reports and stakeholder meetings, which prematurely suggested the making of new regulations, institutions and law enforcement as solutions to the management of the Mahakam Delta.[22] This instrumental approach rests on two misleading assumptions. First, it assumes that the local officials will behave on the basis of prescribed norms. Second, that compliance can be achieved through fiercer law enforcement. As scholars have noted, this assumption is based on the idea that the government 'tells' and others 'act' (Baldwin 1997; Gunningham, Grabosky, and D. Sinclair 1998; Black 2002: 2-3; Baldwin, Carve and Lodge 2012, p. 106-107). The two misleading assumptions have resulted in many people remarkably overlooking the complex picture of the implementation of law. Furthermore, they deny the ability of local officials to respond to the real problems of local communities.

Therefore, this book suggests that upcoming research on the Mahakam Delta should further examine the accounts of the implementation of law. Since this research focuses on the government institutions dealing with the management of resource use, the upcoming research should try to find out the extent to which the formal rules are implementable from the point of view of the resource users. Such research would complement this research and other existing research on some of the socio-legal aspects of the management of the Mahakam Delta. That would provide data and analysis on how the formal rules work when they encounter local social and political institutions.

The combined findings of the present and proposed research would provide accounts on a variety of dimensions of the government dealing with resource use in the Mahakam Delta. Such multi-dimensional view will enable the formulation of law and policy which takes into account the ability of both the local officials and resource users to implement and comply with the formal rules. Moreover, these findings and analysis would probably help shape law and policy with the underlying assumption that the implementation of law

22 For research reports suggesting such recommendations see for instance Bourgeois et al. (2002, p. 94-95); Hidayati (2004, p. 106 and 110); Hidayati et al. (2004, p. 175) and Syafruddin (2005, p. 127-130). For the recent stakeholder meetings which proposed similar recommendations see a proceeding of the 'Lokakarya Penyelamatan Delta Mahakam Program Terpadu Multi Pemangku Kepentingan', held by Total E&P Indonesie in collaboration with the Government of East Kalimantan and Kutai District, 27-28 October 2009 and 'Policy Workshop Analysis on Mahakam Delta, held by the Mulawarman University in collaboration with the University of Essex, Wageningen University, Stockholm Environment Institute, Kasetsart University and Vietnam National University, September 2010.

needs to be regarded as essential and that much could be learned from this process. Instead of regarding the implementation of law from which informal resource tenure has emerged, as irrelevant, law and policy formulation should take these processes into account and incorporate them into the proposed rules and institutions.

Summary

Indonesian Law and Reality in the Delta
A Socio-Legal Inquiry into Laws, Local Bureaucrats and Natural Resources Management in the Mahakam Delta, East Kalimantan

Due to their wealth of natural reserves, deltas worldwide attract people. For ordinary people who seek a better life, a delta is a promising place because its natural resources can be collected and utilized. Meanwhile, states make legal arrangements to control the resource use of deltas so that they can generate state revenue and protect the environment. Nevertheless, in many deltas around the world increasingly destructive natural resource extraction has led to a number of social and environmental problems.

The Mahakam Delta of East Kalimantan, Indonesia, is no exception in that regard. It has repeatedly been suggested that deforestation, namely the conversion of mangrove forest into particular uses, is the main cause of the environmental destruction of the Mahakam Delta. In turn, deforestation has caused other forms of environmental destruction, such as abrasion, water intrusion, depletion of fishery resources and reduced biodiversity. All those forms of environmental destruction have tested the vital ecological functions of the ecosystem of the Mahakam Delta over the last fourteen years. One result has been the fact that the Mahakam Delta has lost much of its ability to provide environmental services. In addition to the environmental destruction, conflicts between resource users have arisen.

These two problems raise socio-legal questions about the Mahakam Delta's legal and administrative arrangements. How does law regulate resource use in the Mahakam Delta? To examine the extent to which formal rules on resource use have functioned, it is important to assess the extent to which government officials have actually implemented the formal rules, and which actors and factors have influenced the implementation of law. To better understand legal and administrative arrangements it is important to also know the law-making process of formal rules so that explanations for why resource use is regulated in a particular way can be provided.

As far as the law is concerned, law has long regulated resource use of the mainland as well as the marine part of the Mahakam Delta. Nevertheless, one should say that when we discuss the making of implementing rules, regulation concerning resource use on the mainland of the Mahakam Delta is ahead of

such regulation on resource use in the marine part. Regulations regarding state control over resource use constitute an important part of the legal arrangements. The state has actually exercised formal control over all forms of resource use in the Mahakam Delta; the type of control has depended, though, on the form of use. For forestry resource use, law applied control through a territorial strategy whereas for oil, gas and fishery resource use law applied a non-territorial strategy. In forestry resource use, law determines that complementary to the designation of a Forest Area, there has to be a physical delineation through which the state affirms its tenure claim over the delineated area. By contrast, in case of a state mining or fishing zone, law determines no such physical delineation. In addition to the exercise of state control, there are laws and regulations on spatial planning, whereby each natural resource sector and each government unit has its own spatial plan.

The different sectors of natural resource apply different forms of state control, but the legal provisions on use are similar. In general, they stipulate that the state determines how and by whom resources within the designated and delineated areas can be used. They also determine that only those who have obtained a permit, license or rights from particular assigned formal authorities are allowed to collect or utilise natural resources. Those who offend the provisions could be sentenced to imprisonment or a fine. To be able to exercise their rights over resource use, the permit or right holders are required to fulfil a number of particular obligations. The companies with a Production Sharing Contract for oil and gas extraction, for instance, are required to acquire the land from private parties, before they exercise their rights of exploration and exploitation.

