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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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7 | The sea: open or exclusive?

7.1 INTRODUCTION

The productivity of the shrimp ponds of the Mahakam Delta started to decrease in 2001, after a remarkable period of four or five years of good harvests. As a result some people returned to their former profession of fishing. Yet, they soon realized that there was less fishing ground available than before due to the growing number of oil and gas platforms, which occupied some of the traditional fishing grounds. These developments led the former shrimp farmers to seek an opportunity to earn money elsewhere. They regarded the petroleum exploration as a source of money of which they sought to obtain a small part for themselves. They believed that the oil company, as a rich business had the moral obligation to share a small part of its fortune with the less fortunate villagers. This belief led to devising a trick. They installed a tidal trap (*julu*) in the vicinity of the companies' platforms¹ on the assumption that one day the companies' transport would crash into their gear. This would suffice to claim compensation for the damage they caused.

As the trick initially succeeded, the number of new gear installations gradually increased. The Kutai District Team on Dispute Settlement which was actively involved in settling disputes concerning fisheries had observed this trend. In order to control the situation, the team introduced a regulation. However, instead of forming a whole new set of norms, the new regulation largely referred to existing legal norms and only added one small provision which was specifically meant to control the increase of gear instalments. It states that any gear installation in the vicinity of the companies' platforms is prohibited (see Section 6.2 on an earlier account of the new regulation).

It was not the first time that the Kutai District government added a new provision to its regulations to enhance its control over fishery resource use. It happened before in 1999 and 2000. In some aspects, as we will see below (see Section 7.4), the new provisions contradicted the provisions of national fishery regulations. However, due to a variety of factors the Kutai District

1 Mini trawls and tidal traps are the most common fishing methods in the Mahakam Delta. Other types of gears, that are used more rarely in the Mahakam Delta are trammel net (*gondrong*), shore-operated stationary lift net (*bagan*), pot (*bubu*) and hook and line (*pancing*). See Sandjatomiko et al. (2005, p. 114-120) and Dinas Perikanan dan Kelautan Kutai Kartanegara (2008b, p. 13).

government was not really able to exercise control over fishery resource use. Some research done in 2002, 2003 and 2008 revealed the widespread inefficiency in the implementation of the Kutai fishing regulations and policies in the Mahakam Delta.

The abovementioned ambiguity, whereby the Kutai District government on paper continued to gain greater control over the fishery resource use, whilst in reality this control was not effectively implemented has traditionally been a feature in the Kutai fishery regulation system. The situation has resulted in only a few fisheries in the Mahakam Delta complying with formal fishery regulations. Within that situation, dispute settlements over natural resources use led by the Kutai District government are characterized by an *ad hoc* approach and most of the time depend on a situational bargaining relation between companies and fishermen or farmers.

At the same time, in the locations where the regulations were meant to serve the interests of oil and gas extraction (see Chapter 6), the prohibition of gear installations nearby companies' platforms was also meant to diminish open access to fishery resources. Particular forms of fishery resource use were restricted to ensure that forms of non-fishery resource use could be run without being endangered by fishery resource use, notably catching fish. This policy has certainly affected fishing which has long practiced open access which co-exists with common and private property.

7.2 LAW-MAKING AND LEGISLATION: MAIN LAWS AND PROVISIONS

Unlike the case of forestry but similar to regulation of oil and gas resource use in the Mahakam Delta, the state has not exercised control over fishery resource use through a territorial strategy.² As is generally the case across Indonesian waters, formal state control over the use of fishery resource in the Mahakam Delta has been run through a combination of input and output control. Input control has placed restrictions amongst others upon the number and size of fishing vessels (fishing capacity control), the maximum amount of time fishing vessels are allowed to fish (vessel usage control). Output control has been conducted through direct limitations on the total amount of fish leaving a fishery, which in other words, equals the total amount of fish that

2 Territorial strategy in essence is a spatial organization of state control by physically delineating particular geographic areas or zones as state property followed by the passage of state jurisdiction over the delineated areas/zones. The passage of the jurisdiction subsequently implies the exercise of state rules which determine how and by whom the resources within the delineated areas/zones could be used. For an extensive account of territorial strategy see Vandergeest and Peluso (1995, p. 387); Kumar and Choudary (2006).

can be caught (Pope 2002, p. 76).³ In a simple formulation Satria and Matsuda (2004) point out that state control over fishery management in Indonesia has always occurred through licenses and zone restrictions. As a result the state never practiced a territorial strategy in exercising control over fishery resource use.

The way in which the state exercises formal control over fishery resource use in the Mahakam Delta has remained unchanged, despite the introduction in 2007 of exclusive rights through territorial use rights in Indonesian fishery legislation after the enactment of Law No. 22/2007 on Coastal Zones and Small Island Management.⁴ This is mainly due to a lack of implementing regulations of the law. Moreover, the implementation of the law has encountered the acute problem current in Indonesian public administration that respective departments have their own laws which leads to sectoral manner (Patlis et al. 2001, p. 28; Patlis 2005, p. 451-452; Waddell 2009, p. 190). The most recent challenge to the implementation of the law is a verdict of the Indonesian Constitutional Court which declared thirteen articles of the law void.⁵

According to Saad (2003) the absence of a territorial strategy in fishery resource management is inevitable due to the application of the common property doctrine in Indonesian fishery laws. Under the common property regime anyone is free to fish in Indonesian marine territories once they have obtained a fishing permit on the condition that they fish in permitted fishing zones as well as use proper gear and vessel (Saad 2003, p. 95 and 99). Hence, unlike in forestry management, in fishery management the state does not delineate particular marine areas as state or private property to determine who would be allowed to utilize fishery resource in the designated areas.

After independence, the common property doctrine in fishery affairs was first regulated in the Decree of the Minister of Agriculture No. 607/Kpts/UM/

3 Referring to state control over fishery management has often been used to contest notions in which it was incorrectly concluded that Indonesian fishery management falls under an open access regime (Bailey 1997, p. 234; Saad 2003, p. 95 and 105). According to the opposite view, Indonesian fishery resource management is open access *de facto*, but not *de jure* (Satria and Matsuda 2004, Patlis 2007, p. 205).

4 Territorial use rights are defined as the exclusive rights of a person or community to the use of fishery resources within a certain area (Christy 1982; Christy 1997, p. 42). In Law No. 22/2007 the introduction of the concept of territorial use rights can be seen in coastal water use rights (*Hak Pengusahaan Perairan Pesisir*, abbrev. HP3). A former legal scholar who became a bureaucrat suggested that the introduction of exclusive territorial rights in the law is a breakthrough for it has released the Indonesian fishery rule regime from the open access doctrine. See further, Saad at <http://lautmenyapa.blogspot.com/2008/11/hak-pengusahaan-perairan-pesisir.html> (accessed on 15 July 2010).

5 See verdict of the Indonesian Constitutional Court No. 3/PUU-VIII/2010. The verdict was made in response to a judicial review application of several NGOs and fishermen who had argued those provisions were in contradiction with the 1945 Constitution.

9/1976 on Fishing Zones Division (Saad 2003, p. 97).⁶ The decree basically regulated the division of fishing zones, and the types and sizes of vessels and gear which could be used. The decree divided the Indonesian marine territory into four fishing zones. Zone I (0-3 nautical miles from the coast) was meant for small-scale fishermen; boats with an inboard engine of more than 5 Gross Tonnage and trawl were prohibited. Zone II-IV were meant for large-scale fishing with a larger size vessel and engine. Apart from regulating the division of fishing zones and types and sizes of vessel and gear, the 1976 Decree also implicitly stipulated the requirement of a fishery permit to be allowed to fish.

The way the 1976 Decree administered fishery resource use has largely inspired subsequent fishery regulations including Law No. 9/1985 on Fisheries.⁷ The decree has also impacted local regulations of East Kalimantan Province and Kutai District concerning fisheries. The following sections describe the extent to which this principle from the 1976 Decree has affected the main provisions of subsequent fishery regulations in later decades. Besides describing some main provisions, the following sections also seek to examine how the local fishery regulations have been formulated. For this purpose special attention will be paid to the drafting process of six Kutai regulations which took place in the course of 2004-2009.

7.2.1 Some Main Provisions

Even though independent Indonesia had its first own-produced Fisheries Law in 1985, state control over fishery management had been officially exercised since the 1950s. A Government Regulation on the Partial Devolution of Government Affairs concerning Marine Fisheries, Forest and Small Timber Plantations to Regional Government in 1957 stated that regional governments could issue fishery permits.⁸ During the 1970s, the Ministry of Agriculture passed eleven decrees concerning fisheries. Given that those eleven decrees applied the common property doctrine, they only regulated the division of fishing zones,⁹ types and size of gear, fishery levies, seasonal closures as well as fishery conservation (Saad 2003, p. 96-97).¹⁰ From literature on fishery it can be con-

6 The decree has been amended by the Decree of the Minister of Marine Affairs and Fisheries No. 392/1999, and recently by the Regulation of the Minister of Marine Affairs and Fisheries No. PER.02/MEN/2011. In the recent regulation, the marine zones are divided into three fishing zones as an attempt to adjust to the provision of Law No. 32/2004 on Regional Autonomy. The issuance of the decree aims at protecting small-scale fishermen from large-scale fishermen who usually use large boats. By specifically allocating Zone I to small-scale fishermen, the decree intended to refrain large-scale fishermen from entering Zone I. See Bailey (1988), Bailey (1997), Tribawono (2002), and Jhamtani (2003).

7 The 1985 Law on Fisheries has been replaced by Law No. 31/2004.

8 Government Regulation No. 64/1957.

9 See the Decree of the Minister of Agriculture No. 01/1975, and No. 123/1975.

10 See the Decree of the Minister of Agriculture No. 327/1972, and No. 35/1975.

cluded that quota, seasonal closures, gear restrictions, taxes or licenses have become the most accepted means in government policies to resolve over-exploitation of fishery resource use (Keen 1983, p. 199-201; Smith and Panayotou 1984, p. 351). The means of control of fishery management as stipulated in those eleven regulations have been reasserted and reproduced by later fishery regulations including by the East Kalimantan Province and Kutai District fishery regulations.

In East Kalimantan the exercise of state control over fishery resource use during the 1960s through to the early 1970s was even more visible compared to the situation at the national level. During a period of State Emergency (1957-1963) local military officers issued some fishing permits. Under the New Order regime, in 1969 the Provincial government enacted Regional Regulation No. DPRGR-Prop/08/PD/1969 concerning Fishery Permits. The regulation provided legal certainty to any fisherman who held a fishing permit issued by the Provincial government. Interestingly, in 1973 the Head of the Provincial Fisheries Agency issued a decree stating that all former fishing permits which had been issued by other provincial agencies other than the Fisheries Agency, were no longer valid from the day the decree was officially issued.¹¹ In 2005, on the basis of the decree, in the case *Seven Fishermen v. PT. ITCI Kartika and the Ministry of Public Transportation of the Republic of Indonesia*, the Supreme Court's decision was in favour of PT. ITCI Kartika and the Ministry of Public Transportation. The judges argued that the fishery permits that the seven fishermen had obtained from the colonial rulers in 1931 which was later supported by a permit issued by a local military officer in 1960, and a letter issued by a head of an urban-quarter (*lurah*) in 1984 were no longer valid in accordance with the 1973 Decree.¹² Another Provincial Regulation issued during the period was the Decree of the Governor of East Kalimantan No. 75/1973 concerning the Prohibition of the Use of Shore-Operated Stationary Lift Nets.

In an attempt to implement the 1976 Decree, the Kutai District government promulgated Regional Regulation No. 18/1978 concerning Fishing within the Administrative Territory of Kutai District. Kutai Regulation No. 18/1978 reiterated two matters that had been stated in the 1976 Decree, namely that the fishing territory would be divided into four fishing zones, and that any use of fishery resources should be undertaken through a Fishery Business License (FBL) and a license for using a vessel. Another important provision in the 1978 Kutai Regulation concerns fishery sanctuaries where fishing was

11 The Decree is number 2002/3/1973, dated 1 February 1973.

12 This case arose when PT. ITCI Kartika used the fishing zone of the seven fishermen which was located in Balikpapan Seberang sub-district as a log pond without prior consultation with the fishermen. The timber company did not believe they violated the law as they obtained a permit to use the area from a Regional Agency of the Ministry of Public Transportation. See Supreme Court Verdict No. 1300 K/Pdt/2005.

totally forbidden. The Kutai Regulation designated eleven fishery sanctuaries, but none of these were located in the marine part of the Mahakam Delta (Hartoto 1997, p. 78; Sumaryono, Kreb and Budiono n.d., p. 3). In an effort to protect the fishery sanctuaries the Kutai District Head subsequently issued a decree concerning a Sub-District Committee on Fishery Resources Conservation.¹³ The members of the committee comprised of local police, a military officer, a village head and a sub-district head. The committee was authorized to carry out supervision and surveillance in the fishery sanctuaries as well as to detain those who illegally fished in the sanctuaries.

Meanwhile on the national level the 1985 Fisheries Law was enacted, followed by regulations of implementation.¹⁴ Yet with regard to substance, the change was not significant as all means of control mentioned in those regulations were still based on the former fishery regulations. What had been done successfully by the new fishery regulations was the organisation of norms into a structured order. In addition, the regulations provided some further detail such as adding two other types of fishery permits, the length of validity of the fishery permits, obligations of permit holders as well as sanctions. Besides the two preceding fishery permits (FBL and a license for using a vessel), the Fishing License (FL) and a license for transporting the catch were introduced.¹⁵ With regard to sanctions, the regulations stated that any fisherman who fished on a large scale without a permit could receive a maximum of 2.5 years imprisonment or a maximum fine of IDR 250,000,000-IDR 500,000,000 (equal to US\$ 2,940-US\$ 5,880),¹⁶ whereas small-scale fishermen could receive a maximum of six months imprisonment or a maximum fine of IDR 5,000,000. An implementing government regulation also set a maximum fine of IDR 250,000,000 (equal to US\$ 2,940) for any non-compliance with the provisions on gear type and size, fishing zone, quota as well as fish disease prevention.

