Addressing industrial pollution in Indonesia: The nexus between regulation and redress seeking

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The Nexus between Regulation and Redress Seeking

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27 May 2019

Table of contents

List of maps, figures, and appendices

Abbreviations and acronyms

AMAN	*Aliansi Masyarakat Adat Nusantara*, Archipelago's Alliance of Indigenous Peoples
ADR	Alternative Dispute Resolution
Art(t)	Article/ articles
BAPEDAL	*Badan Pengendalian Dampak Lingkungan*, Environmental Impact Agency
BAPEDALDA	*Badan Pengendalian Dampak Lingkungan Daerah*, Regional Environmental Impact Agency
BAPPENAS	*Badan Perencanaan Pembangunan National*, Indonesian National Development Planning Agency
BBWS	*Balai Besar Wilayah Sungai*, Water Board
B(P)LH	*Badan (Pengendalian) Lingkungan Hidup*, Environmental Agency
B(P)LHD	*Badan (Pengendalian)Lingkungan Hidup Daerah*, Regional Environmental Agency
CSR	Corporate Social Responsibility
DPR	*Dewan Perwakilan Rakyat*, People's Representative Council
DPRD	*Dewan Perwakilan Rakyat Daerah*, Regional People's Representative Council
EMA	Environmental Management Act
EIA	Environmental Impact Assessment
FGD	Focus Group Discussion
GR	Government Regulation
HiiL	The Hague Institute for Innovation of Law
ICEL	Indonesian Center for Environmental Law
IDLO	International Development Law Organization
ITB	*Institut Teknologi Bandung*, Bandung Institute of Technology
IPB	*Institut Pertanian Bogor*, Bogor Agricultural University
KHLS	*Kajian lingkungan hidup strategis*, Environmental Protection and Management Plan
KNPI	*Komite Nasional Pemuda Indonesia*, National Youth Committee of Indonesia
LAKIP	*Laporan Akuntabilitas Kinerja Instansi Pemerintah*, Government Agency Performance Accountability Report
LEAD (UNDP LEAD)	The Legal Empowerment and Assistance for the Disadvantaged project of UNDP
MERW	Making Environmental Regulation Work for the People project (IDLO project)

MoE (KLH)	Ministry of Environment, *Kementrian Lingkungan Hidup*, (before October 2014)
MoEF (KLHK)	Ministry of Environment and Forestry, *Kementrian Lingkungan Hidup dan Kehutanan*, (since October 2014)
NGO	Non-governmental organisation
NHM	Nusa Halmahera Minerals
NWO	*Nederlandse Organisatie voor Wetenschappelijk Onderzoek*, The Dutch Research Council
PDAM	*Perusahaan Daerah Air Minum*, Regional Drinking Water Company
PerMen LH(K)	*Peraturan Menteri Lingkungan Hidup (dan Kehutanan)*, Ministry of Environment (and Forestry) Regulation
PerMen PU	*Peraturan Menteri Pekerjaan Umum*, Ministry of Public Works Regulation
PT	*Perseroan Terbatas*, Public Limited Company
PRL	*Peduli Ramah Lingkungan, Care for the Environment* (Interest Group from North Halmahera, North Maluku)
PROKASIH	*Program Kali Bersih*, Clean River Programme of the Ministry of Environment
PROPER	*Program Penilaian Peringkat Kinerja Perusahan*, Programme for Pollution Control Evaluation and Rating
REDD	Reduced Emissions from Degradation and Forest Deforestation
RGA	Regional Government Act
ROLAX	Rule of Law and Access to Justice analytical framework
RPPLH	*Penyusunan Rencana Perlindungan dan Pengelolaan Lingkungan Hidup*, Environmental Protection and Management Plan
RW/RT	*Rukun Warga/Rukun Tetangga*, Neighbourhood (Administrative unit)
SLAPP	Strategic Lawsuits against Public Participation
SOP	Standard Operational Procedure
TSS	Total Suspended Solids
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UGM	*Universitas Gadjah Mada*, Gadjah Mada University, Yogyakarta
VOC	*Vereenigde Oostindische Compagnie*, Dutch East India Company
WALHI	*Wahana Lingkungan Hidup Indonesia*, The Indonesian Forum for the Environment
WHO	World Health Organisation

1 Analysing how pollution is addressed
Introduction, research question and methodology

1 INTRODUCTION

This book is about river pollution in Indonesia, and how citizens and government institutions deal with addressing it. Approximately 80 per cent of Indonesians depend on rivers for bathing and drinking water because they do not have access to piped water. However, industrial and domestic waste severely pollutes Indonesia's rivers (see for example WEPA, 2018 and UNICEF, n.d). The Ministry of Environment and Forestry acknowledged that 98 per cent of the country's rivers are polluted, and 68 per cent are even severely polluted (Ministry of Environment and Forestry, 2015, cited by ICEL, 2016; and Kosasih, 2016). The river water pollution causes diseases, affects harvests and forces households to buy their drinking water (UNICEF, n.d, Factsofindonesia.com, 2018 and Indonesia-investments.com, 2015).

The pollution also has more indirect consequences. The Citarum River in West Java province, for example, is one of the dirtiest rivers in the world. Downstream, it supplies the country's capital, Jakarta, with drinking water (see for example Yallop, 2014). However, drinking water companies have to make considerable efforts to purify the polluted river water. Water consumers such as individual households and companies do not want to rely on the poor public drinking water supply system. Therefore, excessive extraction of groundwater takes place. Such extraction is one of the reasons why Jakarta is sinking below sea level, and why floods threaten millions of people (Abidin et al., 2012; Hooimeijer, 2014; Deltares, 2015).

This book takes these issues upstream, to the places where industries discharge their wastewater into the rivers. It looks at how citizens living in the vicinity of the industries and government institutions deal with these pollution issues by trying to regulate the industries' behaviour and seek redress for the pollution.

1.1 Environmental challenges of all times

Industrial pollution is not a new phenomenon in Indonesia. The sudden demise of Batavia around 1730 can be attributed to river pollution. The rapid development of sugar cultivation and sugar factories in the city's hinterland caused the pollution. Despite the increase in mortality, the leadership of the Dutch

East India Company (VOC) refused to close the sugar mills. The rulers denied Batavia's inhabitants any decision-making powers, which prevented the development of a real town community that would promote interests other than those focused merely on short-term economic stakes (Blusse, 1985). They did not acknowledge the correlation between poor environmental governance and short- and long-term social and economic interests.

The Dutch colonial regime bequeathed Indonesia with several laws on nature conservation, wildlife protection and nuisance (Cribb, 1997). However, as in many other countries, in Indonesia the government has a relatively short history of paying serious attention to the promotion of public environmental interests, including the regulation of industries' environmental impact. In the 1970s and 1980s, the country was confronted with the environmental consequences of its rapid industrialisation under the authoritarian Suharto regime (Cribb, 2003: 37). As international attention on environmental issues grew and the Indonesian government desired to be taken seriously at the international level, it took some measures to protect public environmental interests. Addressing environmental problems also became a relatively accepted way for activists to criticise the regime. Under the umbrella of the environmental campaigns, activists could raise awareness of other issues, such as human rights violations (Cribb, 2003).

Indonesia appointed its first Minister of Environment in 1978, and in 1982 it promulgated the first Environmental Management Act. Indonesia was considered a frontrunner among developing countries. Over time, the legal and institutional framework developed as the Minister gained administrative power, environmental agencies were established, and the Environmental Management Act was revised (Niessen, 2003: 66; Bedner, 2008: 189). The Acts revisions in 1997 and 2009 led to a better implementable legal framework as well as the adoption of innovative approaches to enhance public environmental interests more effectively, such as granting a more significant role to market actors and civil society.

Nevertheless, 'environment' is a relatively new policy field and the use of environmental resources always runs the risk of turning into a 'tragedy of the commons'.[1] It is not easy to integrate the regulation of environmental issues into existing institutional and legal structures and to raise public awareness. Environmental problems are often 'wicked problems'; a straightforward solution does not exist because a solution to one problem can cause a problem in another area in potentially complex ways. For example, closing a factory to halt pollution can lead to increased unemployment rates (Rittel and Webber, 1973). The actors in a particular case – such as government institutions, citizens

1 'Tragedy of the commons' refers to a situation in which individuals strive for their maximum advantage, while acting against the public interest of the whole society by over- or under exploitation (Hardin, 1968; see also Cribb, 2003).

and non-governmental organisations (NGOs) – are faced with dilemmas related to these conflicting economic, social and environmental interests.

1.2 Industrial water pollution and other environmental problems in Indonesia

Indonesia faces large environmental problems today. High on the agenda is the prevention of deforestation and peatland destruction. The international attention to climate change and the reduction of CO2 emissions resulted in Western counties offering financial resources to countries that have rainforests and peatlands within their territory to stimulate them to make preservation efforts. Indonesia is one of the countries that receive considerable funding to do so, notably through the Reduced Emissions from Deforestation and Forest Degradation (REDD) mechanism.[2] Some say the financial incentives for forest and peatland preservation divert attention away from other environmental issues, such as reducing industrial pollution. In contrast to the REDD initiatives, measures against industrial pollution often do not have short-term financial benefits. On the contrary, they require investments that can be costly.

Government institutions, industries and citizens living near industries may easily choose a dirty river over a cleaner one when considering the economic interests related to addressing the pollution. Furthermore, reliable data on the extent and effects of pollution is often lacking, which decreases the empirical visibility of the problems (Lucas, 1998: 181; Lucas and Djati, 2000: 6-9). Such data is notably lacking when it comes to addressing industrial pollution.

In Indonesia, current discussions about river pollution often focus more on reducing domestic (rather than industrial) pollution. Addressing this so-called non-source pollution requires creating awareness among the population. Therefore, addressing industrial pollution is – in theory – easier. The sources of pollution are known and limited in number. The sources are subject to the basic regulatory mechanism, since they require certain licenses. Therefore, they are – or should be – 'on the radar' of the government institution that issued the license.

This book will demonstrate that regulating the industries' environmental behaviour is nevertheless difficult. Taking measures against industries may decrease regional government revenues and reduce local employment opportunities. Environmental institutions often lack the financial resources and knowledgeable staff necessary to properly regulate industries. However, this study shows that the poor regulation of industries' environmental impacts is also related to the common understanding that the government should rely

2 REDD (Reduced Emissions from Deforestation and Forest Degradation) is a mechanism which rewards countries with rain forests, such as Indonesia, for preserving them.

on alternative (rather than enforcement-based) regulation and that citizens should play an important role in addressing industrial pollution.

2 Research question and approach

Considering cases of industrial water pollution in Indonesia, this research seeks to answer the following three questions: How, if at all, do affected citizens and interest groups, as well as authorised government institutions, engage in processes of regulation and redress seeking for industrial pollution? If so, why do they do so? What effect does this have on the environment and on social relations within affected communities?

This thesis places a central focus on processes of regulation and redress seeking. When citizens affected by pollution and institutions have the common goal of promoting a clean environment, the two aforementioned processes can be closely linked. The government tries to achieve a clean environment through regulation, and citizens try to achieve the same through redress seeking. This study finds that environmental policies and regulatory practices in Indonesia are informed by the assumption that both regulation and redress seeking are inevitably geared towards a clean environment, and consequently that they can be easily interchanged. However, the processes differ in many respects, and the goals of citizens and institutions can differ. For example, when citizens accept the pollution if they can get a job in the polluting industry, citizen participation in regulation may not contribute to reducing pollution. It may even legitimize it and have a negative effect on the social relations within the affected community.

To be able to better understand how citizens, government institutions and interest groups deal with industrial water pollution in Indonesia, to what extent these practices contribute to a cleaner environment and how they impact the social relations within affected communities, it is essential to look at both processes in conjunction.

2.1 Two angles of analysis: redress seeking and regulation

At the beginning of this research, I focused on the redress seeking process. The research projects in which I took part departed from the citizens' perspectives as redress seekers, and aimed instead to identify the barriers hindering victims of pollution from achieve a more just situation.[3]

3 In 2008, I worked as a researcher in a programme titled, 'Access to Justice in Indonesia'. It was part of the project, 'Building Demand for Legal and Judicial Reform 2007-2010: Strengthening Access to Justice'. The programme was a collaboration between the Indonesian National Development Planning Agency (BAPPENAS), the United Nations Development

Academic literature and policies usually refer to the process of seeking redress as 'Access to Justice'. Nevertheless, I prefer to use the former term. 'Redress' is less normatively charged because it does not imply that what citizens want is per definition 'just'. It furthermore avoids the suggestion that difficulties in accessing a redress forum are the main barrier to citizens achieving redress. Instead, 'redress' encourages one to look at the full process. Bedner and Vel (2010) explain that the process begins with a real-life problem that a citizen experiences. The next step involves considering the citizen's ability to formulate this problem into a grievance, blaming another party for causing the problem and making a claim for redress based on a particular normative framework. Thereafter, the citizen needs access to a forum that will properly handle the matter. Finally, it is important to assess whether the achieved redress is appropriate in the eyes of the redress seeker and under the rule of law. However, Bedner and Vel emphasise that in practice the process is often dynamic and seldom progresses linearly from a real-life problem to an appropriate redress (Bedner and Vel, 2010: 1-29).

The forum that can provide redress for industrial pollution is the government institution that is authorised to regulate the industry. Initiated by a citizen complaint, the authorised institution can take regulatory measures that will halt the pollution. Such a measure is synthesis par excellence; where the process of redress seeking and regulation meet. When I started my research, I presumed that pollution victims would seek redress in the form of a cleaner environment. As a result, I assumed that the citizens would engage in redress seeking processes that would – if successful – serve not only the redress seeker's interests but also those of his or her community and even of the society as a whole. This reasoning is also common amongst policy-makers and scholars. 'Access to justice' and 'legal empowerment' are popular themes in government policies, development projects, and even in research (see, for example, HiiL, 2014; and UNDP Indonesia, n.d.).[4] These sectors focus on 'justice seekers' and aim to strengthen their position, often expecting that citizens can play a role in public interest promotion.

However, as my research progressed, I became increasingly aware of the complexity of redress seeking processes. First, a complaint does not necessarily lead the authorised government institution to take appropriate regulatory measures. When citizens filed a complaint about industrial pollution, the authorised government often considered the matter a conflict between the citizens and the industry. The government chose to mediate between these

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Programme (UNDP), the World Bank, and the Van Vollenhoven Institute of Leiden University. In 2010, I became a PhD researcher within the project, 'Legal Empowerment as a means to development? A political-legal study of rights invocation by pollution victims in China and Indonesia'.

4 Two research projects in which I participated (i.e., 'Access to Justice in Indonesia' and 'Legal Empowerment as a means to development?') also departed from the citizen's perspective as 'justice seeker' (see leidenuniv.nl, n.d.; and nwo.nl, n.d.)

private parties but neglected its role as a regulator with the authority and obligation to take regulatory measures to protect the public environmental interest. Second, certain citizens affected by pollution did not aim to halt the polluter. They preferred to settle for financial compensation (e.g., a job at the polluting industry). The redress seeking processes that I witnessed had devastating consequences for the environment and the social relations within affected communities. Thus, I realised that in order to understand how industrial water pollution is addressed in Indonesia, I also needed to consider the regulation process and better understand its link to the redress seeking process.

Regulation may refer to many different rules and actions to influence behaviour. This thesis takes regulation to mean the process that aims to promote certain public interests.[5] Until the late 1980s, most regulatory theories departed from the idea that only the government can act as a regulator. Acting mostly under administrative law, the authorised government institution sets the norms – for example by issuing a license – monitors the licensee's behaviour and takes (enforcement) measures in cases of non-compliance (Van Rooij, 2006: 5-6). Thus, the key actors in this process are the regulator and the licensee. Regulatory scholars often refer to this as 'command and control regulation'; the regulator commands the norms and controls compliance through monitoring the behaviour and enforcement (see chapter 2).

In recent decades, scholars as well as policy-makers and officials have widely acknowledged that government regulation can involve more than merely strict norm-setting, monitoring and enforcement. For example, prior to imposing a sanction, the government may use more flexible norms (e.g., tradable permits), it can make use of self-monitoring by licensees and respond to violations by trying to persuade the violator to comply.

Furthermore, there is a consensus that non-state actors such as firms, civil society actors and citizens may also carry out regulatory tasks (see, for example, Ayres and Braithwaite, 1992 and Gunningham et al., 1998). Chapter 2 will explain in more detail how the advantages of citizen participation in drafting regulations have become widely accepted in policies and applied research programmes. For example, the importance of consulting with citizens in planning and licensing procedures has been generally acknowledged. Furthermore, citizens can aid the government in detecting violations through complaint mechanisms. Citizens may even play an important role in responding to a detected violation (e.g., boycotting a violator's products or services as a result of the public naming and shaming of the violator). Such boycotts can have a strong deterrent effect.

5 For a more extensive discussion on the concept of regulation, see chapter 2.

2.2 Exploring the nexus between regulation and redress seeking

The previous section explained that the changing ideas about regulation and redress seeking have led to the processes becoming more intertwined. Citizens have a more prominent role in addressing industrial pollution. They can participate in the regulation process. Improving opportunities to seek redress is high on policy agendas. At the same time, the government has more regulatory options and recent debates on the advantages of citizen participation and policies encourage the government to involve citizens in the regulation process. Therefore, at first glance, it seems that with more opportunities to regulate and seek redress, the chances are higher that the government's and citizens' common aim of a cleaner environment will be achieved.

This reasoning is particularly attractive in situations where trust in the government as a regulator is generally low, and hopes are vested in non-state parties to promote public interests. In current debates in Indonesia, the government's failures to carry out its 'command and control' regulatory tasks are barely discussed amongst scholars and policy-makers. Investing in improving the government's regulatory role is usually considered rather hopeless. The presumptions are that the lack of capacity (i.e., financial, human resources, training) is hard to overcome, that the government is corrupt, and that the government suffers too much from bureaucratic and political battles. Many practitioners focus instead on 'empowering' citizens and interest groups by giving them an important role in promoting environmental interests.

However, the previous section also explained that regulation and redress seeking processes have very different features. The key actors and the trajectories of the processes vary. Regulation, in principle, involves the regulator (i.e., the government) enforcing (i.e., through authorities) certain behaviours of license holders (e.g., industry). The key actors in the redress seeking process are, in principle, the affected citizens and the actor that caused a particular problem. In the case of industrial pollution, the question is whether the responsibility for causing a problem lies with the respective industry or the government for not taking adequate regulatory measures. Another question is whether the aims of the processes are the same. The aims differ when the affected citizens want another kind of redress than the halting of the violation (e.g., financial compensation).

Since citizens have – both in theory and in practice – come to play an important role in addressing industrial water pollution, the processes of regulation and redress seeking have become more entangled, and their interactions have become more complex. It is important to see the two processes in conjunction with one another to better understand when the two processes can reinforce one another, or when and how they do not contribute to better protecting the public interest in a clean environment. Few studies have systematically explored this nexus, in theory or in practice. By considering the situation in Indonesia as a case study, this thesis seeks to contribute to a better

understanding of how the two processes interact, overlap and leave gaps in the practice of protecting citizens against industrial water pollution.

2.3 Key actors

The research question focuses on citizens, interest groups and authorised government institutions as key actors. As previously mentioned, my initial focus was on citizens affected by pollution. However, I soon noticed that in the redress seeking process, interest groups often played an important role in representing these citizens. I take interests groups to include NGOs and, for example, groups of community leaders and labourers who engage in redress seeking or regulatory activities.

With regards to government institutions, fieldwork made clear that although district governments are often authorised to regulate the industries within their territories, provincial environmental agencies often play a core part in regulatory activities, particularly when pollution problems come to light. Therefore, this research focuses primarily on provincial environmental agencies. However, the cases that this thesis discusses often include other institutions, such as the Ministry of Environment,[6] a district environmental agency, or a sectoral institution. Therefore, this thesis also considers the roles of such institutions.

Although this research discusses industrial perspectives on and motivations regarding compliance, a systematic analysis of them falls outside the scope of this research.

3 Methodology and course of research

This study is based on an interdisciplinary research approach, known as socio-legal studies. The empirical part comprises of two in-depth case studies of industrial pollution – in West Java and North Maluku – as well as an analysis of the daily regulatory practices of the environmental agencies in the provinces of East Java and West Java. Furthermore, this study contains a legal analysis of the environmental management acts, the water acts and the decentralisation acts. The legal analysis informs an understanding of the regulatory practices, and visa versa, the study of such practices informs an understanding of the substance and developmental history of the legal framework.

The empirical research was mostly qualitative. For the two case studies of West Java and North Maluku, I conducted fieldwork between 2009 and 2012.

6 Elected in 2014, president Joko Widodo passed a policy that merged the Ministry of Environment (MoE) with the Ministry of Forestry. The new ministry is currently named Ministry of Environment and Forestry (MoEF).

For each case, I spent a total of two to three months in the field, spread out over two or three fieldwork periods. I interviewed a variety of stakeholders in each case, including government officials, NGO members, community leaders and industry representatives. I also used semi-structured questionnaires to interview citizens living close to the industrial plants: 56 people in West Java and 77 people in North Maluku.

During the fieldwork, I also gathered relevant archival material, including documentation from government institutions and NGOs, and newspaper articles. For the pollution case in West Java, I gathered and analysed over 400 documents, mainly from the provincial environmental agency. For the North Maluku case, I recovered approximately 450 documents, mostly newspaper articles and documents from Walhi, an environmental NGO. The analysis of these documents of both cases offered a more historical perspective and an understanding of how the cases developed over time.

The analysis of the daily practices of the environmental agencies is based on observations I made when I accompanied agency officials for three months in West Java and nearly one month in East Java. I joined officials involved in monitoring and enforcement. Every day I observed their activities at the environmental agency's office and in the field, where they visited industries.

The selection of case studies and agencies took place throughout the research process. I initially focused on the redress seeking process, but during this process my focus widened, as my early experiences in the field had made me realize that the interesting features of addressing industrial pollution lay in the intersection between the redress seeking and regulation processes. Thus, I began to search for cases where citizens addressed the industrial water pollution problem and environmental agencies were actively involved in regulating the industry's behaviour. Another criterion was that I could get access to environmental agencies and would be allowed to follow their daily activities.

During the first fieldwork period, in North Maluku in 2009, I still focused mainly on the redress seeking process. The selection of the North Maluku had resulted from my participation in the 'Access to Justice in Indonesia' research project, organised by the Van Vollenhoven Institute, the United Nations Development Programme (UNDP) and the World Bank. Together with the research project team, I selected the case study in North Maluku because the UNDP was running an initiative there to increase redress seeking opportunities. My research aimed to support this initiative.

However, the case study in North Maluku, as well as my observations during exploratory visits to North Sumatra, Surabaya and Bandung, made clear that it was uncommon for environmental institutions to take enforcement measures against polluters. As I became aware that the reluctant attitude of the government in regulating pollution was an important factor in understand-

ing the developments within the redress seeking processes, I became keen to better understand the regulatory roles of government institutions.

I became particularly interested in Provincial environmental agencies, because they were often involved in cases with a certain status, for example because they received attention in the media or because citizens had demonstrated against the pollution. I was particularly interested in the West Java and East Java environmental agencies, because they appeared, at least at first sight, exceptionally active in regulating the industries. I wanted to understand what they did precisely to regulate the behaviour of polluting industries and why so.

My presence at these agencies at the same time gave me the opportunity to gather much information on two pollution cases that these agencies were dealing with. During the three-month period in which I observed the daily practices of the West Java agency, I also gathered information on Rancaekek, an infamous local pollution case. I decided to include this case as an in-depth case study, and follow up on previous research conducted on Rancaekek by my supervisor Adriaan Bedner, a decade earlier, in 2001. His material and the documentation I retrieved from the agency's archives allowed me to reconstruct the developments of the case as they had taken place over the decades, similar to my approach in the North Maluku case.

After I observed the daily practices of the West Java agency and studied the Rancaekek case, I concluded that in West Java, the government was also rather reluctant in its role as regulator. Around that time, I heard of examples in the province of East Java where the government had, in fact, closed a sugar factory after it had been found violating the law. In search of new insights on the regulatory role of the government in cases of industrial pollution, I decided to include the East Java environmental agency as well as the pollution case of the closed sugar factory in my study.

In order to situate my findings in a wider theoretical context, I studied global, Indonesian and environmental literature on regulation and redress seeking.

Between 2009 and 2012, I occasionally discussed my findings with Indonesian scholars, policy-makers from the Ministry of Environment and members of national environmental NGOs. In 2016, I conducted more in-depth conversations by cooperating with Indonesian scholars and the NGO Indonesian Center for Environmental Law (ICEL) in the 'Making Environmental Regulation Work for the People' project (MERW). This project was managed by the International Development Law Organization (IDLO) and was funded by the Dutch Embassy in Jakarta. The project aimed to follow up on my existing research findings and to improve the practice of regulating industrial pollution.

My cooperation with Indonesian scholars, NGO members and policy-makers provided me with additional insights into the relevant legal framework and the daily practices of environmental agencies. The MERW project also allowed me to reflect on the question to what extent the findings from my PhD research were exemplary for how industrial pollution is dealt with, also in other parts

of Indonesia. The research that was conducted within the context of this MERW project, as well as the responses from officials and scholars to the findings, showed that although there are significant differences in how industrial water pollution is dealt throughout the country, many findings are generalizable. This goes particularly for the reluctant role that environmental institutions play in enforcement and the focus on seeking redress in the form of compensation for the pollution rather than ending or reducing it.