In addition to the abovementioned legal provisions, there are provisions, which assign the government the task to implement laws to control resource use and carry out environmental protection whereby the different government institutions have to be mutually interdependent. Forestry regulations, for instance, appoint the central and regional government agencies to carry out forest delineation and forest protection. Meanwhile, fishery regulations assign only to the regional government the task to make implementing rules on input and output control to avoid overexploitation.

However, due to a combination of complex factors, laws and regulations on natural resources management of the Mahakam Delta have not been effectively implemented, with a few exceptions. In the forestry sector, the Provincial Forestry Agency carried out forest delineation only seventeen years after the forest designation was made. With regards to forest utilization, neither the Regional Office of the Ministry of Forestry, nor the Regional Technical Implementation Unit of the Ministry of Forestry nor the Technical Implementation Unit of the East Kalimantan Forestry Agency have imposed the laws on oil and gas companies because no permit had been issued by the Minister of Forestry. At the same time, neither the officials of the East Kalimantan Forestry

Agency nor the officials of the Kutai Forestry Agency carried out the official surveillance of the Production Forest of the Mahakam Delta.

Meanwhile, despite a long list of actual and only-scheduled activities of the various agencies of Kutai district in the Mahakam Delta, it is evident that control over destructive fishing through a permit mechanism is (still) lacking. So is the implementation of regulations and policies concerning environmentally friendly shrimp ponds. Dysfunctional implementation of law can also be detected in laws and regulations on spatial planning as sectoral departments and the regional government, to whom had been assigned the task to demarcate the designated areas, hardly did anything.

There are several reasons for why the implementation of law has not been effective. The first explanatory factor is legal, and is related to the observation that the laws and regulations on resource use are neither consistent nor coherent with one another. In general, laws and regulations are inconsistent when they are contradictory and incompatible.

On the basis of some major cases which are assessed in this book, such as regulations on forest management authority, the rights of small-scale fishermen and the legality of possessory land evidence, it can be concluded that the contradictions arise from three sources. Firstly, there are contradictory regulations between the different natural resource sectors. Secondly, a number of higher and lower regulations are incompatible. Thirdly, newly introduced laws and regulations have often ignored already existing laws and regulations.

In addition, the laws are often incoherent mainly because of the severe lack of mutual referencing between sectoral legislation as well as disharmony between statutory and case law.

In practice, the inconsistency and incoherence have diminished the rights security of the resource users, and led to confusion about the level of authority and legality of the regional and local government officials. Inconsistency between statutory and case law has led to inequality between right holders. A lack of rights security, inequality, unclear legality and authority have been caused by the fact that particular regulations de-legitimised other regulations. This has led to a situation whereby illegitimate regulations are unable to pursue their primary goals. Nevertheless, it should be noted that inconsistency and incoherence have also resulted in an increase of legal interpretations by local officials used to justify the legitimacy they had given to the actual resource use.

Next to the abovementioned legal factor, there are also several non-legal factors, which have hampered an effective implementation of law. In a simple classification, the non-legal factors can be divided into: (i) factors that are internal to the government institution tasked with implementing the law; and (ii) factors that are external to such administrative institutions. There are common problems shared by all natural resources sectors, but each sector also has its own specific problems.

Regarding factors *internal* to the administrative institutions, one may say that a lack of resources, administrative competition, and rigid planning and budgeting procedures are common factors that have hampered an effective implementation of law. Specific to the forestry sector is an issue, which this thesis has called 'timber orientation'. Timber orientation has made local forestry officials reluctant to protect the Production Forest of the Mahakam Delta, because no forest concessions have been awarded there. Specific to the fishery sector is the question whether its local officials are strongly committed to or concerned with the environment or not.

Factors *external* to the administrative institution are more complex. Apart from a few differences between the natural resource sectors, generally speaking, there are two factors which have impacted the planned implementation of law: the long residence of the local users in the Mahakam Delta in line with long existing local use rights, and the economic importance of resource use for local livelihoods. On the basis of these two main factors local officials have tried to justify putting social legitimacy ahead of legal legitimacy, when they had to make sure whether the local users had resource rights or not. Local officials also took into consideration the political power of certain resource users, when deciding not to implement the law. Notably the regional forestry officials were reluctant to impose rules on permit use on the oil and gas companies as they were afraid of powerful national backing of the companies, whereas local fishery officials did not implement rules on destructive fishing as they might encounter other local officials who had to serve their constituencies and relatives.

When real interaction between field officials, or 'street-level bureaucrats' in Lipsky's words, and local resource users is taken into account, we witnessed a strong emotion, which has profoundly influenced the implementation of law. Mixed feelings of empathy, respect, fear as well as pragmatism formed two attitudes commonly found among the field officials. Firstly, the belief that non-compliance by local resource users is not something against which legal action should be sought. For explaining this inaction, the field officials raised reasons that have already been mentioned, such as the economic subsistence of the local users. Fear of being harmed and/or losing credible social relations with local users are other reasons which the field officials mentioned. On many occasions, the field officials even defended local users when the latter were accused of violating regulations of other sectors of natural resource. They also concealed the original objective of their activities – the implementation of law - to avoid resistance from the local users so that they could realize their planned programs and activities.

Meanwhile, the government's implementation of law has often been effective when it concerned oil and gas companies. They are classified as national vital objects and have significantly contributed to both central and regional government revenues. Due to its strategic role, oil and gas resource use was often favoured by local officials and law enforcers to ensure that the oil and

gas extraction kept running. It should be underlined that the perception of the importance of oil and gas resource use has coincided with the way in which the local officials often characterized the local users, or Delta inhabitants. The local officials often perceived the local users to be short-sighted, greedy, tricky and stubborn.