Meanwhile, the 1985 Law on Fisheries and its subsequent implementing regulations also introduced a few new provisions. Firstly, they contained

13 No. 79/1978 as has been replaced by a Decree of the Head of the Kutai Fisheries Agency No. E.1.5234/137A/SP/V/2009.

14 Some of those implementing regulations are Government Regulation No. 15/1990 on Fisheries Business as has been amended several times and recently superseded by Government Regulation No. 54/2002; the Decree of the Minister of Agriculture No. 815/Kpts/IK.120/11/90 on Fisheries Business; and No. 815/Kpts/IK.210/1990 on Fishing in Indonesia's Fishery Territory and Exclusive Economic Zone.

15 In brief FBL is given to allow anyone to maintain a fishery business either by capture, farm, collect or preserve fish. FBL is given to any fishing boat which bears the Indonesian flag and will be used for fishing. Meanwhile FL is a part of FBL. Any fishing boat, either using an Indonesian or a foreign flag, is allowed to transport a catch with this license. The 2002 Government Regulation No. 54/2002 made a change to the fishery permits by reducing its number from four to three. This change of fishery permits remained until a new Fishery Law was enacted in 2004. In terms of length of validity, FBL is the only type of fishery permit which does not have a time limit, while a Fishing License and license for boat which is used to transport the catch, expire.

16 US\$ 1 is equivalent to IDR 8,500.

provisions on aquaculture – an issue that the previous fishery regulations had missed. Secondly, with regard to state protection of small-scale fishermen and fish farmers, the new fishery regulations assigned government the task to keep records of small-scale fishing and aquaculture in the hope that the recorded information could be used to carry out control and supervision.¹⁷ In addition, those regulations defined small-scale fishermen and aquaculture farmers as the group of people who had a boat of less than 5 Gross Tonnage or who cultivated fish in an area of no more than 2 ha for inland aquaculture, 0.5 ha for sea water, and 4 ha for brackish water. The new law also prohibited ‘destructive and monopolistic’ gears in an effort to limit large aggressive types of equipment.

The Kutai District government reacted to the changes on the national level by dissolving the 1978 Regional Regulation and replacing it with Kutai Regulation No. 3/1999. In drafting this regulation, Kutai District government was assisted by some lecturers from the Faculty of Fisheries and Marine Science, University of Mulawarman, in Samarinda, the Provincial capital. The provisions of the Kutai Regulation No. 3/1999 are actually a mix between provisions taken from the 1978 Kutai Regulation and the 1985 Fisheries Law. Reiterating what had been stated in the 1985 Law, Kutai Regulation No. 3/1999 prohibits the use of destructive and monopolistic gears as well as catching breeding fish and trading fish eggs. In addition, the Kutai Regulation reiterates that the use of permitted gears should be in accordance with the rules on a fishing zone division.

Similar to the 1978 Regulation, the 1999 Kutai Regulation regulates fish sanctuaries as well. Yet the 1999 Regulation reduces the number of sanctuaries from eleven to nine. As was the case in the 1978 Regulation, the 1999 Regulation does not include any part of the Mahakam Delta in the list of designated sanctuaries. All the nine fish sanctuaries are situated up-stream from the Mahakam River. Any fishery resource use is prohibited in the sanctuaries unless it does not harm or destruct its fishery resources. The 1999 Regulation added another prohibition which existed neither in the 1978 Regulation nor in the 1985 Fisheries Law, stipulating that the installation of gear which could possibly endanger a public shipping line (Ind. *alur pelayaran*) would be prohibited.¹⁸ Anyone offending this rule could receive a maximum of three months imprisonment or a maximum fine of IDR 1,000,000 (equal to US\$ 115).

It is interesting to note that the 1999 Regulation does not have a single provision concerning fishing permits on capturing fish as had been stipulated in the 1985 Fisheries Law and its subsequent implementing regulations. Rather the 1999 Regulation introduces a new fishing permit. It is said that any fisher-

17 See 1985 on Fisheries, the Elucidation of Article 10 (2), Government Regulation No. 15/1990 on Fishery Business, article 14(3) elucidation and General Elucidation, and Government Regulation No. 54/2002 on Fishery Business, article 6 (3) and General Elucidation.

18 Article 8 of the Kutai Regulation No. 3/1999.

man who wishes to fish outside his village or sub-district should obtain a written letter from the village head and sub-district head of where the fishing grounds are situated.¹⁹ This provision is not only confusing, it is also in contradiction with the 1985 Fisheries Law and its subsequent implementing regulations which did not recognize fishing territory based on administrative boundaries. Nevertheless, the above provision is unlikely to be enforceable given that it is not accompanied by any sanctions.

Meanwhile, through Law No. 22/1999 on Regional Autonomy districts in Indonesia were given a much higher degree of regional autonomy. In order to implement this far-reaching law as soon as possible, the Kutai District government promulgated the regulation concerning the Authority of Kutai District government.²⁰ In particular with regard to marine affairs, the Kutai Regulation was inspired by a provision of the Law on Regional Autonomy which granted broader authority to provincial and district/municipal governments to manage their respective sea territories.²¹ The Law on Regional Autonomy of 1999 together with a subsequent government regulation gave the district and municipal government full authority to supervise and monitor any exploration, exploitation, conservation and management of marine resource use taking place within 0-3 nautical miles from the coast (Tribawono 2002; Saad 2003). The provision affected central government jurisdiction over the sea, which now applied to 12 nautical miles and beyond, leaving 0-12 nautical miles under district (0-3) and province jurisdiction (3-12) (Saad 2003, p.110-112). Like the Law on Regional Autonomy Kutai Regulation No. 27/2000 granted broad authority to Kutai District government in managing fishery affairs. The Kutai District government has the authority to issue a permit on both capture and fish farming. At the same day of the promulgation of the Kutai Regulation concerning the Authority of Kutai District government, two other Kutai regulations concerning fisheries were promulgated. The two Kutai regulations are respectively No. 34/2000 concerning Quality Control of Milkfish Fry²² and Fish Seeds, and No. 37/2000 concerning Organoleptic²³ Quality Control.

In addition, it enacted Kutai Regulation No. 36/2000 on Fishery Business, which due to its broader scope, could be considered as the most important of the above three regulations. Kutai Regulation No. 36/2000 regulates both

19 Article 3 and its Elucidation.

20 No. 27/2000 as has been amended by Kutai District Regulation No. 11/2008.

21 Article 10(2 and 3) of Law No. 22/1999.

22 Milkfish fry (Ind. *benur*) is the larvae of milkfish (Ind. *bandeng*) which grows in hatcheries. Milkfish fry has been developed to substitute wild-caught fry. See <http://www.larvalbase.org/MiniEssay.htm> and <http://en.wikipedia.org/wiki/Milkfish> (downloaded on 18 July 2012).

23 The term 'organoleptic' points to the sensory properties of a particular food or chemical as experienced by the senses, including taste, sight, smell, and touch to detect signs of disease or contamination. See <http://en.wikipedia.org/wiki/Organoleptic> (downloaded on 18 July 2012).

capture and aquaculture making it the first Kutai Regulation since the 1960s to regulate fishery resource use comprehensively. Nevertheless, in terms of norms most of its provisions repeated what had been stipulated in the 1985 Fisheries Law and its implementing regulations. To give an example, it recalled that every applicant of a fishery permit should provide in advance a location permit, an environmental impact assessment, a certificate of company establishment, a tax registration number, a business plan and a letter of declaration explaining that the applicant is willing to establish a branch office in the capital town of Kutai Kartanegara District. The last condition is that the applicant holds the so-called Small Scale Fisheries Registration Certificate (Ind. *Tanda Pencatatan Kegiatan Perikanan* abbrev. SSFRC), which is valid for one year with the possibility of renewing it for another year.

Even though most of the provisions of the 2000 Kutai Regulation on Fishery Business are similar to higher national legislation on fishery, it also invented some new provisions which the higher national legislation did not stipulate. Firstly, the Kutai Regulation sets almost the same requirements for obtaining a FBL as a SSFRC. Three of the requirements are permit location, business plan, and letter of recommendation from the Kutai Fisheries Agency. Secondly, it restricts the length of validity of a FBL to thirty years with the possibility of another twenty years of extension. Later in 2008 national fishery legislation adopted the invented norm by revising the length of validity to sixty years including one extension.²⁴ Thirdly, it elevated SSFRC to the same status as FBL.

Meanwhile the enactment of two other Kutai regulations in 2000 enhanced government formal control over fishery resource use. Apart from controlling the capturing of fish and aquaculture, the Kutai District government now extended its control to any transported and traded fish seeds, particularly shrimp and milkfish seeds, and processed-fish product. The examination is aimed at preventing the rise of pests and diseases that may affect the fish. A laboratory, operated by the Kutai Fisheries Agency, is expected to carry out an examination of the transported and traded fish seeds and processed-fish products in an attempt to measure whether they meet the quality standards. The Kutai Fisheries Agency issues a certificate when someone or a legal body meets the criteria.

The drafting and enactment of Kutai regulations on fishery resource use from 2004 onwards show a new dynamic when compared with the previous periods. Not only the dynamic differs, but also the volume. During 2004-2009, Kutai District government initiated four Kutai Draft Regulations, one Draft Regulation of the Kutai District Head and one circular letter. Prior to that period, in 2003 the Kutai District government had only issued the Circular Letter concerning Illegal Ponds and Digging Machines (see Section 5.1 for an

24 See the Regulation of the Minister of Marine Affairs and Fisheries No. Per.05/Men/2008 on Capturing Fish Business.

account of this letter). Agencies involved in the drafting process in this period varied, and so are the subject matters which are regulated. The Kutai Fisheries Agency is no longer the only agency which initiated draft regulations on fishery because other agencies took initiatives as well. The reasons for drafting and enacting the Kutai regulations are diverse, ranging from technical and incidental to substantial and future-oriented. The diversity of reasons eventually translates into various subject matters and goals of the enacted and drafted regulations.

7.2.2 Law-Making in Kutai District

The following section describes the six initiatives of regional law-making of fisheries regulations in Kutai District. It pays attention to reasons, input gathering methods as well as substance. In terms of the initiating agency the six initiatives could be divided into three groups. The first agency to initiate the drafting of regulations was Kutai Fisheries Agency. This agency undertook three initiatives which resulted in the Draft Regulation on Fisheries Levy, the revision of Kutai Regulation No. 3/1999 on Fishing, and the Draft Regulation on Fisheries and Marine Management of the Mahakam Delta. Secondly, some regional law-making was initiated by other agencies beside the Fishery Agency. This included the Kutai Draft Regulation on Fishery Business. Thirdly, some regional law-making was the result from a joint collaboration. This applies to the Decree of the Kutai District Head on the Prohibition of the Installation of Gears on Public Shipping Line, and the Draft Regulation of the Kutai District Head on Standardized Pond.

Initiated by the Kutai Fisheries Agency

Since 2005, the Kutai Fisheries Agency has experienced quite a stable leadership. A few years before 2005, most of the staff was opposed to their former head which led to resistance.²⁵ Apart from the issue of leadership, another issue arose at the time, namely that their head did not have a degree in fishery. Interestingly, the new head who was appointed in 2005 did not have a degree in fishery either. He is a forester by training and has spent most of his time working at the Kutai Agricultural Agency. His longstanding work at the Agricultural Agency which office is located right next to the office of the Fisheries Agency apparently helped him to be smoothly accepted by the staff of the Fisheries Agency. With an increased budget from an equivalent of ten thousand dollars to a million dollars per year, the new head successfully

25 Interview Mnt, a staff of Division for Control and Surveillance of Kutai Fishery Agency, 19/8/2009.

stabilized the internal office politics of the Fisheries Agency.²⁶ In any case, with such annual budget it is not surprising that during 2005-2009 the Fisheries Agency was able to yield three Kutai Draft Regulations, even if none of them were eventually enacted.

Where did the demand for these three Kutai Draft Regulations come from? Only one draft was demanded by the fishing communities, whereas the other two drafts derived from outside these community groups. The demand to make the Draft Regulation on Fishery Levy originated from a call made by the Secretariat Office of the Kutai District government in 2005 asking all agencies to explore as many of their potential local revenue sources as possible.²⁷ Incidentally, a senior staff member of the Fisheries Agency joined a 2005 comparative study trip of the Kutai District government in Banyuwangi District in East Java. During the study trip the senior staff member was informed that in Banyuwangi District there was a local regulation concerning a Local Fisheries Levy. On the basis of the information and in response to the call of the Secretariat Office, a year later, a legal drafting team was appointed by the head of the Fisheries Agency to prepare draft regulations for Kutai District.²⁸

The influence from other districts in Java was also the reason for the Fisheries Agency to draft the Regulation on Fisheries and Marine Management in the Mahakam Delta. It started with the participation of the Fisheries Agency staff in two workshops on mangrove rehabilitation held by Total E&P Indonesia in 2006. A year later, the head of the Fisheries Agency attended a workshop organized by the Ministry of Fisheries and Marine Affairs. Coincidentally, the head of the agency had a conversation with a delegation from Cilacap District of Central Java Province. He was informed that Cilacap District had a local regulation on managing Segara Anakan, an area which still has a large area of mangrove forest.²⁹ Following this example, the head asked his staff to draft

26 In 2005 the Kutai Fisheries Agency managed an annual budget of US\$59,000. In the following years, this rose to US\$ 470,000 (2006), US\$ 1,760,000 in 2007 and US\$ 3,760,000 in 2008. In 2009 and 2010, the amount dropped to US\$ 2,825,000. The rise and fall of the annual budget automatically followed the rise and fall of the annual budget of the Kutai District.

27 The call was made due to the small contribution of local revenue to the Kutai annual budget. Between 2001-2005, Kutai earned a local revenue of a mere US\$ 2,576,000 (approx.) each year. In 2011 the total sum increased significantly to US\$ 11,240,000. See 'APBD Kukar 2011 Didominasi Dana Perimbangan Diprediksi Mencapai Rp 3,446 T. *Kaltim Post*, 6/1/2011.

28 The appointment was made through issuing the Decree of the Head of Kutai Fisheries Agency No. A.3/523.800/117/III/2006. Indeed, besides being assigned to draft a regulation on Local Fisheries Levy in Kutai District, the team was also assigned to revise four existing regulations concerning fisheries.

