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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10 Administrative implementation of law: a cause for concern

This final Chapter consists of two parts. The first part presents the key findings on legal inconsistency and incoherence in legislation (see Section 10.1) as well as on bureaucratic behaviour in law-making (see Section 10.2) and implementation of law (see Section 10.3). The second part sets out how the findings of this book contribute to the theoretical considerations set out in Section 1.3 and makes a number of suggestions for future research (see Section 10.4).

It is important to underline that the key findings explain the extent to which the substance of the laws and regulations and the processes of making, implementation and enforcement have provided legal security to the right holders, and clarity on authority and legality to the regional and local government officials. The processes of making, implementing and enforcing law are analysed in this book by taking a close look at the behaviour of a number of regional and local bureaucrats. This is done in the context of decentralization whereby this chapter suggests that decentralization has shaped the interpretations of the stakeholders, which eventually affected the way in which administrative power on resource management was exercised. To some extent, this book observes that decentralization also affected the working environment within the government agencies.

The second part of this chapter describes the contribution of this book to a wider theoretical debate within socio-legal discourse on the role of the bureaucracy in legal processes concerning natural resources management. In line with the theoretical contribution, there will be some suggestions for further research.

10.1 Legislative inconsistencies and incoherence

As already said (see Section 1.3.2) inconsistency occurs when there are contradictions between legal principles or legal rules, whereas legislation is incoherent when (sets of) legal principles and legal rules are not mutually interdependent or do not fit together. Inconsistency can appear in two ways: (sectoral) legislations contradict each other or are incompatible.[1] Meanwhile,

1 Concerning the second manifestation it is important to underline that incompatibility in this respect refers to a condition whereby a particular legislation constrains the validity of other legislation so that it leads to inconsistency (Hage 2000, p. 373-374).

there are two types of incoherence: the absence of mutual referencing between sectoral laws, or disharmony between statutory and case law.

10.1.1 Inconsistency

A good example of inconsistency in sectoral legislation is in the area of fishing zones, oil and gas platforms and shipping lanes. Fishery regulations aim at protecting small-scale fishermen, allowing fishing in Zone I (0-3 nautical miles from the coast) (Section 7.2). However, this is inconsistent with regulations which prohibit or restrict the use of the area in the vicinity of oil and gas platforms, as they limit the possibilities to fish in Zone I (Section 6.2; Section 7.4). A similar issue applies to the regulations on shipping lanes, which prohibit the installation of gears in public shipping lanes (Section 7.2; Section 7.4). This contradiction rests in the uncertainty of fishing rights of small-scale fishermen and above all impedes fishery regulations in meeting their desired goal, namely the protection of small-scale fishermen.

A similar problem occurs in regulations concerning management authority over the nine Forest Areas. On one hand, regulation on decentralization stipulates that all nine Forest Areas that are located in the administrative area of the Kutai District should be handed over to the Kutai District, but on the other hand regulation on forestry and the organizational structure of the regional government stipulates the opposite, stating that some of the Forest Areas are still under the authority of the Provincial government (Section 5.2). As said in Section 5.3, these contradictions in the sectoral legislation discouraged the Kutai Forestry Agency officials from enforcing the law, e.g. protecting the forest.

Meanwhile, incompatibility may generate inconsistency when lower regulations add new provisions which are not mentioned in the higher regulations. In the Mahakam Delta this occurred when the Kutai Regulation on Fishery Business of 2000 included a provision that changed the nature of the Small Scale Fisheries Registration Certificate (SSFRC) from a mere record to a permit (Section 7.4). As shown in the *julu* case (Section 7.4), an official of the Kutai Fishery Agency referred to the provision in accusing the *julu* installation of being against the law. Another example of such incompatibility is the 2004 circular letter in which the original provisions of the Kutai Regulation on Fishing were extended (Section 7.4). The extension restricted the small-scale fishermen in exercising their formal fishing rights.

10.1.2 Incoherence

Absence of mutual-referencing

Even though sectoral legislation does show a level of mutual-referencing concerning the resource management of the Mahakam Delta (Section 5.4; Section 6.3), there are few pieces of sectoral legislation that mutually support each other (Section 6.3; Section 9.4). Due to the absence of mutually-supporting legislation certain sectoral legislation has lost its legitimacy. In the Mahakam Delta, this occurred in the case of the forestry rules when resource users and even government officials rejected the legitimacy of the Forest Area. This confirms one of the assumptions as set out in the conceptual background (Section 1.3.1): due to the illegitimacy, the implementation of the forestry law and regulations was ineffective.