Not only in the implementation of law, negative characterization also emerged in law-making. The Kutai government hardly took notice of the input from the locals who lived in Kutai district, but did pay attention to input from outsiders. In this respect, Kutai district government favoured legal legitimacy provided by the central government over social legitimacy provided by the local residents. The reason that certain local officials gave for not actively engaging the locals was that they perceived themselves as better educated. Moreover, they claimed to know what the local users aspired to.

From the extensive and comprehensive examination of the most important actors and factors which influenced the implementation of law and legal enforcement, it becomes clear that rather than the pursuit of personal interests or the interests of closely affiliated groups, it is actually a combination of rational and emotional considerations which drove the local officials and law enforcers to not effectively implement and enforce the law concerning resource use in the Mahakam Delta.

The local officials realised that if they were not adaptive and responsive to the reality and merely resorted to a strict implementation of laws and regulations, this would potentially do more harm than good. They have been fully aware that without providing any form of compensation, implementation and enforcement would only worsen the livelihood of the local users. The field officials risked four possible consequences when implementing and enforcing the law. Firstly, they risked not being able to realize other planned programs and activities, due to lack of goodwill with local inhabitants. Secondly, the local users, reacting to the implementation and enforcement, could jeopardize the local officials. Thirdly, the local officials could lose their social insurance derived from having credible social relations with the communities of the local users. Fourthly, the implementation and enforcement of law could increase the workload of the local officials, a problem considering the lack of resources.

In terms of their emotional considerations: these were related to a sense of social concern. Social concern arose alongside feelings of empathy and respect. The local officials felt a sense of fairness, as the local users had long been residing in the Mahakam Delta and carried out resource use only to survive. Such feelings of fairness were often strengthened, when the local officials discovered unjust situations, for example when the central government had hardly paid any attention to the inhabitants of the Forest Area, whilst oil and gas companies earned huge benefits. This sense of social concern combined with the inconsistency and incoherence of legislation, brought local officials to the conclusion that the actual resource use was fair, and legal. As

such, the local officials were often not only responsive and compromising, but on some occasions they would even act as the defenders of local users.

In the light of these observations, this book argues that the lack of implementation and enforcement of law does not always mean that local officials are advancing personal gain. Rather, they try to maintain a continuous equilibrium between adapting to external influences on one hand and maintaining their level of autonomy, on the other.

This book strongly recommends further research on the management of the Mahakam Delta to better understand the way in which implementation of law works in this area. Further research will help to form perspectives, which do not prematurely disrespect the role of local officials or bureaucrats in coping with legal and non-legal factors that make the implementation of law difficult. Such insights may help with the making of relevant local policies and regulations for the future. To be relevant it is important for such regulations regarding informal and semi-informal resource use to be jointly created by local officials and local resource users.

Samenvatting

Indonesische wet en werkelijkheid in de Delta
Een socio-legal onderzoek naar wetgeving, lokale ambtenaren en beheer van natuurlijke hulpbronnen in de Mahakam Delta, Oost Kalimantan

Door hun rijkdom aan natuurlijke grondstoffen trekken delta's overal in de wereld mensen aan. Voor gewone mensen die op zoek zijn naar een beter bestaan, is een delta aantrekkelijk omdat zij de natuurlijke hulpbronnen (hierna: hulpbronnen) kunnen vergaren en benutten. Tegelijkertijd scheppen staten juridische kaders om het gebruik van hulpbronnen in de delta's te controleren, ten behoeve van zowel de staatskas als bescherming van het milieu. Desalniettemin zien wij in vele delta's in de hele wereld dat een steeds destructievere exploitatie van hulpbronnen heeft geleid tot sociale en milieuproblemen.

De Mahakam Delta in Oost Kalimantan, Indonesië, vormt in dat opzicht geen uitzondering. Ontbossing, met name door de conversie van mangrovebossen in andere vormen van gebruik, wordt vaak genoemd als één van de belangrijkste oorzaken van de vernietiging van het milieu van de Mahakam Delta. Ontbossing heeft op zijn beurt ook weer geleid tot andere vormen van milieuvernietiging, zoals abrasie, waterverontreiniging, uitputting van de visstand, en verminderde biodiversiteit. Al deze vormen van milieuvernietiging hebben gedurende de afgelopen veertien jaar de precaire balans van het ecosysteem van de Mahakam Delta aangetast. En dit heeft ertoe geleid dat de Mahakam Delta veel minder goed in staat is om de milieuvoorzieningen (environmental services) te bieden. Naast de schade aan het milieu, is er ook sprake van een toename van conflicten tussen de gebruikers.

Deze twee problemen – de milieuvernietiging en de conflicten – roepen een aantal socio-juridische (*socio-legal*) vragen op over de juridische en bestuurlijke arrangementen voor de Mahakam Delta. Hoe reguleert het recht het gebruik van hulpbronnen in de Mahakam Delta? Om erachter te komen in hoeverre de formele regels voor dit gebruik functioneren, is het belangrijk om na te gaan in hoeverre ambtenaren de formele regels hebben geïmplementeerd, en welke actoren en factoren de implementatie van het recht hebben beïnvloed. Om juridische en bestuurlijke arrangementen beter te begrijpen is het belangrijk om ook het proces waarbij formele regels worden opgesteld en vastgesteld te kennen, zodat uitleg kan worden verschaft waarom het gebruik van hulpbronnen op een bepaalde manier geregeld is.

