Indonesian law and leality in the Delta : a socio-legal inquiry into laws, local bureaucrats and natural resources management in the Mahakam Delta, East Kalimantan

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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

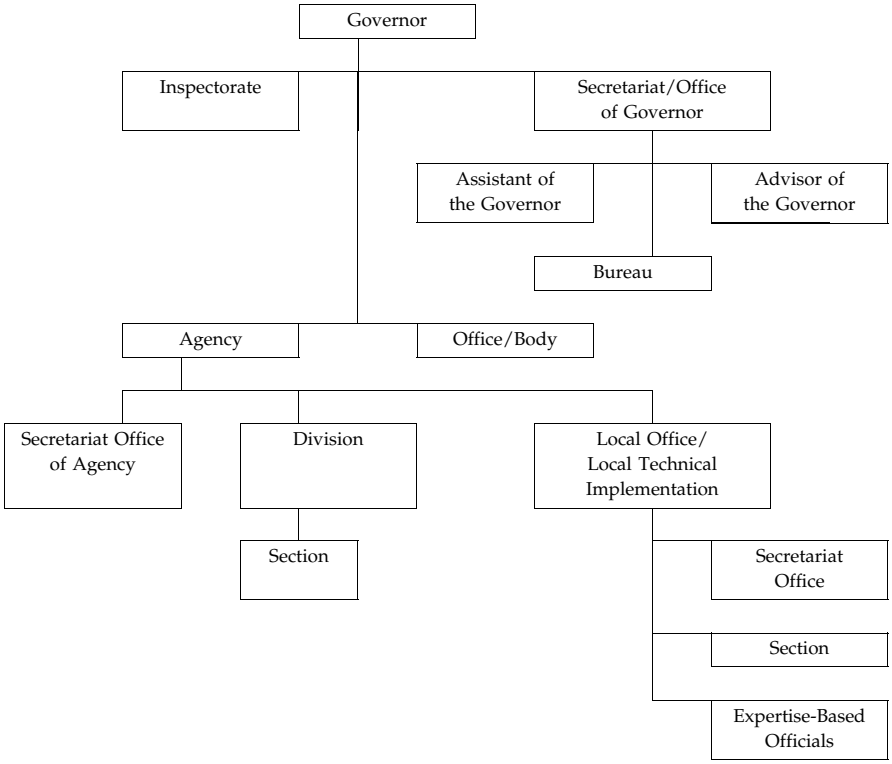
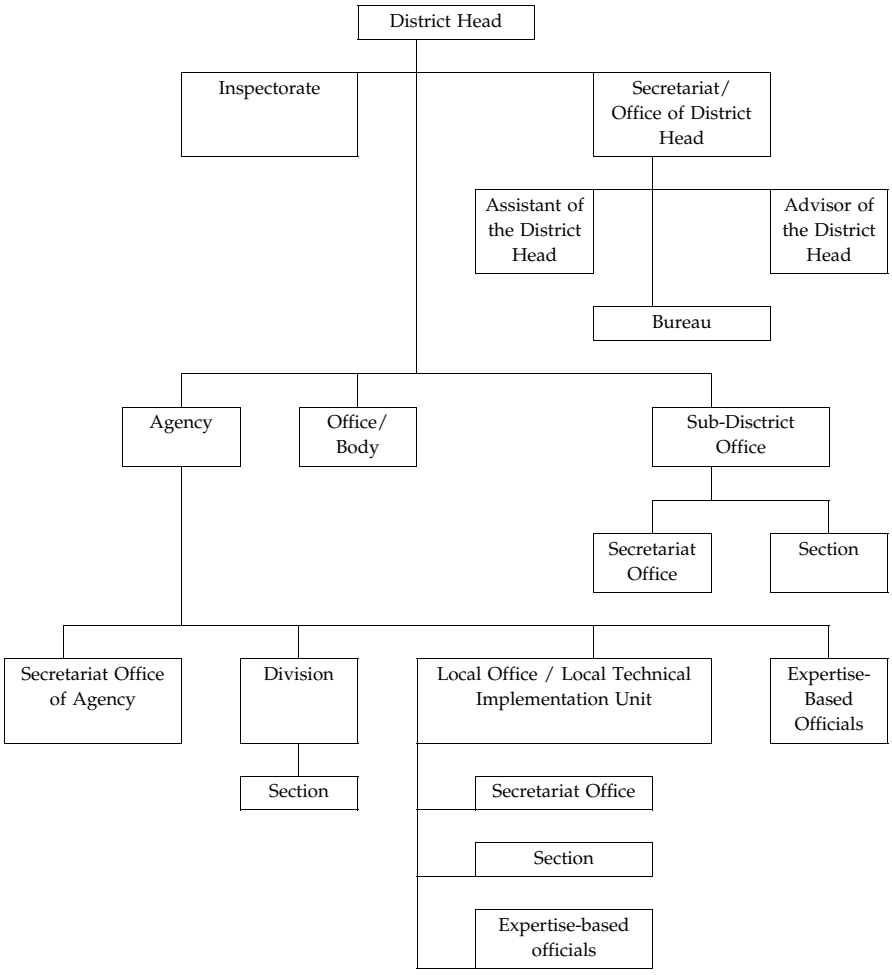