It is obvious that the absence of mutually referencing or mutually supporting sectoral legislation generates uncertainty: instead of creating unity, the sectoral legislation creates overlap so that some legislation cancels each other out. In the case of the Mahakam Delta, one good example is the management of marine resources. Central to this issue is that each government department, which has a spatial plan, claims authority over its respective work areas.[2] Each government agency claims to have a spatial plan that they propose to be taken into account in settling cases. As Yusuf (2003, p. 64) has pointed out, the difference between spatial plans causes confusion among private parties who have applied for a permit location, since they do not know what is legal or not.

Disharmony between statutory and case law

As said (Section 1.3.2), disharmony can occur between statutory and case law. In the Mahakam Delta case, a good example is that both Tenggarong District Court and Samarinda High Court acknowledged the possessory evidence that the plaintiffs and defendants presented (Section 8.4). In this respect, the courts complied with the 1957 precedent on possessory land evidence (Section 8.2). However, forestry legislation did not acknowledge the possessory evidence. In the Mahakam Delta, the non-recognition in the forestry legislation of possessory evidence resulted in the absence of a settlement of third parties' rights (Section 5.4) as well as the refusal by the village and sub-district officials to process land letter applications (Section 8.4). This disharmony between statutory and case law certainly brings about inequality amongst the possession

2 In the discussions on coastal resource management, it is often said that each sector has its own legal basis which pursues different goals (Idris 2001, p. 19; Patlis et al. 2001, p. 28; Arnscheidt 2003, p. 53-55; Patlis et al. 2005; Patlis 2005, p. 451-2; Waddell 2009, p. 190).

holders: despite the fact that they all had possessory evidence, the law treated them unequally.

10.2 Addressing the behaviour of bureaucrats in law-making

This concluding chapter agrees with socio-legal scholars who argue that implementability and enforceability are not solely related to the implementation of law, but to law-making as well.[3] Nonetheless, because this book only examines the *making* of draft regulation, this concluding chapter cannot examine the extent to which the *content* of these draft regulations affects the effectiveness of implementation.

In an effort to examine how regulations and policy rules on resource management were made in Kutai District,[4] this Chapter proposes to look at three specific parts of the process. Firstly, reasons to make draft regulations. Secondly, coordination among and within the local agencies. This also includes the coordination with higher government levels. Thirdly, the involvement of affected people in the process. Accordingly, the type of law-making that this Chapter discusses is one in which the District legislators are not involved.

10.2.1 Reasons for law-making

As far as the local officials are concerned, the reasons they gave for making regulations varied. They ranged from carrying out an assigned task, pursuing local revenue or settling a conflict, to copying other regions' regulations, or responding to ineffective implementation of law. However, one should add one other important reason. The fact that the largest amount of the budget which was allocated for regulation making went to the pockets of the local officials through allowances shows that the officials also had personal financial interests. In addition to the allowance, for higher ranking officials, regulation making appeared to be an opportunity to develop close personal relations with local legislators. It is also important to highlight what incentivized the officials to make a regulation. These reasons vary as well, ranging from a brief talk with someone, a superior's oral instruction, observing a particular local situation, to individual complaints by a regulated group. According to the interviews, the initiative was never prompted by a systematic evaluation of the implementation of law. Since local officials' motives were mostly based on

3 For the accounts of this argument see Seidman (1978a); Seidman (1978b); Seidman and Seidman (1994); Van Rooij (2006), and Arnscheidt, Van Rooij and Otto (2008).

4 The opportunity to closely observe the processes of law-making has a reason during field works in the Fishery Agency therefore the conclusions on law-making in the final chapter are based on finding in this sector only.

their individual experiences, they were hardly ever written down. As a result, it often occurred that a draft regulation was already redundant when one particular agency had prepared a draft regulation, despite the fact that other agencies had arranged similar drafts.

10.2.2 Intra- and inter-agency coordination

Among the Kutai District administrative officials, there is a tendency to perceive coordination as a matter of 'listing names' and getting legitimacy. The former means the inclusion of names of officials of other agencies/bodies/offices/divisions, whilst these people do not play an actual role in reality. The latter is to consult with higher government levels to avoid annulment of regulations, planned by the District. 'The listing names' strategy allows the agencies/bodies/offices/divisions which have initiated the regulation to feel that they have attempted sufficient administrative coordination. For example, the Regional Office of the Ministry of Agriculture (POMA) felt that they had sufficiently engaged the Provincial Office of the National land Agency (PONLA) in making the so-called Agreed Forest Land Use Plan by listing some PONLA officials' names in the team commissioned by PONLA. A similar argument was used by a division of the Kutai Fishery Agency in making the Kutai Draft Regulation on Fishing. The same also applied to the making of the Kutai Draft Regulation on Fishery Business, in which the Natural Resources Bureau put down two officials' names of the District Fishery Agency without asking their permission.