29 Segara Anakan is a unique lagoon which lodges the largest mangrove forest in Java. The lagoon hosts some endangered fish species. Due to fast sedimentation and illegal logging, by 2008 the mangrove forest of Segara Anakan had drastically decreased from 2,900 ha in 1984 to less than 800 ha. In this respect the Mahakam Delta resembles Segara Anakan as the latter also faced ongoing environmental degradation as well as conflict between different resource users. See at <http://nasional.kompas.com/read/2008/12/14/17274064/>

a regulation for managing the Mahakam Delta. However, he did not officially establish a legal drafting team, nor did he make the necessary budgetary arrangements.

Meanwhile demand had risen to revise Kutai Regulation No. 3/1999 on Fishing as the implementation of the regulation had turned out to be ineffective. Many small-scale fishermen had complained about large-scale fishermen who used prohibited gears such as trawl nets in the 0-3 nautical mile zone. Not only did the large-scale fishermen use prohibited gears, they also used trawl during the day which is against a traditional fishery custom, prescribing trawl shall be used at night (Hidayati et al. 2005). Beside the use of trawl, there were complaints about other destructive fishing practices, such as the use of chemical, poisonous and explosive substances. The small fishermen had actually tried to curb the destructive fishing practices by warning and sometimes expelling the destructive fishermen, but the latter contested the legitimacy of the small fishermen to undertake action. Being aware of not having adequate legal legitimacy, the small fishermen asked the officials of the Fisheries Agency to revise the prevailing legislation in order to allow them to take action against those breaking the law.

It seems that the diverse reasons for drafting the abovementioned regulations have affected the extent to which the drafting processes involved target groups, notably fishing and farming communities. The drafting committee of the Regulation on Local Fishery Levy and on Fisheries and Marine Management of the Mahakam Delta hardly listened to the input from target groups. To prepare the drafts the appointed members of the legal drafting team relied heavily on their own knowledge. They conducted four or five internal meetings to share knowledge internally. They did not gather or consult with the field officials who had more adequate knowledge about the fishing and farming communities. In the case of the Draft Regulation on Fishery Levy, the team gathered input from outside by conducting two comparative studies, one in Banyuwangi District of Central Java, and one in Pasir District, a southern district of East Kalimantan province. Those two comparative study trips took place in 2006.

Each of these study trips offers some interesting stories. The agency chose Banyuwangi District because one of the senior staff members had visited the region in 2005. However, during the 2006 comparative study they were surprised to be informed that to be able to collect fishery levy, the Agency should first construct a so-called fish market (Tempat Pelelangan Ikan abbrev. TPI) and fish port (Pangkalan Pendaratan Ikan abbrev. PPI). At that time, the Kutai District government had neither. Having learned about this condition, the

luas.segara.anakan.tinggal.kurang.dari.800.hektar (accessed on 26 July 2011), and Christian Reichel, Urte Undire Fromming and Marion Glaser (2009).

Fisheries Agency changed its priorities and took the first steps to build the two required public facilities.

The comparative study trip to Pasir District took place towards the end of 2006 (22-26 December).³⁰ The fact that the last two days of the study coincided with the Christmas holidays rise the question of how effective the study was.

Meanwhile, those drafting the Regulation on Fishing gathered inputs from outside by carrying out a comparative study trip, consulting related ministries and the Legal Bureau of the Provincial government, as well as holding serial discussions with fishing and farming communities. In addition, the appointed Legal Drafting Team held five internal meetings. All abovementioned activities took place in 2008. Again, the comparative study trip went to Java, in this particular case to Pati, another District of Central Java Province. Meanwhile, consultation with ministries and the Legal Bureau of the Provincial government was aimed to get input concerning three matters. First, how to properly revise Kutai Regulation No. 3/1999? Second, how to make a local regulation in a short period of time? Third, how to draft a local regulation which would not contradict (see Section 1.3.2 and Section 4.3 on contradiction) with higher national regulations? Initially, the Agency also wanted to ask lecturers from the Faculty of Marine Science and Fisheries, University of Mulawarnan, for assistance, but the idea was cast aside when a senior officer of the agency said it was not necessary as he had enough experience to be involved in the drafting of Kutai Regulation No. 3/1999.³¹

Initially, it was proposed to gather input from fishing and farming communities in two ways, namely by a survey and a series of discussions. Yet the survey was cancelled due to time constraints and the fact that the model that was supposed to be used to develop a questionnaire for the survey, disappeared. Due to budgetary restraints, the Fisheries Agency could only organize one discussion in each of the six sub-districts. The available budget for each sub-district was only US\$ 1,000. Each meeting lasted for two to two and half hours with around thirty participants on average. At the meetings, the Fisheries Agency officials circulated a copy of Kutai Regulation No. 3/1999. The participants were asked to read a copy of the regulation before they could propose which provision(s) needed revision.

Even though there were no systematic minutes of the six discussions, the team members assumed that they would take into account the input from the participants of the meetings. However, an official of the Kutai Fisheries Agency who was the secretary of the team commented:

If the input from the fishermen and farmers differs from the agency's view, the team will use the agency's view. That is because the agency's view is scientific while

30 See 'Dinas Perikanan dan Kelautan Kabupaten Kutai Kartanegara (2007).

31 Interview Mnt, 7/8/2008.

the input from the fishermen and farmers is unscientific given they are less-well educated.³²

Of the three initiatives during 2005-2009, two ended up as Kutai Draft Regulation. The two drafts are the Kutai Draft Regulation on Fishery Levy, and the Kutai Draft Regulation on Fisheries and Marine Management in the Mahakam Delta.

In essence, the content of the Kutai Draft Regulation on Fisheries Levy is a continuation of what was stipulated in the two 2000 Kutai Regulations. As already mentioned, these two regulations required that any transported and traded shrimp and milkfish seeds as well as processed fish products had to undergo a quality test. The products that would pass, would receive a certificate issued by the Fisheries Agency. These two regulations did not oblige fishermen, farmers or traders to pay a levy if they passed the test and received the certificate. The Kutai Draft Regulation on Fishery Levy stipulated that any quality test followed by a certificate should be completed with a levy payment. Yet the draft regulation led to confusion because it introduced a new name for the word 'certificate' which had not been used in the previous two regulations.³³

Even though the drafting of the Kutai Regulation on Fisheries and Marine Management in the Mahakam Delta was triggered by a coincidental meeting between the head of the Kutai Fisheries Agency and the delegation from Cilacap District, the increasing awareness of the Kutai District government officials of the environmental deterioration of the Mahakam Delta affected the making of the draft significantly.³⁴

Concern for protection as well as conservation in the fishery management of the Mahakam Delta is strongly reflected in the draft. The draft suggests that fishery management of the Mahakam Delta shall be on the basis of the carrying capacity of the environment. It points out that the goal of fishery management of the Mahakam Delta is to ensure the sustainability of fish production. The draft regulation formulates comprehensive prohibitions and restrictions in order to meet that goal. Concerning the capture of fish, the draft lists the gears that are totally prohibited in the Delta and forbids the use of chemical, poisoned and explosive substances. At the same time it lists environmentally-friendly gear that is advised to be used. Concerning aquaculture, the draft stipulates traditional shrimp ponds (Ind. *budidaya tambak tradisional*) as the only model that could be developed in the Mahakam Delta though there are several conditions. Semi-intensive shrimp farming is still allowed under

32 Interview Mnt, 7/8/2008.

33 The Kutai Draft Regulation on Local Fisheries Levy introduced the so-called Certificate for Transported Fish, whereas the two existing Kutai Regulations respectively introduced the so-called Certificate for Quality and Certificate for Organoleptic Examination.

34 For an account of the increasing awareness of the Kutai District government officials about the environmental deterioration of the Mahakam Delta see Section 9.2.

strict conditions. With regard to a fishing permit, the draft formulates stricter conditions for a permit application and even mentions the possibility of putting a halt to issuing new permits, if necessary.

In addition to those prohibitions and restrictions, the Kutai Draft Regulation on Fisheries and Marine Management of the Mahakam Delta states that the district government would designate marine protected areas in the Mahakam Delta where any installation of static or passive gear is prohibited. To make sure that environmentally-friendly fishery management would be effectively implemented in the Mahakam Delta the draft proposed the establishment of a management body, a proposal that had been strongly advocated over the previous five years (Bourgeois et al. 2002, p. 95; LAPI ITB and Bappeda Kutai Kartanegara 2003; Hidayati et al. 2005, p. 160; Syafrudin 2005).

The way of law-making in these three initiatives differed from one another. There were different reasons for drafting the initiatives, and most importantly, factors that are internal and external to the administrative institutions hindered a follow up. For example, the drafting process of the Regulation on Fisheries and Marine Management of the Mahakam Delta ceased prematurely, when the Agency Head who had initially been the motivating factor behind the process, lost his personal interest in the regulation. The halting of the drafting process was also connected with the situational mood of the Fishery Agency officials who at time of the drafting process were in high spirits given they had just moved to a new office.³⁵ It explains why there was no division within the Fisheries Agency which was willing to take responsibility for continuing the drafting.

Meanwhile the fishing community continued to exert pressure on the continuation of the drafting of the Kutai Draft Regulation on Fishing. Yet, after a one-year program was run in 2008, the drafting process of this regulation too ceased. A lower member of staff of the agency who was in charge of the draft and who acted also as a Secretary of the Legal Drafting Team actually set up a program proposal for 2009. Through the program he projected a final draft would be accomplished in 2009 which was to be sent to the Legal Bureau of the Kutai District government. He believed that the process in the Legal Bureau would not take long given the Secretary of the Fisheries Agency was known to be capable of lobbying the Legal Bureau officials. Yet the superior of the lower member of staff rejected and later fully cancelled the program proposal. This superior was thought to have done so, because he was about to move to another agency and he probably felt that he would not benefit from the program proposal.³⁶

Ideas to continue the formulation of the Draft Regulation on Fishing rose again in 2010. In the same way as the previous year, the lower member of

35 Interview Sji, a Head of Division for Control and Surveillance of Kutai Fishery Agency, 11/8/2008.

36 Interview Mnt, 19/8/2008.

staff prepared a program proposal. Yet this time it was unclear whether his new superior had passed the program proposal on to the Head of Division, another higher superior.³⁷ He suspected that his new superior was not interested in the program proposal simply because he was not happy with his new position as he used to be assigned to another division of the Agency where his main task was to handle issues related to the marketing of fish products.³⁸ Recognising that the drafting process was stagnant the Agency Head suggested to the lower member of staff to continue the process by only inserting minor points of revision such as adding the new name of the District to the draft.³⁹ Yet the lower member of staff refused to do so, given there was no budget allocation for the minor revision.

In the same year as the composing of the Kutai Draft Regulation on Fishing commenced, a proposal to continue the making of the Kutai Draft Regulation on Fisheries Levy appeared. The proposal came from another division of the Fisheries Agency.⁴⁰ As there were two proposals for drafting regulation at that time, the Agency Head decided to prioritize the Kutai Draft Regulation on Fishing. It is not clear why the Agency Head came up with that decision, yet the membership composition of the Legal Drafting Team suggested that the Agency Head came up with a compromise. The Legal Drafting Team was comprised of staff from four various divisions of the Agency. Not only did they have to revise Kutai Draft Regulation No. 3/1999 on Fishing, the Team also had to revise three other Kutai Regulations, No. 34, 36 and 37 of 2000.⁴¹

Initiated by Another Agency

The Kutai Draft Regulation on Fishery Business was initiated by a newly established agency called Bureau of Natural Resources. The Bureau was the result of a reorganization of the Kutai District government in 2008. The Bureau had effectively started running in 2009. According to a Decree of the Kutai District Head one of the duties of the Bureau was to formulate policies concern-

37 'Superior' here means a Head of Section. Apart from a Head of Section, the lower members of staff had two other higher superiors, a Head of Division and the Agency Head (see Section 4.1 on how the section, division and agency are located in regional government structure). The section, to which the lower members of staff were assigned, was the Fisheries and Marine Surveillance, under the Division of Coastal, Small Island and Fishery Resources.

38 The new Head of Section has an educational background in economics. As far as the lower member of staff is concerned, his superior is supposed to be a strong leader since his section deals with surveillance matters. The lower member of staff found that his new Head of Section did not have sufficient leadership capacity.

39 The minor update is the change from Kabupaten Kutai Tingkat II into Kabupaten Kutai Kartanegara.

40 The name of the division was Bisa Usaha Perikanan dan Kelautan.

41 The composition and tasks of the members of the Legal Drafting Team were described in the Letter of the Kutai Fishery Agency Head No. C.4/523.2/138.A.9/IV/2008.

ing natural resources.⁴² Two others duties of the Bureau were to establish coordination among Kutai agencies around the issue of natural resources management as well as to take stock of the problems related to natural resources.

The officials of the new bureau seemed to regard drafting regulations as one of their favourite activities in their first year in office. The bureau aimed to make three Kutai Draft Regulations, one of which was the Kutai Regulation on Fishery Business.⁴³ To start the legislation making process, a Legal Drafting Team was established by the Kutai District Head.⁴⁴ There were eleven officials in the team, one from the Fisheries Agency, one from the Legal Bureau and the remaining nine from the Bureau of Natural Resources itself.

However, the formal intention of the Bureau of Natural Resources to engage with other related agencies in the drafting process was disturbed by the behaviour of the bureau officials both in establishing and running the team. The bureau never informed the Fisheries Agency and Legal Bureau that their staff had been included in the drafting team. The appointment of the two agencies as members of the Legal Drafting Team was made by the bureau without asking the two agencies for consent. In addition, the bureau did not involve the other two agencies in the drafting process from an early stage. They involved the two agencies only after the bureau had already prepared a rough version of the Draft Regulation on Fisheries Business. The officials of the Fisheries Agency were surprised to find out that they were not involved in the first round of drafting. They were not only surprised by the late notification, but also because they thought that the Natural Resource Bureau was only supposed to make a draft regulation concerning natural resources in general.

The Kutai Draft Regulation on Fisheries Business had diverse objectives. It was said that the prevailing Kutai Regulation concerning fisheries, and in particular Kutai Regulation No. 36/2000 on Fishery Business, were out of date and that large-scale natural resources extraction formed a new threat to fishery resource use. The Kutai Regulation No. 36/2000 was considered out of date and needing adjustment, since the new Fishery Law No. 31/2004 and Government Regulation No. 54/2002 had been enacted.⁴⁵ However, the Kutai Draft Regulation on Fishery Business seemed to contain very general goals. Apart from the two above objectives, the making of the Kutai Draft Regulation was also said to be undertaken to generate the use of renewable resources, local revenue as well as to create conducive environment for investment. However the Kutai Fisheries Agency officials suspected that the abovementioned reasons

42 The decree is No. 31/2008, Article 33.

43 The other two Kutai Draft Regulations respectively concerning Animal Husbandry and Health, and the Utilization of Non-Timber Forest Products.