3.1 Sensitivity and ethical considerations

In 2008, I began my research as part of the Access to Justice project on the pollution case in North Maluku. I soon noticed that my preliminary findings led to controversies. The staff members of environmental NGOs disapproved of my research findings as they had expected that my fieldwork would affirm their view that the local people unanimously suffered from pollution caused b y the mining company. The staff members thought that the main barrier for affected locals to achieve a more just situation was their difficulty in addressing their concerns about the environment. The organisations hoped that establishing local complaint posts would help such locals overcome this barrier. However, my findings were not as straightforward. Pollution was not the poor and divided population's only problem, for those who saw it as a problem at all. The villagers I interviewed more often mentioned problems related to economic issues, such as limited job opportunities and an unfair distribution of benefits. Such economic issues had led to serious tensions amongst community members.

This experience illustrates the sensitivity of both my research and its outcomes. The attempts by interest groups to achieve redress for the people they represented were occasionally genuine, but often there was little room for a nuanced presentation of the facts or critical self-reflection about the side effects of their actions. My findings often, at first glance, seem to undermine the positions of the interest groups that seek to achieve redress for certain citizens. However, as a researcher, I analyse the situation from a broader perspective than that of one particular case. Nevertheless, I hope that these researched insights will contribute to more effectively promoting environmental interests and improving the situation of those affected by pollution, particularly the most vulnerable people in communities whose voices often remain unheard.

4 Outline of the book

The next chapter provides an overview of the literature on processes of regulation and processes of redress seeking. It argues that globally, in recent decades,

these two processes have gradually become more entangled. The government – traditionally a regulator – increasingly depends on other actors to carry out its regulatory tasks. At the same time, the attention on the citizen's perspective as a 'justice seeker' expanded. The redress that a citizen seeks – which in principle is a private interest – may be similar to the public interest (e.g., when a citizen seeks to halt environmental pollution in their vicinity). Therefore, one may conclude that by strengthening the position of citizens in the redress seeking process, one may simultaneously achieve the goals of the regulation process. The redress seeking process may complement or even replace the regulation process. However, this chapter explains that the relation between the two processes is complex and that the processes do not automatically complement each other.

Before looking at the implications of these intellectual developments on Indonesian practice, chapter 3 analyses the local legal and institutional frameworks relevant for dealing with industrial water pollution. It discusses the main developments in the successive Environmental Management Acts (EMA) of 1982, 1997 and 2009. It also reflects on how ideas about regulating environmental issues have been developing. The chapter also looks at the relevant water regulations, as well as at the Regional Government Acts of 1999, 2004 and 2014 that are the basis for decentralisation. These have had a considerable impact on the division of authorities between the various government institutions. Uncertainty nevertheless remained in this area. The chapter concludes that despite the fact that the legal framework has progressed over the years, it still has considerable weaknesses. These weaknesses are especially apparent in the administrative law framework for regulating industrial pollution.

The second part of the book will look at the practice of dealing with pollution, from the perspective of the regulator as well as of affected citizens. First, chapter 4 describes how environmental agencies at the provincial level – in East Java, West Java and North Maluku – are involved in regulatory and redress seeking processes concerning industrial pollution. Although the three agencies differ in many ways, they share inconsistent and flawed legal and institutional contexts. Such contexts negatively impact the effectiveness of the regulatory efforts. Due to the limited effectiveness and complication of regulating through administrative law, it is hardly surprising that scholars, policymakers and officials tend to look for alternatives to influence the behaviour of violators (e.g., by depending on self-regulation, economic instruments, ad hoc regulatory initiatives, criminal law and the redress seeking process). However, there are indications that 'command and control' regulation is in fact rather effective in protecting the public interest in clean river water.

The following chapters demonstrate the potential complications and negative effects of relying on the redress process to address industrial pollution. Chapters 5 and 6 depart primarily from the perspectives of citizens affected

by pollution. Chapter 5 describes a case in Rancaekek, West Java. In the media and government documents, the local farmers are usually considered victims of the pollution because their rice fields became less productive after the upstream textile industry ran its wastewater into the rivers the farmers relied on. However, a closer analysis reveals that although the farmers were not the only ones affected, they managed to present themselves as the only victims in the redress seeking process. The farmers did not represent all of the community members and the community's interests. The social relations within the communities were complex and became even more so after the government tried to deal with the case by facilitating negotiations between the farmers and the industries. The outcome did not result in a solution to the environmental problems and even contributed to social tensions within the communities located downstream from the industry.

Chapter 6 discusses a mining case in North Maluku. The people who lived in the vicinity of the mining site experienced many injustices. These were not merely related to environmental pollution. Moreover, different citizens experienced different injustices. These experienced injustices even transformed over time as a result of altered opportunities to achieve redress for a particular injustice. The complexity of the case made it difficult to come to a solution that would satisfy all people living near the mining site. This case illustrates the complications of trying to regulate through the redress seeking process.

Chapter 7 concludes by answering to the main research questions and providing recommendations on how Indonesian regulation can become more effective and how the citizens who are affected by pollution – or those who are at risk of becoming victims of pollution – can play a more fruitful role in the promotion of public environmental interests.

2 Regulation and redress seeking processes
Converging aims and actors

The roles that government, citizens and interest groups play in addressing industrial water pollution through processes of regulation and redress seeking are central to this thesis. The introductory chapter revealed glimpses of what these processes entail. It explained that – in principle – these processes evolve around different key actors, and have different trajectories and aims.

The key actors in the regulation process are the regulator – usually the authorised government – and the licensee (e.g., an industry). It is the regulator's task to promote a particular public interest (e.g., a clean environment). To be able to do so, administrative law grants the government certain authorities. The trajectory of regulation based on administrative law consists of three phases. First, the regulator sets the norms that a licensee needs to comply with (e.g., determining them in a license). Thereafter, the regulator monitors the licensee's behaviour. Finally, in cases of non-compliance, it enforces the law by imposing administrative sanctions (Van Rooij, 2006: 5-6). However, as this chapter will explain, variations to this administrative law-based trajectory exist.

The redress seeking process – which the literature often refers to as 'access to justice' – departs from the perspective of citizens confronted with a real-life problem. It focuses on the trajectory that citizens go through to achieve redress. For example, if they experience pollution, to whom can they turn for redress? Which barriers exist to reaching a solution that is satisfactory for them?

When it comes to industrial pollution, one may assume that the objectives of the regulation process and the redress seeking process are the same: cleaner river water. The public interest and the interest of the citizen who seeks redress overlap, implying that the processes complement each other (see, for example, Harding, 2007). Thus, increased regulatory opportunities combined with increased redress seeking opportunities result in a higher likelihood that this common aim will be achieved.

Departing from this assumption, it seems permissible to consider the regulation and redress seeking processes separately and to identify what enables or hinders achieving the objective in each process. In fact, many studies focus merely on the regulatory process or the redress seeking process. However, this study argues that to understand how pollution is dealt with, it is not enough to consider the barriers and possibilities of each process separately.

This chapter will explain that over the last half-century, regulation and redress seeking processes have become increasingly entangled. This entanglement is the result of changing ideas about how to improve regulation and

redress seeking in both Western and developing countries, particularly in the area of dealing with environmental problems. This chapter looks particularly at the implications for the roles of the government, citizens and interest groups in each process.

The first section focuses on debates about regulation. The second section considers the changing ideas about redress seeking. Section three discusses the nexus of the two processes. The final section pays special attention to how the debates on regulation and redress seeking have influenced discussions in Indonesia, particularly in how to address environmental problems. The chapter concludes that the increased entanglement of the processes creates the need to better understand how the processes are related.

1 Regulation and public interest promotion

Definitions of regulation vary, but they usually include elements of norm-setting, monitoring or enforcement,[1] and hold that regulation aims to promote a certain public interest. While some definitions refer only to 'command and control' regulation that is conducted by the government, others refer to a wide variety of activities by any actor to influence certain behaviour (see, e.g., Hutter, 2006, Levi-Faur, 2011: 16 and Black, 2002: 2, 8,).

In current regulatory theory and practice – and certainly in Indonesia – command and control regulation is often considered something of the past. Alternative forms of regulation are popular instead (e.g., where private parties play a considerable role). This section will discuss the changing views on regulation, and particularly regulation of environmental matters, and the developing countries in general.

1.1 Who should regulate, and how? A brief history of changing views

'Command and control' regulation depends entirely on the state as a regulator, leaving private parties, including citizens and interest groups without any regulatory roles.

During most of the past century, the state was considered the prime mover of the general welfare. It did so through public service delivery, including regulation in the form of 'commanding' the norms and 'controlling' compliance with these norms. However, throughout time, ideas have nevertheless changed regarding who is the prime mover of general welfare and who should have

1 Terminology related to regulation may also be used in different manners. For example, Baldwin and Black (2007: 2-4) include an assessment of the regulatory strategy's effectiveness as part of the regulatory process. They also define enforcement to include monitoring (and thereby detection of violations) and responding to non-compliance. See also Black (2002).

the respective regulatory powers. This did not occur linearly (e.g., from command and control regulation to self-regulation by private parties). Instead, ideas changed, moving between extremes as economic, political or social circumstances pushed the ideological pendulum in a certain direction.

During the 19th century, the industrialisation process was in full swing. A small elite group of entrepreneurs who bolstered industrialisation were seen as the prime movers of development. They were considered to be a 'gentlemen's club' and were left to regulate themselves. However, it soon became clear that such self-regulation could not prevent the existence of poor working and living conditions for labourers. Moreover, the economic crisis that hit Europe and the USA in the 1920s and 1930s shattered the assumption that markets would only have a positive impact on society. Market restrictions and social policies installed by the state enabled the USA to recover from the crisis. The public's trust shifted from entrepreneurs to the state as the prime mover of general prosperity. After the Second World War, the idea that the state was the most important player in generating prosperity remained popular. In many Western countries, wealth increased under the leadership of the state, supported by Keynes' theory that the state was able to manage the market economy and thereby achieve sustained economic growth and employment (Esman, 1991: 6-7; Mascini and Van Erp, 2014).[2] It was generally assumed that the state would properly weigh and mitigate conflicting interests within society in a top-down manner, and regulate by 'command and control'. These actions would lead the way to increased public well-being (see, e.g., Davidson and Frickel, 2004 and Chhotray and Stoker, 2009c: 168).

Scholarly attention reflects this focus on the state through its analysis of 'bureaucracy' (i.e., the rules, actors and practices of [state] organisations). Weber (1922) typified the ideal type of a bureaucratic organisation as consisting of neutral officials who, based on a legal order, take action and carry out the specialised tasks that a complex society demands. He considered bureaucracy in its ideal typical form as the most efficient type of organisation to promote public interests in a modern, complex society.[3]

However, in many Western countries, the economic crisis of the 1980s provoked a more critical attitude towards the state as the sole promoter of general welfare. The state was seen as the problem rather than as the solution (Esman, 1991: 8).[4] Scholarly debates also reflected this critique of the state.

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2 As both the trust in and the power of the state increased, 'government' (or public administration) became the commonly used term to describe the entity attempting to promote public interests.

3 At the same time, Weber warned that the underlying rationalisation causes a threat to individual freedoms because it ignores traditions, emotions or certain values that may also motivate certain behaviours.

4 In response to the financial crisis in the 1980s, the Reagan and Thatcher administrations in the USA and Great Britain emphasised the role the market could play in increasing public wellbeing.

In an analysis bringing together a host of literature, Wilson (1989) argued that in practice, bureaucracies are diverse. Officials' behaviour is neither neutral nor purely rational. It is based not only on rules and laws but also on a response to organisational structures, incentives and other contextual factors. Wilson concluded that in practice bureaucracies do not comply with Weber's ideal type and are often inefficient.[5]

In several Western countries, the limitations of the state as the prime mover of prosperity became more widely acknowledged. In response, the market's role in public interest promotion was emphasised. The government privatised many public services, anticipating more efficiency. Until then, regulation had been the domain of the state. The state had commanded strict norms that the licensee had to comply with, and it controlled the licensee's behaviour through monitoring and enforcement.

However, such command and control regulation was now considered expensive, ineffective and inflexible. It induced the risk of the regulator 'capturing' the licensee. Furthermore, command and control regulation was seen as an obstacle to innovation because it set the lowest common denominator as a standard, rather than stimulating the adoption of higher standards. It would also result in licensees' resentment towards the regulator and even to increased non-compliance (Levi-Faur, 2011: 14). However, instead of deregulating, the government increased formal regulation of market actors by private actors[6] (Ayres and Braithwaite, 1992: 7-12). The state's primary task became, therefore, to regulate regulation, and so it became a 'regulatory state' (Levi-Faur, 2011). At the same time, regulation was considered to not only be a matter purely between the government as regulator and market actors as licensees and self-regulators. Interest groups and citizens were also considered to be able to play a valuable role in the regulation process.

This thesis will demonstrate that in Indonesia, there is also a tendency to decrease the role of the state as the regulator. Policy makers, officials, scholars and NGO members often think that this is in line with progressive insights into regulation, which they believe confirm the idea that state regulation is by definition inefficient and ineffective. However, the section above has shown that ideas on regulation – and on whether the state, the market or the civil society domain is most capable of regulating – have continuously shifted. As

5 According to Wilson, bureaucratic organisations are often inefficient because – unlike private enterprises – they are driven by constraints, rather than goals. Such a difference in motivations results in different incentives. For example, because the public barely rewards bureaucracies for success, but instead holds them accountable when they fail, bureaucracies avoid taking risks and prefer to follow the rules, even though such an approach is ineffective.

6 A short period of deregulation in the USA during Reagan's first years quickly backfired as the need to protect the public against market actors soon became clear. In Great Britain, deregulation never occurred at all. The UK market's expansion, particularly due to internationalisation, introduced many new actors. The UK government wanted formal guarantees that every organisation would play by the rules.

a continuously moving pendulum, larger or smaller regulatory tasks were given in turn to the state, or to market or civil society actors. A shift in preference for one of these domains usually followed after another domain produced disappointing results in its regulatory capacity (e.g., the gentlemen's club of entrepreneurs during the industrialisation process or the state in the 1980s economic crisis). This thesis will demonstrate that the tendency to decrease the state's regulatory role and increase civil society's role produces considerable, negative effects. Such a tendency makes one wonder whether, in Indonesia, the pendulum will soon shift its direction again.

1.2 Command and control regulation

Command and control regulation means that the government 'commands' a licensee to obey strict norms and 'controls' its compliance by monitoring its behaviour and taking enforcement measures in cases of non-compliance (Van Rooij, 2006: 5-6). These three sequential elements of norm-setting, monitoring and enforcement form a 'regulatory chain'. By authorising the executive government to perform these regulatory powers, the government can promote certain public interests, such as ensuring that water pollution stays within – legally determined – acceptable limits.

Command and control regulation is largely based on administrative law, but occasionally also on criminal and private law frameworks. This section offers a legal perspective on the different aims and characteristics of these frameworks.[7] To a large extent, it will draw on Dutch regulations, because Indonesian command and control regulation is largely based on the same legal principles and concepts. Explaining the Dutch notions enables a comparison, as made in chapter 3, between the Indonesian legal framework and other legal frameworks for regulation.

1.2.1 Administrative law framework

In order for the executive government to be able to carry out its task of promoting a particular public interest, such as a clean environment, the administrative law affords it norm-setting, monitoring and enforcement instruments. These regulatory instruments enable the institution to prevent and halt licensees violating such norms and, if necessary, restoring the situation to its original condition (Struiksma, Ridder, and Winter, 2007: 25).

Norm-setting often starts with planning (e.g., by making spatial plans or by determining the minimum standards of the general river water quality).

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7 This thesis does not discuss private law enforcement, concerning the government's capacity to use private law to promote compliance, due to its limited relevance in the current Indonesian regulatory debates and practices. See also VNG, 2010.

Based on that, licenses often outline norms for individual licensees. In principle, the license-issuing institution must monitor whether licensees are compliant. It also has to enforce the law in case of non-compliance, unless clear, previously announced and generally applicable policies stipulate otherwise (Uylenburg and Visser, 2006: 280-281).[8] To enforce the law, the authorised institution can impose administrative sanctions. For example, it can suspend or revoke the license or use administrative coercion (i.e., taking concrete measures to halt a violation or to restore the situation to its previous state). It can then recover the costs from the violator. Other possible administrative sanctions include the administrative fine[9] or the daily fine (i.e., a fine that urges the violator to swiftly halt the violation or take restorative measures).

A precondition for a well-functioning administrative law framework is a clear division of authority. Ideally, the norm-setting government institution issues a license, monitors the licensees and, if needed, enforces the law through administrative sanctions. Some argue that environmental regulation requires flexibility in the division of tasks because regulation often involves various government institutions (Faure and Niessen, 2006: 271). When norm-setting, monitoring and enforcement authorities are spread out over various institutions, this can cause difficulties. For example, one institution may not be aware of the norms another institution has set. Additionally, one institution may be authorised to enforce the law by imposing administrative sanctions, but cannot actually sanction a licensee because a different institution issued its license. An unclear division of authority also has consequences for the possibility of holding the government accountable when it does not perform its task of properly protecting a particular public interest. After all, if multiple institutions have partial or overlapping regulatory authorities, it is unclear which institution is ultimately responsible and which institution citizens should address.

Although command and control through administrative law concerns primarily the relation between the regulatory state and the licensee, other parties may also be involved. In the Netherlands, citizens who have a direct interest in a particular case (e.g., they experience industrial pollution that exceeds the administratively set standards) can request the authorised institution to take enforcement measures. In principle, the institution must adhere to such a request. If it does not, the stakeholder may file an objection and – when the matter requires urgent action – may ask the administrative court to issue a preliminary injunction.

8 These policies more concretely determine the enforcement strategies and priorities in light of the usually limited resources available to conduct monitoring and enforcement tasks.

9 The administrative fine is a somewhat peculiar form of administrative sanction because it does not aim to halt the violation but rather to punish committed behaviour.

1.2.2 Criminal law framework

Regulation through administrative law aims to prevent violations, to halt them as quickly as possible and to restore the situation to its prior condition. Criminal law enforcement has a different goal. It aims to punish certain behaviour and is thereby intended to affirm particular norms within society. Examples of criminal sanctions include incarceration, imposing a financial sanction and 'skimming' the economic profit that the violator generated through its incompliant behaviour. Administrative law enforcement cannot be used for this purpose because it does not have a punitive aim. Thus, an administrative sanction ends an illegitimately profitable situation but does not reclaim its profits (Struiksma, Ridder, and Winter, 2007: 34).

In order for behaviour to be a criminal act, the law must explicitly qualify it as such. In the area of environmental matters, criminal behaviour is often closely linked to the administrative law framework. The criminal behaviour usually concerns a violation of the administrative norms, while also including intent to gain economic profit repeated violations of administrative norms. Therefore, criminal sanctions are generally imposed after or in conjunction with an administrative sanction. From a legal perspective, administrative and criminal sanctions can be simultaneously imposed because they serve different aims. An administrative sanction aims to halt a violation and restore an original state, while a criminal sanction punishes certain behaviour to affirm particular norms within society. Therefore, criminal sanctions may have a deterrent effect. Whether they have such an effect in practice needs to be examined through empirical research. In the same manner, the effectiveness – including the deterrence effect – of administrative sanctions can be empirically examined. The next sub-section will explore this issue further.

A final remark concerns the state actors involved in criminal investigations and enforcement. The executive government does not, in principle, have a role in criminal investigations, unless it has been regulated otherwise. For example, certain executive officials can be appointed to have criminal investigation authorities. Such authorities usually extend beyond monitoring based on administrative law. If this is not the case, criminal investigations are in the hands of the police and the public prosecutor. Criminal sanctioning is ultimately in the hands of the criminal court, and – in the case of environmental issues – usually occurs after a long and expensive process. It thereby differs from the administrative sanction that can be imposed directly after an institution detects a violation of an administrative law norm.

The role of third parties in a criminal procedure is often limited to reporting a case to the respective, authorised institution, which then has discretionary power to decide whether it will follow up on the case.

1.2.3 *Command and control in relation to private law*

The relation between command and control regulation and a private law framework is usually limited. In the Netherlands, private law is only relevant in cases in which the executive government wants to recover expenses from the violator for halting the violation or restoring the situation to its original state. The Supreme Court of the Netherlands has repeatedly confirmed that the executive government can only make use of private law in specific circumstances, and the interests of citizens may not be negatively affected if the government uses the private instead of the administrative law framework.[10] This thesis will demonstrate that in Indonesia, private law has a large role in dealing with industrial pollution matters, a reality which results in considerable negative consequences for environmental protection and beyond.

1.2.4 *Combining administrative and criminal law; normative stands and empirical findings*

The discussion regarding whether command and control regulation should be based solely on administrative law, or if and to what extent it should also be based on criminal law, occurred in the Netherlands over a long period, mostly as a normative discussion. This section briefly explains that historical debate because it resembles current regulatory debates and practices in Indonesia. This section also highlights certain empirical research findings of the effectiveness of each approach and their combined use.

In the 1980s, during the early days of environmental regulation in the Netherlands, policymakers and practitioners considered administrative law approaches to be the most suitable options for regulating environmental matters. After all, the environment was a matter of public interest that fell primarily under the public administration's responsibility. Criminal law responses were considered to be an *ultimum remedium* (i.e., the last resort), only to be used when administrative law proved ineffective. However, at that time, the administrative law framework only offered severe sanctions, notably the revocation of a licence. In practice, administrators and officials often considered imposing this sanction as disproportional. Instead, they preferred criminal law enforcement, which offered the possibility of imposing less severe sanctions. However, over the years the variety of administrative sanctions expanded, offering increased possibilities of more proportional sanctions. Furthermore, resistance grew against the idea that criminal law enforcement should only be an *ultimum remedium*. Instead, the administrative and criminal approaches should have been complimentary to one another in order to effectively serve the various regulatory objectives within the overall goal of

10 See the literature on the '*doorkruisingsleer*' and the Wind Mill case (HR 26 January 1990, *NJ* 1991/393).

'compliance' and promotion of public environmental interests (Struiksma, De Ridder and Winter, 2007: 19-26).

For a long time, the discussion on the use of administrative and criminal sanctions was mainly normative. An empirical study by Struiksma, De Ridder and Winter (2007) on the effectiveness of present strategies for environmental regulation in the Netherlands provided new insights on the use of administrative and criminal sanctions.[11] They define effectiveness of imposing administrative and criminal sanctions by assessing the extent to which certain regulatory goals were achieved. These goals were: ending the violation, undoing the effects of a violation, (specific) prevention[12] and behavioural change or increased environmental awareness of the violator. For example, a behavioural change included a violator investing structurally in improving their performance.[13] The research concluded that the simultaneous use of various legal frameworks in certain circumstances was the most effective approach.

It seems, therefore, that the most effective approach or mix of approaches depends on the characteristics of the case and the violator. To determine the most effective approach(es), the government must first consider whether it can halt the violation and repair its effects, and thus whether administrative law enforcement is appropriate and useful. To determine whether criminal law enforcement is appropriate, the government should determine whether the violator caused severe environmental damage or made an economic profit from non-compliance. Is the violator a recidivist or do they give the impression of being dishonest or manipulative? If so, the government should also impose a criminal law sanction (Struiksma, De Ridder and Winter, 2007: 38-44, 86).

The empirical study analysed 58 cases where the government imposed administrative or criminal sanctions. It showed that the sole use of administrative coercion was effective in 5 out of 6 cases. Such coercion prevented future non-compliant behaviour. However, the government only imposed administrative coercion sporadically due to the (political) sensitivity and the risk that the authorised institution would be unable to reclaim the costs from the violator.

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11 The authors analysed 58 cases to compare the effectiveness of administrative and criminal law approaches. Of the 39 cases that were in line with the 'decision model', 69 per cent were effective, 3 per cent were partially effective, and 28 per cent were ineffective at achieving regulatory goals. The 19 cases that did not follow the model nevertheless showed a similar effect rate: 68 per cent were effective, 16 per cent were partially effective, and 16 per cent were ineffective. However, a closer examination of these latter cases shows that cases that only applied administrative law (and in which the decision model suggested the use of criminal law) were ineffective or only partially effective.

12 Since the effect of general prevention is difficult to determine, the research focused on specific prevention (Struiksma, De Ridder and Winter, 2007: 37).

13 The research considered cases as effective when they achieved three of the four aforementioned regulatory goals. A case was partially effective if it achieved three of the goals, but did not halt the violation, did not undo the effects or did not lead to prevention. All other cases qualified as ineffective.

By comparison, a daily fine provided a good alternative for administrative coercion because it could force the violator to take measures that would halt the violation or restore the situation. Criminal sanctioning was particularly effective when the verdict took place swiftly (i.e., within three months after the government detected the violation). However, when the criminal sanction entailed a low monetary sanction, it was unlikely to have a preventative effect. Moreover, although in 84 per cent of all cases the violators gained economic profit, the government only reclaimed the profit in two severe cases. A final important note was that proper coordination between the executive institution and the public prosecutor was crucial in cases of dishonest and recidivist violators (Struiksma, De Ridder and Winter, 2007: 71-87).

The next chapter demonstrates that in Indonesia, the views on the use of administrative and criminal sanctions in cases of environmental violations are mostly informed by assumptions about their effectiveness that have seldom been tested. This study argues that these assumptions require critical reflection.