This type of quasi-engagement can lead to an ambiguous situation and can have serious implications. In the case of the Mahakam Delta it happened that the officials whose names were listed in the team or committee were not informed beforehand. As a result they were often only involved midway through the process. Meanwhile, a serious implication is that the coordination may not be able to meet its primary goal of avoiding overlap or confusion (*kesimpangsiuran*) among the agencies/bodies/offices/divisions. In the Mahakam Delta this happened when the initiating agency, body or office was not willing to figure out what initiatives and progress the other agencies, bodies or offices had made so far, and therefore could not use the progress as a point of departure. The strategy was used in order to hide something while avoiding criticism from other agencies/bodies/offices/divisions; and out of an arrogance of particular agencies/bodies/offices/divisions, which could lead to neglecting other agencies' capabilities.

It is important to note that the poor coordination does not always derive from the agencies/bodies/offices/divisions, which have initiated the regulation making. They can also come from the invited agencies/bodies/offices/divisions as well. A factor that could hamper the coordination is when the invitees suspect the initiating agencies/bodies/offices/divisions of having narrow

vested interests in organizing the regulation making. Sometimes, no extensive coordination was needed. It happened, for instance, that the invited agencies/bodies/offices/divisions had previously attempted to make regulations, yet failed due to a lack of access to the Legal Bureau or local legislators. In those cases, they hoped that the new initiating agencies/bodies/offices/divisions would succeed. Such expectations would rise, when they knew that the new initiating agencies had closer political ties with the local legislators. In that situation, the invitees were unlikely to object, if the regulation making process was carried out without thorough coordination.

Meanwhile, coordination or what the local officials commonly call 'consultation' with the Provincial government and relevant departments of the central government usually takes place. This occurs due to two reasons. The first reason, often mentioned by the officials, is to avoid annulment by the Minister of Home Affairs, as already happened in the case of two Kutai Regulations in 2004 and 2008. Annulment, it was said, can be avoided by getting initial inputs from departments, where the consultations are held. Yet for some reason, this seems implausible. Firstly, in practice the local officials who undertook the consultation did not only meet the Ministry of Home Affairs yet also other sectoral departments which did not bear any relation to the annulment process of local regulation. Secondly, the officials hardly made any minutes of the consultations, to which they could have referred when they were drafting the planned regulations. Another impact of the absence of minutes was that an agency could carry out a new consultation despite the subject matter being similar to matters that they had consulted on before. Such futile consultations could have been avoided if minutes had been made. Thirdly, they undertook the consultations despite the fact that the draft of the regulation at hand was often not ready yet, allowing them to only orally present general ideas during the consultation. Fourthly, they usually preferred to carry out the consultations in person, eventhough consultations by phone, especially with the officials of the Provincial Legal Bureau, would have been an easier option.

The abovementioned doubts with regards to the first reason of the importance of the consultation leads to a second reason: a vested interest to get additional income through allowances. Recently, the opportunity to get additional income from allowances has increased due to increased supervision over project management (in Indonesian popularly named as *proyek*)[5] which used

5 Project management points to the implementation of planned programs as stated in the Short-Term Working Development Plan and Annual Budget Plan of the regional government (see Section 4.4). Administratively, when the agencies of the regional government implement their planned programs, the head of the agencies appoint his particular officials to implement the planned programs. The appointed officials are popularly called as project head (in Indonesian popularly known as *kepala proyek*). When the central government carries out a financial audit of the implementation of the planned programs, the appointed officials are responsible for any corruption allegations found besides their superiors. See Section 4.4.

to be a favourable source of getting additional income. Of the several activities for which an allowance can be obtained, travelling out of town is one of the favourites.

10.2.3 Public Input

For some of the Kutai draft regulations efforts were made to invite the public to participate. The local officials asked the affected groups – in this case fishermen and farmers – what they thought was needed in the draft regulations. Nonetheless, the public hearings were rarely carried out. According to the officials, this was due to three reasons. Firstly, the officials thought that what the fishermen and farmers raised during the hearings was not reliable knowledge because they were less well educated. Moreover, the officials claimed to know what the fishermen and farmers aspired to as the officials had for long interacted with them. Secondly, the draft regulations concerned practical matters so what the officials required was to have the fishermen and farmers willing to implement the regulations, instead of getting an input from them during the law-making process. Thirdly, budget constraints did not allow for public hearings.

Nonetheless, the last reason for not sufficiently carrying out public hearing seems to be unreasonable when looking at the amount of money that was spent on carrying out other methods to gather input. Comparative study and consultation with higher government units are the two methods on which most money was spent. Not only was much money spent on these two methods, they also turned out to be rather inefficient and ineffective. The local officials carried out the comparative studies on holidays and in regions which they had visited before. Thus, it seems that rather than a budget *constraint*, the lack of engagement with the affected groups in the regulation making was caused by a budget *displacement*. The legislation-makers mostly spent money on travelling rather than asking reliable sources of information, such as the fishermen, farmers and field officials.