Juridisch beschouwd, bestaat er sinds lang wetgeving die het gebruik van hulpbronnen regelt, zowel voor het vasteland als voor het kustgebied en het maritieme deel van de Mahakam Delta. Wel moeten we vaststellen dat bij de uitwerking van die wetgeving in lagere regelgeving die voor het vasteland voorop loopt vergeleken bij die van het kustgebied en maritieme deel van de Delta. Regelgeving voor het beheer van hulpbronnen door de staat vormt een belangrijk onderdeel van de bestaande juridische arrangementen. In feite heeft de staat het formele beheer over alle vormen van gebruik van hulpbronnen in de Mahakam Delta aan zich getrokken; het type van beheer verschilt echter steeds per hulpbron. In het geval van de bosbouw, heeft de wetgever gekozen voor een territoriale strategie, terwijl in het geval van olie, gas en visserij, is gekozen voor een niet-territoriale strategie. Die territoriale strategie voor bosgebieden uit zich hierin dat nadat volgens wettelijk voorschrift zogenaamde Bosgebieden (*Forest Areas*) zijn vastgesteld, er ook daadwerkelijk een gebiedsmarkering plaats moet vinden waarmee de overheid haar het bezit van het desbetreffende gebied bevestigt. Echter, als het gaat om mijnbouw- of visserijgebieden, is een dergelijke fysieke markering niet verplicht volgens de wet. Naast het genoemde overheidsbeheer is ook de wet en regelgeving met betrekking tot de ruimtelijke ordening belangrijk; voor elke sector van hulpbronnen en voor elke daarmee corresponderende overheidsdienst, gelden eigen ruimtelijke plannen.

Terwijl de vormen van beheer verschillen per sector, zijn de wetsbepalingen die gelden voor het gebruik van hulpbronnen in hoofdzaak gelijk. In het algemeen schrijven deze bepalingen voor dat de overheid bepaalt op welke manier en door wie de hulpbronnen in de aangewezen en afgebakende gebieden gebruikt mogen worden. Voorts bepalen zij dat slechts degenen in het bezit van een vergunning of bijzondere gebruiksrechten toegekend door de daartoe bevoegde diensten, de hulpbronnen mogen verzamelen en gebruiken. Zij die de bepalingen overtreden kunnen veroordeeld worden tot een boete of gevangenisstraf. Om hun rechten op het gebruik van de hulpbronnen te mogen uitoefenen, dienen de houders van een vergunning of recht aan bepaalde verplichtingen te voldoen. De bedrijven met een *Production Sharing Contract* voor olie en gas, bijvoorbeeld, zijn verplicht om voordat er met exploratie en exploitatie wordt begonnen de benodigde grond van de rechthebbenden te verwerven.

Naast de genoemde bepalingen, zijn er ook regels die bepaalde overheidsorganen de taak geven om wetgeving voor het beheer van hulpbronnen en de bescherming van het milieu nader uit te werken; hierbij zijn verschillende overheidsinstellingen op elkaar aangewezen. Regelingen voor bosbeheer, bijvoorbeeld, wijzen de centrale en gewestelijke overheid aan om de bosmarkering en bosbescherming uit te voeren. In het geval van visserij, is alleen de gewestelijke overheid aangewezen om uitvoeringsregels te maken voor *input*- and *output*controle die overbevissing moeten voorkomen.

Echter, vanwege een combinatie van complexe actoren, zijn de wetten en regels met betrekking tot het beheer van hulpbronnen in de Mahakam Delta – niet op een effectieve manier geïmplementeerd, enkele uitzonderingen daargelaten. Een kenmerkend voorbeeld uit de bosbouw is dat de Provinciale Bosbouwdienst een aangewezen bosgebied pas zeventien jaar nadat het gebied officieel was vastgesteld, daadwerkelijk markeerde. Voor wat betreft het gebruik van grond in Bosgebied, is opmerkelijk dat geen van de voor bosbeheer verantwoordelijke diensten de wet daadwerkelijk oplegden aan de olie- en gasmaatschappijen, omdat er geen vergunning was verschaft door de Minister van Bosbouw. Dit gold zowel de Gewestelijke Directie van het Ministerie van Bosbouw als de Regionale Technische Implementatie Unit van het Ministerie van Bosbouw, alsook de Technische Implementatie Unit van de Provinciale Bosbouwdienst van Oost Kalimantan. Tegelijkertijd verwaarloosden de ambtenaren van zowel de Provinciale Bosbouwdienst als van de Districts bosbouwdienst van Kutai hun surveillancetaken in het 'Productiebos' van de Mahakam Delta.

Ook is het evident dat controle op milieubelastende visserij in de Mahakam Delta door middel van een vergunning niet heeft gewerkt, ondanks alle bepalingen, en ondanks lange lijsten van feitelijke of geplande uitvoeringsactiviteiten van de verschillende afdelingen van het district Kutai. Hetzelfde geldt voor de implementatie van regelingen en beleid voor milieuvriendelijke garnaalvijvers. Gebrekkige wetimplementatie zagen wij ook op het terrein van de ruimtelijke ordening, waar sectorale ministeries en gewestelijke overheden wier taak het was om aangewezen gebieden officieel te markeren, weinig tot niets uitvoerden.

Er zijn verschillende redenen waarom de implementatie van recht niet doeltreffend heeft gefunctioneerd. Het eerste deel van de verklaring is juridisch, en heeft te maken met de observatie dat wetten en regelingen voor het gebruik van hulpbronnen noch consistent zijn noch onderling coherent. De inconsistentie van wetten en regelingen is, algemeen gesproken, gelegen in hun innerlijke tegenstrijdigheid en incompatibiliteit.