44 The decree is No. 180.188/HK-207/2009.

45 See the minutes of a seminar held on 29 June 2010 on the making of the Kutai Draft Regulation on Fishery Business.

were fake. As a new agency, the Bureau of Natural Resources needed to create programs and activities in order to secure their budget. The bureau officials' motive to get funds rather than genuinely being interested in the new regulation can be concluded from the fact that they set up a three-year program to make the Kutai Draft Regulation on Fishery Business, which according to the Fisheries Agency officials, is longer than necessary.⁴⁶

As said, only after they prepared a rough draft, the Bureau of Natural Resources invited the two other agencies at a first meeting where all eleven members of the team were present. This took place in 2009. Having experience in making regulations, the team members from the Fisheries Agency shared two things during the meeting. Firstly, they let the other team members know that the Fisheries Agency had prepared two draft regulations concerning fisheries. Secondly, they shared their past experiences of the difficulty of pursuing discussion sessions with the Legal Bureau about the draft regulations that particular agencies had submitted. They specifically referred to their experience with the Kutai Draft Regulation on Fisheries Levy which had not been granted any discussion time since 2006. They also reminded the team members that the Secretariat Office of Kutai District government had recently tightened their control on any submission of a draft regulation concerning levy. The tighter control had emerged after the Minister of Home Affairs annulled two Kutai Regulations given they were in contradiction with higher national regulation concerning local tax and revenue.⁴⁷

However, even though the team members were informed about the previous initiatives of the Fisheries Agency, there was no willingness to figure out the similarities and differences between the rough drafts prepared by the Bureau of Natural Resources and the two draft regulations previously prepared by the Fisheries Agency. Being told that the Kutai Fisheries Agency had prepared two draft regulations concerning fisheries, the Head of the Bureau of Natural Resources simply commented:

Any agency could take an initiative to draft a regulation as long as it is for the sake of the people.

46 The Kutai Fisheries Agency officials suspected that the three-year program was intended to enable the officials of the Bureau of Natural Resources to conduct more travelling. A larger budget for travelling has recently emerged as source of additional income.

47 The two regulations which were nullified were Kutai Regulation No. 12/2001 on Permits for Foreign Workers, and No. 2/2001 on Permits for Local Mining. The former was officially nullified in 2004 while the latter was in 2008. The common reason for the nullification of the local regulations is because they added extra levies to some activities on which the Central Government also collected levies. See http://www.djpk.depkeu.go.id/pdrd/pdrd_list2.php?kdpemda=2003 (accessed on 18 August 2010).

One of the heads of the sub-division of the Bureau of Natural Resources reiterated the above pragmatic notion during the regional law-making process. He said:

It would not be a problem if our bureau is preparing regional draft regulations even though other agencies or offices have prepared or are preparing similar drafts. We have two options if such situation emerges. Firstly, we will ask other agencies or offices to incorporate the contents of their regional draft regulations in ours, or secondly we just discontinue preparing our drafts, and let other agencies or offices continue theirs.⁴⁸

Although they suspected a narrow interest of the Bureau of Natural Resources, the Fisheries Agency officials still expected and reckoned that the Bureau of Natural Resources would be more likely to be successful in pursuing the draft regulation. This was mainly because the Bureau had a closer formal line with the Kutai Secretariat Office as well as the Kutai District Head. Moreover, the Bureau had informal political access to some members of Kutai House of Representative since the Head of the Bureau was close to several members of the Kutai House of Representatives.⁴⁹

Following an administrative tradition in regional law-making, the Bureau of Natural Resources consulted with the Provincial government and two ministries notably the Ministry of Home Affairs and the Ministry of Marines and Fisheries Affairs. Once again, they did not engage the two other district agencies in the consultation despite having promised to do so. The Bureau had another chance to get input from the two ministries when the Bureau invited two officials of the two ministries as speakers during a one-day seminar held by the Bureau in June 2010 (see footnote 45). Together with the officials of the two ministries, the Bureau also invited lecturers from the local university and the University of Indonesia.

The Bureau of Natural Resources did fulfil its promise to involve the Fishery Agency when they organized two comparative study trips to Riau

48 Pragmatism, which can turn into competition in regional law-making also emerged in the making of an academic draft of the natural resources management of the Mahakam Delta. In 2011, the Bureau of Natural Resources arranged the making of the academic draft. The Bureau kept on re-arranging this, despite the fact that they knew that the Provincial government was arranging a draft as well. The head of the sub-division as mentioned above said that it is good that the Provincial government steps ahead so that the bureau knew what the Provincial government wished to have, and it would help the Kutai District government to determine what should be the content of the district policy. Interview Thd, a Head of Sub-Division of the Bureau of Natural Resources Administration of Kutai District government, 9/12/2011.

49 The close relation of the Bureau Head with some parliament members originates from the time when he used to be an activist in two prominent youth organizations. Traditionally the two youth organizations have produced successful politicians as well as high-ranking government officials.

Province in 2011. During the first trip, joined by officials from the Kutai Fishery Agency, the Bureau of Natural Resources of Kutai District, and the Legal Bureau of the Provincial government, they met the officials of Riau Provincial government. During the second trip, some members of the Kutai House of Representatives joined. The second trip was initially set up to meet the government of Riau Island Province. Yet, due to miscommunication, they changed the trip to Pekanbaru city of Riau Province.⁵⁰

The expectation of the Kutai Fishery Agency concerning the law-making came true. The failure of the Kutai Fishery Agency to propose the Kutai Draft Regulation on Fishery Levy since 2006 turned out into a success of the Bureau of Natural Resources to propose the Kutai Draft Regulation on Fishery Business to become Kutai Regulation No. 15/2011 on Fishery Business.

Not only did the Bureau of Natural Resources succeed in proposing the regulation, the regulation contains provisions concerning a fishing levy. As already said, in 2006, the Kutai Fishery Agency ceased to make the Kutai Draft Regulation on Fishery Levy when they were told that Kutai District is required to have the so-called fish market and fish port to be able to collect a fishery levy. At the time of the enactment of Kutai Regulation No. 15/2011, the two required public facilities had not been constructed yet.

Thus, by having provisions on a fishery levy, Kutai Regulation No. 15/2011 has broadened and superseded Kutai Regulation No. 26/2000. Nevertheless, the rest of the content of Kutai Regulation No. 15/2011 resembles No. 26/2000. In that respect, its primary legal objective, namely to supersede the old regulation, is achieved. Meanwhile, to its other original objective, namely to couple increasing threats from other large-scale natural resources use to fishery resource use, has been responded by making a new separate Kutai Draft Regulation on Fishery Resources Conservation. As had happened when of the Kutai Draft Regulation on Fisheries Business was made, the Bureau of Natural Resources formed a Legal Drafting Team in which an official from the Kutai Fisheries Agency and Legal Bureau were included. For this law-making initiative, the Bureau of Natural Resources held two consultations with the Ministry of Marine Affairs, and with the Faculty of Fishery and Marine Science of Mulawarman University, and met with related Kutai agencies and local offices of the Kutai Fishery Agency.

Initiated by Joint Collaboration

Kutai District collaboration in regional law-making initiatives concerning fisheries was usually suggested by the Kutai Kartanegara District's Committee on Conflict Resolution (KKDCCR). This made sense, given that KKDCCR members came from various agencies of the Kutai District government. Such varied

50 Interview M (a staf of Kutai Fishery Agency) and H (a staff of Bureau of Natural Resources Administration of Kutai District government), 8/12/2011.

composition of members enabled the KKDCCR to establish collaboration among the agencies. The following two initiatives of regional law-making are instances of such collaboration.

The drafting of the Circular Letter of the Head of Kutai District government on the Prohibition of the Installation of Gear on Public Shipping lanes came at a time when the number of gear installations in the vicinity of companies' platforms increased.⁵¹ Some Kutai bureaucrats including field officials had long suspected that the reason behind the emerging gear instalments was not purely for fishing. Instead they suspected that it was a trick to get compensation from the company. As two of the officials said:

Once fishermen found out that a company was planning to undertake activities in a particular area of the sea of the Mahakam Delta, they would quickly install a tidal trap nearby the area where the activity would take place. By doing so, they expected the companies' transportation would crash into the installed gear one day, which would be a reason to ask compensation from the company.⁵²

Due to the growing number of such tidal trap installations, a new name for tidal trap emerged i.e. *julu jebakan*.⁵³ As the emerging tidal trap installations caused conflicts, the KKDCCR became more actively involved. Their active role in the whole affair led to the KKDCCR suggesting that the Kutai District government needed to make a particular rule dealing with that matter. They suggested introducing a circular letter, which eventually resulted in Circular Letter No. 100/287/Pem.A/VI/2004 on the Prohibition of the Installation of Gear on Public Shipping lanes. The fact that the KKDCCR played an important role in this initiative can be seen in the first few sentences of the circular letter. The start of the letter states that observation of the KKDCCR, ie. that in many parts of the District's marine water the gear instalments had endangered public shipping lanes, is a consideration to draft the circular letter.

As already mentioned in Section 6.2, the 2004 Circular Letter actually recalled what had been regulated in both Kutai Regulation No. 3/1999 and the 1975 Circular Letter of the Directorate General for Fishery of the Ministry of Agriculture. The 2004 Circular Letter actually combined the content of the two previous Kutai Regulations so that gear instalments were not only pro-

51 Interview ED, a Head of Bureau of Governance of Kutai District government, 8/12/2011.

52 Interview Sun, a staff of Kutai Environmental Agency, 18/6/2008, A, 19/6/2008, and ES, 30/1 and 1/7/2008. See also Simarmata (2011). However, this accusation was disputed by some fishermen and confirmed by village government officials saying that the number of tidal trap instalments near platforms increased due to a growing number of platforms. Given that platform constructions occupied fishing zones, fishermen became more limited in the areas, where they could still fish. Interview, Amr, a Secretary of Sepatin village government, 19/2/2010.

53 For the local people of the Mahakam Delta the name refers to any tidal trap which is consciously installed to be crashed into by companies' ships in order to be able to claim compensation.

hibited on public sailing lanes as stipulated in Kutai Regulation No. 3/1999 but also in the vicinity of companies' platforms as stipulated in the 1975 Circular Letter.

Similarly, the Draft Regulation of Kutai District Head on Standardized Ponds was born from the experiences of the KKDCCR. With regard to fishery disputes, the KKDCCR had long encountered a common pattern whereby shrimp farmers complained that company activities had contaminated the water in the ponds and damaged pond constructions. For any loss resulting from the contamination and damage, the farmers asked the company for compensation. The success of earlier complaints for compensation actually inspired other farmers to behave similarly so that the number of complaints increased gradually.

In response to the growing number of complaints the KKDCCR had to think of a way to control them. The team therefore decided that it was best to select complaints that really needed settling, which meant that they could refuse complaints that did not meet approved formal criteria. The team eventually came up with a definition of a 'standardized pond'. The basic idea was that only the complaints of farmers whose shrimp ponds met the criteria of a 'standardized pond' would be taken into account. Like other fishery policies and regulations of the Kutai District, the standard definition aimed at developing sustainable shrimp ponds which at the same time added to local income.

After half a year of occasional meetings, the KKDCCR organized several further more regular meetings. To make use of all insights that had arisen during the meetings, two lecturers from the Faculty of Fishery and Marine Science of Mulawarman University were brought in to digest and write the remarks down in a draft concept paper. Once the draft was finished the KKDCCR carried out some activities to get input from outside. First they asked feedback from the Bogor Agricultural Institute who had carried out some research as well as served consultancies in the Mahakam Delta. Second, they consulted with the Ministry of Marines and Fisheries Affairs. Third, they carried out comparative studies in two districts in Java.

The KKDCCR did not deem necessary to consult with the shrimp farmers or even the *punggawas* for input on the concept paper, as they regarded the scientific input from academics as more reliable. Besides, in their view the concept paper contained rather technical matters which the farmers would probably find difficult to understand. What the farmers needed to do at the time of interviewing, was to develop their ponds in accordance with the 'standardized pond'. In any case, the KKDCCR felt that they already knew what the farmers were thinking for they had met the farmers many times.⁵⁴

After the concept paper was completed, the KKDCCR asked the Legal Bureau of the Kutai District government to convert it into a legal text. They opted

54 Interview FI, a lecturer at the Faculty of Fisheries and Marine Science of Mulawarman University, 1/3/2010.

for a Regulation of the Kutai District Head instead of a Kutai Regulation. Yet as of 2009 the drafting process of the regulation stagnated due to two factors. First, the Deputy Head of Kutai District was detained by Indonesia's Commission on the Eradication of Corruption in 2008 for corruption charges, making it difficult to ask for his signature.⁵⁵ Second, some key actors who used to actively engage in the formulation of the concept paper had been moved to other agencies, which did not deal with the issue of the Mahakam Delta. As a result, they could no longer engage in the drafting process. Meanwhile, officials who took over the position of the previous key actors were not as concerned about the issue of the Mahakam Delta as their predecessors.

Following its title, the provisions of the Draft Regulation of the Kutai District Head on Standardized Ponds chiefly determine the standards for ponds with regard to the following three matters: location, construction and management. With regard to location, the draft regulation stipulates one thing which is in direct contrast with what has actually been happening on the ground: it forbids all ponds which do not comply with land use planning. An instance of non-compliance is if a pond is located along a green belt (*sabuk hijau*). Concerning construction, the draft regulation states that the size of an ideal shrimp pond can not exceed 2 hectares. In addition, the pond shall not be badly constructed to avoid it from being easily damaged by sea waves. Last, the draft regulation prohibits the use of chemical fertilizer in an attempt to prevent environmental destruction.

Looking at the content of Kutai Regulation No. 3/1999, the three Kutai Regulations of 2000, the 2004 Circular Letter, and Kutai Regulation No. 15/2011, we can conclude that the scope of Kutai District government's formal control over the management of fishery resource use expanded over time. They added new provisions which were not part of the national legislation by increasing input control. They limited fishing zones where fishing could take place. They increased control over fishing by requiring fishermen to obtain permits from local authorities as well to pay fishery levy. The enhanced scope of formal control raises the larger question to what extent the Kutai District government has been able to effectively exercise control in practice. The following section deals with that question.