Having described what incentivized the officials to draft a regulation and how the coordination and public consultation were carried out, it is interesting to assess the extent to which these processes have influenced the contents of the Kutai draft and enacted regulations. It is interesting to note that due to a lack of public hearings the contents of the draft and enacted regulations were not in favour of the fishermen and farmers. However, this does not make the content of the draft and enacted regulations defective in terms of environmentally-sound policies. It is apparent that the individual concerns of the local officials regarding the environmental deterioration affected the content of the regulations. However, at the same time, the process was also hijacked by vested

interests. In such cases the actual rationale of a regulation got lost. As occurred in the case of the Kutai Draft Regulation on Fishery Business, the content only constituted a compilation of enacted and draft regulations making it unlikely that they were able to protect fishery resources from large-scale resource extraction, as was its original objective.

10.3 Administrative behaviour in the implementation of law

As has been described extensively in Chapter 5 and 7, in response to factors that are internal and external to administrative institution, the local officials and legal enforcers behaved in such a way that it subsequently affected the implementation of laws and regulations. The behaviours of the officials and legal enforcers brought the implementation of law into two contrasting situations: on most occasions the implementation of law was ineffective, but sometimes the implementation of law was effective.

10.3.1 Behaviours that led to ineffectiveness

Economic advantage, long residence, justice concerns and internal conditions

The officials and enforcers frequently mentioned the following reasons in arguing why the implementation of law was ineffective: economic advantage and settlement history as well as political power of the resource users that would cause the government to have to spend a lot of money if they implemented the law, justice concerns, resource shortage, and bureaucratic administrative culture. In addition, they mentioned the rationality of resource users in legal compliance and the exercise of local power. Of those reasons, economic advantage and long residence of the resource users seem to be the primary factors that impeded the effective implementation of law. In all natural resource sectors, these two reasons have been advanced as a reason not to carry out law enforcement despite the resource users obviously violating the formal rules.[6] In the forestry sector, law enforcement was feared to worsen the livelihood of the local people.[7] It is suggested that in a situation whereby law breaking in the form of forest occupancy is widespread, enforcing the law strictly would only generate large-scale violation that would make enforcement

6 On how economic advancement has influenced effective implementation and enforcement of the law see Kubo (2010, p. 246). For other accounts of the argument of long residence see Arnscheidt (2009, p. 354) and Kubo (2010, p. 244).

7 See Kaimowitz (2003: 2004) on how law enforcement of forestry laws and regulations can worsen the livelihood of local people.

unfeasible.[8] Legal enforcers in the forestry sector, therefore, thought that their response to the violation of formal rules should not necessarily rest on prosecution or legal punishment, but on creating a sense of legal obligation instead.[9] Thus, in this case, as exactly occurred in the protection of the Production Forest of the Mahakam Delta, the legal obligation could be perceived as an exchange for the deliberately missed legal punishment. The idea behind the exchange was an invitation from the local forestry officials to the shrimp farmers to conduct a partnership in protecting the Forest Area.

Economic advantage and long residence of the resource users do not stand alone. The cost of enforcing the law and justice concerns, are two corresponding reasons which the local officials raised. The officials were aware that if they would enforce the law, they would need to provide alternative sources of income or compensation for the subsistent resource users.[10] Apart from the concrete repercussions of implementing the law, the local officials tried to link the minimal presence of law enforcement over the Productive Forest with justice concerns. They pointed to two unfair situations to illustrate those concerns.

Firstly, on one hand the local users had lived in the area for a long period, even prior to the 1983 designation, and had spent much money to construct ponds and cultivate fish. On the other hand, the Provincial government and the MoF hardly protected or guarded the forest. Giving a concrete example of the absence of higher government levels, the local officials blamed the Provincial government and MoF for not socializing the official status of the Delta's forest to the local people. It should be underlined that the local officials' criticism on the unjust situation partly needs to be set against the context, namely a competition between Kutai District government, and the Provincial government and MoF regarding the authority to manage the forest. Secondly, whilst the oil and gas companies earned a huge amount of money from the oil and gas extraction, the larger-scale local fishermen and shrimp farmers earned only a small amount of money. The abovementioned reasons caused the local officials and legal enforcers to think that legal punishment was unfair and therefore unnecessary.

Apart from the abovementioned reasons, the local officials also pointed to the regulated groups. Their argument that the fishermen and shrimp farmers were short-sighted was not only pointed out as factor that led to a decline in people's participation in law-making, it was also mentioned as a factor that

8 See Wasserman (1992) about the relation between the cost of compliance and enforceability, and Gezelius and Hauck (2011, p. 461) for how a deterrence-oriented enforcement of fishery regulation has strengthened resistance through increasing illegal fishing.