Op basis van een aantal belangrijke gevallen die worden beschouwd in deze studie – zoals de regelingen betreffende bevoegdheden in het bosbeheer, de rechten van kleinschalige vissers, en de juridische aanvaardbaarheid van bewijzen van landbezit – kan worden geconcludeerd dat de tegenstrijdigheden uit drie bronnen voortkomen. Ten eerste zijn er regels in de verschillende grondstofsectoren die onderling tegenstrijdig zijn. Ten tweede zijn sommige hogere en lagere regelingen niet met elkaar verenigbaar. Ten derde gaan nieuw ingevoerde wetten en regelingen vaak voorbij aan reeds bestaande wetten en regelingen.

Daarnaast bestaat er vaak incoherentie tussen wetsbepalingen vanwege het feit dat bepalingen in de verschillende sectoren niet naar elkaar verwijzen, alsmede vanwege de disharmonie tussen wetgeving en jurisprudentie.

In de praktijk heeft het gebrek aan consistentie en coherentie de rechtszekerheid van de gebruikers van hulpbronnen verzwakt, en geleid tot onduidelijkheid over de mate van gezag en wettigheid van gewestelijke en plaatselijke ambtenaren. Doordat wetgeving en jurisprudentie elkaar tegenspraken, is ongelijkheid ontstaan tussen de houders van rechten. Het genoemde gebrek aan rechtszekerheid, de ongelijkheid, en de onduidelijkheden rond gezag en wettigheid konden ontstaan doordat bepaalde regelgeving andere regelgeving delegitimeerde. In deze situatie kon de gedelegitimeerde regeling haar primaire doel niet meer nastreven. Overigens heeft het gebrek aan consistentie en coherentie ook geleid tot nieuwe juridische interpretaties door plaatselijke ambtenaren, ter rechtvaardiging van hun erkenning van bestaand gebruik van hulpbronnen als juist.

Naast de bovengenoemde juridische verklaring, is er ook een aantal niet-juridische factoren die implementatie van het recht hebben belemmerd. Volgens een simpele classificatie kan men de niet-juridische factoren indelen in twee groepen: (i) factoren *binnen* overheidinstellingen; en (ii) factoren *buiten* overheidsinstellingen. Men ziet veel van dezelfde factoren optreden in de verschillende sectoren van hulpbronnen. Daarnaast kent elke sector ook zijn eigen factoren die een rol spelen.

Met betrekking tot factoren *binnen* de overheidsinstellingen kan worden gezegd dat een gebrek aan middelen, bestuurlijke rivaliteiten, en rigide procedures voor planning en begroting gemeenschappelijke factoren zijn die een effectieve implementatie van de wet hebben belemmerd. Naast deze factoren, heeft de bosbouwsector in het bijzonder te kampen met een *bias* van ambtenaren voor houtproductie. Deze factor heeft plaatselijke ambtenaren van bosbeheer zeer terughoudend gemaakt als het ging om bescherming van het 'Productiebos' van de Mahakam Delta omdat daar immers geen vergunning voor houtkap was verschaft. In het bijzonder voor de visserij hangt het succes van de wetsimplementatie af van de vraag of de plaatselijke ambtenaren zich duidelijk betrokken en verantwoordelijk voelen voor de bescherming van het milieu of niet.

De externe factoren, dus degene die *buiten* de overheidsinstellingen vallen zijn complexer. Afgezien van enkele verschillen tussen de sectoren, zijn er, algemeen gesproken, twee factoren die van invloed zijn op de voorgenomen implementatie van recht: het langdurige verblijf van de lokale gebruikers van hulpbronnen in de Delta en de dus al lang bestaande plaatselijke gebruiksrechten, en het economische belang van deze hulpbronnen voor het leven van de mensen ter plaatse. Op basis van deze twee factoren hebben lokale ambtenaren geprobeerd te rechtvaardigen waarom zij sociale legitimiteit boven juridische legitimiteit stelden, toen ze moesten vaststellen of de lokale gebruikers nu gebruiksrechten hadden of niet. Lokale ambtenaren hielden bij hun beslissing de wetgeving niet te implementeren ook rekening met de politieke macht van bepaalde gebruikers. Met name bosbouwambtenaren waren terughoudend om bij het gebruik van vergunningen regels op te leggen aan olie- en gasmaat-

schappijen, omdat zij bang waren voor de machtige nationale achterban van deze maatschappijen. Lokale visserijambtenaren implementeerden de wetgeving tegen overbevissing en visserij-met-milieuschade niet, omdat dat hen zou kunnen confronteren met andere plaatselijke ambtenaren die de belangen van hun gemeenschappen en familieleden hadden te dienen.

Bij het observeren van de daadwerkelijke interactie tussen de plaatselijke ambtenaren in het veld – de zogenaamde *street level bureaucrats* zoals Lipsky hen noemt – en de plaatselijke gebruikers van hulpbronnen, zagen wij dat de implementatie van de wet ook sterk beïnvloed werd door sterke menselijke emoties. Een mengeling aan gevoelens – medeleven, respect, angst en pragmatisme – droeg ertoe bij dat ambtenaren twee houdingen aannamen. In de eerste plaats zagen de ambtenaren het gebrek aan naleving niet als iets waar actie tegen ondernomen hoefde te worden. Vaak werd door hen, zoals gezegd, als uitleg gegeven de economische afhankelijkheid van de plaatselijke bevolking van het gebruik van de hulpbronnen. Daarnaast zeiden veldambtenaren ook dat zij vreesden dat hen kwaad zou worden berokkend en/of dat ze hun geloofwaardigheid bij en het vertrouwen van de plaatselijke bevolking zouden verliezen als zij de wet zouden opleggen. In veel gevallen, verdedigden plaatselijke ambtenaren de lokale gebruikers tegen beschuldigingen van het schenden van wetgeving. Daarnaast hielden veldambtenaren soms ook het officiële, eigenlijke doel van hun activiteiten verborgen voor de bevolking, om tegenstand te voorkomen en zo hun programma's en activiteiten te kunnen realiseren.