1.3 Alternatives for command and control regulation

Regulation can involve more than the government strictly commanding the norms and controlling compliance through administrative or criminal law enforcement. Many contemporary policies and theories on regulation display a general consensus that mere 'command and control' regulation is ineffective, expensive and even old-fashioned. Instead, the government should develop other regulatory instruments to influence licensee behaviour (e.g., by developing mechanisms that allow for more flexibility in norm-setting, creating awareness and using persuasion instead of sanction-based enforcement to change licensee behaviour) (Black, 2002: 1). Furthermore, non-state parties, including citizens and regulated market actors themselves, can and should participate in norm-setting, monitoring and enforcement (see, for example, Baldwin, Cave, and Lodge, 2010: 5-10; Levi-Faur, 2008: x; Van der Heijden, 2014; Baldwin, Cave, and Lodge, 2010: 10; Chhotray and Stoker, 2009a, and Hutter, 2006).

Sections 1.4 and 1.5 will demonstrate that this view has also become popular in developing countries, particularly when it concerns the regulation of environmental issues. The following section will further explore some of the most influential ideas that emerged in Western countries regarding alternatives for command and control regulation. It first focuses on alternatives to state 'command and control' regulation and then explains how non-state actors and citizens can play a regulatory role.

1.3.1 Flexibility in state regulations: 'Responsive regulation' and economic instruments

By the late 1980s, the regulation debate in Western countries had become polarised. While some argued that sanction-based deterrence was the most effective response to non-compliant behaviour, others argued in favour of using persuasion to improve compliance.

Ayres and Braithwaite (1992) introduced the notions of 'responsive regulation' and the 'enforcement pyramid', which offered a practical way to reconcile the extremes of the debate. The authors suggested that the most effective regulatory approach depended on the circumstances and, more precisely, on the motivations of the violator. For example, an ignorant violator is likely to comply when the government gives advice, while a reluctant or recalcitrant violator requires a more coercive response. Such regulation, 'responsive' to the licensee, is thereby a variation of command and control regulation.

The notion of the 'enforcement pyramid' elaborates on the idea of 'responsive regulation'. It suggests that responses to persistent non-compliance should become gradually more intrusive and coercive. In principle, the government will first take non-intrusive regulatory measures. Thus, the government first persuades or advises violators on how to become compliant. The case only escalates up the pyramid when the non-compliant behaviour continues, after which the enforcer uses more intrusive and coercive measures. A violator will rarely remain non-compliant despite the increasingly intrusive sanctions. These rare cases will reach the top of the pyramid, where the government will impose the most intrusive and coercive regulatory measures (e.g., revoking the license). These measures will ensure that the violation ends. Therefore, the government increases the chances of achieving compliance by initially 'speaking softly' to the licensee and only later threatening them with 'big sticks' in the form of severe sanctions (Ayres and Braithwaite, 1992: 20-1, 35-41). Ayres and Braithwaite acknowledged that their idea needed empirical testing to confirm its effectiveness in practice (1992: 54-100).

The enforcement pyramid has been criticized.[14] It requires frequent and repeated monitoring, which the government often lacks the required resources to do.[15] Furthermore, it builds primarily on the relationship between the regulatory state and the licensee and thus induces the risk of capture and corruption. Ayres and Braithwaite acknowledge this but suggest that public

14 Other critiques of responsive regulation are discussed by Gunningham (2010: 127-31), Baldwin and Black (2007) and Mascini (2013).

15 A popular alternative approach to determining how regulators should allocate their limited recourses is 'risk-based regulation'. It is not based on a 'pyramid' approach to escalation, but rather on the calculated risk a particular industry poses. This approach has been critiqued because of the difficulty of calculating risk and because its focus on a small number of high-risk cases implies its neglect of a larger number of low-risk activities (Baldwin and Black, 2007: 12-15; Gunningham, 2010: 129).

interest groups can and should play a role in counterbalancing this risk by critically monitoring the regulatory process (1992: 54-60). Moreover, the 'enforcement pyramid' suggests that only one sanction can be imposed at a time. More recent empirical research by Struiksma, Ridder, and Winter (2007) shows that combining sanctions from both the administrative and criminal framework can be more effective under certain circumstances. The enforcement pyramid furthermore suggests that criminal and administrative law enforcement may succeed one another during escalation[16] (Ayres and Braithwaite, 1992: 35-8). In reality, administrative and criminal sanctions serve different aims and have their own enforcement trajectories.

The enforcement pyramid has been influential because it has resonated with practitioners and academics alike. It offered practical guidance on how to improve regulation and allowed regulators to decide when to escalate a case. It also offered an opportunity to depoliticise regulation by avoiding normative discussions on the value of neoliberal ideology, which assumes that self-regulation is 'good' and a large role of the state is 'bad'. Therefore, the enforcement pyramid was enthusiastically adopted, while theoretical, practical and normative problems were often overlooked (Mascini, 2013: 48-60 and Black, 2002: 16). This thesis will show that in the practice of environmental regulation in Indonesia this is certainly also true, as policymakers, officials and scholars embrace the idea the enforcement pyramid but disregard the complications.

Apart from responsive regulation, market-based regulatory approaches also became popular. Economic instruments, such as emission trading schemes and certification, created incentives and disincentives for the licensee. They also offered more flexible norms and forms of monitoring and responding to non-compliance (Levi-Faur, 2011; Mascini and Van Erp, 2014). Nevertheless, the successful application of economic instruments still depends on properly functioning command and control regulation. For example, tradable permits still require that the government set overall standards, monitors whether licensees comply with the standards in the permits, and enforces the law in case of non-compliance.

16 The example model of an enforcement pyramid, provided by Ayres and Braithwaite, suggests that when persuasion is ineffective, a warning letter will follow. As previously explained, in certain circumstances it can be useful to impose administrative and criminal sanctions simultaneously. However, by switching between administrative and criminal sanctions successively, the consistency of each trajectory is jeopardised. For example, when monetary sanctions are ineffective, and the violator is to be criminally prosecuted, what are the consequences for the accountability of the authorised executive institution? The latter does not control the process of criminal prosecution, yet it is responsible for certain guarantees (e.g., a river's sufficient water quality). However, this thesis will demonstrate that in Indonesia, environmental agencies (i.e., executive government institutions) are primarily responsible for promoting the public environmental interest but tend to divert their regulatory responsibility to the public prosecutor and criminal courts.

1.3.2 Civil society and citizen participation in regulation

While 'responsive regulation' remains mainly a matter between the regulatory state and the licensee, many authors consider regulation to happen 'in many rooms' (Black, 2002: 4), arguing that informal social control is often more important than formal state control (Gunningham, 2010: 131). For example, the notion of 'smart regulation' adopts the enforcement pyramid's idea of escalation but also sees a large role for non-state parties, considering them as quasi-regulators (Gunningham et al., 1998: 399-400; Baldwin and Black, 2007: 11-12). For example, certification by NGOs and branch networks may influence customer behaviour and exercise peer pressure (Gunningham, 2010: 132-3).

The idea that civil society in shape of specific interest groups can play a positive regulatory role is relatively recent. Until the mid-20th century, interest groups were often seen as either consisting of poorly integrated, discontent, irrational citizens or as rational citizens who calculated the costs and benefits of joining an interest group. Either way, interest groups were mainly considered as obstructing the (formal) processes of public interest promotion. Instead, the state was considered the most capable party for weighing conflicting interests and making decisions in the public interest (Handler, 1978: 1-25). In the 1950s, a more positive stance emerged towards the role of interest groups in public interest promotion. Groups in the USA strived for black civil rights, environmental rights, women's rights and consumers' rights. These groups tried to provoke social reform primarily through court litigation but also used informal strategies such as creating media pressure and increasing public awareness.

Interests groups' potentially positive role in social reform sparked academic interest in the topic. Olson (1965) pointed towards a potential 'free-riders' problem, where a larger beneficiary group would be unwilling to voluntarily share the costs of a smaller group's investments in policy reform. Handler (1978) added that if participatory incentives for interest groups were not purposive (i.e., economic benefits, increased carrier opportunities and prestige), the groups would find it difficult to attract members and keep them involved. Moreover, an interest group's success may be hindered by the executive government's hostile attitude, particularly when the interest group demands more government efforts (e.g., field level penetration instead of desk-based problem-solving) (Handler, 1978: 1-25).

Both resource mobilisation theory and new social movement provide further insights into the functioning of interest groups and explanations for their levels of success, although these theories depart from different assumptions. Resource mobilisation theory focuses on how a group mobilises its resources and makes a cost-benefit analysis before taking collective action against (perceived) structural deprivation. Internal organisational aspects (e.g., leadership) are particularly relevant because not all members may have common interests within one interest group, and there exists a risk of an 'all out

war against each other due to competition for limited resources and support' (Zald and McCarthy, 1987: 161 in Canel, 1997). At the same time, a government may use its resources to either facilitate an interest group or to repress it, depending on its prevailing ideas about the group's potential roles (Canel, 1997; Rydin and Pennington, 2000: 165). By contrast, new social movement theory takes greater consideration of the normative, emotional and symbolic aspects of collective action. It considers collective action as being able to create meaning and affirms identities (e.g., among indigenous people) as a motivation to join and support an interest group (Canel, 1997). So an embrace of the potential of these social movements may solve the collective action problem. Therefore, 'empowerment' is needed, particularly in developing countries (Chhotray and Stoker, 2009b: 169).[17]

The attention for the roles of citizens and interest groups in the regulation process and the development of related theories reflects the resistance against top-down approaches to promoting public interest that highly value professional 'expert' knowledge. Instead, the focus is on 'bottom-up' participatory approaches that have become popular since the 1980s (Smith, 2008: 354). The potential of interest groups and affected citizens in participating in regulation is currently widely acknowledged, but often considered under-utilised. While indirect participation in decision-making through representative democracy was previously considered sufficient to adequately take into account the views of citizens (Chhotray and Stoker, 2009c: 168), nowadays direct participation of citizens and interest groups in promoting the public interest is considered to be a precondition to make adequate decisions in the public interest as well as a democratic right in itself. Furthermore, it is often assumed that policies become more effective if they are based on local knowledge. Local involvement in the early stages of policy-making could furthermore increase legitimacy and avoid conflicts (Rydin and Pennington, 2000: 154-155). Finally, involving the market and civil society in responding to non-compliance as well as decision-making or norm-setting could reduce the costs and responsibilities of the state (Chhotray and Stoker, 2009c: 171). Identifying and developing 'new modes of problem solving and decision-making [could] fill gaps created by the failure of traditional forms,' leading to 'better citizens, better decisions and better governance' (Fischer, 2006: 19, in Chhotray and Stoker, 2009c: 172).

The rosy images of the potential of citizen and interest groups' participation in public interest promotion have been severely critiqued. These images wrongfully portray communities as homogeneous and static units, leaving them historically and spatially unspecified. Civil society leaders and institutions are pushed into positions as brokers of their community's interests, overlooking

17 This theory resonates with Ayres and Braithwaite, who argue that public interest groups need to be empowered in order to overcome problems of capture and corruption. Ayres and Braithwaite nevertheless admitted that this idea required empirical evidence (1992: 54-100).

the fact that they might not attend to the real needs of the people they represent, and ignoring the diversity within these communities (Chhotray and Stoker, 2009b: 176; Davidson and Frickel 2004: 473; Cappelletti and Garth, 1977: 194). If there is insufficient social capital within a community – in the form of community solidarity, reciprocity and a system of social rewards and sanctions – special interest capture may occur. A few vocal and well-organised representatives of the community may benefit from their position as participants in the regulatory process but to the disadvantage of the wider community. The theories that regard participation as only having advantages, focusing on how to lift the barriers to participation, disregard the underlying power structures within and outside communities, and simplify state-community relations as dichotomies. As a consequence, participation becomes a way for governments to offload their responsibilities for promoting public service delivery (Chhotray and Stoker, 2009b: 169-171 and Mascini, 2013: 48-60). Furthermore, Rydin and Pennington (2000) argue that scholarly work in favour of increased public participation makes no clear distinction between 'participation as a right' and 'participation to improve policy'. While the first is a normative issue, the latter is a matter that can and should be empirically examined (Rydin and Pennington, 2000: 153-167). Section 1.4 will further discuss criticism of citizen participation, which is particularly relevant in the context of developing countries.

To conclude, over the past decades, scholars engaged in the regulation debate have sought to define the various roles that citizens and interest groups can play in the regulation process and provide explanations for a group's level of success, pointing to different preconditions that influence their ability to have an impact on the behaviour of the regulatee,[18] particularly in relation to the original purpose of the regulation process, e.g. environmental protection (see Van Rooij and FŸrst, forthcoming). However, the critical reflections on citizen participation in regulation suggest to look at the impact of this participation beyond the original purpose of the regulation, for there may also be much broader societal impact, for example because of shifting power relations within and outside communities that are directly affected by, in this case, regulation of industrial pollution.

The developments in regulation debates show that the term can have normative connotations. Explicit connotations can occur, e.g., when regulation

18 FŸrst (2016) provides an overview of definitions and approaches that scholars developed over the past two decades to describe the various roles that citizens and interest groups can play in the regulation process (29). She furthermore sums up various internal and external factors that influence the potential contribution of NGOs in regulating industries, such as political, legal, financial, and psychological factors, the extent to which an NGO is socially accepted, and an NGOs amount of analytical, diplomatic, strategic and, communication skills, as well as its ability to obtain information (36, 198-220).

is considered negative for restricting individual liberty or is seen as a tool for market expansion (Levi-Faur, 2011: 3). Connotations can also be subtle, such as when command and control are seen as traditional or old-fashioned, while other 'alternative' forms of regulation are intuitively preferred (Black, 2002: 2). Sinclair (1997) explained that self-regulation is often preferred over command and control. It is assumed that self-regulation inherently increases the chances of achieving a win-win outcome in which the licensee performs beyond the minimum norms. However, Sinclair warned against dichotomous thinking about self-regulation and command and control, in which the former is preferred. He argued that in practice, and particularly in environmental regulation, pure forms of command and control and alternative regulation do not exist. For example, command and control regulation is never fully compulsory because of the regulator's limited monitoring capacity, the varying degrees of discretion and the possible existence of capture and corruption. Moreover, a licensee does not make their choices purely on rational grounds, calculating the chances of detection and punishment. On the other hand, alternative forms of regulation are almost never free from compulsion, because when self-regulation fails, stricter state regulation or licensee peer pressure could occur.

Several authors argue that, despite the potential of command and control alternatives – in the form of 'responsive' regulatory government approaches as well as non-state actor regulatory tasks – a minimum of state command and control is indispensable and that market and civil society regulation can never replace state regulation (Vogel, 2010: 83). Furthermore, regulation should be a 'continuous action of monitoring, assessment and refinement of the rules, rather than an ad hoc operation' (Levi-Faur, 2011: 5). According to Gunningham, 'no single approach will however function efficiently and effectively in [...] all circumstances' (Gunningham, 2010: 141). The context in which a particular regulatory approach is applied always needs to be taken into account.

Therefore, questions remain regarding how to integrate context-specific, non-state actor regulation with government regulation, and what the side-effects or risks are of a larger market and civil society regulatory role (Baldwin et al., 2010: 11). What effect does the involvement of private regulatory actors have on the capacity of the state? Will it stimulate the state to perform better or will the state's role be marginalised? With the expanding diversity of regulatory actors and approaches, questions also arise regarding the (democratic) legitimacy of norms, the transparency of regulatory activities, and the accountability of regulators (Levi-Faur, 2011; Grabowsky, 2013).[19] Finally, questions arise about the impact of increased citizen participation in regulation on the relations within affected communities (i.e., beyond its original purpose of environmental protection by modifying the polluting behaviour of the industry).

19 For critical assessments of alternative regulation, see also Gunningham and Grabosky (1998) and Black (1997; 2002).

1.4 State-society relations and regulation in developing countries

The previous section described how ideas about the role of state and non-state parties in regulation have developed in Western countries, primarily inspired by experiences in those countries. These ideas then transferred easily to developing countries but played out differently because the contexts were different. This section first outlines how discourses on state-society relations and regulation evolved in light of the 'development' of these countries, and the implications for the roles that state, market actors and civil society (should) play in regulation. It then zooms in on the issue of citizen participation in regulation in developing countries.

1.4.1 A brief history of state-society relations discourses and 'development'

After the Second World War, many colonies became independent. The main goal of the newly independent governments was to bring about economic and social 'development'. Following the example of Western countries, they wanted political, social and economic modernisation (i.e., secularisation, industrialisation, and urbanisation). They expected technology to eventually offer solutions to (nearly) all societal dilemmas, including the unequal distribution of wealth and risk, which was also related to the environment. Economic development was thought to inevitably lead to open and democratic political and government institutions. The largest obstacle was considered to be the scarcity of financial and technical resources (Esman, 1991: 5). The state took a central position in top-down economic and social development plans in many developing countries. Local communities were considered 'obstacles' to such development and needed to adapt to modernisation (Bhatta and Gonzalez, 1998; Evans, 1998; Esman, 1991: 6-7).

When economic growth did not occur as expected in the 1970s and 1980s, trust in the state to stimulate development shrivelled in both developing and developed countries. Some explained the failure by arguing that in theories and policies which placed the state central stage, the complex links between cultural values, and administrative and economic problems had been neglected. Bureaucracies in developing countries where characterised by heterogeneity within institutions, multiple overlapping normative frameworks, and large gaps between prescribed rules and practices (Riggs, 1964: 243-259). However, following popular tendencies in Western countries, the solution was thought to involve entrusting market actors with a larger role in promoting the general welfare.[20]

20 Stimulated by Western donor organisations such as the World Bank (WB) and the International Monetary Fund (IMF), the privatisation of government enterprises and deregulation minimised the state's role in economic activities (Esman, 1991: 8).

Initially, local communities were no longer seen as an obstacle to development, but rather as incompatible with economic growth and, therefore, eventually doomed to dissolve in the expanding market (Bhatta and Gonzalez, 1998; Evans, 1998). However, this view changed. The international development community coined the concept of 'governance'. In contrast to the commonly used term 'government', 'governance' emphasised that public interest promotion should involve market actors, civil society and citizens alongside the state. As part of this change in views, local communities' potential was considered to be underutilised. By establishing participatory systems, local communities would be able to take more responsibility for their development. This bottom-up approach was believed to advance the position of the poor and disadvantaged, to stimulate access to justice for all, to promote effective basic service provisions, and to establish honest and accountable governments. Along the same lines, the international development community promoted government decentralisation. It would become easier to adapt national policies to local contexts and to increase government accountability because local voters would assess the government's local performance (Chhotray and Stoker, 2009b: 97-119, 205-206).

Various authors criticised the aforementioned ideas[21] as being insufficiently supported by empirical analysis.[22] Consequently, policies based on these ideas do not sufficiently consider the regional and local circumstances in which they play out (Chhotray and Stoker, 2009: 105-107; Esman, 1991: 5-15; Olivier de Sardan, 2011: 22-31; 2013: 49). Among these authors is Tania Li (2007), who, based on her experiences in Indonesia, criticised the strategy of international donors to stimulate decentralisation and a larger role for local interest groups. The latter became 'trustees', who falsely claimed to know what was best for the people they represented and whose living conditions they aimed to develop (Li, 2007: 81).

Along these lines, Van Klinken and Barker (2009) argued that state studies literature, and particularly Indonesia-focused literature, wrongfully departed from the assumption that there is, or *ought* to be, a clear divide between the state and society. According to Van Klinken and Barker, in reality, states are embedded within the societies in which they operate. In the case of Indonesia, particularly after it underwent democratisation and decentralisation, the state

21 According to Chhotray and Stoker (2009b), liberal democratic ideology underlies many seemingly neutral initiatives that promote citizen participation and a limited role of the state. It departs from ideas on individual freedom, the neutral state and the importance of a liberal civil society to balance the diversity of interests. Chhotray and Stoker argued that this ideology is often wrongfully presumed to have universal value (97-119). See also Mascini, 2013: 48-60.

22 Chhotray and Stoker explained that the lack of empirical research is partly due to the limited resources of donor organisations, and their fear of lacking public support for such in-depth analysis. The findings may also not translate into practical recommendations or strategies (2009b: 105-107).

appeared to have become more 'chaotic'. New elites made use of the opportunity to engage in 'money politics' while assertive middle-class groups (e.g., indigenous groups and NGOs) emerged and came to play an important role in how the state functioned. Van Klinken and Berker concluded that the state was not the centred, unified authority that its ideological image portrayed it to be (Van Klinken and Barker, 2009: 1-5).

1.4.2 Regulation and participation in developing countries

At the turn of the millennium, the idea that non-state parties and, in particular, local communities could (and should) play a part in development, including in regulation, slowly gained ground in many developing countries. The idea offered an alternative to the poorly functioning state and its disappointing results. Many countries moved away from command and control regulation and shifted towards 'regulatory governance'; the state would steer the regulation boat, while others – market and civil society actors – would row it (Beer, Bantley, and Roberts, 2012: 328-329; Baldwin et al., 2010: 8; Braithwaite, 2008).

There were demanding preconditions for new regulatory actors to contribute to regulation in developing countries positively. For example, they required the existence of reliable, integrated information systems, programmes that orchestrated the contribution of all regulating actors, community control, structured learning from regulation experiences and flexible instruments that were adaptable to rapid changes (Afsah, Laplante, and Wheeler, 1996). At the same time, many obstacles could hinder citizens and civil society organisations from participating in regulatory processes. Stakeholders could be excluded from decision-making processes, they often lacked monitoring knowledge and resources, and corrupt or otherwise malfunctioning executive government institutions and courts may not properly attend to the interests of the stakeholders (see, e.g., Van Rooij, 2012: 703-704). Nevertheless, by focusing on the barriers, the assumption was made – implicitly or explicitly – that participation was always a good thing; the more participation, the larger the positive effect on regulation (see, e.g., Harding, 2007: 1-3).

Others were even more sceptical about the potential of new regulation models in developing countries and the role of non-state regulators. The new position of NGOs in the regulatory process led to new problems (e.g., corruption and fraud), threatening NGO legitimacy (Beer, Bantley, and Roberts, 2012: 330-331). Non-state regulators in developing countries were likely to execute their regulatory roles poorly, particularly because state institutions offered insufficient guidelines to the non-state regulating agencies and could not keep them in check, due to the former's limited capacity and commitment. In addition, there was a lack of other mechanisms to hold the non-state regulators accountable when they did not execute their task well. However, the limitations of non-state institutions were often underestimated. Therefore, the trend of delegating regulatory tasks to non-state parties in developing countries often

led to poorer regulatory performances regarding quantity, quality, costs and public welfare (Estache and Wren-Lewis, 2010: 372-395).

Others remarked that the enthusiasm about participation was built on a 'myth of community', portraying the community as a homogeneous, harmonious unit, consisting of members with common interests and needs; concealing the power relations within a community (Cooke and Kothari, 2001: 1-8). In reality, participatory approaches would be a 'system of representation' that would not reflect local realities (Mosse, 2001). Instead, they would create new power relations by including certain community members and excluding others from participatory initiatives (Cleaver, 2001). For facilitators of the participatory approaches (e.g., officials, development workers and NGOs) who have been influenced by the simplified and romanticised ideas about the virtues of participation, it was often difficult to understand the local complexities in which they operate (Smith, 2008: 359-363) and the nuances and conflicting interests within the 'participating' community. Some argued that in developing countries, command and control approaches were, in fact, more appropriate than alternative forms of regulation, especially because the latter left more room for corruption and collusion (see, e.g., Faure and Niessen, 2006).

Section 3 of this chapter explains that, despite the aforementioned critiques, the idea that participation in regulation should be encouraged remained popular in development thinking in Indonesia as well as in scholarly debates, especially regarding environmental regulation. The next sub-section pays attention to the changing global ideas about regulation that are considered particularly relevant for environmental matters. As a new and urgent policy field, it has its own particularities.

1.5 Promotion of environmental interests

In recent decades, 'the environment' has become one of the most debated policy fields in Indonesia and worldwide. There is a sense of urgency in dealing with environmental problems because of their seriousness and (potentially) irreversible effects. As Indonesia's first Minister of the Environment, Emil Salim, said: 'We need to rapidly move along the path of sustainable development. Indonesia cannot afford to spend decades on environmental education and raising awareness before getting into action. We have to sail the boat while building it' (Lucas and Djati, 2000: 54). It is, therefore, no surprise that debates on environmental policy reflect the features of global debates on public interest promotion and regulation. However, environmental regulation has its own particular characteristics.

Globally, creating a coherent legislative and institutional framework for environmental matters, without overlaps, gaps and contradictions between new and existing norms, mechanisms, and institutional structures remains a challenge (Bedner, 2008: 171-3). Debates on environmental public interest

promotion are further complicated when knowledge of the environmental effects of certain behaviours is unavailable. Such a knowledge gap fuels discussions about the degree of urgency and seriousness of situations, and whether certain measures are required. It also creates room for rather vague framing terms. For example, 'sustainability' is a general concept that does not clarify who is responsible for achieving specific goals (Chhotray and Stoker, 2009a: 210-211; Arnscheidt, 2009: 393).