7.3 IMPLEMENTATION OF LAW BY REGIONAL AND LOCAL OFFICIALS

To examine the extent to which the Kutai District government has effectively implemented fishery regulations, this section will focus first on control, notably control over fishery permits, and then discuss the issue of gear restrictions.

⁵⁵ At that time the Deputy Head of Kutai District actually acted as District Head after the formerly appointed Kutai District Head had been detained on account of corruption charges in late 2007. See footnote 95.

As the Kutai fishery regulations have eventually turned the SSFRC from a mere recording instrument into a permit, the description of control over the permit also includes an account of the SSFRC. Another matter that will be examined is the development of environmentally-friendly shrimp ponds, something that is not yet regulated but for which the Kutai District government has been developing a regulation since 2002. In describing the extent to which the Kutai fishery regulations have been effectively implemented, an account of the factors that have influenced implementation is also given.

7.3.1 Control

The term 'ineffectiveness' has been widely used and mentioned by a number of research reports and forums when trying to connect the Kutai fishery regulations/policies with the 'real' problems or issues. Some researchers even said that the government is absent in the Mahakam Delta or it is a place where no government regulations exist (Timmer 2010, p. 711; Timmer forthcoming, p. 29). The ineffectiveness has been strongly associated with government incapability to implement and enforce the law (Bourgeois et al. 2002, p. 2 and 27; Rachmawati 2003, p. 34; Hidayati et al. 2004, p. 79).

Some research reports base their findings and conclusions on the peoples' perspectives obtained from surveys. A survey held in 2002 found that 45% of the fishermen and farmers who lived in four villages of the Mahakam Delta knew nothing about the existing policies.⁵⁶ The most striking answer was that 81% of this group had no idea about the government's role in the Mahakam Delta. In line with the answers of the respondents, the report says:

Despite a long list of actual or planned activities, it is important to mention that until now, the government has had little control over what happens in the Delta. Most of the aquaculture developments have taken place at the initiative of migrants and local people, without much government intervention... It means that the above government activities have had little visibility and little impact.

One year later, another piece of research reaffirmed the 2002 findings discovering that of 324 households in the Mahakam Delta 73.3% confessed to know nothing about formal rules on mangrove. Only 13% said to know about the existing formal rules (Rachmawati 2003, p. 82). A recent piece of research, funded by a multi-stakeholder project, reiterates the 2002 findings. Having held a survey in three main villages in the Mahakam Delta, the research found

⁵⁶ The survey was conducted by the French research institute CIRAD, collaborating with some local NGO activists. Total E&P Indonesia and Inpex supported the research financially. The survey included 100 household respondents who worked as fishermen or shrimp farmers. See Bourgeois et al. (2002, p.15).

that between 40% and 80% of the respondents did not see any effect from the activities carried out by the Kutai Fisheries Agency. As a result, when they were asked whether the Kutai District government should continue their activities in the Mahakam Delta, the majority said they should not (PMD Mahakam 2008, p. III36-58). To a large extent the discrepancy between the Kutai fishery regulations and policies on one hand and the real problems on the other, is actually visible.

With regard to the FBL, only two permits were issued up to 2008 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008a, p. 34-35). These two permits were neither concerning the capture of fish nor aquaculture. They were permits on seeds of and breeding milkfish and collecting crab in areas which were not located in the Mahakam Delta.⁵⁷ A Kutai Fisheries Agency official revealed that no fisherman or farmer from the Mahakam Delta has applied for a fishery permit.⁵⁸ Large-scale fishermen who came from upstream of the Mahakam River (Muara Muntai, Samarinda) and South Kalimantan (Hidayati et al. 2005, p. 52-62) only had ship certificates without a fishery permit.⁵⁹ Regarding permit non-compliance, the Kutai Fisheries Agency even confessed, as can be found in their annual reports, that control of permits was not effective yet, given there was still a great number of fishermen, farmers and traders who had no idea about the permit.⁶⁰

Nevertheless, the imposition of the SSFRC had worked pretty effectively during 1995-1997, when 500 fishermen and pond owners obtained a SSFRC. However, after the authority to issue a SSFRC was transferred to the sub-district head in 2001, only a few SSFRC's have been reported.⁶¹ To address the decreasing compliance, the Kutai Fisheries Agency set up a program on boat registration in collaboration with the Kutai Public Transportation Agency, in 2007 and 2008. The aim of the program was to help fishermen to obtain a boat certificate as a way to proceed to applying for a SSFRC. This two-year joint program led to the issuance of 1,700 boat certificates. Nevertheless, only 100 SSFRC's were reported to have been issued in 2008, so the registration program hardly achieved its aim (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 49). The number of issued SSFRC's is particularly low when compared

57 The first FBL was given to CV. Undayana and the second to PT. Bone Teknik. The first was located outside the Mahakam Delta, while the second was located in the hinterland of the Mahakam Delta.

58 Interview Sfd, a Head of Division of Kutai Fishery Agency, 17/6/2008.

59 Interview SH, a Head of Anggana office of Kutai Fishery Agency, 30/7/2008. The large-scale fishermen have larger vessels with a machine capacity of no less than 100 horse power, whereas the local fishermen of the Mahakam Delta have vessels with a machine capacity of no more than 32 horse power (Hidayati et al. 2005, p. 59).

60 See Dinas Perikanan dan Kelautan Kutai Kartanegara (2008a, p. 36) and Dinas Perikanan dan Kelautan Kutai Kartanegara (2009, p. 50).

61 The transfer of authority was officially carried out through Decree of Kutai District Head No. 180.188/HK-537/2001 on the Transfer of Authority of Kutai District Head to Sub-District Heads.

to the number of vessels being used in the Mahakam Delta which is estimated at approximately 6,000 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 35; Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 39).

Meanwhile, the Kutai Fisheries Agency intention to carry out quality control over transported and traded milkfish and processed-fish products met its goal to some extent, despite the fact that the test laboratory had not yet been constructed, forcing the Kutai Fisheries Agency to rent the Province's laboratory. In the course of 2007, the Kutai Fisheries Agency issued 164 Certificates for Quality, while in 2008 the number decreased to 124 (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008a, p. 2; Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 45).

Going back to the 1970s the implementation of the 1976 Decree on Fishing Zones Division prohibiting the use of trawl in Zone I was not effective given that many small and large-scale fishermen still operated and used trawl in the zone. Large-scale fishermen fished in Zone I because the shallow waters were richer in shrimps (Bailey 1988, p. 34; Tribawono 2002, p. 68). As a result, conflicts between small and large-scale fishermen arose (Bailey 1988, p.13 and 36; Jhamtani 2003, p. 27). To prevent conflict, the Central Government then promulgated a total ban for the use of trawl across Indonesian marine waters except in the Arafura Sea (Bailey 1988, p. 13; Jhamtani 2003, p. 27).⁶² Nevertheless due to the widespread use of trawl at that time, the Central Government implemented the policy gradually and it only came into full force in 1983.

In the Mahakam Delta, in the early years, the implementation of the trawl ban seemed to be effective, which resulted in a gradual shift in fishery resource use from capturing fish to aquaculture. Some researchers even view the trawl ban as a significant trigger of the initial establishments of ponds (Bapedalda Kutai Kartanegara and PKSPL IBP 2002, p. III-66, and Hidayati et al. 2005, p. 63). Moreover an active involvement of local military officers had enabled the implementation of the ban to run effectively.⁶³ Yet, in general and in the years after reformation era, the implementation of the regulation ceased to be effective, despite various efforts such as dissemination of the regulation, the introduction of new recommended gear as well as the establishment of a provincial and district inter-agency team (Herlindah 2008, p. 7-8).

The use of the trawl net in the Mahakam Delta re-emerged after the fall of the authoritarian New Order Regime in 1998 (Buorgeois et al. 2002, p. 36; Hidayati et al. 2004, p. 77; Hidayati et al. 2005, p. 53-59; Sandjatismiko et al. 2005, p. 115; Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 13).

62 The ban was stated in Presidential Decree No. 39/1980 on the Eradication of Trawl Fishing. Later the Presidential Decree was followed by Decree of the Minister of Agriculture No.503/Kpts/Um/7/1980 concerning measures to carry out the first ban on trawl use, and Presidential Directive No. 11/1982.

63 In 1983, local military officers mobilized the fishermen to gather at the Governor's office. The Governor urged the fishermen to develop ponds as an alternative to trawling. Interview Smr, an elder of Muara Badak Ulu village, 11/8/2008.

From this time onwards, many local fishermen reverted back to using trawls after they had failed to compete successfully with later immigrants in aquaculture development (Hidayati et al. 2005). Compared to the Mahakam Delta the use of trawl in the upstream areas of the Mahakam River is limited because efforts to enforce rules on the use of trawls have been more effective.⁶⁴ In the course of 2001-2005, Kutai District was even the region in which trawl was most used compared to other districts across East Kalimantan. The use of trawl increased around 20.2% each year during that period (Herlindah 2008, p. 9-10). Given that approximately 50% of the fish production of the Kutai District came from three sub-districts of the Mahakam Delta (Anggana, Muara Badak, Muara Jawa) it can be assumed that most of the trawl use took place in the Mahakam Delta (Dinas Perikanan dan Kelautan Kutai Kartanegara 2008b, p. 8).

It is important to note that the use of the trawl in the Mahakam Delta re-emerged despite the fact that the Kutai Fishery Agency supported the establishment of the so-called Community Group for Surveillance (abbrev. CGS, Ind. *Kelompok Pengawas Masyarakat*).⁶⁵ Since 2008, across Kutai Kartanegara 48 CGS have been established.⁶⁶ Eleven of them are located in some villages of the Mahakam Delta.⁶⁷ Pursuant to the Decree of the Minister of Marine Affairs and Fishery of 2001,⁶⁸ a CGS is a community-based organization whose members consist of community leaders, religious leaders, adat leaders, fishermen and fish farmers (*petani ikan*). In practice, the members of the CGS are elected in a village meeting. A village regulation is made to endorse the elected CGS's members which is then submitted to Kutai Fishery Agency for registration.

Concerning authority, the CGS can only report (*melaporkan*) to the PPNS, the district fishery agency or the local police and military officers if they

64 Interview Mnt, 7/8/2008. Stronger enforcement of the ban on trawl use up-stream of the Mahakam River was due to over-fishing caused by a wide use of trawl. The strong enforcement then led the up-stream fishermen to come down to the Mahakam Delta. In the Mahakam Delta they found that the prohibition of trawl use hardly existed (Hidayati et al. 2005, p. 62).

65 A CGS is different from a Sub-District Committee on Fishery Resources Conservation (see Section 7.2). The members of the latter are the Leaders of the Sub-District Consultation Forum whereas the members of the former are local inhabitants. Concerning authority, the latter is authorized to carry out prosecution, whereas the former can only do reporting. Interview MK, 6/12/2011.

66 See <http://humas.kutaiartanegarakab.go.id/read/news/2012/6338/pokmaswas-menjaga-kelestarian-sumber-perikanan.html> (downloaded on 15 July 2012).

67 Nationwide there were 1,419 CGS's in 2010, 48 of which were in East Kalimantan. Kementerian Kelautan dan Perikanan (2010, p. 139-140). Another figure said that the number of CGS's in East Kalimantan was 113, with 45 in Kutai Kartanegara. See 'DKP Kaltim Optimalkan Peranan Pokwasmas' (<http://www.kaltimprov.go.id/kaltim.php?page=detailberita&id=4433>, accessed on 28 July 2011).

68 No. KEP.58/MEN/2001 concerning Guidance for a Community-Based Monitoring System on Marine and Fishery Resource Management

suspect or witness a violation of law. However, in practice the CGS also expelled (*mengusir*) those are not complying with the law.⁶⁹

In relation to efforts to control the use of destructive fishing, the Kutai Fishery Agency installed warning boards in some places. The signs issued warnings such as 'Stop!! Illegal Fishing', written in large print. The small print reminded people that the use of chemical and explosive gear was prohibited and that they could receive a punishment of maximum ten years imprisonment and a fine of IDR 2 billion (US\$ 235,000).

7.3.2 Development

The policy of the Kutai Fisheries Agency to develop environmentally-friendly shrimp ponds in the Mahakam Delta which lasted from 2002 up to 2009 was widely perceived as ineffective, despite the fact that the Agency had funded several pilot projects as of 2002 and had undertaken several training sessions and comparative studies.⁷⁰ All pilot projects of environmentally-friendly shrimp ponds had ended tragically with shrimp farmers cutting the trees, which had been planted near or inside their ponds, after two or three years. Shrimp farmers did so because they found that the productivity of their ponds did not increase while they were told that the planting of the mangrove trees would increase their pond productivity. The pilot projects often failed because the Kutai Fisheries Agency arranged pilot projects that only targeted planting mangrove seeds around or inside shrimp ponds, without any follow-up. The Agency never arranged activities to maintain the ponds where mangrove seeds had been planted. This happened exactly to a pilot project located in Muara Pantuan village, which was pioneered by the Provincial Fisheries Agency in the 1980s. Due to the decentralization of 1999, the Provincial Fisheries Agency handed over a 3 ha shrimp pond to be owned and managed by the Kutai Fisheries Agency. Yet, ever since the Kutai Fisheries Agency hardly paid attention to it with the exceptional glance from a senior field staff member of the Kutai Fisheries Agency. The senior field staff member could keep an eye on it, because he held a 1.3 ha pond, which was located next to the pilot

⁶⁹ Interview Mnt, 19/9/2009.