9 According to Kubo (2010, p. 246) the decision to not control and punish 'illegal' forest occupants is in order to maintain a credible social relationship so that the officials can work together with the communities. See also Kajembe and Monela (2000, p. 383).

10 Other scholars examined the decision to not enforce formal rules in order to avoid political risk. See for instance Fisher et al. (2005).

stopped the local officials from carrying out effective implementation of law. In stressing the importance of character, the local officials and legal enforcers sometimes added other associated character traits such as being greedy, tricky or stubborn (Hidayati 2004; Simarmata 2011, p. 177-196). With this characterization, the local officials and legal enforcers actually depicted two different sides of the fishermen and shrimp farmers. On one hand they saw the fishermen and shrimp farmers as vulnerable groups that needed to be understood, but on the other hand they saw the fishermen and shrimp farmers as those who have a determining influence over the implementation of law. This determining influence seemed even stronger because the fishermen and shrimp farmers complied (or not) with the laws and regulations on the basis of an estimation of the cost and benefit they might get.[11]

Concerning factors derived from conditions internal to the administrative institutions, the local officials and legal enforcers pointed to the lack of resources and coordination as well as political interference. Carrying out implementation and enforcement of law in a remote area such the Mahakam Delta is extremely expensive, and budget displacement did not make the job easier.[12]

Legitimacy delivery

It is interesting that local officials and legal enforcers did not only point to non-legal factors, they also pointed to legal factors. They used the legal factors to justify both inaction and action. They did not carry out effective implementation because the shrimp farmers were legal. They provided legitimacy to the shrimp farmers, because they thought that their action of issuing or recognizing the land letter did not violate the existing formal rules. They came up with such perception by developing a particular interpretation of the law.[13]

The fact that some of the local officials thought that there was no illegality in the actual resource use in the Mahakam Delta may suggest two things. Firstly, an ambivalence had clearly emerged among the local bureaucrats in looking at the legality of the actual resource use. Secondly, a heterogeneous legal understanding emerged within the local bureaucracy from which different legal meanings and actions could arise.[14]

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11 Scholars with an economic approach to law and regulatory studies have pointed at the influence of a cost and benefit calculation on legal compliance. See for instance Becker (1968), and Baldwin, G.R., and Veljanovski, C.G (1984).

12 See Hyden, Court and Mease (2004, p. 136) and McCarthy (2006, p. 14) on how distance really matters for public service provision in Indonesia.

13 On how forest users developed legal interpretations in an attempt to justify their actions in utilizing Forest Areas see Safitri (2010, p. 213-215).

14 Santos (1995; 2006, p. 46) suggests that plural or heterogeneous legal meaning and action could be the result from the co-existence of different or even contradictory legal orders or cultures. Other literature on legal pluralism names the phenomenon as state law plural-

Social distance

Meanwhile, the field officials are often members of the fishermen's and farmers' neighbourhoods as they live in the same villages. This means that they are socially attached to the community, and therefore maintaining social relationships is unavoidable. It is a strategy for them to secure social backing for playing their official role.[15] For officials who are ethnic, kinship or family members of a regulated group, the social attachment is stronger given they also have to comply with traditional authorities.[16] Together with the acknowledgement of the economic advantage and long residence of the fishermen and shrimp farmers, the social ties generated behaviours that led to field officials favouring the regulated groups. They sometimes shifted their role to become a defender of the regulated groups against the higher government level officials or the officials of other agencies. In cases concerning the formal status of the Delta's forest, the field officials of the District Forestry Agency most of the time acted as defenders of the shrimp farmers by showing old documents that they had issued to prove the prior existence of the ponds. When their sense of sympathy met with pragmatism, they shifted their role to being a legal problem solver in which they discovered how actual use could be fitted within the legal requirements.

However, the local officials as well as legal enforcers who were socially distant from the fishing and farming communities, were mostly pragmatic and cynical despite their understanding of the economic and social aspects of the actual resource use. Their pragmatism often led to the concealment of their official mission in front of the shrimp farmers. Meanwhile, their negative characterization of the fishermen and shrimp farmers and favouritism of the oil and gas extraction companies led these local officials and legal enforcers to overlook the economic and social reality and as a result apply formal deductive logic.[17]

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ism. For accounts of state law pluralism see for instance Hooker (1975) and Woodman (1998).

15 For literature which perceives the avoidance of law enforcement as a survival strategy see Kajembe and Monela (2000, p. 383).

16 The implementation of formal rules in which informal rule is taken into consideration is seen as a strategy to balance two normative orders. See Fleming (1966) and Kiggundu, Jorgensen and Hafsi (1983, p. 77). Other literature sees it as cultural influence on the attitude or behaviour of bureaucrats (Harris and Kearney 1963; Pizam, Abraham and Reichel 1977; Haque 1997, p. 445). For how kinship, family and friend ties have considerably influenced the way bureaucrats carry out public services see Riggs (1964, p. 274-276) and Conkling (1975).