Environmental public interest promotion is marked by a fundamental problem of dividing scarce common goods. Initially, there was a common belief that technology would be able to solve all environmental problems (Boelens, Zwarteveen, and Roth, 2005: 8-9). However, it was quickly acknowledged that the lack of environmental public interest promotion was, in fact, primarily a social problem. The lack of environmental interest promotion was a 'tragedy of the commons' at every level, locally and globally. Hardin (1968) argued that it is unlikely that the rational individual will voluntarily invest in measures that will neutralise the environmental impact of their activities that impact a larger group within the society if this larger group is unable or reluctant to keep the causer (fully) responsible. Hardin proposed that this problem could be overcome by either giving the state absolute control or by privatisation (Chhotray and Stoker, 2009a: 201-202). Around the same time, Mancur Olson (1965) explained that collective action against environmental degradation was likely to encounter the 'free rider problem'. However, Olson also argued that the free rider problem could be, in theory, overcome by giving the state coercive power to force the majority to contribute to pay for small group costs for promoting the larger group interests (Chhotray and Stoker, 2009a: 201-202). Nevertheless, as previously explained, although the state was initially seen as the main promoter of environmental interests, various complications prevented the state from fulfilling this regulatory role. Institutions were not always neutral; various interests existed within institutions and institutions themselves often resisted reform (Wilds, 1990).

The economic crisis of the 1980s led the public to distrust the state and its ability to promote environmental interests. Market-based instruments emerged (e.g., tradable environmental permits, certifications and eco-based taxes), stimulating the emergence of private regulatory actors (Chhotray and Stoker, 2009a: 203). Many argued that the relationship between the regulatory state and regulated market actors should be a dialogue amongst equals, leading to mutual understanding, trust and an ability to jointly solve problems. Such a close relationship raised concerns regarding the risk of the licensee 'capturing' the regulatory agency. Civil society actors, such as interest groups, were expected to counterbalance this adverse side effect (Davidson and Frickel, 2004: 473-475). Proponents of new institutionalism theories even considered markets and civil society actors to be new institutions. Alongside the state, these new institutions could play an important role in environmental interest promotion (Chhotray and Stoker, 2009a: 201; Buttel, 2003). Community-based partnerships

of public, private and non-governmental stakeholders would mutually define problems and co-produce consensus based on solutions with environmental agencies (Durant, Fiorino, and O'Leary, 2004: 12). However, these new approaches were also critiqued, as they would obscure power relationship asymmetries (Chhotray and Stoker, 2009a: 202, 213. See also Boelens et al., 2005: 9-11).

Thus, in recent decades, theories on environmental public interest promotion have displayed a tendency to attribute a large(r) role to non-state actors in regulatory processes, and particularly to civil society actors (e.g., interest groups and local communities) (see, e.g., Chhotray and Stoker, 2009a; Buttel, 2003; Davidson and Frickel, 2004). Nevertheless, state command and control regulation is still dominant in most environmental legal systems (Gunningham and Grabosky, 1998; Bedner, 2008: 173). Although the extent of the state's regulatory role is debated, many authors endorse balancing regulatory approaches, combining command and control regulation based on administrative, criminal and private law frameworks, as well as seeking alternative approaches. Nevertheless, command and control approaches should always be in place to support alternatives – the latter being dependent on the former – to serve as a back up when other approaches fail (Faure and Niessen, 2006: 278-279; Rahmadi, 2006: 140-1; Davidson and Frickel, 2004; 473-475; McAllister, Van Rooij, and Kagan, 2009: 8). In the end, the government should remain responsible for protecting the general environmental interests of its population. Therefore, an essential aspect of proper environmental interest promotion is a clear division of administrative authority and responsibilities between various government institutions (Stroink, 2006: 183).

In order to determine the most appropriate regulatory approach for environmental interest promotion, one needs to consider the relevant contexts, including the local sociocultural normative systems and power relations (Boelens et al., 2005: 2). Policymakers should be aware of whether they operate in a context where committed licensees have established well-organised regulatory mechanisms or whether a strong culture of regulatory resistance exists. In any case, if environmental threats are serious and acute, the effectiveness of regulatory efforts should prevail over efficiency. Thus, in such cases, the state should not curtail its regulatory efforts by depending on other regulatory actors or attempt to improve compliance through 'soft' measures (Sinclair, 1997). The state should also consider the severity of the collective action problem in determining the appropriate regulatory approach. When social capital is limited, and participation in the regulatory process by a few representatives is unlikely to lead to effective measures that will benefit the wider community, the state should take a role as a controller rather than acting as a facilitator between other stakeholders (Rydin and Pennington, 2000). Regardless, when learning about local contexts, including the attitudes of the licensees and the relevant civil society actors, empirical research is indispensable.

A final remark concerns the call for introspection by Clapp and Dauvergne (2005), who urge those concerned with finding solutions for environmental problems to take a self-reflexive stand towards one's assumptions and to assess one's underlying worldviews, perceptions of power and ideologies. Indeed, these may unconsciously influence one's thinking to differ from the empirical reality of how environmental problems can best be addressed.

1.5.1 Environmental regulation and citizen participation in developing countries

It has been argued that developing countries have the advantage of being able to use technical knowledge to reduce their industrial environmental impact much earlier in their industrialisation process than developed countries (Sonnefeld, 1998). Environmental interest promotion is nevertheless often more complex in these countries than in developed countries. Against the backdrop of global conflicts related to national sovereignty, developing countries occasionally argued that they have the right to develop high consumption economies before prioritising environmental public interest promotion (Chhotray and Stoker, 2009a: 201). The previous section discussed some of the complications that are typical for bureaucracies in developing countries. Van Rooij (2006) argued, based on his study of China, that law-making is often 'ad hoc', as legal reforms are not embedded in a legal tradition, but rather result from political rationale, and is responsive to incidents or power shifts. Additionally, economic factors are likely to play a more dominant role in regulatory approaches in developing counties than in Western countries. Economic interests are likely to dominate decision-making by state institutions, while communities that are largely dependent on a polluting industry, particularly for their income, are unlikely to exercise substantial social and political pressure on the company to comply with environmental policies.[23]

Despite the economic, social, political and institutional differences between them, many developing counties adopted ideas from regulatory studies conducted in developed countries. The former seldom conducted empirical research on the implications of adopting such ideas outside of their studied context. As a result, the reforms were rarely based on a careful balancing of conflicting aims and characteristics of laws, such as uniformity and legal certainty, and their implications regarding feasibility and flexibility towards local circumstances (Van Rooij, 2006: 364-386).

Several studies in developing countries demonstrated that when state regulation lacks effectiveness, enthusiasm for alternative regulatory approaches increases (McAllister, Van Rooij, and Kagan, 2009: 8). Some studies have

23 Nevertheless, citizen participation in regulation is likely to fail in developed countries as well, when citizens are economically dependent on the licensee (Gould, Schnaiberg, and Weinberg, 1996: 82-126).

pointed towards the limitations of market-based regulatory approaches in developing countries (Faure, Peeters, and Wibisana, 2006; McCarthy and Zen, 2009; Russell and Vaughan, 2004). However, the potential negative implications of a larger role of interest in regulation have been less critically studied. On the contrary, the focus has been on lifting the barriers for citizens and interest groups to take part in the regulatory process (e.g., by increasing their organisational and political power) (O'Rourke, 2002; Sonnefeld, 1998; Pargal et al., 1997; Smith, 2008; Harding, 2007). One example of a more critical perspective includes Harding (2007) emphasising the importance of acknowledging that there can be a difference between the procedural, legal guarantees for citizen participation, and the extent to which this leads to substantive justice (1-11).

Focusing on the barriers to participation, however, does not fully cover the implications of citizen participation. Van Rooij (2012) describes how in China, compensation paid to citizens for environmental damage led to complex interdependencies between various affected groups, the industry and the state. Community leaders acted as intermediaries between the polluting industries and other villagers. The leaders arranged compensation while mitigating the risk of protests against the environmental situation. The villagers developed an interest in continued pollution because it offered the basis for compensation. The responsible government institutions approved of the situation because they had an interest in preventing social unrest and securing the tax revenues from the industry. This 'compensation trap' resulted in a situation where citizen participation was placed in a redress-seeking rather than a regulatory framework (Van Rooij, 2012).

In sum, command and control regulations usually confine citizen involvement to the norm-setting phase of the regulatory chain, in which citizens are to be actively informed about planning and licensing issues and invited to express their views. To a more limited extent, citizens may also be involved in the phases of monitoring and enforcement, where they can object to the government's decisions in these matters. However, the rising desire to expand the regulatory role of non-state actors increases the importance of better understanding the role of redress-seeking citizens for regulation-based wrongdoings. Such understanding is especially important in developing countries, where governments often fail to conduct their regulatory tasks properly. The next section will discuss the role of citizens as redress seekers in-depth.

2 Redress seeking processes

In essence, regulation aims to promote public interests, while redress seeking departs from the perspective of the individual or group that experiences an injustice and seeks 'justice' or redress. This redress may serve only the private interest of the individual. However, it can also promote particular public

interests. This distinction is seldom recognised in policies, practice, or even academic debates.

As mentioned in the introductory chapter, the process of seeking redress is usually referred to as 'Access to Justice' in policies and academic debates. The phrase has become popular as a means of achieving certain goals, a policy goal in itself, and as an analytical concept (Parker, 1999: 30-32; Bedner and Vel, 2010; Banik, 2008: 14-15).

However, I instead prefer the term redress-seeking process. It enables one to distinguish between Access to Justice as a policy goal and as an analytical framework. The policy goal has various contestable assumptions underlying it that will be discussed in this section. The analytical framework informs systematic assessments of the position of those experiencing injustice and the process they go through.

The words 'Access' and 'Justice' have quite normative connotations. 'Justice' suggests that citizens per definition seek something that is just. However, defining justice is a problematic endeavour (see, e.g., David Schlosberg, 2004). The term 'redress' is less normatively charged. What the redress seeker considers (or what was provided or proposed) as redress primarily determines the definition. When normatively assessing this redress (i.e., asking whether it is appropriate), one needs to explicitly refer to a particular normative framework, such as to the state's legal framework, to human rights, or to customary norms. 'Access' furthermore suggests that 'static' obstacles hinder the path to a more just situation. By contrast, the term 'seeking' allows one to look beyond problems of access. It stresses that the phenomenon is, in fact, a process. This process begins with a real-life problem that a citizen experiences. It then moves on to the citizen's ability to formulate a grievance, their access to redress forums and how these forums handle the case and the assessment of the achieved redress' appropriateness, if any, in relation to a particular normative framework (Bedner and Vel, 2010). 'Seeking' stimulates an assessment of the dynamics within the process, allowing one to recognise that the steps in the process may not occur linearly.

2.1 Access to Justice discourses

The term 'Access to Justice' was introduced in the 1970s in the USA. It referred to policies that aimed to improve the position of poor and marginalised citizens by focusing on facilitating their access to formal state institutions, particularly courts, by providing legal aid through legal professionals (Cappelletti and Garth, 1978: 6). Over the next fifty years, the focus of Access to Justice policies and wider discourses changed. Similar to the trend in regulatory thinking, attention shifted away from the state and from attempts to improve (access to) formal justice institutions. Instead, the attention turned towards the importance of non-state parties and informal mechanisms and strategies in redress-

seeking processes (Parker, 1999: 30-36; Hazel, 1999; Bedner and Vel, 2010; Harding, 2007).

In the last two decades, Access to Justice became a popular concept in government policies in developing countries and international donor organisations (e.g., World Bank, the UNDP and the Asian Development Bank). It offered an alternative to the top-down Rule of Law promotion initiatives that had dominated the development paradigm until then. These had focused on strengthening government institutions, but had failed to sufficiently alleviate poverty and improve other aspects of wellbeing for the poor and marginalised in society (Golub, 2003; Banik, 2008: 14-15; Sheldrick, 2012: 3). Many Access to Justice initiatives reflected the idea that both state and non-state institutions needed to be strengthened (see, e.g., Banik, 2008: 14; UNDP, 2005: 5; Ghai and Cottrell, 2010: 5). However, particularly in developing countries, it was considered unlikely that poor and marginalised people would attempt to resolve their problems through the formal justice sector. Instead, they would seek solutions through informal justice systems. In an attempt to close the gap between formal and informal systems, some academics proposed focusing on establishing property rights,[24] while others suggested acknowledging Access to Justice as a human right.[25] In 2003, Golub introduced 'Legal Empowerment' as yet another new paradigm in development thinking. It had a strong focus on bottom-up initiatives and was presented as an alternative to the top-down 'Rule of Law Orthodoxy' initiatives that had merely focused on strengthening state institutions. This new paradigm would put 'community-driven and rights-based development into effect' (Golub, 2003: 3). Although Golub claimed he did not want to create a dichotomy between initiatives that aimed to strengthen state institutions (i.e., Rule of Law initiatives) and bottom-up, community-driven approaches, dichotomous thinking did occur (Golub, 2003: 4). The attention on improving state institutions diminished as hope became vested particularly in informal or community justice systems. Legal Empowerment and bottom-up approaches were eagerly adopted by development organisations such as the UNDP, the World Bank and the Asian Development Bank (Van Rooij and Van De Meene, 2008: 6-8). These approaches were seen as a new way to

24 See De Soto, 1989. The development community initially embraced Hernando de Soto's suggestion to establish property rights. However, the suggestion was also met with resistance, particularly because it promoted a neoliberal agenda and underestimated 'the difficulties of formalising property rights in many developing countries' (Palacio, 2006 in Ghai and Cottrell, 2010: 18 and Sheldrick, 2012: 3).

25 See, e.g., Francioni, 2007. Acknowledging Access to Justice as a human right would allow the use of existing human rights instruments and build on internationally recognised principles. States' international obligations would help to realise the rights of the poor in their local contexts (Ghai and Cottrell, 2010: 35-37). Although framing Access to Justice as a human right was applauded for provoking a different way of thinking, emphasising the duty of certain actors and thereby having important symbolic value, it was also argued that attention for the human rights-based approach was primarily rhetoric, having limited practical implications (Banik, 2008: 25).

bring poverty alleviation and public interest promotion (Sheldrick, 2012: 1). Legal Empowerment even became a popular notion in academia (see, e.g., Gramatikov and Porter, 2010).

Notions of Access to Justice and Legal Empowerment became entangled[26] and were even used interchangeably as popular development initiatives used bottom-up strategies, departing from the justice seeker perspectives and focusing on informal justice systems in which non-state parties acted as dispute settlers and used mechanisms such as mediation (Banik, 2008: 13-14; Van Rooij and Van De Meene, 2008: 9). They were thereby considered an alternative to the formal court-based legal procedure and so their efforts were referred to as Alternative Dispute Resolution. Informal justice institutions were often assumed to be accessible, quick and cheap. They offered resolutions that were in line with local values and norms while focusing on collective interests, reconciliation and social harmony. Decisions would be based on consultation and participation, and would thereby have legitimacy (Banik, 2008: 14-15). Alternative Dispute Resolution would lead to win-win solutions, ones that both parties preferred over court-based outcomes. Such resolutions would even empower communities, stimulating them to develop their own values and norms (Parker, 1999: 38-41).

Nevertheless, notions of Access to Justice and Legal Empowerment were criticised. The notions fused concepts and were accused of underestimating the complex interconnectedness of legal, political, social and economic processes, and their underlying power relations. Sheldrick (2012: 7-11) wrote, 'Legal Empowerment approach leaves the responsibility for addressing issues of poverty, exclusion and exploitation to those individuals who are least able to address them- namely the poor themselves.' Informal justice systems and Alternative Dispute Resolution would offer little protection to the weakest parties against more powerful parties' misuse of power. They would be too individualistic and would not address public interest problems (Parker, 1999: 35-36; Bedner and Vel, 2010; Hazel, 1999). Informal mechanisms were even misused by powerful market actors, allowing them to avoid court (Parker, 1999: 38-41). Since 'not everything is negotiable and [...] some [actors] have a better bargaining position than others,' power inequalities within societies may be reinforced (Ubink and Van Rooij, 2011: 11). Furthermore, the outcomes of dispute resolution may be in line with local values, but not with human rights standards (Banik, 2008: 15; Ghai and Cottrell, 2010: 5-6; Ubink and Van Rooij, 2011: 7-11).

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26 Some authors nevertheless pointed towards differences in emphasis in the two notions. Legal Empowerment notions generally leave room for the recognition of alternative, customary forms of law while notions of Access to Justice remain associated with conventional Rule of Law issues (Sheldrick, 2012: 6). Furthermore, Legal Empowerment stresses the importance of power relations, particularly within informal justice systems that engage in dispute resolution (see, e.g., Van Rooij and Van De Meene, 2008: 7).

In sum, 'Access to Justice' initiatives may have unanticipated effects that do not per se work to the advantage of the poor and marginalised. As focus shifts towards informal justice institutions and dispute resolution and away from formal state institutions, questions arise as to who will promote public interests, and how.

3 Environmental regulation and redress seeking in Indonesia

When assessing how environmental issues are dealt with in Indonesia – including underlying ideas, regulation practices and redress seeking processes – we see many parallels with how (environmental) regulation and redress seeking discourses developed elsewhere. Nevertheless, some features are specific to Indonesia.

Although Indonesia inherited certain environmental regulations from the Dutch colonial state, at the end of the 1970s, the Indonesian government initiated reforms towards a more mature legal and institutional framework for governing environmental issues. In 1978, Indonesia appointed its first Minister of the Environment (Niessen, 2003: 66). Considering his limited powers, he was designated a nearly impossible task. While lacking the authority and ability to regulate actions, the Minister was tasked with policy-making and coordination. An Environmental Act did not yet exist. Environmental legal norms and procedures were scattered over numerous regulations that had been issued by other, more powerful departments (e.g., the Ministries of Mining, Forestry and Industry). Apart from the gaps and overlaps in the sectoral legislation, these Ministries often had priorities that differed from protecting public environmental interests. The Minister of the Environment could only try to stimulate these Ministries to prioritise environmental matters and coordinate their regulatory efforts. Despite these arduous tasks, his appointment and assignment to draft an Environmental Act were of symbolic importance because they marked the growing weight given to protecting the environment (Otto, 2003: 17; Bedner, 2003b: 4; Rahmadi, 2006: 131).

Indonesia's 'Command and Control' environmental regulation

The enactment of the first Environmental Management Act (EMA) in 1982 was a milestone in the development of Indonesia's regulatory framework. The EMA's wording revealed Indonesia's high ambitions. The country was considered an environmental protection leader in the developing world (Bedner, 2008: 189). Nevertheless, in the years that followed, addressing environmental issues remained difficult. For example, the press was prevented from reporting on environmental problems (Lukas and Djati, 2000: 18). However, there were some victories as well, such as the recognition of NGOs' legal standing (Nicholson, 2009). The powers attributed to the Minister of the Environment gradually

increased. The establishment of the Environmental Impact Agency (BAPEDAL) in the early 1990s made the Minister less dependent on other departments for implementing environmental legislation (Rahmadi, 2006).

The EMA's 1997 revision made it more specific and easier to implement. The Minister's new ability to impose administrative sanctions was a breakthrough. Nevertheless, the legal framework for command and control regulations remained weak, not least because there was no specific environmental license. Mandatory industry licenses were often too general when it came to environmental issues. The licenses were not enforceable because norms were often too abstract, vague and inconsistent. The lack of enforcement was partially due to a lack of implementing regulations (Bedner, 2008; Niessen, 2003).

While the framework for 'command and control' environmental regulation developed in Indonesia, ideas about alternative forms of regulation also caught on. For example, the 1997 EMA introduced economic instruments for protecting the environment. Meanwhile, the Ministry of the Environment established the Clean River programme, PROKASIH, which monitored certain industries and occasionally imposed sanctions, existing parallel to the immature standard framework for command and control regulation (Faure et al., 2006; Lucas and Djati, 2000). PROKASIH later evolved to become the PROPER programme, where the Ministry monitors industries in an 'ad hoc' manner, rates them with a colour code ranging from black to green and publishes the results. At the same time, during Suharto's New Order regime, trust was placed on the development of technical solutions for environmental problems, allowing the government not to make economic and socially adverse decisions against violators (Cribb, 2003: 40).

Just one year after the 1997 EMA was promulgated, Indonesia went through political turmoil when president Suharto was forced to step down. As a reaction against the New Order's highly centralised government structure and stimulated by donor organisations, the country embarked on a far-reaching decentralisation reform process, shifting considerable powers from central government ministries to the regional governments. Decentralisation presented an additional challenge to environmental regulation. Environmental authorities needed to be coherently rearranged between the sectors – which had already proved to be a challenge during the New Order – and among different administrative levels of government. Furthermore, the regional governments – particularly at the district level – became responsible for implementing most of the regulatory tasks. However, they had little experience and expertise in environmental regulation and usually had direct economic interests in the industrial activities within their territories (Lucas and Djati, 2000; Verbruggen, 2003). According to Verbruggen (2003), the need to develop the administrative apparatus was greater than the need to provide increased technical assistance to the environmental institutions.

In 2009, a new and more elaborate Environmental Management Act was enacted, based on the decentralised government structure. It covers more topics

than its predecessor and describes the arrangements in more detail, which makes it more suitable for direct implementation. At first glance, the 2009 EMA expands the possibilities for command and control regulation, since the provisions on norm-setting, monitoring and enforcement are more developed. Indeed, (Santosa, 2014) argues that the current administrative law framework offers a sufficient basis for proper regulation.

3.1 Previous regulatory studies by Indonesian environmental agencies

It is widely acknowledged that environmental regulatory efforts in Indonesia remain ineffective. A common explanation for such ineffectiveness is corruption in the executive government and the courts. However, the environmental agencies' lack of capacity in staff, expertise and material, as well as the lack of proper archiving systems are also important factors (Santosa, 2014: 176-183, 194-200; Verbruggen, Wisandana, and Wangsaatmaja, 2003; Fatimah, 2016).

Santosa (2014) conducted one of the rare studies on the functioning of the regional environmental agencies. He concludes that complaint handling is important in the monitoring activities of the government and argues that the effectiveness of the government's regulatory practices largely depends on the involvement of the Ministry of the Environment, particularly through its PROPER programme (Santosa, 2014: 25, 74-75, 267-290, 315). This study will critically reassess these conclusions. In order to better understand how and why environmental agencies operate as they do, this study will look at the legal framework for norm-setting, monitoring and enforcement, as well as the division of regulatory authority between government institutions. It also seeks to explain to what extent and under which circumstances citizen participation and complaint handling contributes to public environmental interest promotion, and when it does not and why.

3.2 Redress seeking and public participation in Indonesia

Indonesia's policies and environmental legal framework gradually allowed the public to play a larger role in environmental matters. The policies and framework provided more possibilities for citizens affected by pollution to achieve redress, and to participate in the regulation process. For example, the legal standing of environmental NGOs was officially recognised. This recognition first occurred in the 1988 Indorayon case[27] and was later confirmed in the 1997 EMA. Furthermore, there was considerable attention on developing anti-SLAPP provisions, aiming to prevent wealthy violators from initiating

27 WALHI vs Into Indorayon Utama, South Jakarta District Court Decision 820/PDT./G/1988/GM/Jkt.Pst.

'Strategic Lawsuits Against Public Participation' against those who criticised them (Nicholson, 2009: 109-111, 254, 274, 278). Finally, public complaint mechanisms for environmental issues were established (Murharjanti, 2011; Santosa, 2014) and the 1997 EMA introduced options for resolving disputes outside of the courtroom.

Dispute resolution outside the courts, also referred to as Alternative Dispute Resolution or mediation, was intended to lower the barrier for citizens to address their grievances.[28] David Nicholson (2009) compared courtroom litigation and mediation in environmental cases. Mediation had several advantages with regards to accessibility. It suited the Indonesian cultural tradition of seeking consensus more so than litigation, where parties directly oppose one another. Furthermore, court litigation was usually costlier than mediation, in part because it often required legal aid. Moreover, redress seekers in court often faced institutional and technical difficulties (e.g., finding it hard to gather sufficient evidence of the violations and dealing with court corruption). However, although mediation was considered as a way of bypassing many of the disadvantages of court litigation, independent mediators were often absent (Nicholson, 2009; 165, 227-8, 268-73, 308-9, 312).

Nicholson compared fourteen private interest litigation cases and seventeen mediation cases. At first sight, the mediation cases appeared advantageous. In 82 per cent of the mediation cases, an agreement was reached between the disputing private parties. In 65 per cent, compensation was paid to the redress seekers. By contrast, claimants only won 14 per cent of the private interest litigation cases in which they demanded compensation. However, of the mediation cases that resulted in an agreement, environmental problems continued in 72 per cent of them. In 47 per cent, the agreement did not resolve the conflict between the disputing parties. Furthermore, the claims in mediation cases generally concerned monetary claims rather than environmental remedies. These monetary claims were usually not referred to as redress or 'compensation', but rather as 'good will payments' to avoid a link with actual environmental damage (Nicholson, 2009: 321-327).

Nicholson also assessed ten public interest litigation cases, which focused on environmental measures, rather than redress for damage. In 70 per cent of these cases, the claimants lost. The failure of the courts to address environmental behaviour can be partially explained by corruption, the political character of the judiciary, judges lacking knowledge of environmental matters and their conservative, legalistic attitude towards environmental issues. If the court decides that environmental measures are to be taken, these decisions are often not implemented by the agency responsible for doing so.

Mediation is often wrongfully portrayed as a way of bypassing many of the problems involved in litigation. However, mediation has considerable disadvantages as well. The impact of possible power disparities between parties

28 EMA 1997: artt 31-33, and EMA 2009; artt 85-86.

is often underestimated, and mediation does not actually function as an alternative to court-based dispute resolution or command and control regulation. Mediation, therefore, does not function 'in the shadow of the law'. Nicholson concludes that 'until there are effective administrative and judicial sanctions against polluters who won't comply with mediated agreements, environmental justice will not be achieved' (2009: 3, 284-6, 296-316).