⁷⁰ For a place like the Mahakam Delta which has a mangrove forest, the most environmentally-friendly type of shrimp pond is known as a silfo-fishery. The term refers to the use of a forest area for aquacultural purposes. There are generally two types of silfo-fishery which in Indonesian are popularly known as *empang* and *komplangan*. The basic difference between the two types is that in the former mangrove and pond are in the same place, while in the latter mangrove and pond are split and separated by a dike (Bappeda Kutai Kartanegara and LAPI ITB 2003, p. VI-7-8). The Kutai Fisheries Agency is at the time of writing in favour of the *komplangan*.

project.⁷¹ A local academic who had been hired by the Fisheries Agency to carry out many research projects, commented on the planning management of the Kutai Fisheries Agency:

The Agency did not set up serial activities. They usually set up completely new activities or repeated the former ones. If arranged activities were completely new, they preferred to ask new parties to implement the arranged activities to prevent any criticism of the discontinuation of some other activities. The Agency simply did not have the capacity to set up comprehensive activities.⁷²

7.3.3 Explanatory factors

The Kutai Fisheries Agency on the one hand claimed that programs and activities that they carried out met their 2000-2010 primary goal, namely to improve the skills of its officials to be able to carry out control over fishery resource use as well as to develop fishery business, in an attempt to generate income for fishing and farming communities.⁷³ However, the Agency on the other hand, also admitted to not having yet fully achieved its goals due to some unexpected setbacks. This leads to the question why the multitude of programs and activities of the agency have not (yet) resulted in and have contributed so little to an effective implementation of the fishery regulations and policies.

The next section describes some factors that have hindered the implementation of the many policies, programs and regulations of the Kutai Fisheries Agency. Similar to factors pointed out by local forestry officials which stopped them from carrying out effective forest protection in the Mahakam Delta (see Section 5.3), the next section describes prominent factors as related by local fishery officials. The factors are divided into (a) factors that are internal and (b) factors that are external to the administrative institutions. Factors that are internal to the administrative institutions, in this case, include a lack of

71 The senior field staff member used to be head of a fish port in Muara Pantuan village. When the fish port was closed he chose to remain in the village while taking care of the 3 ha shrimp pond of the Provincial Fisheries Agency. Later the Provincial Fisheries Agency cut the budget for maintaining the shrimp pond. The senior staff member continued to maintain the pond with his own money. When it was handed over to the Kutai Fisheries Agency, including the maintenance, he insisted on a compensation from the Kutai Fisheries Agency of IDR 7,000,000 to IDR 10,000,000 (US\$ 825 to US\$ 1,170) ie. the amount that he had spent to maintain the shrimp pond. The Agency refused his request and decided to rent ponds from other villagers.

72 Interview IS, a lecturer at the Faculty of Fisheries and Marine Science of Mulawarman University, 15/2/2010.

73 See Dinas Perikanan dan Kelautan Kabupaten Kutai Kartanegara (2007, p. 20-21), and http://www.kutaikartanegarakab.go.id/index.php/gov/dinas_perikanan_dan_kelautan (accessed on June 23, 2010).

resources, problems with the budget spending mechanism, other agencies' concerns, leadership and the local officials' perception of fishermen and farmers. Whereas, factors that are external to the administrative institutions include the fishermen's and farmers' expectations of formal rules and local power.

Internal factors

(a) Lack of resources

In the first five years of their presence starting in 2000, the Kutai Fisheries Agency managed a relatively small annual budget of approx. 10.000 US\$ (see Section 7.2.2, footnote 26). Yet during the second five years the annual budget increased significantly to some 100.000 US\$ each year.⁷⁴ The annual budget was to serve 36,515 fishery households covering an area of around 244,557 ha.⁷⁵ In the second five years, the agency did not encounter a budget shortage. For the last four years, the agency was not even able to spend the allocated budget fully.⁷⁶ Apparently, the annual budget was not allocated proportionally, so that some programs lacked a budget, important infrastructures were not available yet, and some field officials suffered from severe budget shortages.

Most of the Kutai Fishery Agency officials still pointed to a lack of budget as one of the reasons for the ineffective implementation of fishery regulations and policies. They specifically pointed to the CGS's. In practice, the Kutai Fisheries Agency could only prepare a budget for establishing a CGS, together with a budget for providing supporting equipment such as a boat. They could not finance the daily operations of a CGS.⁷⁷ Meanwhile, a CGS needed approximately US\$ 2,350 per month to be able to carry out regular surveillance.⁷⁸ The budget shortage that the 48 CGS's of the Kutai District encountered could have actually been solved from 2009 onwards by allocating part of the annual village budget (Ind. *Alokasi Dana Desa*) to surveillance. Yet, sometimes particu-

74 The increase of the agency's annual budget was linked to an increase in the Kutai annual budget. Due to the enactment of Law No. 25/2000 on the Financial Balance, the Kutai annual budget increased significantly as of 2001. It was the first time in 2001 that the Kutai annual budget reached hundred million dollar (US\$ 150 million). It was US\$170 million in 2002, US\$ 273 in 2003, US\$ 264 million in 2005, US\$420 million in 2006, US\$488 million in 2007, US\$ 550 million in 2008, US\$ 499 million in 2009, US\$ 444 million in 2010, and US\$ 344 million in 2011.

75 The number of fishery households is nearing 50% of total fishery households in East Kalimantan. See in Dinas Perikanan dan Kelautan Kutai Kartanegara (2009).

76 For instance in 2007 the agency could only spend US\$132,000 of the total budget of US\$ 183,000, whereas in 2008 they could spend US\$ 220,000 of a total of US\$ 368,000.

77 According to the decree of the Minister of Marine Affairs and Fisheries of 2001 concerning Guidance for a Community-Based Monitoring System on Marine and Fishery Resource Management, district and municipality governments could provide donations (*bantuan*) to the CGSs to buy equipment.

78 The number is based on an estimate made by a field official of the Kutai Fisheries Agency. Interview Agg, 8 and 9/2/2010.

lar CGS's found it difficult to access the annual village budget when some of their members had not voted for the elected village head.⁷⁹

Due to a budget shortage, the Kutai Fisheries Agency's plan to construct a laboratory for quality control of transported and traded milkfish and processed-fish products could not be realized. As a result, the agency did also not construct check points for surveillance over the transported and traded products. This implied that the Agency could only do a small number of quality control tests, given they had to rent the laboratory of the Provincial Fisheries Agency (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 47).

The field officials of the Kutai Fisheries Agency who were based in the sub-district and village suffered more from a budget shortage and dislocation. The lack of resources led to two problems in particular. Firstly, there was no budget to make regular village visits, especially because there were limited funds to pay for the transportation to cover the distance of 120km between the Agency and the villages. Secondly, there was no budget to pay for supporting equipment. Given the agency's central office could only provide funds for two village visits per year, the field officials could only hope to be invited to cooperate with Total E&P Indonesia, which could enable them to carry out more frequent village visits.⁸⁰ A research project supported by Total E&P Indonesia during 2005-2007 had enabled the field officials of Anggana, Muara Badak and Muara Jawa sub-district fishery offices to visit villages in the Mahakam Delta twice a week. Opportunities to carry out village visits arose also when the field officials were involved in dispute settlements, whereby they could get a chance to travel around the villages. Since the Agency's central office did not provide their branch offices with a boat, the field officials often borrowed fishermen's boats.⁸¹ Likewise, the Agency's central office did not provide the field officials with motorcycles for daily activities. As a result the field officials used their own motorcycles or took them from the agency's central office without permission.⁸²

Not only the budget shortage and the lack of supporting equipment were a concern, a lack of resources also affected the number of skilled officials. One recent example is the fact that the agency at the time of writing only had one *Pegawai Penyidik Negeri Sipil* (abbrev. PPNS), a civil servant authorized to carry out investigations over a potentially legal case.⁸³ The only PPNS that the agency had was also the treasurer of the agency. The double position made

79 Interview Agg, 8 and 9/2/2010.

80 Interview Snt, a staff of Anggana office of Kutai Fishery Agency, 30 June 2008.

81 Interview Agg, 8 and 9/2/2010.

82 An official of Anggana local office of the Kutai Fishery Agency took a motorbike from the Agency's central office without getting formal approval from the office. The Agency's central office did not take any action and actually let the local official use it until present.

83 See the Decree of the Minister of Home Affairs No. 6/2003 concerning *Pedoman Pembinaan Penyidik Pegawai Negeri Sipil di Lingkungan Pemerintah Daerah*.

it impossible for him to carry out investigations. Meanwhile, other officials of the agency refused to undergo PPNS training, arguing that they could not spend three months away from their families for the training. As a result, the Agency involved provincial PPNS, local police and military officers to undertake the investigations on the condition that the Agency members had all their expenses paid. Traditionally the Agency only has a regular budget for surveillance (*pengawasan*) and not for investigation. As a result, investigation is usually paid for by redirecting the budgets of other activities, such as extension (*pembinaan*). Meanwhile, the annual budget for surveillance usually consists of one or two trips for the whole 18 sub-districts of the Kutai District.⁸⁴

The weak capacity of the field officials has also been linked with the low SSFRC record. Not only did they have a weak capacity, the field officials were also considered as badly-motivated by the agency's central office. The Agency's central office suspected that the sub-district officials (*kecamatan*) were reluctant to take care of recording the number of SSFRCs since it does not generate income unlike, for example, permit applications. Moreover, the transfer of issuing SSFRCs from the district head to the heads of the sub-districts in 2001 had not been followed by a budget increase to the sub-district offices. To deal with the matter, the Agency Head repeatedly reminded the field officials recording the SSFRCs. He did so when the field officials visited the agency's central office to collect their salary.⁸⁵

(b) Planning and budgeting procedure

The planning and budgeting procedures have also contributed to ineffective implementation of the fishery regulations and policies. Existing planning procedures impeded the formation of a serial program while budgeting procedures impeded fruitful field visits.

In 2009 the Kutai Fisheries Agency proposed an annual budget of IDR 90 billions (US\$ 1,060,000) to the Development Planning Agency of the Kutai District government. The Development Planning Agency who is in charge of preparing Kutai Annual Budget, refused the request deciding that the Kutai Fisheries Agency would only receive IDR 24 billions (US\$ 282,000). In response to the significant reduction, the Kutai Fisheries Agency deleted some of the proposed programs and activities to meet the limits of the Development Planning Agency. Proposed programs and activities were cancelled just before a deadline given by the Development Planning Agency. The deadlines were originally set by the Development Planning Agency, which informed other agencies only very late. Due to limited available time, processes to cut budgets and cancel programs and activities did not widely involve divisions and units within the Kutai Fisheries Agency, as occurred when the proposed budget was first drafted. Instead, the final steps of the process would exclusively

84 Interview MK, 6/12/2011.

85 Interview Shrn, a Head of Kutai Fishery Agency, 1/2/2010.

involve the Agency Head together with officials who were in charge of planning. In practice, it was the Agency Head who took the final decision about which program or activity would continue or be cancelled.⁸⁶

Another factor that hindered the forming of serial program was the self-interest of high-ranking officers, who were the decision makers in their respective division or unit. In many cases, the high-ranking officers would not be enthusiastic about the proposed programs or activities suggested by their staff, simply because they were about to move to another agency and did not think that they would gain any benefit from the arranged programs or activities. A similar behaviour could be seen amongst the senior staff, who were about to retire.

Some Kutai Fisheries Agency officials complained that the rigid official procedure for budget planning and spending left them insufficient time to carry out village visits. Budget rules determined that an official of the agency's central office could spend a maximum of three days away travelling (Ind. *perjalanan dinas*). For field officials the travelling allowance was even shorter: one day. Under the formal procedure of budget planning and spending, Kutai Fisheries Agency officials usually proposed on Monday and Thursday a budget for travelling twice a week. When they received money on Monday, they would travel on Tuesday and Wednesday. On Thursday they proposed another budget to be used for travelling on Friday, Saturday and Sunday if necessary. Hence, they actually only had two days for each journey. Nevertheless this was actually a system for the Agency to save some money so that they could pay their 106 (2008) part-time staff members.⁸⁷ By proposing three days of travelling but spending it in only two days, they could allocate money for paying their part time staff members. Thus, on one hand, some Kutai Fisheries Agency officials were complaining about not having sufficient days for village visits, yet, on the other hand, some benefited from it.

(c) *Other agencies' concerns*

Some Kutai Fisheries Agency officials also connected their failure to achieve effective implementation with the minimal concern and self interest of other agencies.⁸⁸ The Kutai Fisheries Agency officials blamed the Kutai Forestry

⁸⁶ Interview Mnt, 19/8/2009, and M, 6/8/2009.

⁸⁷ In that year, the Kutai Fishery Agency employed 101 full-time staff members. In Kutai District it is common that some agencies and offices have more part-time officials than full-time officials, which is also the case at the Kutai Planning Agency, Education Agency and Secretariat Office. In 2007, the Kutai District employed 10,523 officials including around 9,000 part-time officials. This means that of the total population in Kutai District 2,08% number are employed by the government – the largest percentage in East Kalimantan Province (Badan Penelitian dan Pengembangan Daerah Kabupaten Kutai Kartanegara 2008, p. 17-18).

⁸⁸ At the same time other agencies blamed the Kutai Fisheries Agency for only caring about pond development, and less about the environment and land use.

Agency officials for not being concerned with rehabilitation of the Mahakam Delta. Moreover, they blamed the Kutai Forestry Agency for reluctantly supporting the idea to rezone the Mahakam Delta. They were reluctant because re-zoning meant a reduction of the size of the Forest Area. The Kutai Fisheries Agency officials suspected that the Kutai Environmental Agency was reluctant to support the idea of establishing a new management body for the Mahakam Delta. Again, the reluctance was probably closely related to the self interest of the Environmental Agency officials, who worried that the new management body would take over some of their roles.

The Kutai Fisheries Agency officials mentioned a recent case to show how other agencies deliberately dramatized the deforestation of the Mahakam Delta. The Kutai Fisheries Agency suspected that other agencies intentionally used pessimistic deforestation figures of the Mahakam Delta in order to secure programs on mangrove replanting. The worse the deforestation, the longer the reforestation program would be. This explanation helped the Kutai Fisheries Agency to understand why the Kutai Environmental Agency kept using the 2002 research report, saying that deforestation has reached 85% of the land of the Mahakam Delta. It also explains why the Kutai Development Planning Agency, at a workshop in late 2009, mentioned that deforestation of the Mahakam Delta added up to 120,000 hectares (see Section 2.2 on the figures of deforestation of the Mahakam Delta).