Intussen was de implementatie van de wet vaak wel effectief als het ging om olie- en gasmaatschappijen. Die werden immers erkend als *national vital objects*, en droegen fors bij aan het inkomen van de centrale en gewestelijke overheden. Vanwege de belangrijke strategische rol van deze sector, genoten bedrijven in de olie- en gaswinning vaak een voorkeursbehandeling van de plaatselijke ambtenaren en wetshandhavers die immers handelden in het belang van een ononderbroken gas- en oliewinning. Hier moet bij vermeld worden dat de perceptie van olie- en gaswinning als een zaak van groot gewicht, samenviel met een bepaalde stereotypering van de plaatselijke bewoners door de plaatselijke ambtenaren. De inwoners werden dikwijls door hen gezien als kortzichtig, hebberig, listig en koppig.

Niet alleen bij de implementatie van de wet- en regelgeving maar ook bij maken van wetten en regelingen was er sprake van dergelijke stereotypering. De districtsoverheid van Kutai hield nauwelijks rekening met de mening van de plaatselijke inwoners van Kutai district, terwijl buitenstaanders wel inspraak hadden. Op deze manier verkoos de districtsoverheid van Kutai juridische legitimiteit in de ogen van de centrale overheid boven sociale legitimiteit, in de ogen van de plaatselijke bewoners. De reden die sommige plaatselijke ambtenaren gaven om de plaatselijke bevolking er niet bij te betrekken was dat zij zichzelf als meer ontwikkeld, beter geschoold, zagen. Bovendien zeiden zij de wensen van de plaatselijke bevolking al te kennen.

Uit de uitgebreide en veelomvattende analyse van de belangrijkste actoren en factoren die een rol speelden bij de implementatie en handhaving van de wet, blijkt dat de lokale ambtenaren en wetshandhavers vaak niet zozeer handelden uit eigen belang of het belang van hun naasten, maar dat zij de wet- en regelgeving betreffende gebruik van hulpbronnen in de Mahakam Delta niet altijd effectief implementeerden vanwege een combinatie van rationele en emotionele overwegingen.

De plaatselijke ambtenaren realiseerden zich dat, als zij zich niet zouden aanpassen aan en reageren op de realiteit en de wetten en regelingen op een rigide manier zouden implementeren, dit waarschijnlijk meer nadelige gevolgen dan voordelen zou hebben. Zij waren zich er volledig van bewust dat als zij niet enige vorm van compensatie zouden aanbieden, dat implementeren en afdwingen van de wet het bestaan van de plaatselijke bewoners zou verslechteren. De plaatselijke ambtenaren zouden vier risico's lopen als zij de wet streng zouden implementeren en handhaven. Ten eerste zou het moeilijker zijn om hun eigen plannen en activiteiten te realiseren vanwege gebrek aan *goodwill* bij de bevolking. Ten tweede zouden de plaatselijke bewoners, als de wet geïmplementeerd zou worden, de ambtenaren in gevaar kunnen brengen. Ten derde liepen de plaatselijke ambtenaren het risico hun sociale erkenning onder de plaatselijke bevolking te verliezen. En ten vierde, als de wet strenger zou worden geïmplementeerd, vreesde men extra werkdruk, en dat terwijl de plaatselijke overheid te kampen had met een gebrek aan middelen.

Wat betreft de emotionele overwegingen, deze hadden voornamelijk te maken met sociale betrokkenheid. Deze betrokkenheid werd vooral opgewekt door gevoelens van medeleven en respect, die hierboven beschreven zijn. De ambtenaren realiseerden zich dat de bewoners al lang in de Delta woonden en de hulpbronnen nodig hadden voor hun bestaan. Zulke overwegingen van rechtvaardigheid werden vaak versterkt wanneer de lokale ambtenaren onrechtvaardige situaties tegenkwamen waarbij bijvoorbeeld de centrale overheid weinig aandacht besteedde aan de 'Bosgebieden' in de Delta terwijl dichtbij olie- en gasmaatschappijen enorme winsten boekten.

De sociale betrokkenheid van de plaatselijke ambtenaren, in combinatie met het gebrek aan consistentie en coherentie in de wetgeving, leidden ertoe dat zij het bestaande gebruik van hulpbronnen door plaatselijke bewoners terecht achtten, en juridisch aanvaardbaar. Met hun betrokkenheid en juridische interpretaties, waren ambtenaren niet alleen responsief en tegemoetkomend, maar traden zij bij bepaalde gelegenheden zelfs op als verdedigers van lokale gebruikers van hulpbronnen.

Tegen deze achtergrond stelt dit boek dat gebreken bij de implementatie en wetshandhaving niet altijd wijzen op lokale bureaucraten die puur uit eigen belang handelen. Veeleer proberen zij het evenwicht te bewaren tussen aanpassing aan externe invloeden enerzijds, en behoud van autonomie anderzijds.

Deze studie beveelt sterk aan dat meer onderzoek wordt verricht naar het beheer van de Mahakam Delta om nog beter te begrijpen op welke manier

implementatie van recht hier in zijn werk gaat. Dergelijk vervolgonderzoek zal bijdragen tot de vorming van perspectieven waarin niet bij voorbaat de rol van plaatselijke ambtenaren of bureaucraten – bij hun confrontatie met juridische en niet-juridische factoren in het proces van implementatie van wet- en regelgeving – in twijfel wordt getrokken. Zulke inzichten zouden kunnen helpen bij het maken van toekomstig beleid en relevante regelgeving. Om relevant te zijn, is het van belang voor zulke regelgeving inzake informeel en semi-informeel gebruik van hulpbronnen, dat deze door de plaatselijke ambtenaren en lokale gebruikers samen wordt opgesteld.