Murharjanti, who conducted follow-up research on the same cases as Nicholson, is more positive about the effects of mediation. She points at the relatively short time in which agreements were reached and the high percentage of mediation cases that led to monetary redress. Murharjanti (2011), therefore, makes a plea for more participation through mediation. This enthusiasm for mediation matches a general tendency in Indonesia, where mediation is considered a more appropriate and effective way of addressing environmental issues than regulation by the government and formal dispute settlement (Nicholson, 2009: 171).

It is not self-evident in either litigation or mediation that the redress-seeking individuals or groups will represent the interests of the community that is affected by pollution. Due to the difficulty of proper representation of the various interests, Tania Li (2007: 275-8) has warned of the problematic aspects of 'community based' participation and empowerment programmes. Chapter 5 and 6 contain case studies in West Java and North Maluku and will demonstrate that representation and participation in regulation can indeed be problematic when it comes to dealing with environmental problems.

4 Analysing the nexus between regulation and redress seeking

The previous sections have explored various notions of the regulation and redress seeking processes. When both processes are about environmental pollution, it seems obvious that the two have the same goal: a cleaner environment. It appears that the processes simply complement each other; if addressing the problem through regulation fails, a cleaner environment can still be achieved through the redress seeking process, and vice versa. Adding up the opportunities and barriers involved in each process separately seems to offer a complete explanation of why the aim is or is not achieved. However, studies on and initiatives to improve addressing environmental problems often focus on either the regulation process or the redress seeking process, and thereby the processes are often understood in relative isolation.

Particularly in situations where the government does not adequately execute its tasks as a regulator and thereby fails to promote the public (environmental) interests, it is generally assumed that increased opportunities for citizen participation and redress seeking will contribute to a cleaner environment. In Indonesia, there is a strong tendency to promote possibilities for citizens to file environmental pollution complaints and seek redress for

them through Alternative Dispute Resolution. This tendency indicates that in Indonesia, it is also widely assumed that redress seeking can compensate for failing regulation. However, this thesis comes to a different conclusion. It finds that the nexus between regulation and redress seeking is more complex than the hypothesis that the processes merely complement and mutually reinforce each other.

To explain why the processes do not merely complement each other, we need to return to the basic characteristics of each process. As explained previously, the regulatory process aims to protect certain public interests, and it consists of norm-setting, monitoring and enforcement. In principle, it concerns the process where the regulatory state seeks to control the licensee's behaviour in order to prevent the latter from inflicting harm against the public interest (e.g., by causing pollution).

The redress seeking process departs from the real-life problem and analyses the process until redress is achieved. Thereby, it aims to primarily serve the private interest of the citizen who is confronted with a wrongdoing. This may nevertheless coincide with the promotion of a public interest (e.g., when a citizen seeks redress in the form of halting environmental pollution). However, when citizens affected by pollution is satisfied with financial compensation, they may achieve their aim in the redress seeking process, but not the aim of the regulation process (i.e., the promotion of the public interest in a clean environment).

In theory, the regulatory and redress seeking processes only overlap at a few stages. It is generally acknowledged that citizens play a particularly important role in the norm-setting phase of the regulation process because the government must consider their interests when it decides, for example, whether an industry should be granted a license. In addition, it is generally acknowledged that citizens should be able to urge the government to execute its regulatory tasks properly. They can do so, for example, by filing a complaint and urging the government to conduct inspections. Citizens may, for example, object to a government decision not to take monitoring or enforcement measures. They may object, if necessary, by taking court-based measures to force the authorised government to take adequate enforcement measures. Thus, in the regulatory phases of monitoring and enforcement, the role of citizens is limited to addressing the government and urging it to take adequate regulatory measures towards the licensee.

Nevertheless, as section 1 and 2 explained, as ideas about the two processes evolved, they developed in similar directions. Attention to and expectations of state institutions and formal mechanisms regarding regulation and dispute settlement shifted towards giving a larger role to non-state parties and informal mechanisms for regulation and dispute resolution. As a result, regulation and redress seeking processes have become intertwined, and the roles that government and citizens play in them have become more alike. While the theoretical

and actual similarities between the two processes increased,[29] both policy-makers and academics have hardly recognised the consequences of using the two notions interchangeably, particularly in the context of developing countries.

Some academic work has been done on the nexus between redress seeking and regulation in Western countries. Viscusi (2002) argues, based on a study in the USA, that redress seeking and regulation may reinforce one another – particularly in norm-setting – because both can have a deterrent effect on producers of certain products. He nevertheless argues in favour of clearly distinguishing the two processes. 'The allocation of responsibilities for policy becomes blurred [...]. The policies that result from litigation almost invariably involve less public input and accountability than government regulation' (Viscusi, 2002: 1). If regulation occurs through redress seeking, vital processes of representative democracy, where public interests are weighed by considering careful analysis by government regulatory agencies, may come under pressure (Viscusi, 2002: 1-21). Wandesforde-Smith (2003) argues that it is beneficial for the two disputing parties to have a choice in how they want to deal with the issue, either by getting compensation through the private law framework or seeking measures through the administrative law framework. Furthermore, he argues that in the 'real world', a strict separation of (legislative and judicial) powers does not exist. Therefore, the regulatory and redress seeking processes cannot be separated. He also claims that litigation (as an alternative form of norm-setting within the regulatory process) is required when the regulatory state is unwilling to take appropriate action (Wandesforde-Smith, 2003).

This thesis will argue that although the parties' flexibility to choose between a private or administrative law framework to handle the dispute might be beneficial for them, the public interest at stake can be overlooked. The argu-

29 The parallels between the two processes are mirrored in their similar vocabulary. For example, the term 'alternative' is used within the context of redress seeking to refer to 'alternative dispute resolution', which means dispute resolution outside of court, usually between private parties. However, 'alternative' is also used within the context of regulation. 'Alternative regulation' usually refers to non-command and control regulation, through which the regulator controls the behaviour of the licensee. However, the next chapters will demonstrate that the terminology leads to confusion among Indonesian environmental officials and scholars, who often consider alternative dispute resolution as a form of alternative regulation.
Another example is the term 'win-win'. A 'win-win outcome' in the context of regulation refers to a situation where the regulatory efforts result in the licensee's performance exceeding the legal minimum standards. Such an outcome is not only beneficial for the public interests the regulator seeks to promote. The licensee also benefits because their competitive position improves, as consumers prefer environmentally friendlier products. However, within the context of dispute resolution – and therefore of the redress seeking process – a 'win-win solution' means that the two disputing parties find a solution outside of court that both parties prefer over the likely court-based outcome. This thesis will demonstrate that in the Indonesian practice, 'win-win' within the regulatory context and redress seeking process are used interchangeably.

ment that redress seeking can substitute a failing regulating state is frequently used in developing countries to promote alternative forms of regulation. It is in line with the shift in development thinking from top-down to bottom-up approaches in which Access to Justice policy initiatives replaced Rule of Law approaches, and the redress seeking process and the regulatory process became more and more entangled. However, the consequences of interchanging regulatory and redress seeking processes has barely been acknowledged. Such a lack of acknowledgement is certainly the case for dealing with environmental pollution issues in developing countries. The analysis of the empirical data gathered for this study distinguishes the regulation process from the redress seeking process in order to make the characteristics of the nexus between the two processes more theoretically and practically insightful.

In conclusion, as a consequence of the evolving debates about regulation and redress seeking, the government's room for responding to violations has increased, alongside the roles of citizens as participants in the regulation process and as redress seekers. It seems reasonable to expect that increased regulatory possibilities alongside increased redress seeking opportunities will lead to cleaner rivers, or at least will deter progress towards cleaner rivers. However, the positions and responsibilities of the government and citizens in these processes have become less clear. What are the consequences when the government, instead of imposing an administrative sanction, acts as a dispute settler in a conflict between the affected citizens and the violator? Moreover, what happens when citizens are explicitly encouraged to complain about environmental regulations, in addition to or instead of the government's monitoring and enforcement tasks?

3 The development of the legal and institutional frameworks

Regulating environmental pollution in Indonesia

Creating a coherent legislative and institutional framework for the regulation of environmental matters is quite a challenge. It involves bringing together new and existing norms, mechanisms, and institutional structures in a coherent manner. This synthesis includes the legal mechanisms of administrative, criminal and civil law, as well as legal and institutional structures that focus on other policy fields, such as public works, industry, forestry and spatial planning.

Since colonial times, Indonesia has had some legislation concerning environmental matters, such as the nuisance-license (*hinder ordonnantie*). However, in the 1970s and 1980s the legislature for the first time acted towards a more coherent legal and institutional framework to enhance public environmental interests. At that time, the environmental consequences of Indonesia's rapid industrialisation became apparent, and the international attention to environmental matters had increased. Indonesia's first Minister of Environment had hardly any administrative power, depending on other Ministries to implement environmental legislation and adjust their sectoral legislation. Therefore, the first Environmental Management Act (EMA) in 1982 was a milestone, showing Indonesia's high ambitions in the field (Bedner, 2008: 189).

The legislature revised the EMA 1982, first in 1997 and again in 2009. Many factors influenced the revisions, including the (limited) effectiveness of the previous Act and changes in the institutional landscape. Both the establishment of environmental agencies in all Provinces and Districts, along with the decentralisation process that began in 1999 particularly influenced the current situation. The revisions also reflected the shifting ideas on how to best govern environmental matters and the roles that the state, market actors, citizens and civil society organisations should play in it.

This chapter identifies the strengths and weaknesses of the current legal framework relevant to the regulation of and redress for industrial water pollution. Section 1 reflects briefly upon how the EMAs have developed. Section 2 focuses on the impact of decentralisation on how environmental problems are addressed. Section 3 discusses, in particular, regulations relevant to water. Section 4 goes more in-depth into the 2009 EMA, and section 5 sums up some of the crucial problems in the current legal framework. Section 6

draws some general conclusions about how the institutional and legal frameworks have developed, and their strengths and weaknesses.[1]

1 The first Environmental Management Acts of 1982 and 1997

In the 1970s, Indonesia witnessed both major industrial developments under the Suharto regime and their environmental consequences. The Ministry of Environment and an Environmental Act did not yet exist. In the highly centralised government structure, the powerful Ministries of Mining, Forestry, Industry and Agriculture established the regulations and policies for their sectors, including those dealing with the environment. The ministries' regional branch offices implemented these regulations and policies at the local level.[2] That provisions related to environmental issues were spread out across various sectoral regulations meant it was difficult to get an overview of environmental standards. The procedures and contents of various sectoral regulations were poorly coordinated and sometimes contradictory. These regulations were designed primarily to serve sectoral interests, ignoring environmental interests and lacking substantive and procedural qualities (Bedner, 2003b: 1-4).

During the 1970s, the political will to improve the environmental legal framework grew, partially because of increased domestic environmental problems. Indonesia's participation in the U.N.'s first major conference on international environmental issues (i.e., the 1982 Stockholm conference) contributed to placing the environment on the national agenda (Niessen, 2003: 66-68). Indonesia's 1973-1978 State Policy Guidelines dedicated a special section to 'Natural Resources and Living Environment', after which the environment remained a topic in general policy guidelines for many years (Hardjasoemantri, 1996: 86-7).[3]

In 1978, Indonesia appointed its first Minister of Environment (Niessen, 2003: 66). However, for over a decade, the Minister merely made policy and coordinated tasks, depending on other ministries to adjust their legislation and implement the regulatory tasks related to the environment. Nevertheless,

1 This chapter focuses on the most relevant legislation concerning industrial water pollution. It is beyond its scope to consider all environmental regulations. These are spread out over various bodies of legislation on specific sectors and policy fields, such as forestry, conservation of natural resources and ecosystems, agriculture, mineral and coal mining, industry and spatial planning (Kartikasari, 2016).

2 EMA 1982: art 18, and EMA 1997: artt 8-12.

3 The State Policy Guidelines of 1978-1983, 1983-1988, 1988-1993 all contained a special chapter on Natural Resources and the Living Environment. The Five-Year Development plans further elaborated the issue. The 'Second Long Term Development' plan for the period between 1993 and 2018 also recognised the importance of environmental preservation (Hardjasoemantri, 1996: 87).

his appointment marked the government's growing consideration of environmental protection (Bedner, 2003b: 4; Rahmadi, 2006: 131; Otto, 2003: 17).

1.1 Environmental Management Act 1982

In 1982, Indonesia's first Environmental Management Act (EMA 1982) was promulgated.[4] It had great symbolic value (Bedner, 2008: 194). Its mere 24 articles were an 'umbrella Act', setting the agenda for further legal drafting. The EMA 1982 also contained general principles, serving as a foundation for evaluating and adjusting all environmental sectoral legislation (Niessen, 2006: 171; Bedner, 2008: 190). However, the general character of the provisions was a considerable weakness, as the Act lacked mechanisms for implementation. As a result, implementation regulations were enacted years after the EMA or never at all[5] (Peeters, 2006; Bedner, 2003b; Otto, 2003).

EMA 1982 nevertheless mentioned the basic elements of the regulatory chain. The Act referred to environmental quality standards as a basis for environmental protection and required that every business license should include the licensee's obligation to preserve the environment.[6] Furthermore, the Act explicitly required firms to conduct an Environmental Impact Assessment.[7] It did not specify the meaning of monitoring ('*pengawasan*'), other than that it was part of 'environmental management', to be carried out along sectoral lines.[8] EMA 1982 did not arrange for administrative sanctioning or civil law instruments. It did list criminal sanctions, but prosecution depended on the police, public prosecutors and judges, who were generally unfamiliar with environmental matters. Furthermore, criminal procedures were time-consuming and expensive, and evidence was difficult to obtain (Bedner, 2008: 190; Nicole Niessen, 2003: 67-8). On the issue of citizen participation, EMA 1982 formulated the right and obligation of every person to participate in environmental management and emphasised the supporting role that NGOs should play.[9] However, the legislature did not enact implementation regulation on these issues.

The powerful ministries on which the Minister of Environment depended continued prioritising their own sectoral, economic interests over environmental stakes. In response, the government first established the Environmental Impact Agency (BAPEDAL) in the early 1990s and later established regional

4 Law 4/1982.

5 Moreover, case law hardly offered any explanation of how people should interpret the Act's general principles in concrete situations. The Indorayon case of 1988 is an exception, which acknowledged the legal standing of NGOs acting on behalf of victims of environmental damage (Niessen, 2003: 66-7).

6 EMA 1982; artt 1 (6) and 15 in conjunction with art 7 (1, 2).

7 EMA 1982: artt 1 (10) and 16.

8 EMA 1982: artt 1(s), and 17-18.

9 EMA 1982: art 6, in conjunction with artt 1 (12) and 19.

environmental offices (BAPEDALDA's). Thereby, the implementing capacity of the Minister of Environment increased considerably (Rahmadi, 2006; Hardjasoemantri, 1994; 2006). The Minister and BAPEDAL came up with clever ways to expand their regulatory influence. They developed parallel regulatory initiatives to influence industrial behaviour, such as the Clean River Programme (PROKASIH) and the public disclosure programme, PROPER. They used these programmes as alternatives for administrative law enforcement, monitoring industries to pressure them towards improving their behaviour. Section 5 of this chapter, along with chapter 4, both discuss PROPER, because it still plays an important role in the Ministry's regulatory activities and environmental agencies.

1.2 Environment Management Act 1997

EMA 1982 failed to significantly impact industrial behaviour (Hardjasoemantri, 1996; Otto, 2003; Bedner, 2003b: 8). Meanwhile, policy makers and academia were developing new ideas on environmental management elsewhere in the world.[10] These developments eventually made their way to Indonesia, where the legislature enacted EMA 1997.

EMA 1997 improved the legal framework for environmental regulation in various respects. It was more specific and had a broader scope than its predecessor. The Act was praised for the way in which it embraced international concepts and ideas, without losing sight of the particularities of the Indonesian context (Bedner, 2008: 192). The Act introduced the sustainability principle[11] and strengthened certain environmental rights and duties, such as the right to environmental information for communities,[12] and the duties of firms to provide true and adequate information and to manage their waste and hazardous and toxic materials.[13]

EMA 1997 increased the regulatory requirements for individual firms. When applying for a business license, firms had to consider spatial management plans and public opinion.[14] They also had to conduct an Environmental Impact Assessment (EIA).[15] The fact that BAPEDAL or BAPELDADA would chair the EIA

10 Indonesia sought knowledge and inspiration from other countries to improve its environmental governance, particularly in Canada and the Netherlands. Intensive cooperation projects with these countries led to new attempts to establish effective environmental regulation (Bedner, 2008: 180-1).

11 EMA 1997: art 3(1).

12 EMA 1997: art 5(2) and its elucidation.

13 EMA 1997: artt 6 (2), 16 and 17. Furthermore, see art 6(1), which arranges that every person has the duty to preserve and protect the environment, while only mentioning the duty of firms to do so (EMA 1982: art 7).

14 EMA 1997: artt 18-19.

15 EMA 1997: artt 15 and 18(1) and elucidations, and art 23.

commission that assessed the applications was a victory for the environmental sector (Bedner, 2008: 181).

Under EMA 1997, the Minister of Environment acquired the authority to monitor firms and delegate this task to officials. These officials could then take samples as well as check equipment, installations and documents.[16] The environmental audit further expanded the monitoring repertoire.[17]

The introduction of administrative sanctions was a major improvement.[18] EMA 1997's provisions on administrative sanctioning allowed the Governor – or the delegated District Head – to prevent or halt violations. They could also carry out safeguarding, mitigating and remedial measures at the violator's expense.[19] In that way, the Governor's dependency on other sectors decreased considerably. The Act also explicated the right of citizens with a direct interest to request the Governor or District Head to impose administrative coercion or revoke the business license of a violating industry.[20]

The Act also expanded the possibilities for criminal law enforcement. The number of criminal law enforcement provisions increased from 1 to 8, criminal sanctions intensified, and special civil servants were given the authority to carry out criminal investigations. Criminal investigations seemingly became less dependent on the police. However, the special investigators could not report to the public prosecutor independently from the police, as they had to inform the latter first.[21]

The possibilities for recovering damages through the private law framework also improved. The Act strengthened provisions on both strict liability and the 'polluter pays' principle (Sakumoto, 2007: 216-20).[22] The Act's introduction of out-of-court dispute settlement intended to make dispute settlement more accessible for citizens affected by pollution, offering an alternative to going to court. EMA 1997 even made it obligatory to attempt out-of-court dispute settlement before bringing a case to court.[23] The Act strengthened the positions of citizens and civil society organisations. Citizens should have a role in decision-making and other environmental preservation efforts.[24] The Act

16 EMA 1997: artt 22 and 24.

17 Notably, the environmental audit (EMA 1997: artt 28-29) is not part of the Act's monitoring chapter, but directly follows the chapter on administrative sanctions. This position in the Act's structure suggests that the environmental audit is associated more with the system of sanctions than as a monitoring instrument. There are indications that, in practice, the audit is considered to be a type of administrative sanction or substitute.

18 EMA 1997: artt 25-27. The possibility to impose administrative sanctions is an indispensable aspect of regulation, offering the tools for the authorised government institution to immediately take measures to halt violations (Stroink, 2006: 183).

19 EMA 1997: art 25.

20 EMA 1997: artt 25(3) and 27(3).

21 EMA 1997: artt 40-48.

22 EMA 1982: art 20(1) and EMA 1997: art 34(1), EMA 1982: art 21 and EMA 1997: art 35.

23 EMA 1997: artt 31-33.

24 EMA 1997: art 10(c) and elucidation.

recognised class action as a legal proceeding and codified the legal standing of NGOs (EMA 1997: art 37-38). Citizens, communities or NGOs could take legal action against environmental problems through the private law framework.[25] Besides that, they could request the government to take enforcement measures through administrative law mechanisms.[26] As we will see later, in reality, cases are often dealt with through the private law framework, and particularly through out-of-court dispute settlement or mediation, and policy-makers and officials frequently consider such resolutions as substitutes for regulation based on the administrative law framework.

Despite its improvements, various scholars criticised EMA 1997 for providing insufficiently concrete economic-technical norms. For example, in the area of licensing, the Act did not specify the required level of environmental protection (Peeters, 2006: 117-9), and it did not provide details on how public opinions should be taken into account. Although the general rules in the Act occasionally provided further implementation guidance, it was often formulated in too broad terms, delaying the enactment of implementing regulations and sometimes hindering their enactment all together (Niessen, 2003; Bedner, 2003a).[27]

Furthermore, scholars criticised EMA 1997 for not clearly allocating authorities, both vertically (i.e., between the sectoral institutions) and horizontally (i.e., between the various administrative levels) (Niessen, 2006: 168-70; Peeters, 2006: 117-9). Norm-setting, monitoring and enforcement authorities were not in the hands of one institution. For example, the Minister of Environment had monitoring authority,[28] while the Governor had administrative sanctioning authority. However, in practice, the Governor was unlikely to use this power because, in the centralised government structure of that time, he was prone to encounter resistance from the powerful sectoral Ministries at the central level. Support from the Minister of Environment to the Governor would be of little help given the unwritten departmental hierarchy in which the Ministry of Environment could not measure up against Ministries with more economic importance. Indeed, it made it hard to effectuate the administrative sanctioning power. Even more problematic was the division of authority between the various sectors, which resulted in a situation in which an industry was required to have at least seven types of licenses issued by various institutions (Rahmadi, 2006: 136-7).

25 EMA 1997: art 39.

26 EMA 1997: art 27(3).

27 Some authors have argued that the EMA, as primary legislation, should more specifically define the scope of environmental protection and decision-making criteria (Niessen, 2006; Peeters, 2006: 117-9). However, others have argued that a general Act should not be too detailed regarding norms because it would make the primary legislation very extensive (Rahmadi, 2006: 136) and the legislation less flexible towards adjusting to new circumstances. Furthermore, it is difficult to pass such a detailed Act through parliament (Bedner 2008).

28 EMA 1997: art 22.

EMA 1982 recognised the importance of coherency in environmental legislation. It mentioned 'integration' repeatedly, but failed to specify its meaning and outline mechanisms for achieving it (Bedner, 2003b: 3; Otto, 2003).[29] Although EMA 1997 was even more explicit in its ambitions for coherency, it also lacked the mechanisms to realise them.[30] This topic dominated the debate on environmental management for years. 'Integration' was the magical recipe that would solve many, if not all, environmental management problems (see, e.g., Rahmadi, 2006). However, it was also unclear in these debates what 'integration' (or, e.g., 'harmonisation') referred to exactly (Berge and De Waal, 1988; Otto, 2003: 15-6; Bedner, 2003b: 8). Moreover, the debate seemed to hardly consider the legal and institutional Indonesian context (Bedner, 2003b: 7; Peeters, 2006: 93-4). A lack of conceptual clarity made it difficult to think through all the details, the necessary steps, the consequences and the potential difficulties that were particular to the Indonesian context (Otto, 2003).

2 DECENTRALISATION AND ENVIRONMENTAL REGULATION

The EMAs of 1982 and 1997 reflect that the legislature drafted them at a time when Indonesia had a highly centralised government structure. However, after three decades of Suharto's centralised regime, there was a growing desire for more regional autonomy (Niessen, 2006: 143, 159-60). A decentralised system was believed to offer a 'people-centred' approach to local problems. Democracy would be more effective when the government would be more accountable to its constituency, leading to more economic and social justice (Kothari, 1996: 35-41; Niessen, 2006: 144-5). Some warned that decentralisation could increase regional differences and give power to local elites without holding them accountable. It was also highly uncertain if the local governments, particularly the Districts, had sufficient capacity and expertise to carry out their new tasks (Bedner, 2010: 40-1).

Only one year after the enactment of EMA 1997, Suharto was forced to step down. In 1999, a sweeping process of decentralisation began. The process had significant consequences for environmental regulation and created new challenges in the area of dividing authority. Environmental regulation already lacked horizontal coherency between sectoral ministries, and now decentralisation demanded also vertical coherency between Districts, Provinces and the Central Government (Niessen, 2006: 169).

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29 Provisions of the EMA were integrated into sectoral legislation at a very slow pace. For example, the 1967 Forestry Act was replaced in 1999 and the 1974 Water Act was revised in 2004 (Act 7/2004). However, consistent use of terminology throughout these acts remained problematic (Rahmadi, 2006: 134-5).

30 EMA 1997: Considerations letter b, artt 1(2), 9(2), (3) and (4), and elucidation, general, point 3.

2.1 Regional Government Act 1999

The Regional Government Act of 1999 (RGA 1999)[31] introduced a radically decentralised government model. Regional governments, especially District-level governments, gained more power[32] and became more self-reliant[33] (Niessen, 2006: 141; Van Klinken and Nordholt, 2007; Barr, Resosudarmo, McCarthy and Dermawan, 2006: 2-3). The Provincial positions changed significantly.[34] During the Suharto era, Provinces were important regional representatives of the Central Government and implementers of national policy. As such, the Provinces had expertise in many policy fields, including environmental regulation. With the enactment of RGA 1999, the Provincial authorities were reduced to cross-District matters, tasks delegated from the Central Government, or Districts lagging in their duties[35] (Aspinall and Fealy, 2003: 4).

RGA 1999 was inconsistent in dividing authority on environmental matters. In principle, 'the environment' became a policy field under the Districts' authorities, but Provinces gained authority on 'environmental control'.[36] Meanwhile, the Act gave Districts general licensing and implementation powers.[37] It was unclear what the Provincial authority to conduct 'environmental control' entailed.[38]

Government Regulation (GR) 25/2000 elaborated how 'environmental' authorities were divided but was occasionally inconsistent with RGA 1999. The Central Government received more powers than RGA 1999 had arranged.[39] Furthermore, the GR determined that, in line with RGA 1999, the Province was authorised to conduct 'environmental control' in 'transboundary' (i.e., cross-

31 Law 22/1999.

32 In principle, the Central Government remained authorised in only a few fields, including the exploitation of natural resources and conservation (RGA 1999: art 7). In all other policy fields, regional governments became authorised.