17 Eisendstadt (1969, p. 356-366) pointed out that in an effort to maintain relations with the external environment, bureaucrats establish a continuous equilibrium in which they are subversive of their desired goals on one hand, and maintain their autonomy by means of strict implementation of law on the other hand.

The effects of decentralization

In Section 3.3 it was shown that there is hardly a difference between the ways in which natural resources of the Mahakam mainland and Mahakam Delta were governed before and after the 1999 decentralization. This, of course, stands in sharp contrast with the status of the Kutai District which has long been seen as an icon of decentralization.[18] Not only because of the position, the Kutai District indeed made many local regulations and established some new agencies in a way to decentralize. It is apparent that decentralization has affected the administration of resource management in the Mahakam Delta as can be seen in the perceptions and actual behaviours of local bureaucrats and local users. When the changing perceptions and behaviours affected the administrative resource management, they subsequently influenced how the central government perceived as well as exercised their authority in the Delta. Decentralization was not only reflected in the perception and behaviour of the local officials, its effects were also reflected in the administrative competition between the different levels of government. The economic advancement of the fishermen and shrimp farmers, to which the local officials pointed, is actually a logical consequence of the District Government's general insight on decentralization. They believed that people's prosperity is a final destination where decentralization should head (see Section 3.3). In this respect, we could say that the District Government advanced the goal of economic development by temporarily overlooking the implementation of law. As a result, in dispute settlements, instead of advancing the imposition of law, the local officials and legal enforcers sought for a 'win-win solution'.[19]

The way in which the local officials viewed decentralization in the Mahakam Delta was not only based on their personal views, they also took into account local users' perceptions of decentralization. The central government transferred the authority to issue permits to the district/municipality government in a response to the emerging social conflicts regarding natural resources use. Not only did the central government respond to the emerging situation through administrative means, it also refrained from imposing laws upon those who illegally occupied and utilized Forest Areas as happened in the Delta. Moreover, the MoF even advised the companies to compensate the forest occupants.

Meanwhile, given there is no powerful oil and gas regulatory agency left since the great repositioning of Pertamina in the early 2000s, the exercise of administrative power on oil and gas resource use in the Mahakam Delta has

18 Kutai District has been an icon of decentralization due to two advantages. Firstly, it has the largest District Annual Budget Plan of all districts in Indonesia. Secondly, it used to have a District Head who was famous and chaired the Indonesian Association of District Governments (2000-2004).

19 Interview NUS, 26/8/2009.

changed. The new regulatory agency, the Executive Agency, which received authority on the basis of deconcentration, does not have the same amount of power as Pertamina. As a result, the Executive Agency advised the oil and gas companies to refrain from advancing legal enforcement for it could disrupt extraction. Hence, the change in administrative authority which occurred alongside the emergence of the resource user's perception on decentralization seems to have led to law playing its former role: to integrate various interests of groups of society.

10.3.2 Behaviours that led to effectiveness

Meanwhile, in the instances when the implementation of law has been effective, this has been largely influenced by the interest to ensure continued oil and gas exploration. As mentioned in Section 3.2, in the past on the Mahakam mainland, the implementation of law had been effective in the forestry sector due to its important contribution to the District's revenues. Throughout the periods of state intervention, it is evident that oil and gas regulations were fairly effectively implemented, making it difficult to implement the regulations of other resource sectors effectively at the same time. Apart from favouring the oil and gas extraction, another factor that has allowed for effective implementation is the characterization in which the local officials and legal enforcers saw the fishermen and shrimp farmers as profit seekers. In that situation, the local officials and legal officers did no longer see the fishermen and shrimp farmers as a vulnerable group who needed an 'understanding policy'. They, instead, saw the fishermen and shrimp farmers as those whose behaviour should be controlled in order to be in line with the existing laws and regulations.

10.4 Theoretical considerations and suggestions for research

As said the second part of this chapter shows how this book is placed in and contributes to the wider academic debate on legal processes of administrative management of natural resources. Finally, this section also makes a number of suggestions for further research both to enrich academic discussion and provide reliable input that can be used for any law and policy reform initiative.

10.4.1 Theoretical considerations

The reasons and factors that the local officials in the Mahakam Delta mentioned to explain why they did not implement and enforce the formal rules as officially desired, again confirm views which suggest that the bureaucracy is not

always a threat for society (see Section 1.3.1). The incongruence between the administrative practices in natural resources management and the formal rules is not a result of self-interest or corrupt behaviour despite the fact that, as Auer et al. (2006) and McCarthy (2006) point out, it could risk natural resources. In the Mahakam Delta, the incongruence has emerged on account of both rational and emotional considerations. The rational consideration is to avoid conflict and a larger workload, and to maintain credible social relationships. The emotional consideration is sympathy or respect as an expression of social concern.

