# 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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# 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.

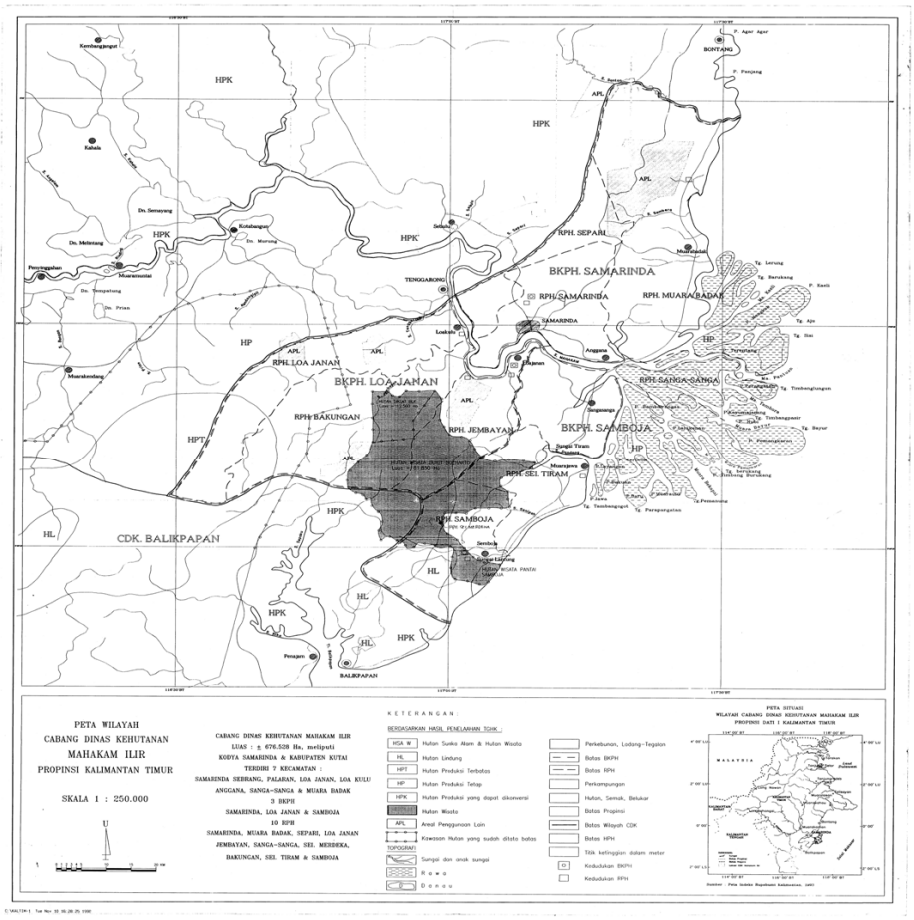
65 The remaining 3,591,625 ha of the Forest Areas of East Kalimantan were controlled by Perhutani, a state-owned company. See in Bappeda Kabupaten Kutai (1971, p. 66), and Magenda (1991, p. 78).

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 15$^{th}$ 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.