33 Act 25/1999 on 'Fiscal Balance between Centre and Regions' and Government Regulation 25/2000 on 'Authority of the Government and the Authority of the Provinces as Autonomous Regions' further strengthened the idea that the Districts needed to be self-sufficient (Niessen, 2006: 161).

34 RGA 1999, art 11 states that the authority of the Districts includes all authority, except those authorities that are mentioned in art 7 and 9, describing the authorities of the Central Government and Provinces (RGA elucidation: 'general', letter h; Niessen, 2006: 143).

35 RGA 1999: art 9 and its elucidation.

36 RGA 1999: art 9 and its elucidation.

37 RGA 1999: art 8 and its elucidation.

38 Other examples of inconsistent or at least confusing division of authority arrangements are that regional governments became responsible for maintaining environmental sustainability (RGA 1999: art 10), but natural resources and conservation remained under the authority of the Central Government (RGA 1999: art 7 (1) and (2)). Regional governments would at the same time manage the natural resources within their territory.

39 RGA 1999 arranged that five core policy fields remained under the authority of the Central Government, plus eight other fields. In contrast, article 2 of GR 25/2000 summed up twenty-five policy fields in which the Central Government had standard-setting authority.

District) cases.[40] The GR did not explain the extent this meant a shift in all norm-setting authorities (including licensing), monitoring and administrative law enforcement and how, if at all, such a shift should occur. It also remained unclear whether the 'transboundary' character of a case referred merely to the location of a particular firm or activity, or also to its impact.

GR 25/2000 elaborated on the RGA 1999 arrangement that authorised a Province when a District did not meet the minimum service standards.[41] This arrangement seemed to offer an opening for 'second line enforcement', meaning that a higher administrative level would take over the authority of a lower administrative level. However, such a shift of authority could only occur with District-level and presidential permissions.[42] Finally, 'in agreement' with the Districts, the Province was allowed to implement the Districts' authorities.[43]

Soon after, many legislators and officials at Central Government level considered the decentralisation process, initiated in 1999, as too drastic and sudden. Districts were often incapable of executing their tasks properly. Moreover, their financial independence led to abuses of power and corruption (Van Klinken and Nordholt, 2007; Niessen, 2006). GR 25/2000's rather loose formulations allowed for multiple interpretations, and districts used it to enlarge their powers and sometimes even went as far as to enact local legislation that was not in line with higher legislation, in violation of article 70 of RGA 1999 that assumes that lower legislation will be in line with higher legislation. Districts became more inward looking, uninterested in collaborating with other Districts and reluctant to obey higher levels of government (Niessen, 2006: 168-9). Therefore, the Central Government deemed a revision of the RGA 1999 necessary, and the RGA 2004 was enacted.

2.2 Regional Government Acts of 2004 and 2014

Under the new Regional Government Act (RGA 2004),[44] the Central Government retained authority in the same fields of government as under RGA 1999,[45] and regained some grip on the Districts, gaining the authority to suspend District Heads in cases of corruption (Van Klinken and Nordholt, 2007: 14-5).[46]

The Provinces retained authority over several policy fields, including environmental control. They lost the purview over certain policies, including energy, and gained authority over others, such as public order and tranquillity,

40 RGA 1999: art 9 and GR 25/2000: art. 3(3).
41 RGA 1999: art 9 and GR 25/2000: art 3(3).
42 GR 25/2000: artt 3 and 4.
43 GR 25/2000: art 3(4).
44 Law 33/2004.
45 RGA 2004: art 10.
46 The regional parliaments became less powerful because both District heads and governors were no longer elected by the regional parliaments, but through direct elections.

and public facilities and infrastructure.[47] Overall, Provinces regained power at the expense of the Districts (Aspinall and Fealy, 2003: 4). However, RGA used different terminology to indicate which government level it was authorised in a particular matter. The Act simply spoke of 'Provincial' and 'District scale' affairs.[48] However, the Act did not define these concepts further.[49] RGA 2004 did not clarify what the Provincial authorities in 'environmental control' entailed. It merely stated that the decisive factor was the 'Provincial' or 'District scale'.[50] Regarding the division of government affairs between the Central Government and the regional governments, Government Regulation 38/2007 only mentions that 'environment' is under the authority of the regional governments.[51] Court decisions and the resulting body of case law do not offer relief in interpreting the legislation and providing clarity, as the role of case law in Indonesia is generally minimal (Bedner, 2013).

The legislature revised the Regional Government Act again in 2014. Since it was enacted after I conducted fieldwork for this study, it is beyond the scope of this research to discuss it in detail. Nevertheless, future research should note that the Act appears to arrange for Provincial licensing authority in cases with cross-District impacts.[52] During discussions with the Ministry of Environment and Forestry, it became apparent that officials had not generally recognised this consequence of RGA 2014 and that, in practice, Districts continue to issue licenses to these firms along 'transboundary' rivers.[53] This can be problematic because a licensing District may tend not to take into account the

47 RGA 2004 art 13.

48 RGA 2004: artt 13 and 14.

49 RGA 2004: art 11(4) states that implementation should be based on the minimum service standards. However, it is unclear what the implications are when these standards are not met, and whether authority then shifts to a higher administrative government level. The implementing regulation on these minimum service standards (Ministry of Environment Regulation (PerMenLH) 19/2008) mentions in art 1(5) and (6) that Provincial environmental agencies conduct government affairs at Provincial environmental fields, and District agencies do this at the District environmental field, but does not refer to the possibility of an authority shift if the District does not implement according to the minimum service standards. However, Article 2 states that one of the obligations of the Provinces is to follow up on environmental complaints, but it is unclear how this relates to a possible shift of authorities. For example, it is unclear whether and to what extent a Province can (or should) handle a complaint that concerns a firm or activity that, in principle, falls under the District's authority.

50 RGA 2004: artt 13(1) j and 14(1).

51 GR 38/2007: art 2.

52 RGA 23/2014: Annex 1K (*Lapiran: Pembagian Urusan Pemerintahan Bidang Lingkungan Hidup*) states that in 'cross District border' cases, the Province is authorised to conduct 'prevention', 'mitigation' and 'recovery'. According to the EMA 2009 as well as GR 82/2001, which will be discussed below, 'prevention' includes licensing authority.

53 This stems from a discussion with officials from the Directorate for Water Pollution Control of the Ministry of Environment and Forestry and team of 'Making Environmental Regulation Work for the People' (MERW) project, including the author, on 3 October 2017, in Jakarta.

effects of discharged wastewater further downstream, across its District borders.

In sum, after the decentralisation was set in motion, the details of the precise divisions of environmental regulatory authority between the administrative levels of Districts, Provinces and the Central Government remain unclear.

3 WATER LEGISLATION

While the EMAs of 1982 and 1997 hardly paid specific attention to water quality issues, the Ministry of Public Works developed legislation that did. The Government Regulation 82/2001 (GR 82/2001) on Water Quality Management and the Control of Water Pollution is of particular relevance. It is still in force today and is based on the Water Act of 1974.

3.1 Water Act of 1974

During colonial times, the General Water Regulation (*Algemene Waterreglement*) of 1936 consolidated disparate water legislation. Its focus was not on water quality, but rather on issues surrounding water quantity. More specifically, it arranged irrigation systems that were important for sugarcane production.

In 1974, the Water Act was promulgated. It was an 'umbrella act', consisting of only 17 articles that required many implementation regulations. The Act's preamble appeared ambitious, covering a wide spectrum of water resource management issues such as river basins, irrigation, water supply and water pollution control. However, the Act only focused on surface water and not on groundwater.[54] Furthermore, the Ministry of Public Works had prepared the Act. It focused on aspects of water quantity, specifically irrigation, rather than on water quality. The Province was generally the institution authorised to issue water usage licenses (Teeuwen, 2016), and it has remained so throughout the years.

3.2 Government Regulation on Water Quality Management and Pollution Control of 2001

Despite the Water Act 1974's limited attention to water quality issues, one of its implementing regulations is the Government Regulation on Water Quality Management and Water Pollution Control (GR 82/2001). This GR is also an

54 The Ministry of Public Works had prepared the Water Act. However, groundwater fell under the authority of the Ministry of Energy and Natural Resources.

implementing regulation of EMA 1997. Both of these Acts offered limited guidance on the interpretation of some vital concepts. As a result, the GR's interpretation of these concepts has been influential, especially for the regulation of industrial water pollution.

'Management' (*pengelolaan*) in GR 82/2001 refers to the management of the river's general water quality.[55] 'Control' (*pengendalian*) on the other hand refers to the regulation of individual firms and activities. In the norm-setting phase, 'management' and 'control' are closely related. The river's quality standards determine whether Districts can issue additional licenses to firms. However, Kartikasari (2016) argued that, in practice, this regulatory mechanism often fails because the Governor frequently neglects his obligation to calculate the carrying capacity of the river. Moreover, Districts do not have complete inventories of firms to whom they have issued a license. As a result, the Districts are unable to calculate whether they may issue more licenses without exceeding the river's general quality standards. Furthermore, Kartikasari claimed that the Districts poorly integrate monitoring of the river's overall quality (*pemantauan*) and the behaviour of individual licensees. For example, when overall river quality monitoring shows that the quality is below standard, no mechanism can increase the monitoring of individual licensees to detect possible violating behaviour (Kartikasari, 2016).

'Water pollution control' (*pengendalian kwalitas air*) in the GR 82/2001 refers to the regulation of individual licensee behaviour. It consists of 'prevention', 'mitigation' of damages by the violator or the government and 'recovery' of damages.[56] The GR 82/2001 does not define 'prevention', but it is usually understood to mean norm-setting mechanisms, such as planning and licensing.[57] It is important to note that, although GR 82/2001 arranges for the monitoring of firms and activities (*pengawasan*),[58] and for law enforcement (*penegakan hukum*), the regulation does not frame these arrangements as part of 'control'.[59]

GR 82/2001 is still in force today, but at the time of writing this book in 2018, the Ministry of Environment and Forestry is preparing a revision. A revision is important because the GR needs to be made coherent with the EMA

55 'Management' mainly refers to standard setting mechanisms for the overall quality of river water. These mechanisms include arrangements on classifying rivers into four categories according to the purpose of water usage. The governor also has an obligation to calculate the carrying capacity of a river in relation to its category and determine the general standards for particular parameters (GR 82/2001: artt 8-12, 18, 20 and 22). 'Management' also concerns the monitoring of the river water's overall quality (*pemantauan)* (GR 82/2001, art 13).

56 GR 82/2001: art. 1(4). 'Prevention', 'mitigation' and 'recovery' translate respectively as *pencegahan, penanggulangan* and *pemulihan.*

57 See, for example, EMA 2009: artt 14-52.

58 GR 82/2001: art 44-47.

59 GR 82/2001: art 48-49.

2009 and the Regional Government Act of 2014. However, in the current revision discussions, stakeholders adopt the limited scope of the term 'control' without much discussion, excluding licensee monitoring and law enforcement. Such exclusions further marginalise the importance of these phases of the regulation process. On the other hand, there is a call to increase citizen participation in the monitoring phase. Section 5 provides a further discussion of the potentially negative consequences of the adaptation of the terminology as used in GR 82/2001 for the regulation of industrial pollution.

3.3 Water Act of 2004

Partially as a result of the World Bank's efforts to stimulate reforms after Suharto's fall, a new Water Act was promulgated in 2004. Although the Act remained a 'framework act' that depended heavily on implementing regulations, its content was more substantial, and its scope was broader than that of its predecessor (Teeuwen, 2016).

A few issues stand out when assessing the norm-setting, monitoring and enforcement elements of the 2004 Water Act. Regarding norm-setting, the 2004 Act introduced new planning instruments.[60] According to Teeuwen, these offered an opportunity to better integrate quantity and quality aspects of surface and groundwater management. However, the Act's licensing arrangements merely concern water quantity issues, especially water utilisation.[61] The Act does not pay specific attention to water quality issues such as water discharge (Teeuwen, 2011). Furthermore, it contains a chapter on monitoring and 'empowerment'.[62] Although the government is responsible for monitoring,[63] the Act suggests a considerable role for 'the community' as well. The Act also explicitly mentions the possibility of a criminal investigation when administrative norms are violated,[64] but it does not arrange for administrative sanctions. By contrast, several implementing regulations of the Act, including Government Regulation 82/2001 on Water Quality Management and Pollution Control, do indeed provide for administrative sanctions.[65]

Like its predecessor, the 2004 Water Act was progressive in the sense that the division of authority was not based on administrative borders, but on

60 Act 7/2004: artt 51 and 59-62.
61 Act 7/2004: artt 8, 9, 14, 15, 16, 38, 39, 45, 46, 47 and 49.
62 Act 7/2004: Chapter IX on 'Empowerment and Supervision' (*Pemberdayaan dan Pengawasan)*, art 70 et seq.
63 Act 7/2004: art 75.
64 Act 7/2004: artt 93-95.
65 GR 82/2001: artt 48-49. See also Government Regulation on Water Resource Management (PP 42/2008): artt 121-123.

natural river basin boundaries[66] (Teeuwen, 2016). The introduction of 'rivers of national strategic interest' was of particular importance. The Central Government then had the authority to license the utilisation of water from such rivers.[67] However, the relation between this arrangement and the divisions of the licensing arrangements in the EMAs of 1997 and 2009, as well as well the Local Government Acts, remained unclear. Section 5 discusses this topic in more detail.

However, the 2004 Water Act is currently no longer in force. In 2015, the Constitutional Court took a drastic decision to annul the Act. Already in 2004, this Court ruled that the 2004 Water Act might conflict with the Constitution because private actors could be granted exclusive rights to particular water resources, while the Constitution guarantees access to clean water to the whole population. The Court ruled that, therefore, the Act's implementing regulations would have to meet certain conditions limiting the power of the private sector. In 2015, the Constitutional Court decided that the implementing regulations had not met those conditions. As a consequence of the annulment, the implementing regulations based on the Water Act 2004 also became invalid.[68] To prevent a legal vacuum, the Constitutional Court reinstated the Water Act of 1974 (Teeuwen, 2016; Johnson, 2015).[69]

4 The Environmental Management Act of 2009

The critiques of EMA 1997, the required adjustments to the decentralised governance model and the development of new environmental management ideas all justified a revision of environmental regulations (Niessen, 2006: 170-182). In October 2009, the political circumstances were right for the enactment of the Environmental Management Act of 2009 (EMA 2009, i.e., Act 32/2009).

EMA 2009 purported to be 'fundamentally' different from EMA 1997, stating that it strengthens the principles of environmental protection and management, and is 'based on good governance because in every formulation and in the

66 One of the main reasons to take a river basin approach was to establish more coherencies in water management. The Central Government became authorised to oversee 69 river basins that crossed Provincial borders or that were of national strategic importance. The Province became responsible for 51 river basins that crossed District borders, and the District authority oversaw 13 river basins (Act 7/2004: artt 13-19, and PerMen11A/PRT/M/2006). The procedure for establishing the division of authority is not clear (Teeuwen 2011).

67 Act 7/2004: art 14.

68 These include GR 42/2008 on Water Resource Management and GR on 38/2011 on Rivers.

69 At the time of writing, a new Water Act had not yet been enacted. However, insiders of the drafting process claim that the draft of the new Water Act resembles the Act of 2004, but without the provisions that attribute a large role to the private sector. This means that the current framework on water pollution control, as based on the Water Act of 2004 will likely largely remain in place (Discussion between Bart Teeuwen and Budi Kurniawan, held within the context of the MERW project, 8 September 2016, Leiden).

implementation process of prevention and enforcement instruments, integration is required regarding aspects of transparency, participation, accountability, and fairness'.[70]

Indeed, EMA 2009 is quite progressive. In the continuous battle between conflicting environmental and economic interests, the Act offers a legal framework that has a greater potential to protect environmental interests than its predecessors. For Parliament to be able to pass such a progressive act, the timing was crucial. In April 2009, elections were held for the National Parliament and the People's Representatives Council (DPR). On 1 October of that year, the newly elected representatives were to be sworn in. Some say that the departing parliamentary members were willing to pass the progressive new EMA because they wanted to leave a legacy. The parliament accepted EMA 2009 right before the newly elected members took office. EMA 2009 came into force on the day of its promulgation, 3 October 2009.[71]

EMA 2009 is much more elaborate than its predecessors. It offers better possibilities for direct implementation. However, the Act still depends heavily on implementing regulations. The Act repeatedly states (i.e., twenty-nine times) that either a Government or Ministerial regulation will provide further details.[72] However, as had been the case in the past, there are no clear guidelines regarding the substance of such implementing regulations. The Act prescribes that the implementing regulations should be in force within one year after the Act's enactment (EMA 2009: art 126). However, after nearly five years, only five of the regulations had indeed come into force (Sembiring, Rahman, Napitupulu, Quina and Fajrini, 2014: 4).

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70 EMA 2009: elucidation, general point 7.

71 Informal discussion with Prayekti Murharjanti, ICEL (Indonesian Centre for Environmental Law), 22 March 2011.

72 The EMA 2009 requires further implementing regulations on matters of planning (art 11), carrying capacity (art 12 (4)), planning procedures (art 18 (2)), quality standards (artt 20(4) and 20(5)), criteria for environmental damage standards (art 21(5)), types of firms that require an EIA (art 23(2)), certification and competency criteria for the EIA (art 28(4)), the EIA in general (art 33), environmental assessments for small firms (art 35(3)), environmental license (art 41), economic instruments (art 43(4)), risk analysis (art 47(3)), environmental audit (art 52), procedures pollution prevention or damage (art 53(3)), procedures for restoration of environmental functions (art 54(3)), guarantee fund restoration (art 55(4)), pollution or damage control (art 56), natural resources conservation and preservation of the atmosphere (art 57(5)), toxic and hazardous waste import (art 58 (2)), toxic and hazardous waste management (art 59(7)), procedures and requirements for dumping waste or materials (art 61(3)), information system (art 62(4)), complaint procedures (art 65(6)), procedures appointment of official environmental watchdog and monitoring (art 75), administrative sanctions (art 83), institutions as dispute resolution service providers (art 86(3)), government responsibility for tort (art 90 (2)), and implementation integrated law enforcement (art 95(2)). Strategic Environmental Assessment and the Environmental Protection and Management Plan (EMA 2009: artt 1(10), 9, 10, 14-19 and 63).

EMA 2009 has a different structure and approach to regulation. It introduces new planning instruments[73] and the environmental license. It also elaborates the articles on 'economic instruments'.[74] The provisions on planning, licensing and economic instruments together form an extensive 'Prevention' chapter.[75] It also contains a chapter on 'Monitoring and Administrative Law Enforcement'. However, these chapters are not ordered in a sequential manner.[76]

By contrast, the EMA 1997 provided arrangements concerning licensing, monitoring and administrative law enforcement sequentially, all within the chapter titled 'Compliance' (*penaatan*),[77] emphasizing the links between these different regulatory phases. EMA 2009's structure does not accentuate the sequential link between these phases of regulation, implying a subtle abandonment of 'command and control' regulation based on administrative law.

Other features of the EMA 2009 also indicate that it weakened arrangements for 'command and control' regulation based on administrative law while strengthening arrangements for alternative approaches to violations.[78] Likewise, the EMA 2009's sections on dispute settlement and criminal sanctioning were lengthier than those of its predecessor.[79] Additionally, as mentioned earlier, the more recent EMA pays substantial attention to alternative forms of regulation (e.g., through its sections on 'economic instruments'). The next section will elaborate on how the neglect of command and control regulation and focus on alternatives approaches may negatively impact the effectiveness of regulatory efforts.

The legislature adopted the EMA 1997 when Indonesia still had a centralised government structure. The legislature then adjusted the EMA 2009 to suit the decentralised government structure. The Act states that 'in accordance with his authority', the District Head, the Governor or the Minister could exercise power to, e.g., issue a license or impose an administrative sanction.[80] As mentioned earlier, the EMA 2009 does not emphasize the links between the different regulatory phases. Nevertheless, it still departs from the principle that the license-issuing government institution is also authorised to monitor and enforce the law. However, this is not the case in 'transboundary' cases and when the lower government does not sufficiently implement its tasks. Initially, the EMA 2009 seems to be in line with the RGA 2004 on this issue. Nevertheless, the

73 Strategic Environmental Assessment and the Environmental Protection and Management Plan (EMA 2009: artt 1(10), 9, 10, 14-19 and 63).
74 EMA 2009: artt 37-43.
75 The chapter 'Prevention' (*pencegahan)* in EMA 2009 runs from article 14 until 52.
76 EMA 2009: artt 71-83
77 EMA 1997; chapter VI on Compliance (*penaatan*), art 18-29
78 Economic instruments are arranged in the EMA 2009 in artt 37-43. Other example of an alternative regulatory approach in the EMA is the information system (art 62). Furthermore, international trademarks (e.g., ISO trademarks), including environmental standards and assessment procedures, have become popular in Indonesia (Rahmadi, 2006: 140).
79 EMA 2009: artt 84-93 and 97-120.
80 See, for example, EMA 2009: artt 10, 29, 31, 36, 37, 39, 55, 59, 61, 71, 72, 76, 82, and 123.

next section will explain that several unclear points remain regarding the division of authority. The next chapters of this book will, moreover, demonstrate that such vagueness leads to problematic practices.

The following section will also elaborate on the above-mentioned features of the EMA 2009 by contextualising them alongside other relevant legislation for regulating industrial pollution and highlighting some of the main weaknesses of the current legal framework.

5 PROBLEMS IN THE CURRENT LEGAL FRAMEWORK TO REGULATE INDUSTRIAL WATER POLLUTION

This section moves beyond just the EMA 2009 to focus on some of the main weaknesses of the most relevant laws and regulations for regulating industrial water pollution. It will consider the use of terminology and its implications, at aspects of planning, licensing, monitoring and administrative law enforcement, as well as the division of regulatory authorities and the tendency to focus on alternatives for administrative law based 'command and control' to regulate industrial water pollution.

5.1 'Control' or 'Management'?

Both EMA 2009 and GR 82/2001 define 'control' (*pengendalian*) as consisting of 'prevention' (*pencegahan*) -including planning, licensing and economic instruments- 'recovery' (*penanggulangan*) and 'mitigation' (*pemulihan*).[81] The latter two notably concern situations where the damage has already occurred or is expected to occur. However, 'control' does not cover aspects of monitoring and enforcement. In the EMA 2009, monitoring and enforcement are part of 'protection and management' (*perlindungan dan pengelolaan)*.[82] However, two features of the legal framework contribute to the neglect of monitoring and enforcement in the regulation process. First, the EMA 2009 does not establish a clear sequential link between norm-setting, monitoring and enforcement. Unlike in the EMA 1997, the EMA 2009 addresses these regulatory phases in separate parts of the Act. Second, the Ministry of Environment and Forestry is currently preparing a revision of Government Regulation 82/2001 on Water Quality Management and Pollution Control. The Ministry's discussions with regional environmental officers, scholars and NGOs usually take 'management' (*pengelolaan*) to concern the definition in GR 82/2001, i.e., general river quality. The discussants do not understand 'management' as the EMA 2009 defines it. As a result, current discussions do not consider 'control' or 'management' to

81 EMA 2009: art 13.
82 EMA 2009: art 1(2).

concern monitoring of and enforcement against industries.[83] This lack of consideration influences the focus and scope of the discussions and reflects the tendency to neglect aspects of monitoring and enforcement in the government's regulation of industries.

5.2 Norm-setting through planning and licensing

The EMAs of 1982 and 1997 have been criticised for lacking mechanisms promoting coherency between all of the disparate environment-related norms (Otto, 2003; Niessen, 2003). The EMA 2009 addresses this issue by expanding the planning instruments, such as the Strategic Environmental Assessment and the Environmental Protection and Management Plan.[84] Nevertheless, Kartikasari (2016) noticed that in practice, there are many problems in the planning phase. For example, Provinces often do not calculate the specific quality standards of a river based on its carrying capacity. Districts usually do not have complete inventories of industrial sources of pollution located along the river. As a result, the licensing government – usually the District – cannot properly determine whether it can issue new licenses without exceeding a river's carrying capacity.

In their critique of the EMA 1997, some authors argued that the introduction of an environmental license could resolve many inconsistencies related to the division of authorities (Peeters, 2006: 117-9). Such a license could replace other environment-related licenses. However, others argued that an integrated environmental license would be a step too far for Indonesia's complex institutional and legislative framework. Bedner (2003) argued that coordinating or harmonising licensing mechanisms could achieve more coherency (Bedner, 2003b: 8, 19).

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83 Discussions with the Ministry of Environment and Forestry, 4 and 5 October 2017, within the context of MERW project and public consultations on the draft revision of GR 82/2001.

84 The Environmental Protection and Management Plan (*Penyusunan Rencana Perlindungan dan Pengelolaan Lingkungan Hidup* or *RPPLH*) is regulated in the EMA 2009; artt 9-10 and 63. As a result, Districts, Provinces and the Central Government are required to describe their efforts to protect and manage the environment. The Strategic Environmental Assessment and the Environmental Protection and Management Plan (*Kajian lingkungan hidup strategis* or *KLHS*) is regulated in the EMA 2009: artt 1(10), 14-19 and 63. Governments are, therefore, obligated to integrate the sustainable development principle into their plans and policies.
Furthermore, the concept of 'ecoregion' was introduced, allowing ecological regions that cross administrative boundaries to be considered in the planning phase (EMA 2009: artt 1(9), (29), 7, and 8). The implementing regulations on these planning instruments are not yet in force or do not provide sufficient guidelines.