Some literature as cited in Section 1.3.1 points out that when actions to violate formal rules constitute a main or sole source of income to sustain the livelihood of the resource users, the bureaucrats often prefer to only warn the law-breakers instead of imposing the formal rules (Kubo 2012; Chhteri, Larsen and Smith-Hall 2012). This book found that the imposition of a non-legal obligation on law-breakers as an alternative administrative punishment was used besides the warning. As said, the Kutai District officials asked the shrimp farmers to plant mangrove trees as an exchange for their unlawful occupation and use of the Forest Area.

The concerns of the local officials with the people's livelihood alongside other historical and socio-cultural considerations, have been suggested to be a manifestation of rational and emotional considerations on behalf of the local officials. As Van Rooij (2006) points out, the imposition of law, which regulated groups find demanding, might generate conflict or larger violations. As Gezelius and Hauck (2011) have shown, deterrence-oriented enforcement of fishery regulations could result in resistance through increased illegal fishing. In a situation where the bureaucracy is lacking resources, the imposition of the formal rules could increase their workload, for they have to provide compensation or other employment opportunities. Kajembe and Monela (2003) and Kubo (2010) have pointed to the importance of maintaining credible social relationships which enables the bureaucrats to work together with the affected communities as another rational motive. Moreover, for a place like the Mahakam Delta, in which the *punggawas* are considerably powerful due to their economic and social role (see Section 2.4), maintaining credible social relationships is even more important.

Nevertheless, as I mostly found in the Mahakam Delta, the attention to livelihood seems to be an expression of what some literature names 'social concern' or 'non-maximizing behaviour' (Barnard in Milne 1970; North 1990; Dixit 1997). The social concern which manifested in sympathy and respect also included concern about the fact that the local users had spent money to sustain their source of income and the fact that they only carried out subsistent resource use. The imposition of the formal rules was therefore believed to potentially worsen the livelihood of the local resource users (Kaimowitz 2003).

This book found that the concern with local users was greater when the local officials had real justice concerns. In the era of decentralization, such

concern emerged when the local officials noted the unfairness and inequality that the central government authority had created in the regions. When such justice concerns were at play, the local officials were not merely compromising, cooperative, responsive or inclusive like the existing literature has pointed out (Thomson 1964; Milne 1970; Ayres and Braithwaite 1992; Aalders and Wilthagen 1997), but they would shift their role to become the defender of the local users causing them object against formal rules.

However, the social concerns that the local officials showed, do not merely originate from objective facts that they had observed. It also originates from their self-perceived role as a social group which has a higher status than the ordinary people (Abueva 1970). Regarding origin, some say that this culture of paternalism stems from the post-colonial period when, due to the small size of an entrepreneurial class, bureaucrats emerged as the elite (Hirschmann 1981; Haque 1997; Hirschmann 1999). According to the concept of the 'bureaucratic clect' in which the bureaucracy is formed and functions on the basis of communal exclusiveness, as Riggs (1965, p. 276) suggests, the feeling might derive from a perception of bureaucrats who regards themselves as a leader or father (Ind. *bapak*) on whom the regulated communities rely. In that role, the local officials may have felt the duty to guide (*membina*) the fishermen and shrimp farmers. At that point, the local officials were possibly not thinking about carrying out legal duties, but instead about helping (*membantu*) and giving (*memberi*). As Gray (1985: 55) notes, that feeling may come from Indonesian legal culture in which citizens are concerned with a wise exercise of power. In that culture, generosity of the state administrators is more valuable than their attitude towards the law.[20]

Apart from the rational and emotional considerations, this book adds the interpretation of the formal rules by local bureaucrats as another motive used to explain why they did not impose the formal rules. Not only did the legal interpretation justify their decision to legitimize the actual resource use, it also resulted in their opinion that the actual resource use was not illegal. This of course contributes to a higher level of perceived tenure security (Safitri 2010; Reerink 2011). As was described in Section 8.4, the legal professionals and company employees shared the same perception on the legality of forest use.

This study of the Mahakam Delta shows two more factors which enhanced perceived tenure security. The first is that due to severe incoherence and inconsistency of the formal rules, the bureaucrats undertook legal interpretations which overlooked the principle of the hierarchy of legislation and justified the actual resource use. The second is the bureaucrats' perception of the actual implementation of law. Having found that some regional government agencies and private companies had illegally used the forest but had not been prosecuted, the local bureaucrats concluded that the shrimp ponds were also

20 See also Lev (1972, p. 305).

legal. Thus in the Mahakam Delta, these two factors complement long residence and land-related documents, as Reerink has noted before (2011), to form perceived land tenure security.