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List of figures, maps, tables and pictures

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Appendix 1

List of regulations

Regulations on Forestry

Number/Year	*Name*
Law No. 41/1999	On Forestry, has superseded Law No. 5/1967
Government Regulation No. 28/1985	On Forest Protection
Government Regulation No. 44/2004	On Forest Planning, has superseded Government Regulation No. 33/1970
Government Regulation No. 45/2004	On Forest Protection, has superseded Government Regulation No. 28/1985
Government Regulation No. 6/2007	Concerning Forest Management, and the Formation of Forest Plans and Forest Utilization
The Decree of the Minister of Forestry No. 32/Kpts-II/2001	On Criteria of Forest Establishment
The Decree of the Minister of Forestry No. 79/Kpts-II/2001	Concerning the Designation of the Forest and Water Areas of East Kalimantan
Regulation of the Minister of Forestry No. P.14/Menhut-II/2006	Concerning Forest Permit Use
Circular letter of Kutai District Head No.100/75/Pem A/IV/2003	Concerning Illegal Conversion of Mangrove into Fish Ponds and the Use of an Excavator

Regulations on Mining, Oil and Gas

Number/Year	*Name*
Law No. 11/1967	On Basic Provisions of Mining
Law No. 22/2001	On Oil and Gas, has superseded Law No. 44 Prp/1960
Government Regulation No. 35/2004	On Upstream Oil and Gas Activities
Presidential Directive No. 63/2004	Concerning the Security of a National Vital Object
The Decree of the Head of the Executive Agency of Upstream Oil and Gas Activities No. KEP-0113/BP00000/2007/S0	On Land Acquisition in the Petroleum Sector

Regulations on Fishery, Coastal Management and Sailing

Number/Year	*Name*
Law No. 31/2004	On Fisheries, has superseded Law No. 9/1985
Law No. 22/2007	On Coastal Zones and Small Island Management
Law No. 17/2008	On Sailing, has superseded Law No. 21/1992
Government Regulation No. 54/2002	On Fishery Business, has superseded Government Regulation No. 15/1990
Government Regulation No. 45/2004	On Forest Exploitation Rights and Rights to Collect Forest Products, has superseded Government Regulation No. 21/1970
Presidential Decree No. 39/1980	On the Eradication of Trawl Fishing
The Regulation of the Ministry of Marine Affairs and Fisheries No. Per.05/Men/2008	On Capturing Fish Business
The Regulation of the Minister of Marine Affairs and Fisheries No. PER.02/MEN/2011	On Fishing Zones Division, has superseded the Decree of the Minister of Agriculture No. 607/Kpts/UM/9/1976
Kutai Regulation No. 3/1999	Concerning Fishing within the Administrative Territory of Kutai District, has superseded Kutai Regulation No. 18/1978
Kutai Regulation No. 34/2000	On Quality Control of Milkfish and Fish Seeds
Kutai Regulation No. 37/2000	On Organoleptic Quality Control

Number/Year	*Name*
Circular Letter of the Directorate-General for Fishery of the Ministry of Agriculture No. E.V/2/4/15/1975	Concerning the Prohibition to Sail or Fish Around Oil and Gas Platforms
Circular letter of the Kutai District Head No. 100/287/Pem.A/VI/ 2004	Concerning the Prohibition of Gear Installations along a Public Sailing Lane
The Decree of Kutai District Head No. 180.188/HK-458/2001	Concerning the Task Force on Integrated and Sustainable Management of the Mahakam Delta

Regulations on Land

Number/Year	*Name*
Law No. 5/1960	Basic Agrarian Law
Law No. 4/1996	On Mortgage over Land and Related Properties
Government Regulation No. 24/1997	On Land Registration
Presidential Regulation No. 10/2006	On the National Land Agency
The Regulation of the Ministry of Home Affairs No. 6/1972	On the Transfer of Authority to Issue Land Titles, has been superseded by the Regulation of the Head of the National Land Agency No. 3/1999
Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 2/1999	On Location Permits
The Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 3/1997	On Land Registration
The Decree of the Governor of East Kalimantan No. 237/1974	On the Cultivation of State-Owned Agricultural Land

Number/Year	*Name*
The Decree of the Governor of East Kalimantan No. 31/1995	On the Guidance to Control Land Letters and Control and Ownership of Building/Plans on State Land
Kutai Regulation No. 32/2000	On Location Permits
The Decree of Kutai District Head No. 180.188/HK-630/2008	On the Basic Price of Compensation Lists, has superseded the Decree of Kutai District Head No. 083/1993

Regulations on Environment and Spatial Planning

Number/Year	*Name*
Law No. 26/2007	On Spatial Planning, has superseded Law No. 24/1992
Presidential Decree No. 32/1990	Concerning the Management of Protected Zones

Regulations on Regional Autonomy

Number/Year	*Name*
Law No. 32/2004	On Regional Autonomy, has superseded Law No. 22/1999
Government Regulation No. 64/1957	On Partial Delegation of Government Affairs on Fishing, Forestry and Small-Scale Rubber Plantations to Provinces
Government Regulation No. 8/1995	On the Transfer of Some Government Affairs to 26 Districts/Municipalities
Government Regulation No. 38/2007	On Central and Regional Government's Authorities, has superseded Government Regulation No. 25 of 2000
Government Regulation No. 41/2007	On the Organizational Structure of Regional Governments
Kutai Regulation No. 11/2008	On the Authority of Kutai Government, has superseded Kutai Regulation No. 27/2000