Despite these reservations, the EMA 2009 introduced the environmental license.[85] However, several problems still exist. First, the government has found it difficult to integrate all of the environment-related licenses. The different licensing institutions have an interest in keeping their licensing authority, not least because they can charge license fees. On the positive side, the wastewater license might be integrated with the environmental license when the legislature revises GR 82/2001. Meanwhile, GR 27/2012, concerned with the environmental license, introduced a new license. This new 'environmental protection and management license' does not have a legal basis in the EMA 2009, and it is unclear how it relates to the environmental license (Indonesian Center for Environmental Law (ICEL) and Van Vollenhoven Institute, 2017; Kartikasari, 2016).

The second problem is that the legal framework is not entirely clear on which government it authorises to issue the environmental license. In principle, it authorises the District. However, when a firm's location, activity or impact will cross District or Provincial borders, then the Province or the Central Government has the licensing authority, respectively.[86] However, no criteria exist to define a 'transboundary impact', and there are no clear mechanisms for shifting the licensing authority to the Province or Central Government (e.g., when an Environmental Impact Assessment (EIA) shows that the impact will cross administrative borders).

Thirdly, the relation between the environmental license and the business license is problematic. A technical, sectoral, government institution (e.g., the Ministry of Mining or Energy) or one of their regional branch offices issues a business license.[87] However, the EMA 2009 stipulates that a firm needs to obtain an environmental license before it can obtain a business license.[88] In practice, officials often believe that even if an agency revokes a firm's environmental license, that firm is still allowed to operate as long as it has its business license. Therefore, the environmental license does not have an independent position, as revocation in practice does little to stop polluting behaviour. Moreover, an environmental license does not have an expiration date, which means that it is valid as long as the business license is valid. This arrangement leaves few opportunities to tighten any requirements towards a firm or industrial activities when political or technological developments demand or allow for that.

85 EMA 2009: art 1(35). Besides the already existing and mandatory EIA for rather large firms, EMA 2009 introduced the environmental management and monitoring efforts (*UPL-UKL*) for smaller types of firms (EMA 2009: artt 1(12) and 34-38).

86 EMA 2009: art 63 (1)m and (2)g, in conjunction with artt 13 and 14; RGA 2014.

87 EMA 2009: art 1(36). Business licenses include industrial licenses and mining and logging concessions (Rahmadi, 2003: 137).

88 EMA 2009: art 40 (1).

One may argue that the environmental license is little more than the formalisation of the EIA approval that the EMA 1997 required,[89] and that, therefore, the introduction of the environmental license has not added much to the existing regulatory instruments. Nonetheless, its introduction has potentially produced some positive effects. First, its existence stresses the importance of the EIA as one of the few moments – if not the only moment – in which the government sits down with the industry to assess the environmental standards it has to comply with and the implications of such an assessment for the firm's environmental management. In many cases, the government initiates no further communication on this issue (e.g., as a result of monitoring activity). Second, the existence of the environmental license makes explicit that the licensing institution in principle is also authorised to and responsible for monitoring the licensee's behaviour and for enforcing the law. In fact, despite the problematic relation between the business license and the environmental license, the latter can strengthen the position of environmental institutions. If the District Heads, Governors or the Minister delegated their full regulatory authorities to their environmental institutions, the latter would have more power to enforce the law, particularly because they could suspend or revoke the environmental license.[90]

5.3 Monitoring instruments

This section reflects on the most relevant manners to monitoring and detecting violations. Besides 'regular monitoring', which the licensing government is theoretically supposed to carry out, complaint verification has in recent years become an important way to detect violations. Finally, this section discusses the Ministerial programme PROPER, which can be characterised as an 'ad hoc' regulatory programme that exists parallel to the standard system of regulation. This section will highlight the strengths and weaknesses of these monitoring efforts and pay special attention to the coherency between them.

5.3.1 Regular monitoring, self-monitoring and self-reporting

The government institution that issued the licence has, in principle, the obligation to monitor the firms and activities under its authority. However, several obstacles hinder effective implementation of this obligation. The first is a practical one and concerns the fact that regional environmental agencies often

89 See GR 27/2012 on the environmental license.

90 These heads of the administrative level may delegate the licensing and monitoring power to the environmental agencies. This means a considerable increase in power for these agencies.

lack inventories of the industries that they have licenced (Fatimah, 2017). They do not precisely know whom they should monitor.

Second, national policies are severely limited in providing guidelines on how and how frequently a government institution should monitor (specific) industries.[91] Although the licensing government – usually the District – is primarily responsible for determining monitoring policies and budgets, they often lack policies on this issue. They do not determine such policies partially because there is no incentive, e.g., from the Ministry or local parliament, to draft them. As a result, environmental agencies and individual officials have considerable discretion to decide whether to inspect an industry. Due to the limited staff and budget, the agencies and officials are likely to prioritise only the monitoring of industries they suspect of non-compliance. If there are no direct indications of non-compliance, the government is unlikely ever to monitor such industries.

5.3.2 Complaint verification

The EMA 2009 emphasised the right for citizens to complain.[92] Complaint verification is an important way to detect violations (Santosa, 2014: 185). The EMA does not provide further details on what the right to complain entails. The 2010 Ministerial Regulation on Complaint Handling provided more details, which the relevant Ministry replaced in 2017 with an even more detailed regulation.[93] These relatively swift developments indicate the importance the government gives to handling complaints.

The implementing regulation on complaint handling – both from 2010 and 2017 – clearly describes the responsibility of environmental institutions to verify complaints. It explicitly mentions the forms in which citizens may bring complaints to the attention of an environmental institution (e.g., through a text message or a newspaper article). The institutions should verify the complaint within ten working days, and issue a follow-up recommendation to the administrative head in the following ten days, all while informing the complainant of the progress. These clear environmental institution requirements appear, in practice, to stimulate the institutions to execute their post-complaint monitoring tasks adequately.

What is less clear is what the follow-up options are regarding a detected violation through complaint verification, and who is authorised to do so. The complaint handling regulation does not provide any guidance about whether, and under which circumstances, an institution should respond to violations

91 Standard Operational Procedures (SOPs) do exist and give technical instructions for inspections, e.g., that an inspection is to be announced by a letter.

92 EMA 2009: artt 65(5) and 70(5)b.

93 Ministry of Environment Regulation (PerMenLH) 9/20100 and Ministry of Environment and Forestry Regulation (PerMenLHK) 22/2017, respectively.

with a particular administrative sanction, whether they should initiate criminal prosecution, or whether they should initiate mediation between the complainants and the violator. Moreover, the licensing institution is, in principle, authorised to monitor and verify complaints. However, the complaint handling regulation allows for shifts of authority to monitoring and enforcement between the District, Provincial and Central Government, for which the EMA 2009 provides no legal basis. The two issues will be further discussed below.

5.3.3 PROPER: an 'ad hoc' Ministerial programme

The Ministry of Environment in 1995 introduced the monitoring programme, PROPER[94] At that time, the Ministry had little regulatory authority to address non-compliant industries. The programme allowed the Ministry to circumvent their limited authorities. Within PROPER, the Ministry monitors industries thoroughly and regularly. The Ministry takes water and emission samples and implements inspections every one or two years.[95] They publicly disclose their findings,[96] in the hopes that 'naming and shaming' will motivate industries to become or remain compliant. They rate the performance of individual industries and colour-code individual compliance levels. Black and red mean an industry is (severely) non-compliant, while blue, green and gold mean it is compliant or goes beyond regulatory requirements.

Two decades later, PROPER is still running. The Ministry often praises the programme because it covers over two thousand industries across Indonesia[97] and has seen overall compliance rates improve over the years.[98] However,

94 PROPER is an acronym for *Program Penilaian Peringkat Kinerja Perusahaan* or 'Program for Pollution Control Evaluation and Rating'. It is the successor of the PROKASIH programme that had originated in East Java in 1989. In 1992, PROKASIH had expanded to include the monitoring of industries along twenty-seven rivers in twelve Provinces. PROKASIH did not aim for industrial compliance, but rather built on the voluntary commitment to reduce pollution levels by fifty per cent. The PROKASIH working teams were authorised to monitor, give warnings and bring cases before the court, although the latter never occurred (Lucas and Djati, 2000: 37-42).

95 Ministry of Environment regulation 06/2013 (PerMenLH 06/2013), (http://proper.menlh.go.id/portal/pubpdf/Kriteria%20dan%20Mekanisme%20PROPER%20(Permen%2006%202013).pdf (last accessed on 30 July 2018).

96 The ratings are published, initially only through a paper report but more recently on the programme's website. See http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI\ and http://proper.menlh.go.id/portal/ (last accessed on 30 July 2018).

97 In 2015, 2137 industries were monitored within the context of PROPER.

98 The Ministry states that the compliance rate between 2004 and 2015 increased from 49 to 74 per cent. See http://proper.menlh.go.id/portal/ and http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI\ (last accessed on 30 July 2018). Various scholars are positive about effectiveness as well (see Afsah, Blackman, Garcia and Sterner, 2013; Santosa, 2014: 116). It appears that the Ministry itself has an interest in presenting PROPER as a successful programme. A similar situation occurred with PROPER's predecessor, the programme PROKASIH. Regional governments had an interest in making

the programme has also received criticisms. NGOs commented that the Ministry should also publicly disclose the inspection reports that inform their ratings.[99] After receiving complaints about 'green'-rated industries, the NGOs also questioned the accuracy of PROPER inspections and ratings.[100]

Another issue is that environmental factors do not solely determine the rating. In order to receive a 'green' or 'gold' rating, the industry must act towards 'community empowerment'. The Ministry assesses the Corporate Social Responsibility (CSR) funding that an industry provides.[101] As a result, the meaning of the ratings has become blurred, potentially implying that CSR can compensate for poor environmental behaviour.

Public disclosure remains important in the PROPER programme. However, its attention has shifted from 'shaming' all non-compliant industries to focusing on exceptionally well- and poorly-performing industries. For example, in 2015, the Ministry found a quarter of the participating industries to be non-compliant and ranked them as 'red'.[102] While the Ministry's website showcased the names of the 'gold' and 'black' industries, the names of the non-compliant 'red' industries were difficult to find.[103] Moreover, the website is not designed for the public to easily look up how a particular industry has performed over the years.

The vague relationship between PROPER and the standard regulatory mechanism is also problematic, particularly because PROPER currently also involves administrative and criminal law enforcement. This vagueness raises questions about whether the license-issuing District Head or the violation-detecting Minister is authorised and responsible for following up on violations. In practice, both seem to follow up on violations at random. Section 5.6.1 discusses this issue further.

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industries under their authority appear to be performing well, as this made the institution that regulated them look good too. It led to the manipulation of monitoring data by the government (Lucas and Djati, 2000: 17).

99 Between 2006 and 2009, two categories were added: 'red minus' and 'blue minus'. Both categories no longer exist, perhaps because they caused confusion regarding their precise meaning. One can particularly question the blue minus category, because it suggests that the company is indeed non-compliant but that the government still more or less approves of its performance (see 'Laporan hasil penilaian PROPER 2006-2007').

100 See, for example, 'Perbaiki Program Proper, KLH Siap Terapkan Sistem Informasi Lingkungan Proaktif' 1 May 2013 (http://www.mongabay.co.id/2013/05/01/perbaiki-program-proper-klh-siap-terapkan-sistem-informasi-lingkungan-proaktif/) and 'Kementerian Lingkungan Hidup Perbaiki Proper Melalui PRTR', 2 May 2013 (http://icel.or.id/2013/05/02/kementerian-lingkungan-hidup-perbaiki-proper-melalui-prtr/).

101 Ministry of Environment Regulation (PerMenLH) 6/2013, article 8 and 9(1).

102 In 2015, for example, nearly a quarter of the more than two thousand inspected industries (529 of 2137 industries) were rated 'red' (i.e., non-compliant).

103 Furthermore, the 2015 report mentions that the inspection results of 61 industries will not be made public, for reasons that remain unclear. This is quite surprising, considering the fact that PROPER is primarily a public disclosure programme.

5.4 Inconsistencies in administrative law enforcement instruments

The EMA 2009 lists the four types of administrative sanctions: a written warning, administrative coercion, the suspension of the environmental license or the revocation of this license.[104] These sanctions seem to be an improvement, especially considering that the EMA 1982 did not allow imposing administrative sanctions and the EMA 1997 did not describe them clearly. However, a closer look reveals several weaknesses in the more recent EMA.

This section first discusses the prevailing ideas about the function and principle aims of administrative enforcement. It then takes a closer look at 'administrative coercion' and the 'fine' and focuses on how 'escalation' of increasingly severe sanctions has taken shape in the current legal framework. The next chapters of this book will demonstrate that in practice, officials rarely consider administrative sanctions as an appropriate tool for halting violations or restoring situations.

5.4.1 The function and aim of administrative sanctioning

The EMA 1997 did not explicitly mention various types of administrative sanctions, but it did clearly state that administrative sanctions aim to enable the authorised government institution to prevent or halt violations, and to take recovery measures at the violator's expense.[105] The EMA 2009 no longer explicitly mentions that administrative sanctions have these aims.[106]

As the following chapters will demonstrate, current practices and environmental regulation debates usually consider administrative sanctions to be a weak response to environmental violations. A telling example is a policy from the East Java environmental agency. It prescribes that criminal law enforcement is an appropriate response to a serious environmental violation with victims. If the violation only caused damage, the victims and the violator should negotiate reparations. However, when there is no environmental damage, an administrative law sanction is appropriate.[107] This policy lost sight of administrative law enforcement's original reparatory aim.

The obvious question is why a policy may consider administrative law enforcement to be an inappropriate response to environmental violations. An important part of the explanation involves the weak structure of administrative sanction arrangements, especially the concepts of 'administrative coercion' and the 'fine'.

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104 EMA 2009: art 76(2).

105 EMA 1997: art 25.

106 However, Ministerial of Environment Regulation on Administrative Sanctions (PerMenLH 2/2013) nevertheless briefly mentions the reparatory aim of administrative sanctions in one of its annexes (Annex 1, A 1(c)).

107 Presentation by the East Java Environmental Agency, 2012, 'Evalusi Pelaksanaan Patroli Air'.

5.4.2 *Administrative coercion and the fine*

The EMA 2009 mentions the administrative sanction of administrative coercion (i.e., *paksaan pemerintah)*. However, administrative coercion in the EMA 2009 has a different meaning than in most countries. A comparison with the Netherlands is particularly relevant because the concept *paksaan pemerintah* originates from the Dutch concept *bestuursdwang*. People in Indonesia still occasionally use the latter term. However, in the Netherlands, administrative coercion (*bestuursdwang*) refers to the authorised government institution's power to carry out concrete actions to end a violation or restore a situation at the violator's expense. When halting the violation is less urgent, the government can order the violator to take the prescribed measures, with the threat of using administrative coercion after a certain time. The relevant Dutch phrase for this is '*last onder bestuursdwang*'.[108]

In the Indonesian EMA 2009, administrative coercion does not refer to concrete government action, but rather to the government ordering the violator to take certain measures.[109] This coercion resembles the *last onder bestuursdwang,* rather than *bestuursdwang.* This approach is problematic because when the violator does not carry out the order(s), the government has no other option than to suspend or revoke the license. However, in practice, the government rarely suspends or revokes the license because they usually consider that to be disproportionate. Thus, administrative coercion in Indonesia is not a powerful instrument for (swiftly) ending a violation and recovering damages. In some circumstances, the government concludes that when the violator does not comply, it has no more possibilities for administrative sanctions and needs to move to criminal prosecution.[110] However, as the previous chapter explained, criminal prosecution is often expensive, time-consuming, and is meant to be punitive rather than that it primarily aims to halt the violation.

The 'fine' is another administrative law enforcement instrument that article 81 of the EMA 2009 mentions. However, it is unclear whether the fine intends to be primarily punitive, or whether it is meant to be reparatory (i.e., aiming to end violations and restore the situation as soon as possible). Article 82 states: 'Anyone carrying responsibility for a firm or activity who does not implement administrative coercion is fined for delaying the implementation of the administrative coercive sanction'.

108Algemene wet bestuursrecht (Dutch General Administrative Law Act), art 5:21.

109 Both articles 79 and 81 of the EMA 2009 state – indirectly – that the violator is to carry out administrative coercion. Article 79 does so by stating that the environmental license may be suspended or revoked when the violator does not implement administrative coercion, while article 81 states that in such a case a fine can be imposed.

110 EMA 2009: elucidation, I(6).

The government has not yet developed implementing regulation for the fine. However, the regulation could considerably strengthen the framework for administrative sanctioning. If the fine primarily has a reparatory function, it could be a daily fine (or *dwangsom* in Dutch). Such a fine would increase every day a violation would continue. The fine thereby functions as an incentive for the violator to swiftly stop its violating behaviour and take measures to restore the situation. However, the government should carefully consider how this type of fine would relate to administrative coercion, as the EMA defines it. Due to the formulation of article 82, the authorised government cannot use the daily fine as an alternative for administrative coercion. It can only impose a fine after the violator fails to implement the government's orders. Due to the weak administrative coercion that depends on the violator's cooperation, it becomes even more important to have a well-functioning seizure system to be able to collect the fine.

If the fine in article 82 has a primarily punitive aim, it could be a punitive fine imposed by the government (or *bestuurlijke boete* in Dutch). This fine is particularly useful in situations where the violating behaviour has already ended. It gives the executive government the possibility of creating a deterrent effect.[111] However, one should be careful when introducing this type of fine in Indonesia, because it can incentivise environmental institutions to impose administrative fines instead of taking concrete measures to end violations. However, the fine that article 82 mentions could also refer to a criminal fine, as in article 114 of the EMA 2009. In that case, the executive government institutions will not have the authority to impose it.

Until now, it remains unclear which position the fine can fulfil in the frameworks for administrative and criminal sanctioning. In any case, the weak formulation of administrative coercion considerably deteriorated the overall potential effectiveness of the framework's administrative sanctioning power.

5.4.3 Escalation by imposing increasingly severe sanctions

In line with the idea of the 'enforcement pyramid' (Ayres and Braithwaite, 1992), the current system of administrative sanctions in the EMA 2009 allows for an 'escalation' of sanctions.[112] This system allows the government to gradually impose more intrusive sanctions when 'light' administrative sanctions prove ineffective. However, several obscurities in the legal framework hinder effective escalation.

First, the legal framework for administrative sanctioning does not adequately instruct the government on how to respond to a violator who does not

111 In the Netherlands, such a fine is referred to as *bestuurlijke boete.* It was introduced only recently in the Netherlands after a long debate because many argued that it is not in line with the primary goal of administrative sanctions to halt violations and restore situations.

112 EMA 2009: art 79.

implement the 'administrative coercion' (i.e., the orders they receive). The District Head, the Governor or the Minister can impose a fine or suspend or revoke an environmental license.[113] However, in practice, he is unlikely to choose these options because implementing regulation about the fine does not yet exist, and the government usually considers license suspension and revocation to be overly heavy sanctions that require support from institutions that often have an interest in keeping an industry operational. The West Java officials I interviewed on this matter for instance, reasoned that when the violator does not implement the 'administrative coercion', the government has exhausted the administrative law enforcement system's possibilities. Therefore, in line with the 'ultimum remedium' principle, the government may initiate criminal law enforcement.[114] However, responding to violations with criminal prosecution rather than with administrative sanctioning has considerable downfalls, as previously explained.

The ambiguity of '*pembinaan*' (i.e., 'guidance' or 'persuasion') is another weakness in the escalation mechanism. This term may refer to two different situations. It can refer to the government giving technical guidance to a compliant licensee on how to perform even better.[115] However, *pembinaan* can also refer to the government attempting to persuade a violator to change its behaviour, rather than imposing an administrative sanction. In practice, the fact that the government uses the same term for both situations leads to obscurities and inconsistencies in addressing non-compliant behaviour. The next chapter demonstrates that, for example, a West Java environmental agency's unit focuses on giving *pembinaan* to both compliant and non-compliant licensees. However, this unit functions separately from the 'Law Enforcement' unit. One of the 'Guidance' unit's officials justified this practice by stating that imposing sanctions is generally ineffective. He claimed it is the regulator's task to help licensees improve their behaviour. Consequently, there is a risk that 'guidance' will be given continuously, without the government ever taking more intrusive measures to halt a violation.

In sum, it does not come as a surprise that many Indonesian officials believe that administrative sanctioning is a weak response to non-compliant behaviour because, in the current legal framework, it is. However, it does not need to be. Nevertheless, as long as there is no recognition that administrative

113 EMA 2009: artt 81 and 76.

114 EMA 2009: elucidation.

115 Government Regulation 82/2001 on Water Quality Management and Water Pollution Control of 2001 defines '*pembinaan*' or 'guidance' as efforts 'to improve compliance', e.g., by informing licensees of the legal requirements and implementing incentive and disincentive policies. One of its chapters is entitled 'Monitoring and guidance', suggesting that these two concepts are closely related. The fact that 'guidance' is mentioned prior to 'monitoring' suggests that 'guidance' is intended as a preventive measure, and not as a type of 'persuasion' that is used after a violation is detected and prior to imposing an administrative sanction.

law enforcement can be a powerful tool for protecting the public interest in a clean environment, it is unlikely that scholars, policy-makers and officials will critically reflect on the legal framework and make the required improvements.

5.5 Division of authority

The division of regulatory authorities regarding environmental matters is a complicated matter. As the previous chapter explained, global environmental regulation is a new policy field that needs to be integrated into existing legal and institutional structures. Nevertheless, Indonesian environmental institutions nowadays have considerable regulatory authorities. However, since decentralisation, the division of authority between the environmental institutions at the various administrative levels of government is not always clear.

This section focuses on the division of authority between the administrative levels, starting from the EMA 2009 and moving to other relevant regulations. It concludes that problems in this framework help explain current regulatory practice inefficiencies and the lack of possibilities to pressure the government to take action and hold it accountable when it fails regulatory tasks.

The general systematics of administrative regulation dictates that, in principle, the same institution implements the full 'regulatory chain'. It sets the norms through planning and determines the directly applicable standards for individual licensees through general standards and specific licensing. It monitors the behaviour of the licensee and takes enforcement measures in cases of noncompliance. The EMA 2009 follows this systematics. In most cases, the Districts are authorised to issue the environmental license, and so are also authorised, in principle, to monitor and enforce standards.[116] However, there are a few exceptions. The programme PROPER, which was discussed previously, is not in line with the systematics, and it is unclear what the legal basis is for the shift of authority as it occurs in PROPER. However, the EMA 2009 does provide a few possibilities for shifting authorities between Districts, Provinces and the Ministry.

The first possibility involves the lower administrative level government lacking qualified staff, and asking a higher administrative level for monitoring assistance.[117] In these cases, the lower-level government remains responsible for properly implementing the regulatory 'chain'. The second possibility involves an authority shift in a 'transboundary' case, meaning that a firm's location, activity or impact crosses the administrative borders of a District or Province. A final exception involves the licensing government, at the District or Provincial level, failing to conduct its regulatory tasks sufficiently, leading

116 EMA 2009: artt 10, 12, 20, 29, 30, 31, 36, 37, 39, 55, 59, 61, 71, 72, 76, 82, and 123.
117 EMA 2009: artt 63(2)l; Ministry of Environment Regulation (PerMenLH) 9/2010: art 14.

to the Minister taking over the monitoring ('oversight') and enforcement ('second line enforcement'). The latter two exceptions are examined more in depth below.

5.5.1 Shifting authorities in transboundary cases?

The EMA 2009 authorises the Province and makes it responsible for coordinating and controlling environmental damage or pollution that crosses District boundaries.[118] Indeed, chapter 5 will demonstrate that, in practice, officials often assume that monitoring and enforcement authorities shift from the District to the Province in 'transboundary' (*lintas batas*) cases. However, as previously explained, the authority to 'control' includes 'prevention' such as licensing, 'mitigation' and 'recovery', but excludes monitoring and enforcement authorities.[119] Furthermore, since the EMA 2009 does not provide for a shift of authority from the Province to the Ministry in cross-Provincial impact cases, we can conclude that its authority to shift regulatory authority in transboundary cases is limited.

Although the Regional Government Act (RGA) 2014 provides more options to shift authorities to higher administrative levels in transboundary cases, it does so only in cases where a complaint has been filed. The Central Government and the Province are authorised to 'settle' or 'close' (*penyelesaian)* complaints in cases where the impact crosses Provincial and District borders, respectively.[120] However, it is unclear whether the authority to 'settle the complaint' includes enforcement power. Nevertheless, the next chapters will demonstrate that before the promulgation of the RGA 2014, Provinces and the Ministry already imposed sanctions in such cases, and acted as a mediator between complainants and violators.

Moreover, the 2015 Ministerial Regulation of Public Works on River Areas arranges that a river that crosses Provincial or District borders and is appointed as a river of national strategic interest – such as the Brantas and Ciliwung rivers – the Minister of Public Works or the Governor, respectively, are authorised to manage the water resources (*pelaksanaan pengelolaan sumber daya air*).[121] This management includes monitoring (*pemantauan*) the implementation of water resources conservation and 'control' of water damages.[122] However, it is unclear to what extent the Governor and Minister have authority to monitor individual licensees and use enforcement in these cases.