Suspicion and blame of other agencies inevitably affected any effort to coordinate with other Kutai District government agencies. An attempt was made with a multi-stakeholder team, the so-called Team for Integrated and Sustainable Management of the Mahakam Delta (TISMMD).⁸⁹ Beside civil society members, all related Kutai agencies were represented in the TISMMD.⁹⁰ The TISMMD had difficulty establishing coordination among the Kutai agencies. Meanwhile, once the TISMMD was able to organize joint meetings, decisions could not be made, as the agencies sent their junior staff members who were not authorized to take a decision.⁹¹ Consequently when the Kutai agencies allocated their respective budgets in respect of the Mahakam Delta, instead of merging the different budgets into one, the agencies used and spent their own budgets separately.⁹²

Not only with other agencies, the Kutai Fisheries Agency also encountered serious internal problems of coordination. With regard to the SSFRC, alongside weak capacity, a lack of coordination among field officials led to fewer SSFRC applications than hoped for (Dinas Perikanan dan Kelautan Kutai Kartanegara

89 The Team was officially established through the Decree of the Kutai District Head No. 180.188/HK-458/2001 on The Establishment of a Team on Integrated and Sustainable Management of the Mahakam Delta.

90 The civil society members were companies, NGOs and academics.

91 Interview HT, a former Secretary of Kutai District government, 31/1/2010.

92 Interview RBS, 24/4 and 7/5/2008.

2009: 50). With regard to law-making, the lack of internal coordination was an even greater problem. The making of the Kutai Draft Regulation on Fishing as a revision of Kutai Regulation No. 3/1999 on Fishing hardly took into account the previous making of the Kutai Draft Regulation on Fishery Levy. As a result, the Legal Drafting Team of the initiative overlooked what had been produced by the Legal Drafting Team of the Kutai Regulation on Fishery Levy.

(d) Leadership

There exists a strong belief among Kutai District government officials that the extent to which the Kutai District government is concerned with the Mahakam Delta environment is influenced by persons who occupy leadership positions both in the secretariat, agencies and offices (see Section 4.1 on the difference between secretariat, agency and office). If leadership is in the hands of people, who are personally concerned with the environment or social issues, policies concerning the Mahakam Delta are better implemented. The opposite situation occurs, if the people are less concerned. A former Head of Kutai Environmental Agency said:

One of the factors that has added to the destruction of the environment of the Mahakam Delta is that only a few Kutai higher or lower officials were concerned about the environment. There are mostly short-terms views in seeking how environmental destruction should be resolved.⁹³

The local officials made a comparison between the period before and after 2001-2005 to point to the importance of the individual or personal concern. The period of 2001-2005 was seen as period when some important positions were occupied by persons who were highly committed to the Mahakam Delta's environment. Three key positions that were occupied by concerned high-ranking officials at that time were the Head of the Environmental Agency, the Head of the Fisheries Agency and the Head of the Government Bureau of the Secretariat. This resulted in the undertaking of various activities, such as mangrove replanting, organisation of workshops, formulation of legislation, and carrying out (comparative) research. Initiatives to formulate legislation on the management of the Mahakam Delta even led to the establishment of a Special Committee of Kutai Parliament in 2005.⁹⁴

Yet, the way the positions were filled ended in 2005 following the election of 2004. The elected Kutai District Head 'toppled down' around 400 high and

⁹³ Interview RBS, 24/4/2008.

⁹⁴ The Special Committee of Kutai Parliament was dismissed after delivering a report in a plenary session of the Kutai Parliament. In its report, the committee recommended two things. First, to establish a special management body for the Mahakam Delta. Second, to develop sustainable shrimp ponds. Interview MA, a member of Kutai House of Representative, 14/6/2008.

middle ranking officials without giving them a clear new position.⁹⁵ The former Head of the Environmental Agency was one of the victims of what she called a 'political government'.⁹⁶ Her new position as an advisor of the Kutai District Head left her unable to be involved in the Mahakam Delta any longer. The Head of the Government Bureau of the Secretariat could also be no longer involved, as he was moved to another agency in 2009.⁹⁷ Their successors were less concerned with the issue of the Mahakam Delta.

External factors

To understand why fishery regulations and policies were not effectively implemented, the Kutai Fisheries Agency officials also pointed to the behaviour and life of the fishing and farming communities. They perceived the failure of environmentally-friendly shrimp ponds as caused also by bad attitudes of the fishermen and farmers.

As said, a lack of budget was mentioned as a factor preventing the Kutai Fisheries Agency officials from effectively enforcing rules on destructive fishing. Yet, they pointed also to the importance of fish capture for the livelihood of the small-scale fishermen of the Mahakam Delta. The fishery officials were reluctant to ask fishermen not to use trawls, given that fishermen were dependent on fishing for their subsistence. It is therefore that the fishery officials felt they had to come up with alternative ways of generating income, if they wanted to be successful in enforcing the law upon the small-scale fishermen.⁹⁸

95 'To topple down' is in Indonesian popularly called *pe-non-joban*. It should simply be understood as taking away an assignment from a civil servant, even when he or she officially still holds the position of civil servant. A worse implication of *pe-non-joban* is that someone's name disappears of the list of the agency where someone was last registered. The act of *pe-non-joban* came into being after the elected Kutai District Head and Campaign Team were hostile to the 400 officials given that they attended a meeting held by the acting Kutai District Head. The elected Kutai District Head refused to acknowledge the acting Kutai District Head, whom was appointed by the Governor. At that time, the elected Kutai District Head urged all Kutai District government officials to not go to office by way of protest. The 400 officials rejected the invitation and continued to go to work due to reasons of professionalism. The massive *pe-non-joban* actually de-stabilized the Kutai District government, because many positions were not occupied. It got worse from 2005 onwards, when the Kutai District Head was detained by Indonesia's Corruption Eradication Commission in 2007. As already said (see footnote 55), one year later, the Deputy Head of Kutai District was detained as well by Indonesia's Corruption Eradication Commission. .

96 The former Head of the Kutai Environmental Agency found two basic elements of political government. First, that selection and appointment were based on favoritism. Second, that people who were selected and appointed were those, who used to support the elected district head. Interview RBS, 24/4, and 7/5/2008.

97 In 2009, the former head of the Government Bureau was moved to the Office of Civil Registration and Population. Yet, in 2010 he was promoted to a higher position to become an assistant to the District Head.

98 Interview Sji and MK, 11/8/2008.

On the whole, the Kutai District government officials perceived the inhabitants of the Mahakam Delta as tricky, stubborn as well as short-sighted and money-oriented. One official even perceived the inhabitants as cannibals.⁹⁹ In addition, they also regarded the fishermen and farmers as poorly-educated people. As mentioned before, when the Kutai Fisheries Agency rented their ponds, the farmers would let their ponds be used as a trial for environmentally-friendly shrimp ponds. The agency even had to pay the farmers to plant mangrove around and in their ponds. Often the farmers planned as many mangrove trees as possible, so they would earn more money. For each seed of mangrove tree they planted, farmers would receive US\$ 0.03 and the amount would go up to US\$ 0.05, if the planted seeds grew. As a result the seeds were planted too closely together.

The Kutai Fisheries Agency officials found that the fishermen and farmers of the Mahakam Delta favoured instant means to catch and cultivate fish, despite potentially causing environmental damage. Their traditional practices hampered the introduction of new technologies as well as knowledge of environmentally-friendly shrimp ponds (Dinas Perikanan dan Kelautan Kutai Kartanegara 2009, p. 62-63). To illustrate how rooted the tradition was, the local fishery officials said that they had invited many experts from national and local universities to meetings with the villagers, but that they still could not change the socially-embedded practice.

In addition, the Kutai Fisheries Agency officials mentioned two other factors that made the implementation of regulations and policies ineffective. First, fishermen's and farmers' expectations of the implications of complying or not complying with the laws and regulations. Second, the village political dynamics.

The officials observed two other reasons why the fishermen and farmers were not willing to register their fishing activity to either the agency office or sub-district office. First, they found that they were not going to be punished for not having a SSFRC. In addition, the Kutai Public Transportation Agency did not forbid them to use their boats, if they did not have a boat certificate. Second, the fishermen and farmers were afraid of having to pay tax if their fishing activities were officially registered. The fishermen perceived the SSFRC as a kind of permit, which would make their business subject to tax collection.¹⁰⁰

Meanwhile the reason why many fishermen, and in particular fishermen from outside, continued to use destructive gear despite the fact that a few fishermen had been prosecuted, was that the punishment stipulated in Kutai Regulation No. 3/1999 was not very severe. Instead of imprisonment, fisher-

99 Interview ES, a head of technical section of Aggana sub-district, 30/6 and 1/7/2008. Some researchers also associated the fishermen and farmers with particular character-traits, such as greed. See Hidayati (2004, p.101-102).

100 Interview Shrn, 1/2/2010, and Sfd, 17/6/2008.

men favoured to pay a fine which was less than the profit they made on fishing. Because they could earn more money than the amount of the fine, they decided to continue using destructive gear (see Section 1.3.2 on adequacy of legislation). This explains why the warning boards displayed sanctions stipulated in Law 2004 on Fisheries, rather than the sanctions stipulated in Kutai Regulation No. 3/1999, which were milder. Moreover, it was sometimes difficult to enforce the rule forbidding the use of destructive gear, as in some villages elected village heads had bravely promised to voters to hinder any enforcement, if he or she was elected.¹⁰¹ The situation, where local political power hinders formal rules to work, also occurred when fishermen who were allegedly carrying out destructive fishing, were the relatives of a member of the CGSs or sub-district head. To deal with the situation, the officials conducted sudden investigations so that the suspected fishermen would be caught unaware.¹⁰²

It is apparent that the factors affecting the implementation of the Kutai fishery regulations are manifold. The factors range from the governmental system to individual interests and actions. It is true that the ineffective implementation has been caused by the government system (staffing, planning, budgeting and coordination), but individual concerns and interests of local officials also contributed. We also found a remarkable variation and ambiguity in administrative attitudes. On one hand, the local officials perceived the fishermen and farmers as tricky, short-sighted and stubborn, yet, on the other hand, the local fishery officials were sympathetic to the fishermen and farmers given their poor economic conditions. This ambivalent attitude can, to some extent, be explained by ambiguities in the agency's strategies and policies, which have translated into different roles played by the local fishery officials.

7.4 LEGISLATION: IDENTIFICATION OF SOME PROBLEMATIC ISSUES

There are at least three main problematic legal issues at stake in fishery management in the Mahakam Delta. First, the excessive formal control of the Kutai District government over fishery management, which eventually turns to be in contrast with higher national fishery regulations. Second, vagueness or a lack of clarity in regulating other non-fishery resources. Third, incoherence among the Kutai fishery regulations due to incompatibility. Each of these three legal issues affect tenure security of the various resource users.

101 Interview Mnt, 19/8/2009.

102 Interview Iw and Akh, staffs of Kutai Fishery Agency, 8/12/2011.

7.4.1 Excessive formal control

As already mentioned (Section 7.2) the Kutai District government has the tendency to enhance formal control of fishery resource use through input control as reflected in some Kutai regulations. It started with Kutai Regulation No. 3/1999 and continued in 2000 and 2004 through respectively Kutai Regulation No. 36/2000 and the 2004 Circular Letter No. 100/287/Pem.A/VI/2004. The intention to widen the scope of formal control can also be seen in the Kutai draft fishery regulations. In the name of sustainability of biodiversity and conservation, the Kutai Draft Regulation on Fishery and Marine Management of the Mahakam Delta imposes strict prohibitions and restrictions on the type of gear, pond construction and fishing zones. The Kutai District government wanted to exercise specific control over shrimp ponds through imposing 'standard shrimp ponds', as reflected in the Draft Regulation of Kutai District Head on Standard Ponds.

As already described (Section 6.2 and Section 7.2), the implementation of the new regulatory norm that gear installation was no longer allowed in the vicinity of a company's platforms abolished the pre-existing rights of small-scale fishermen to fish in Zone I. The implementation of this new norm has been strongly linked with other excessive rules, which transferred three requirements of a FBL to the application for a SSFRC. One of the three requirements is that one should obtain a location permit first issued by the Kutai Land Bureau. During a meeting on the tidal trap case as described in Section 6.1, a high ranking official of the Kutai Fisheries Agency pointed out that the installation of ten tidal traps in GTS G and TN G19, which is situated in Sepatin village, was illegal given that the owners of the tidal traps had not obtained a location permit.¹⁰³ Not only the Kutai Fisheries Agency officials held this perception, the head of the neighbourhood (see Section 4.1 on neighbourhood) did so too.¹⁰⁴ As a result the SSFRC changed from a means of supervision to a means of control.

7.4.2 Overlooking non-fishery resource use

Fishing legislation, both national and local, has intensively regulated fishing resource use in the Mahakam Delta over the last few decades. Yet, it has not adequately regulated how non-fishery resource use activities, namely oil and

¹⁰³ The meeting was held on 7 September 2009.

¹⁰⁴ A head of a neighbourhood of Sepatin village sent a letter to the Head of the Kutai Fisheries Agency, asking him for clear information (*petunjuk*) on the formal rules on installing a tidal trap. He made the request, as he saw an increase in installments of tidal traps by outside inhabitants. The new tidal trap installments covered almost half of the river, which disturbed regular shipping activities.

gas and sailing taking place across sea and marine waters, should exist alongside fishing. The situation is different with regard to legislation on aquaculture or shrimp cultivation, which has limited links with land use. Pursuant to the legislation, applicants of FBLs and SSFRCs should have obtained a so-called location permit (see Section 8.2 on permit location) ahead of applying for a permit. Above all, a FBL can only be issued if there are clear rights over land that is to be used for aquaculture. Another provision states that small-scale farmers who carry out aquaculture on their private land will not be required to pay a fishery levy.

As said, there have been fishery regulations which manage to bridge fishery resource use and non-fishery resource use. These regulations are (i) Kutai Regulation No. 3/1999 on Fishing; and (ii) The Circular Letter of Directorate General for Fishery of the Ministry of Agriculture No. E.V/2/4/15/1975, which was later implemented by a letter of the Special Directorate (*Sub Direktorat Khusus*) of Kutai District No. Pal-902/VI/2.d/75. A Circular Letter of the Kutai District Head No. 1000/287/Pem.A/VI/2004 recalled the content of the two previous letters from 1975. The former letter bridged fishing and sailing, whereas the latter letter bridged fishing and sailing as well as petroleum resource use.