Regulations on Organizational Structure of Government

Number/Year	*Name*
Law No. 39/2008	On State Ministries
Government Regulation No. 47/2009	On the Formation of State Ministries' Organization
Presidential Regulation No. 47/2009	On the Organizational Structure of the Ministry of Forestry
Presidential Decree No. 103/2001	On the Functions, Tasks, Authority and Organizational Structure of Non-Ministerial Departments
The Regulation of the Minister of Home Affairs No. 57/2007	Concerning the Organizational Structure of Regional Governments
The Regulation of the Minister of Administrative Reform No. PER/18/M. PAN/11/2008	Concerning a Guide for Forming the Organization of a Service Unit of the Departmental and Non-Departmental Ministries
Regulation of the Minister of Forestry No. P. 40/Menhut-II/2010	Concerning the Organizational Structure of the Ministry of Forestry
The Decree of the Governor of East Kalimantan No. 03/2005	On the Formation of the Organizational Structure of the Provincial Technical Units, has superseded the Decree of Governor of East Kalimantan No. 16 of 2001
Kutai Regulation No. 12/2008	Concerning the Organizational Structure of Kutai District Agencies
Kutai Regulation No. 15/2008	Concerning the Organizational Structure of the District Inspectorate, Office and Technical Unit

Regulations on Inter-departmental Synchronization

Number/Year	*Name*
President Directive No. 1/1976	On the Synchronization of Agrarian, Forestry, Mining, Transmigration and Public Sector Works

Appendix 2

List of court decisions

District & High Court

1. District Court of Tenggarong, verdict No. 03/Pdt.G/2003/PN.Tgr, and No. 44/Pdt.G/2003/PN Tgr., *Haji Onggeng and others 57 plaintiffs vs. Haji Latief and Haji Onggeng*, concerning a dispute on cultivated land.
2. High Court of East Kalimantan, verdict No. 132/PDT/2006/PT.KT.SMDA, *Haji Onggeng and others 57 plaintiffs vs. Haji Latief and Haji Onggeng*, concerning a dispute on cultivated land.

Supreme Court

1. Supreme Court of the Republic of Indonesia, verdict No. 361 K/Sip/1958, *Djojosentono alias Tukijo .v. mBok Kromodimedjo*, concerning a dispute on land between two families which had been settled by village government before the case was filed in court.
2. Supreme Court of the Republic of Indonesia, verdict No. 123/K/Sip/1970, *I Wajan Minah and I Made Suartha .v. Men Suari alias Ni Ketut Sitiari*, concerning the bequest (*hibah*) of land in accordance with Bali adat law.
3. Supreme Court of the Republic of Indonesia, verdict No.1300 K/Pdt/2005, *Seven Fishermen .v. PT. ITCI Kartika and the Ministry of Public Transportation of the Republic of Indonesia* concerning fishing grounds.
4. Supreme Court of the Republic of Indonesia, verdict No. 2642 K/Pid/2006 concerning illegal use and occupation of Forest Area in South Tapanuli district, North Sumatera.
5. Supreme Court of the Republic of Indonesia, verdict No. 28 PK/TUN/2006, *Junaidi bin Mada .v. Balikpapan Regional Office of National Land Agency and Hengki Wijaya*, concerning cultivated land.

Constitutional Court

1. Constitutional Court of the Republic of Indonesia, verdict No. 3/PUU-VIII/2010 concerning judicial review of Law No. 22/2007 on Coastal Zones and Small Island Management.
2. Constitutional Court of the Republic of Indonesia, verdict No. 45/PUU-IX/2011 concerning judicial review of Law No. 41/1999 on Forestry.

Curriculum vitae

Rikardo Simarmata obtained a bachelor degree in law from the Faculty of Law of Gadjah Mada University, Yogyakarta, in 1997. During his years at the university, he was actively involved in a number of student organizations, in particular in the student press. From 1998 up to 2001, he worked at the Institute for Policy Research and Social Advocacy (Lembaga Studi dan Advokasi Masyarakat), a Jakarta-based human rights NGO. In 2001, together with other NGO activists and university lecturers, he established a new NGO called Community and Ecology Based Society for Law Reform or HUMA. He has conducted numerous research projects on forestry, fishery and land issues in relation to the rights of indigenous peoples, as well as facilitated several training sessions on policy analysis, critical thinking on law and legal drafting. In 2007 he was accepted as a PhD researcher at the Van Vollenhoven Institute of Leiden University. In the roles of NGO activist and consultant, he wrote a number of books. These include *Otonomi Daerah Kecenderungan Karakter Perda dan Tekanan Baru bagi Lingkungan dan Masyarakat Adat: Sebuah Diagnosa Awal* [Regional Autonomy and the Character of Local Government Laws and Regulations: New Pressures on the Environment and Indigenous Communities] (2002) and *Pengakuan Hukum terhadap Masyarakat Adat di Indonesia* [Legal Recognition of Indigenous Peoples in Indonesia] (2006). In addition, he wrote a number of articles which were published both in international and national journals.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2011, 2012 and 2013

MI-189 M.R. Bruning, M.P. de Jong, T. Liefaard, P.M. Schuyt, J.E. Doek & T.A.H. Doreleijers, *Wegwijs in het jeugdsanctierecht. Onderzoek naar het juridisch kader voor de zwaarste jeugdsancties in theorie en praktijk,* Nijmegen: Wolf Legal Publishers 2011, ISBN 978 90 5850 621 4

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