However, as some literature has pointed out, in a situation where implementation and enforcement of law hardly exist, sometimes formal rules are strictly imposed. Yet, rather than regarding this development as a means for bureaucrats to pursue personal gain, I would rather see the imposition as a matter of what Eisenstadt (1969) called 'maintaining a continuous equilibrium'. As a frontier area where 'national vital objects' exist, it is important to maintain the credibility of threat in order to keep the oil and gas extraction running (Braithwaite 2002). For the field officials, the responsive and repressive attitudes could be a consequence of playing a role as intermediary to keep both the superiors and affected groups satisfied (Arce 1993).

Another aspect of the legal process, namely that the local officials hardly took into consideration the fishermen and shrimp farmers' opinions, is more visible in the law-making process. Similar to the implementation of law, in the law-making process the officials considered themselves as an educated elite or father and believed they knew what the local users were thinking and demanding. They therefore thought that listening to the affected groups in the law-making process was unnecessary. Consequently, this led to top-down law-making, in which bureaucrats who closely worked together with local university lecturers dominated (Riggs 1964; Seidman 1978). During the making of the 1983 Agreed Forest Land Use and 1975 and 2004 Circular Letter concerning fishing ground restrictions, the bureaucrats served the interests of the oil and gas companies.

On other occasions the legislation making also appeared as an arena in which the various district agencies competed. Yet it should be noted that in the Mahakam Delta, the competition cannot be regarded as a result of the agencies' rivalry, as the bureau-political theory points out, or the need to put their own organizational interests ahead of other agencies' interests.[21] It is evident that the competition was rather influenced by the pursuit of personal interests, namely additional income and pursuing access to political institutions. Thus, unlike what the incrementalist theory on policy making suggests, namely that during such competition the agencies fight for their own coherent and clear goals and ideologies, in the Mahakam Delta decisions and choices concerning law making were also based on fluid personal preferences making it difficult for organizational cohesion to exist (Cohen, March and Olsen 1972; Tanner 1995).

21 For the accounts of the bureau-political theory see Arnscheidt, Van Rooij and Otto (2008).

10.4.2 Some suggestions for further research

The suggestions for further research that this book would like to make are not merely for scientific development, but also in an effort to better understand the legal and administrative aspects of the Mahakam Delta in order to formulate knowledge-based policies.

This book points to the recommendations of previous research reports and stakeholder meetings, which prematurely suggested the making of new regulations, institutions and law enforcement as solutions to the management of the Mahakam Delta.[22] This instrumental approach rests on two misleading assumptions. First, it assumes that the local officials will behave on the basis of prescribed norms. Second, that compliance can be achieved through fiercer law enforcement. As scholars have noted, this assumption is based on the idea that the government 'tells' and others 'act' (Baldwin 1997; Gunningham, Grabosky, and D. Sinclair 1998; Black 2002: 2-3; Baldwin, Carve and Lodge 2012, p. 106-107). The two misleading assumptions have resulted in many people remarkably overlooking the complex picture of the implementation of law. Furthermore, they deny the ability of local officials to respond to the real problems of local communities.

Therefore, this book suggests that upcoming research on the Mahakam Delta should further examine the accounts of the implementation of law. Since this research focuses on the government institutions dealing with the management of resource use, the upcoming research should try to find out the extent to which the formal rules are implementable from the point of view of the resource users. Such research would complement this research and other existing research on some of the socio-legal aspects of the management of the Mahakam Delta. That would provide data and analysis on how the formal rules work when they encounter local social and political institutions.

The combined findings of the present and proposed research would provide accounts on a variety of dimensions of the government dealing with resource use in the Mahakam Delta. Such multi-dimensional view will enable the formulation of law and policy which takes into account the ability of both the local officials and resource users to implement and comply with the formal rules. Moreover, these findings and analysis would probably help shape law and policy with the underlying assumption that the implementation of law

22 For research reports suggesting such recommendations see for instance Bourgeois et al. (2002, p. 94-95); Hidayati (2004, p. 106 and 110); Hidayati et al. (2004, p. 175) and Syafruddin (2005, p. 127-130). For the recent stakeholder meetings which proposed similar recommendations see a proceeding of the 'Lokakarya Penyelamatan Delta Mahakam Program Terpadu Multi Pemangku Kepentingan', held by Total E&P Indonesie in collaboration with the Government of East Kalimantan and Kutai District, 27-28 October 2009 and 'Policy Workshop Analysis on Mahakam Delta, held by the Mulawarman University in collaboration with the University of Essex, Wageningen University, Stockholm Environment Institute, Kasetsart University and Vietnam National University, September 2010.

needs to be regarded as essential and that much could be learned from this process. Instead of regarding the implementation of law from which informal resource tenure has emerged, as irrelevant, law and policy formulation should take these processes into account and incorporate them into the proposed rules and institutions.