Yet, the above regulations have suffered from the following weaknesses. First, they are so general that it is unclear which sailing lanes and petroleum platforms they mean. Until the time of writing, the Kutai District government has not further elaborated either Kutai Regulation No. 3/1999 or the 1975 and 2004 circular letters, thus keeping the provisions general in nature. With regard to the fishery-sailing relation, several fishery regulations have been made separately to deal specifically with the type of gear that is prohibited to stop it from endangering a public shipping lane. At the time of writing, shore-operated stationary lift nets (*bagan*) and fish aggregating devices (*rumpun*) were the only types of gear mentioned.¹⁰⁵ However, as already said, since 2000 shore-operated stationary lift nets in East Kalimantan were permitted again after a twenty-five year ban. This ban was included in the Decree of East Kalimantan Governor No. 75/1973. One of the two reasons for the ban was that the shore-operated stationary lift nets were seen as a potential danger to public shipping lanes. After the Letter of East Kalimantan Governor No 523/1133/Proda.2/EK was passed in 2000, the ban was officially lifted. The letter allowed fishermen to install shore-operated stationary lift nets on strict conditions, such as having a license from either the Governor or District/Municipality Head and install the nets within 0-3 nautical miles from the coast.

105 For more detailed provisions of the two decrees, see the Regulation of the Minister of Marine Affairs and Fisheries No. PER.02/MEN/2011 concerning Fishing Zones and the Use of Fishing Gear in Indonesia's Fishery Territories, and the Decree of the Minister of Agriculture No. 51/Kpts/IK.250/1/97 on the Installment and Use of Fish Aggregating Device.

However, with regards to the fishery-sailing relation, the Kutai fishery regulations did not refer to the 1975 Governor Decree nor to the 1997 Ministerial Decree. In the case of the Mahakam Delta, this could be the result from the fact that the tidal trap, the most common gear in the region, was not mentioned in the regulations.

Second, for the regulations that managed to bridge fishery with non-fishery resource use there is no higher legislation as a legal foundation. No national fishery regulation has included any stipulation on sailing or petroleum resource use. Due to their binding force, the enforceability of the abovementioned three letters is weak (see Section 4.3 and Section 6.3 on the binding force of policy rule).

Third, the regulations narrowly regulate fishing when encountering sailing or petroleum resource use. Yet, the other way around, the way in which sailing or petroleum resource use should be regulated, when they occur in the same area as where fishing takes place, does not seem to be stipulated anywhere. Considering the principles of legal drafting, such technique of legal drafting is correct. Yet, since neither petroleum nor shipping regulations, at the time of writing, have any provisions on fishing, there is still a lack of coherence.¹⁰⁶ The incoherence brings forward an imbalance, which sometimes appears as discrimination of different resource users with prohibitions and obligations for fishermen, whilst those involved in sailing and petroleum resource use are not subject to the same rules. Rules on compensation are unlikely to lift the imbalance, given that the compensation scheme does not really concern fishing rights which have temporarily or permanently disappeared when the companies' activities were taking place. Some officials from both the Executive Agency and Total E&P Indonesia have never recognized the rights of fishermen, arguing that sea and marine resources are open access.¹⁰⁷ Therefore, as is the case regarding compensation over land, compensation over fishing would only apply to expenses of fishermen rather than to the opportunity to exercise their fishing rights.¹⁰⁸

106 There is not single provision in a regulation on Shipping which either explicitly or implicitly stipulates prohibition of installing fishing gear, which could endanger public shipping lanes. See Law No. 21/1992 on Sailing, replaced by Law. No. 17/2008, and Government Regulation No. 82/1999 on Water Shipping, replaced by No. 20/2010. Meanwhile, Government Regulation No. 17/1974 concerning the Implementation of Monitoring Offshore Oil and Gas Exploration and Exploitation is the only regulation on petroleum regulatory rules. Nevertheless, this Government Regulation has an article relating to fishing, which states that petroleum resource use cannot be carried out in area with a nursery ground and/or coral reefs.

107 Interview DH, 19/12/2009.

108 The Decree of Kutai District Head No. 180.188/HK-630/2008 concerning the Basic Price of Compensation Lists. Apart from compensating damaged boats or gear, Total E&P Indonesia usually offered fishermen, who could no longer fish (temporarily or permanently), to become security officers of the company. As a security officer, one would earn US\$ 6 per day.

7.4.3 Internal incompatibility

There are only a few instances of incompatibility between the different Kutai fishery regulations. In fact, only Kutai Regulation No. 3/1999 on Fishing and the 2004 Circular Letter of the Kutai District Head contradict each other. The incompatibility between these two regulations emerged when the 2004 Circular Letter added oil and gas platforms as areas where gear installation was forbidden (see Section 6.2 and Section 7.2). Oil and gas platforms were not included in Kutai Regulation No. 3/1999. Public shipping lanes were the only object that this regulation explicitly mentioned as a forbidden area for gear installations.

A former head of section on fishery resource surveillance of the Kutai Fishery Agency, acknowledged that the 500 meter forbidden zone is located within the 0-3 miles zone in which small-scale fishermen are allowed to fish as existing fishery regulations clearly state (see Section 7.2). Thus the implementation of the 2004 Circular Letter has decreased fishing grounds for small scale fishermen. Even though no fisherman who has broken the rules has ever been detained, the security officers of the oil and gas companies still warned and asked them to stay away from the zone.¹⁰⁹

The above regulations also state that gear installation which could endanger public interest is prohibited as well. However at the time of writing there were no subsequent regulations defining 'public interest'. Even though Presidential Directive No. 63/2004 concerning the Security of National Vital Objects classified a 'national vital object' – which included oil and gas extraction – as anything concerning the livelihood of the majority of people and national interest, there are as yet no regulatory rules, dispute settlements, or court decisions which explicitly explain what is meant by 'public interest'. Nor have the Executive Agency or Total E&P Indonesia used the 2004 Presidential Directive to accuse fishermen or farmers of having broken the law.

7.5 INTERACTION BETWEEN THE STATE AND RESOURCE USERS

Various factors have shaped the interaction between the Kutai District government officials and the fishery and aquaculture resource users in the Mahakam Delta. Similar to what happened in the case of the forestry regulations (see Section 5.5), the local officials had mixed feelings of sympathy, respect as well as pragmatism in interacting with the local resource users. However, one should say that two other attitudes of the local officials can be discerned, which specifically arise in the implementation of fishery regulations. The first concerns oil and gas resource use where the local officials are required to impose regulations repressively. The second is their attitude as 'defender' of the shrimp

109 Interview MK, 6/12/2011.

farmers, when the local users are accused of breaking the law by other regional agencies.

As mentioned before, local fishery officials showed empathy when they did not enforce the law on those who used damaging gear, taking into consideration the economic subsistence of small-scale fishermen. Sympathy also played a role, when the fishery local officials settled disputes between fishermen or farmers and Total E&P Indonesia. In dispute settlements concerning environmental pollution, the local fishery officials always expected the company to be willing to pay compensation to the fishermen or farmers, even when investigation proved that the companies' operations had not caused the environmental pollution, which fishermen or farmers suggested. In a way, the officials acted in this manner to prevent resistance from fishermen or farmers after the dispute settlement, but the motive was mixed with a sense of humanitarianism. For the local fishery officials, the sum that the company donated, would be nothing in comparison with what the company has earned from the Mahakam Delta.

Pragmatism also caused the local fishery officials to overlook formal fishery legislation, when they favoured the realization of planned programs and activities. For instance, in dealing with aquaculture farmers, the Kutai Fisheries Agency officials continued to supervise the farmers by organising a high number of meetings on how to develop environmentally-friendly shrimp ponds as well as mangrove replanting, despite them being aware of the illegality of the ponds in the Mahakam Delta.¹¹⁰ The Kutai Fisheries Agency even officially rented several ponds, to demonstrate how to farm an environmentally-friendly pond, turning illegal pond owners into formal occupants. With regard to the legal status of the land of the pond, local fishery officials would rely on information given by the village head. The following comment from an official of the Kutai Fisheries Agency reflects the pragmatism.

If our agency questioned the legal status of the land, it would only stop the government from ever doing anything. It would be useless for our agency to continue discussing the land's legal status, and it would take a lot of time. Moreover, it would make our agency do nothing.¹¹¹

The field officials of the Kutai Fisheries Agency often practiced pragmatism when they found themselves in a dilemma, with the fishermen and farmers being very sceptical about the programs of the Kutai Fisheries Agency on one hand, whilst they continued to demand programs, on the other. The solution was often that they continued with the programs and activities, whilst knowing full and well that they were rather meaningless. Similarly, in various meetings

110 Interview Shrn, M, SR and DS, 11 and 12 June 2008.

111 Interview Mnt, 12/11/2008.

the field officials kept reminding the fishermen of the fishery regulations, despite knowing that the fishermen would not adhere to them.¹¹²

Meanwhile in settling disputes, the local fishery officials could be repressive instead of showing sympathy to the fishermen and farmers. This occurred when the pressure to prioritize the continued operations of the companies combined with a negative, paternalistic approach stereotyping the fishermen's and farmer's attitudes as stubborn and backward. In such situations, the local officials could bluntly apply legal norms. A statement of a senior official of the Kutai Fisheries Agency during a meeting in 2009, saying that all tidal trap instalments without a location permit were illegal, is a perfect instance of it. Actually, the provision requiring the SSFRC applicant to have a location permit ahead of applying for the SSFRC is actually incorrect given that a permit location would only be given to a legal body which needs land to carry out its business activities.¹¹³ A SSFRC applicant is an individual who does not need land for his/her fishing.

In the end, the repression of fishermen and farmers by local fishery officials went hand in hand with favouritism of petroleum companies. In some cases, favouritism led to the local fishery officials deliberately ignoring the legal incompliance of companies. For instance, the local fishery officials did not ask whether the companies' platforms were really located outside public shipping lanes, for which they needed a permit issued by the Port Administration Office of the Ministry of Public Transportation.

Meanwhile, the local fishery officials shifted their role as defenders of the shrimp farmers when the latter were contesting information and policy by the village government and sub-district government when they were not willing to process land letter applications. As of 2009, the village government and sub-district government officials refused to process the application of a land letter if the proposed land was located in Forest Areas. This occurred after the officials of a regional technical implementation unit called the Unit of Forest Area Establishment of the Ministry of Forestry and the officials of the office of the District Head told the village government and sub-district officials to not issue land letters on land, which is located inside Forest Areas. They were told in a meeting attended by the Kutai District Head.

In response to the situation where the validity of land ownership of the shrimp farmers was questioned, the local fishery officials argued that the land ownership was valid. By way of argument, the local fishery officials showed old official documents, which had been issued and produced by the local office

112 Interview Snt, 30/6/2008.

113 See a Regulation of the Minister of Agrarian Affairs/Head of National Land Agency No. 2/1999 on Location Permit. Article 2 (1).

of the Kutai Fishery Agency, in an interview that I conducted in 2011.¹¹⁴ The fishery local officials showed a so-called Shrimp Pond Registration Certificate (Ind. *Tanda Bukti Pendaftaran Usaha Pertambakan*). The document primarily contains personal data of the shrimp pond owners as well as the size of land and year the land is reclaimed.¹¹⁵

By showing the old document, the local officials argued that land ownership of the shrimp farmers was legal. In an effort to delegitimize the claim of Forest Areas – in addition to the legal argument by showing the old documents – the local officials suggested that there might be a conspiracy behind the order to not serve the land letter applications. They suspected that the oil and gas company had lobbied the higher officials to raise the rules on the Forest Areas in the hope that the company would only need to pay a small amount of compensation to the shrimp farmers for they would not be the owners, but merely the users (see Section 6.4).

7.6 CONCLUDING REMARKS

As pointed out by the 2002 research report, plenty of programs and activities have been carried out by the Kutai District government in and for the Mahakam Delta. Not only did they enlarge their programs and activities, the Kutai District government also extended their formal control over fishery resource use which initially started in 1999. Yet, due to a number of factors that are internal and external to the administrative institutions, in spite of the long list of actual and planned programs and activities as well as the excessive formal control, the implementation of fishery regulations and policies has not been very effective. Using the definition of effectiveness as set out in Section 1.3.1, the lack of effectiveness is indicated by the fact that the fishermen and shrimp farmers hardly behaved as the legal rules prescribed with regards to fishery permits and the use of destructive gear.

When discussing prominent factors that have left the implementation ineffective, we can not simply say that the lack of effectiveness has been caused by government inability. Rather than corresponding to one factor, it is the result of a complex amalgamation of factors. One cannot solely speak of inability, because the Kutai District government officials partly did not do everything to implement fishery regulations and policies because they were empathic to the poor economic conditions of the fishing and farming commu-

114 Interview MT (a resident of Sepatin village), HTR (a Head of Muara Badak office of Kutai Fishery Agency), Agg and Whd (a staff of Muara Badak office of Kutai Fishery Agency), 3/12/2011.

115 The local office of the Kutai Fishery Agency issued the certificates in a way to implement the policy of the Ministry of Agriculture and the Provincial government to boost the development of small-scale aquaculture (Ind. *Tambak Inti Rakyat*) after the ban on the use of trawl in 1980 (see Section 7.3).

ities. Their reluctance to strictly follow certain provisions of the regulations also derived from their perception of the huge income disparity between the petroleum companies and the fishermen and farmers.

Moreover it is incorrect to say that the exercise of state control over fishery resources in the Mahakam Delta has always or wholly been weak or absent. In this region, where the concept of a 'national vital object' exists, the Kutai District government officials together with local law enforcers have occasionally exercised effective control on fishing. In this regard, the state did not only exercise ordinary control as stated in the national fishery regulations, but also excessive control, as stipulated in some of the Kutai fishery regulations. It is important to underline that repressive behaviour of the local officials and officers usually derived from the importance of petroleum extraction for the state on one hand, and their prejudices about fishermen's and farmers' attitudes, on the other.

To some extent, the root of the formal and actual excessive state control over fishery resources use as can be seen in the Mahakam Delta is laid down in national legislation. National legislation, notably on fisheries, has long required fishery resource use to respect non-fishery resource use. Not only has this legislation restricted fishing rights, it has also abolished rights which are legally recognized.

With regards to the process of drafting legislation, the Kutai Fishery Agency officials perceived fishermen and farmers as objects, as can also be seen in the implementation of the law. Given that they are less-well educated, the officials believed that the fishermen did not need to be engaged in law-making. Through this opinion, most draft and enacted regulations have been made overwhelmingly with input from the outside. Personal concerns and interests of officials coinciding with pursuing legal legitimacy in the eyes of higher government units have turned regional law-making into something much more concerned with outsiders than with the inhabitants as stakeholders of the Mahakam Delta.