Figure 4.2: Organizational structure of the district government

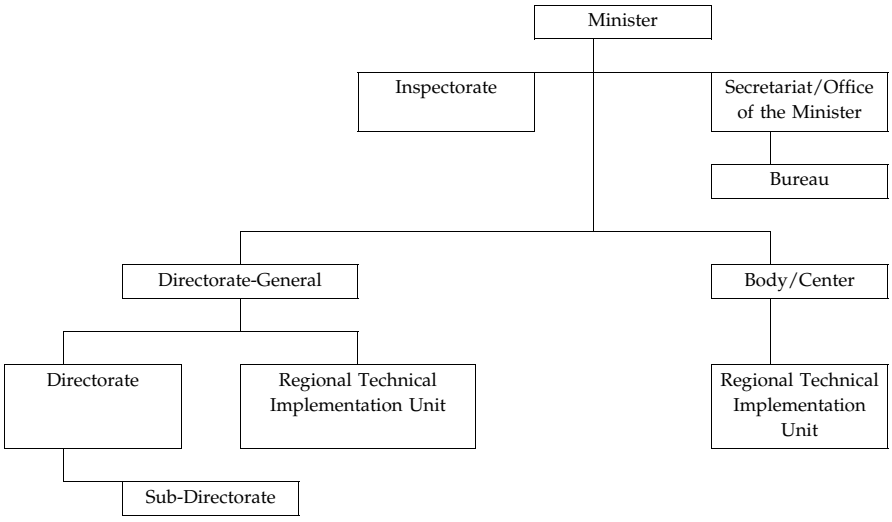


4.2 GOVERNMENT STRUCTURE: VERTICAL OR SECTORAL GOVERNMENT

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

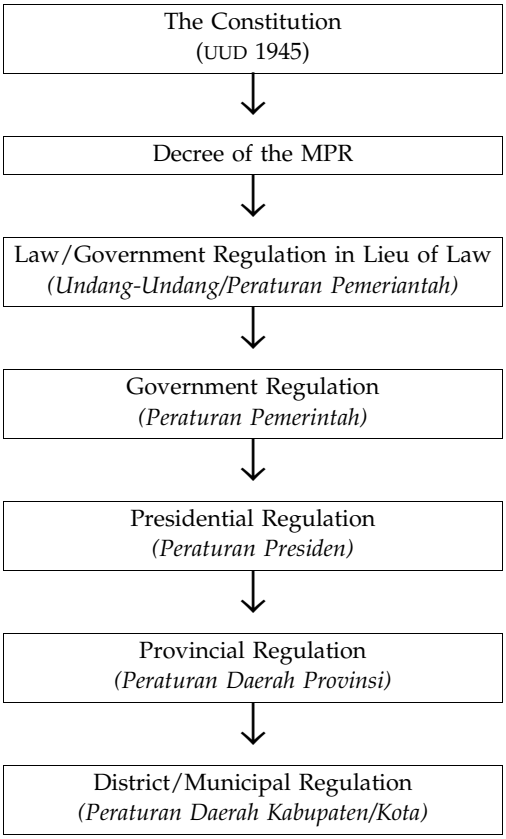
35 The departmental ministries are the Ministry of Foreign Affair, the Ministry of Defense, the Ministry of Justice and Human Rights, the Ministry of Finance, and the Ministry of Religion.

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