In sum, in transboundary cases, the possibilities to shift regulatory authorities to a higher administrative government level are limited, particularly when

118 EMA 2009: art 63(2)g.
119 See section 5.1 of this chapter.
120 Regional Government Act 2014 (Act 23/2014) art 13 and annex 1.k.
121 Ministry of Public Works Regulation (PerMenPU 4/2015): art 5.
122 Ministry of Public Works Regulation (PerMenPU 4/2015): art 1(4).

it concerns monitoring and enforcement. Nevertheless, chapters 4 and 5, on the regulatory practice of Provincial agencies and a pollution case in West Java, respectively, will illustrate that in practice officials quickly assume that the transboundary character of a case results in a shift of authority, especially monitoring authority, to a higher administrative government level.

5.5.2 *Oversight, second line enforcement and complaint handling*

A licensing government institution that fails its monitoring and enforcement responsibilities can also lead to a shift in authority. Oversight and second-line enforcement refer to the Minister taking over monitoring and enforcement authority, respectively, from a lower administrative government level. However, the criteria are rigorous. The violation must be serious, and the regional government must intentionally not take proper measures.[123]

Despite lacking monitoring authority, the Minister can identify a serious violation through complaints that are filed to the Ministry. However, when we look at the Ministerial Regulation on Complaint Handling 2010, we see it is not entirely consistent with the EMA 2009. In some ways, it increases the possibilities for complainants to express their concerns. For example, while oversight and second-line enforcement imply that regulatory authorities shift to the Minister, the Ministerial Regulation allows for both the Minister and Governor to 'handle the complaint'.[124] Furthermore, the Ministerial Regulation does not require that the complaint concerns a serious violation before the complaint-handlers can get involved. Instead, the Minister and the Governor are authorised to 'handle' a complaint when the lower administrative government level has not 'followed up' on it within ten working days. However, several arrangements are unclear or not in line with the EMA 2009.

The Ministerial Regulation's definition of 'complaint handling' is narrow, to the disadvantage of the complainant. It includes verifying the complaint and a recommendation on how to following up on the case to the authorised authority,[125] but it does not mention an enforcement authority shift to the higher administrative level. As a consequence, it is unclear which administrative government level is authorized and in fact has the duty to take measures.

The complainant faces problems in the inconsistencies between the Ministerial Regulation on Complaint Handling and the EMA 2009 and in the lack of arranged shifts of enforcement authority. The vagueness and inconsistencies in the legal framework decrease the complainant's opportunities to pressure the government to carry out its responsibility to protect the public interest in a clean environment, particularly its enforcement power to halt a violation and restore the situation. The Indonesian General Administrative Act of 2014

123 EMA 2009: art 77 and Ministry of Environment Regulation (PerMenLH) 2/2013.
124 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 8 and 9.
125 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 11, 13 and 14.

allows citizens to request enforcement, and to object and appeal to government decisions.[126] However, due to vagueness about which government institution can or should take certain actions, it is difficult for citizens to appeal to the government and hold it accountable.[127] Even for industries, the unclear division of authority can be problematic, as they do not know to which institution they are accountable.

The next chapter will demonstrate that while the Provinces have limited regulatory tasks, in practice, they do play a considerable role in regulating industries, even though the legal basis for their involvement is often unclear.

5.6 Alternatives for administrative law based 'command and control' regulation

There is a strong tendency in Indonesia to turn away from administrative law based 'command and control' regulation and rely on alternatives instead (Wibisana, 2016).

This chapter has already discussed some of these alternatives. Section 5.4.3 discussed '*pembinaan*', or 'guidance'. The concept appears to match the idea of 'responsive regulation' that the previous chapter discussed. However, the unclear position of 'guidance' in the system of administrative sanction escalations can result in ineffective enforcement. The next chapter covers environmental agency practices and demonstrates that there are examples where the government was reluctant to respond to continuous or serious non-compliant behaviour with coercive measures, preferring to use guidance. One explanation for the government's behaviour is the unclear status of 'guidance' in the mechanisms of escalation through different types of administrative law enforcement.

This section will also highlight other alternatives for administrative law based 'command and control' regulation, namely economic instruments, criminal law approaches and violator-victim mediation (i.e., alternative dispute resolution). In Indonesia, mediation is also considered an alternative form of regulation. Section 5.7 elaborates further on this issue.

5.6.1 Economic instruments and the standard regulatory mechanism

The EMA's attention to economic instruments reflects the tendency to rely on alternatives for administrative law based 'command and control' regulation. Economic instruments are part of the EMA 2009's chapter on 'Prevention', which

126 General Administrative Act 2014 (Act 30/2014): artt 7j and 75-77.

127 In fact, the term 'accountability' in the Indonesian context of environmental regulation is limited to a narrow form of financial accountability. In the yearly 'accountability' reports (LAKIP), agencies do not motivate their policy choices (Fatimah, 2016).

mainly covers norm-setting instruments that the EMA does not clearly link to its monitoring and enforcement arrangements.[128] The EMA 2009's definition of economic instruments is quite broad, covering a wide range of economic policies that encourage environmental conservation, including incentives -such as performance awards- and disincentives.[129] This broad definition provides regulatory approach flexibility but does not clarify how economic instruments relate to the standard regulation mechanism.

For example, the EMA defines PROPER as an economic instrument.[130] Section 5.3.3 explains that when PROPER was established in the mid-1990s, environmental institutions had barely any regulatory authority. The programme existed parallel to the standard regulatory mechanism in which other Ministries were responsible for regulating the environmental behaviour of the industries within their sector. PROPER was the Ministry of Environment's clever way of trying to influence industrial environmental performance. Industrial participation in the monitoring and public disclosure programme was voluntary.

By contrast, today the standard regulatory mechanism provides environmental institutions with many more norm-setting, monitoring and enforcement instruments to regulate industrial behaviour. Therefore, one might expect that there is no longer a need for an ad hoc programme such as PROPER. However, as previously mentioned, PROPER has been widely hailed as a success, and the scope of the programme now encompasses enforcement, as well as monitoring and public disclosure.[131]

So as a ministerial programme, PROPER exists parallel to the standard regulatory mechanism, where the District usually has licensing, monitoring and enforcement authorities. However, the EMA 2009 does not clarify how these parallel regulatory mechanisms relate to one another. It also does not clarify how the mechanisms should divide the regulatory authorities and duties of detecting and halting violations between the Ministerial, Provincial and District levels.

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128 International trademarks (e.g., several ISO trademarks), environmental standards and assessment procedures also became more popular as alternatives to classic command and control (Rahmadi, 2006: 140).

129 The EMA 2009 defines environmental economic instruments as economic policies for encouraging governments and any other party or persons to conserve the environment. Such instruments include development planning and economic activities, environmental funds, incentives and disincentives (e.g., taxes, subsidies and tradable permits), a labelling system for environmentally friendly behaviour and performance awards (art 1(33) and 42-43). The introduction of economic instruments provides flexibility in the regulatory approaches. Nevertheless, the understanding of economic instruments as incentives and disincentives is very broad. Such an understanding informs and justifies the government's awareness of and inaction towards non-compliant behaviour.

130 Ministry of Environment Regulation (PerMenLH) 6/2013 on PROPER (consideration a) in conjunction with EMA 2009: art 43(3).

131 Ministry Regulation on PROPER states that industries that have been rated red and black are subject to 'sanctions in accordance with laws and regulations' (Ministry of Environment Regulation (PerMenLH) 6/2013, article 9 (3)).

The next chapter will show how, in practice, the Minister has imposed administrative sanctions on several occasions, but has not done so consistently. In some cases, Districts and Provinces have imposed sanctions. However, in most cases where PROPER has detected a violation, no sanction was imposed at all. It is unclear which institution was responsible for the lack of enforcement.

The Ministry refers to PROPER as an economic instrument to justify its involvement in cases where, in principle, the District is authorised to act,[132] as well as to explain the success of the programme (Santosa, 2016). However, Wibisana (2017) is critical of both these issues. He argues that the Indonesian debate on environmental regulation commonly and mistakenly considers that economic instruments oppose 'command and control' types of regulation, exemplifying the dichotomous thinking of which Sinclair (1997) has warned.[133] As a result of this supposed dichotomy, officials, scholars and policy-makers often assume that an economic instrument such as PROPER can exist parallel to command and control and that coherency with the standard regulatory mechanism is not required.

According to Wibisana (2017), PROPER is, in fact, a mix of regulatory instruments. Instead of opposing command and control regulation, it shares many of its characteristics. For example, participation in PROPER is no longer purely voluntary, monitoring takes place on a regular basis, and the Ministry occasionally responds to violations with sanctions. Wibisana argues that assumptions about the ineffectiveness of command and control regulation are made without conducting empirical research, and without recognising that PROPER does, in fact, have many features of command and control regulation. However, not embedding this regulatory programme in the standard regulatory mechanism, has caused a situation which may contribute to ineffective regulatory efforts and legal insecurity for both licensees and (potentially affected) citizens.

To conclude, although PROPER can be occasionally effective, it has downsides. The fact that it exists parallel to the standard regulatory system can negatively affect regulatory efforts. District governments may become reluctant to carry out their standard regulatory tasks because they trust PROPER to do it instead. Furthermore, the authority and responsibility overlap makes it

132 Santosa has argued that 'second line enforcement' is the basis for the shift of authority that occurs within the context of PROPER (2013, 116). However, with the vast majority of industries that participate in PROPER, there is no indication that a serious violation is occurring. The involvement of the Ministry through PROPER may also be based on the right of Districts to ask for technical assistance from the Province (art 63(2)l) or the Ministry's authority to monitor those with a license (art 63(1)o). However, in any case, the EMA 2009 does not offer a basis for a shift in enforcement authorities. The next chapter will demonstrate that the Ministry has, nevertheless, imposed sanctions after detecting violations through PROPER.

133 Chapter 2 discusses Sinclair's work.

difficult to hold them accountable for when they fail in fulfilling their regulatory tasks.

5.6.2 *Criminal law enforcement*

'Control' in 'command and control' can refer to monitoring and enforcement both within the administrative and criminal law framework. As the previous chapter explained, both have their own characteristics and aims. Two notable differences are that administrative law enforcement aims to halt violations and is executed by the executive, while criminal law enforcement aims to punish and is in the hands of the public prosecutor and the criminal court.

In Indonesia, there is a tendency to focus on strengthening the criminal law framework. Compared to the EMA 1997, the EMA 2009 has a more expansive section on criminal sanctioning, contains more severe penalties, and authorises more officials to conduct criminal investigations.[134] Nonetheless, the act states that criminal law enforcement remains an 'ultimum remedium' (i.e., the last resort after administrative law enforcement has failed). It explicitly mentions that this principle is applicable when violations involve wastewater quality, emissions and nuisance.[135] It does not explicitly mention violations related to hazardous and toxic materials, which suggests that for these violations criminal sanctions can be imposed straightaway. The next chapter will show that as a result, officials of the West Java environmental agency – who prefer to respond to violations through criminal prosecution instead of imposing administrative sanctions – focus on detecting violations related to hazardous and toxic waste, instead of on wastewater quality, emissions and nuisance

Struiksma, Ridder and Winter (2007) argue that a combination of administrative and criminal law enforcement can be effective in particular circumstances, but that it requires empirical research to gain insight on this issue. In Indonesia, academics have not conducted such empirical research thus far.

5.7 The role of citizen in environmental regulation

The role of citizens in environmental regulation has increased over the years. However, administrative law mechanisms are not the primary instruments for promoting their interests in a clean environment.

The first EMA of 1982 mentioned that private parties could file complaints requesting compensation against a party responsible for environmental destruction or pollution. Thus, addressing environmental problems was a private law matter. Although the term 'complaints' disappeared in the EMA 1997, the Act gave citizens with a direct interest in a case the right to request the authorised

134 EMA 2009: artt 97-120.
135 EMA 2009: elucidation, 1(6).

government to enforce the law. Hence, complaint handling became a matter of administrative law.[136] The EMA 2009 elaborated on the role of citizens and representative organisations, at least in some respects. The Act confirmed the legal standing of NGOs, explicitly mentioned the participatory principle and established the governmental duty to develop and implement complaint mechanisms.[137] Furthermore, the EMA 2009 and its implementing regulations established the governmental duty to receive and, within a certain time frame, verify complaints. It also established the governmental duty to recommend follow-up actions to the authorised institution and to inform the complainants about its progress.[138]

However, in two respects, the position of citizens has weakened. First, citizens may no longer request the authorised government to take enforcement measures. Second, it has become less clear which government institution is responsible for following up on the complaint and which institution can be held accountable for taking insufficient measures.

Regarding citizen requests for government enforcement, EMA 2009 does not mention the possibility to file an objection against a governmental decision regarding monitoring or enforcement, or against the lack such decisions or actions. At the same time, both the 2010 implementing regulation on complaint handling and its 2017 successor cite administrative sanctions, criminal law enforcement and environmental dispute resolution (inside or outside court) as possible responses to violations.[139] However, the implementing regulations do not explain when a particular follow-up method is appropriate. One might expect that administrative law enforcement follows administrative law norms violations.[140] However, the next chapter will demonstrate that complaints are often dealt with outside the administrative law framework. Governments

136 EMA 1997: art 25(3).

137 EMA 2009: artt 1(31, 32, and 34), 63(1)t, (2)n, and (3)k, 65 and 70.

138 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 4-6, 11-18 and 20; Ministry of Environment and Forestry Regulation (PerMenLHK) 22/2017.

139 Ministry of Environment Regulation (PerMenLH) 9/2010: art 19(2); PerMenLHK 22/2017), art 24(5).

140 Although the EMA mentions the possibility of filing an objection against a government decision, this is only applicable against plans, EIAs, firms or activities that pollute the environment (EMA 2009, art 26(4), art 65(3) and art 70(2)). Filing an objection against a governmental decision regarding monitoring or enforcement is not mentioned in the EMA, because the general administrative law only provides for objecting against a government decision in the form of a written document (a 'beschikking') (Act 5/1896, art 1(3)). In practice, when the government decides not to monitor or enforce, this decision is rarely confirmed in a 'beschikking'. The Act on the Administrative Courts of 1986 offered a way out of this obstacle, stating that an institution or official that does not issue the requested decision within the set period is considered to have refused it (Act 5/1986, art 3), opening the possibility to file an appeal and filing a case before the administrative court. The Administrative Law Act of 2014 has nevertheless erased this possibility because objection against untimely decisions is only possible when it concerns decisions related to licenses, dispensation and concessions (Act 30/2014, art 39(5) and 53).

often prefer to respond by initiating criminal enforcement, through which they offload their regulatory responsibility to the public prosecutor and criminal court. Alternatively, they act as mediators in private law dispute resolution settlements. Citizens then have to negotiate with the violator not only about the type and amount of compensation for the suffered damages, but sometimes also about the required level of compliance going forward.

Environmental agencies consider it an option to engage in mediation between complainants and violators of administrative norms in part because of how officials interpret two of the EMA 2009's provisions. First, it is mandatory for disputing private parties to try to settle their dispute outside a court before a court accepts their case. Second, the EMA 2009 authorises governments to regulate a case and act as dispute settlers in civil quarrels, the latter being an alternative to private courts.[141] The next chapter will demonstrate that, in practice, some environmental officials believe they should mediate disputes before taking administrative law enforcement measures. As a result, the distinction between the regulation to promote the public interest in a clean environment and redress seeking processes by private parties who are affected by pollution becomes blurred. On the one hand, this creates opportunities for citizens to complain about environmental issues to promote their private interests, which have little to do with a clean environment. On the other hand, if citizens are genuinely interested in achieving a cleaner environment, their position is weakened by the fact that they cannot call upon the authorised government to take measures. Instead, such citizens have to negotiate this issue on private law terms, through which an industry usually has a strong position.

Hence, the burden is more on citizens rather than the authorised government to address industrial violations. This burden is also noticeable when it comes to detecting violations. Section 3.2 mentions that current discussions on revising GR 82/2001 formulate the desire to increase citizen regulatory participation in an increased monitoring role. However, the burden to prove the occurrence of non-compliant behaviour may then shift from the authorised government to affected citizens. The alleged increased responsibility of citizens to detect and address violations weakens their position considerably.

Another aspect that weakens the position of citizens is the lack of clarity in the EMA 2009 and implementing regulations on complaint handling about which government has the authority and duty to handle a complaint. In principle, the licensing institution must handle complaints. However, there are exceptions, such as when serious violations occur or when the relevant institution has not followed up on the case within the legally set time frames. In these cases, authority shifts to a higher government level.[142] However, the EMA and regulations provide no further details regarding this issue. Considering that the EMA 2009 may shift regulatory authorities from the licensing

141 EMA 2009: artt 84 (3) and63 (1)q, (2)j, and (3)h.
142 Ministry of Environment Regulation (PerMenLH) 9/2010: artt 9-10.

institution to another institution (see section 5.5), it appears that the implementing regulation on complaint handling provides more detailed criteria for second-line enforcement. However, if this is the case, it means authority would then shift to the Ministry. The next chapters will demonstrate that, in practice, Provinces often carry out regulatory authorities after they have received a complaint. The legal basis for their involvement in such cases is often unclear.

In sum, it is difficult for citizens to pressure governments to act when it is unclear which institution is authorised and has the duty to take regulatory actions, and when it is uncertain what regulatory action can be expected. For example, it is unclear whether citizens may object to a government decision or take a case to the administrative court to request a preliminary injunction. Thus, although increasing citizen participation in monitoring and following up on detected violations may have been intended to strengthen citizens' positions, in practice, it can have the opposite effect. This is because the incentives for the government to properly execute its regulatory tasks have decreased.

6 Conclusion

This chapter has identified the strengths and weaknesses of the current legal and institutional frameworks relevant to the regulation of and redress seeking for, industrial water pollution. Over the past decades, significant legal and institutional changes have occurred. Compared to the first Environmental Management Act (EMA) of 1982, the EMA 2009 contains more arrangements for command and control regulation based on administrative law. Environmental institutions have instruments at hand to plan, set norms, monitor behaviour and enforce the law by imposing administrative sanctions. Economic instruments created room for innovative regulatory approaches and expanded the arrangements for criminal sanctioning. This change potentially enables improved regulation of industrial environmental behaviour. However, it is widely acknowledged that environmental regulatory efforts in Indonesia are still quite ineffective.

As chapter 2 explained, a common explanation for the ineffectiveness is executive government and judiciary corruption. Furthermore, environmental agencies lack capacity, which hinders effective regulation. Santosa's (2014) study on the functioning of environmental agencies at the regional government level argues that the legal framework offers a sufficient basis for the effective promotion of environmental interests, but that the implementation by the regional government agencies requires improvement. The agencies often lack the capacity in staff, expertise and material for effective implementation (Santosa, 2014). Additionally, Districts' direct economic interests in industries located within their territory can also hinder effective regulation. However, this chapter argues that although these implementation problems exist, the

development of the administrative law framework for regulation still has key weaknesses.

First, despite the District-level implementation problems, the EMA 2009 offers only limited opportunities for shifting monitoring and enforcement authorities to the Provincial or Central Government level, and the procedures for shifting authorities are unclear.[143] This lack of clarity leads to inconsistencies and vagueness regarding which institution is authorised to take regulatory measures and makes it difficult to hold an institution accountable when it fails its regulatory task.

Second, while the EMA 1997 stressed the importance of a consistent transition between the norm-setting, monitoring and enforcement phases in the regulation process, the structure of the EMA 2009 no longer emphasises this. Therefore, the licensing institution's responsibility to also monitor and enforce the licensee is less obvious.

Third, the arrangements in the EMA 2009 for administrative law enforcement have weakened because its reference to 'administrative coercion' refers to orders the violator needs to execute, rather than concrete action the authorised government needs to take to halt a violation or restore the situation. When the violator does not execute the orders, the government is unlikely to revoke or suspend their license. Therefore, the 'top of the enforcement pyramid' does not, in reality, exist in Indonesia.

Another weakness is the lack of clarity in how command and control regulation relates to other regulatory approaches (e.g., economic instruments) and ad hoc programmes (e.g., the ministerial programme PROPER and the Water Patrol in East Java[144]). These alternative regulatory approaches exist parallel to the standard regulatory mechanism in which the regional governments are primarily authorised to carry out command and control regulation. This lack of clarity leads to inefficiencies in the regulatory process because monitoring data are not used to their full potential and detected violations are not responded to consistently. The lack of clarity also concerns the division of authority between the involved institutions, which then makes it difficult to hold a particular government institution accountable for not executing its regulatory task.

The relevant relation between administrative, criminal and private law frameworks for addressing environmental pollution is also unclear. In theory, administrative law measures for regulation allow the authorised government to halt violations swiftly and to recover the damage. Criminal law enforcement cannot directly halt a violation. It punishes behaviour after it has taken place

143 However, the implementing regulation on complaint handling has somewhat stretched the possibilities of a monitoring authority shift, while the Regional Government Act of 2014 did so even more. However, field research for this chapter was conducted before the passage of that Act.

144 The Water Patrol in East Java will be further discussed in the next chapter.

and can have a future deterrent effect, but typically only after a long and costly court trial. Nevertheless, the EMA 2009 fails to emphasise this difference in administrative and criminal enforcement as a response to violations.

The quality of EMA 2009's administrative law framework for regulation has some vital shortcomings, while the Act expanded and emphasised the importance of the criminal and private law arrangements for following up on violations. Regarding the latter, the authorised institution can opt to respond to a violation by mediating between the violator and complainants in a private law dispute about the damages. This choice justifies why, in practice, environmental agencies do not take consistent and firm action by using administrative law enforcement instruments to halt violations and restore environmental conditions. Nevertheless, the next chapter shows that there are strong indications that a relatively consistent administrative law based command and control regulation is effective.

Wibisana (2017) has argued that many Indonesian scholars and policymakers consider alternative regulatory approaches as opposing command and control regulation, and prefer to depend on the former. Therefore, they do not see a need to integrate alternative approaches with command and control, and barely any critical debate takes place on how the different regulatory approaches, in theory, and in practice, relate to one another. The debate on regulation in Indonesia is generally dominated by the false dichotomy between command and control regulation and alternatives for it, about which Sinclair (1997) has warned.

A final point of concern is the role of citizens and interest groups in the regulation process. At first sight, their position seems to have improved. They have more opportunities to participate in the regulation process. For example, they need to be consulted when licenses are issued. Another improvement is the increased opportunities for filing complaints. However, in recent debates (e.g., about the revision of Government Regulation 82/2001 on River Pollution Control), there is a tendency to further expand citizen participation in the monitoring and enforcement phases of the regulation process. This can result in a shift of regulatory responsibility from the government to citizens and interest groups. The desire to increase the regulatory role of citizens and interest groups is understandable in the Indonesian context, in which there is generally little trust that the government will properly execute its regulatory task. At the same time, the developments increase the risk that addressing environmental pollution becomes a matter of promoting the private interest of a citizen, rather than considering it as a matter of public interest. Chapter 5 and 6 will demonstrate that the private interest of citizens affected by pollution is not necessarily the same as the public interest in a clean environment.

The next chapter will consider the practical consequences of the legal and institutional frameworks for regulating industrial pollution. It will take a closer look at the Provincial environmental agencies in East and West Java. It will

demonstrate that the weaknesses in the legal framework reflect, or perhaps are at the root of, inconsistent regulatory practices.

4 Provincial environmental agencies in East and West Java

Patchwork of regulatory approaches with limited results

Over the past decades, the legal and institutional frameworks for regulating the environmental performance of industries in Indonesia have improved in several ways (Rahmadi, 2006; Hardjasoemantri, 1994: 29–30; 2006: 450–468). However, as the previous chapter explained, they still have considerable weaknesses. Several studies have shown that implementing legislation is hindered by the lack of environmental institutions' staff, expertise and material (Santosa, 2014). Studies by Fatimah (2017) and Sembiring (2017) have also indicated that the resources that are available are not used to their full potential. Fatimah's study on District and Provincial environmental agencies in East Java demonstrated that these agencies often lack a proper information management system. This absence hampers systematic assessment of the performance of industries and consistent follow-up on violations. It also conceals the role that government institutions play in the regulation process, and hinders the possibility to assess the government's actions critically.

This chapter seeks to provide more insight into the regulatory practices of environmental agencies. It attempts to identify which regulatory approaches they apply, why they do so, and how these approaches affect the promotion of the public interest in a clean environment.

The previous chapter explained that after decentralisation, Districts are, in principle, authorised to regulate industries within their territories. However, in practice, it is Provinces rather than Districts that are frequently involved in the process of regulating industries. Provinces are particularly involved when a pollution case has caught the attention of the public (e.g., because the pollution problem led to social unrest or the media reported on the case).

This chapter focuses on the practices of Provincial environmental agencies, particularly on the agencies of East Java and West Java.[1] Throughout 2011 and 2012, I observed the day-to-day practices of these agencies during several fieldwork periods. I joined the West Java agency in their daily activities for nearly three months and the agency in East Java for more than a month. My time at these agencies also allowed me to gather archival documents, through

1 Due to the time and capacity limitations of this research, it was not possible to study other Indonesian administrative levels and sectors engaged in environmental management in-depth.

which I could study the regulatory trajectories of a considerable number of pollution cases in which these agencies had played a role.[2]

Both agencies were quite active in regulating polluting industries. However, a closer look reveals that there are some important differences in their regulatory approaches that impact their effectiveness.

This chapter focuses on the practices of monitoring and following up on violations. With regards to monitoring, it looks at how the authorised government should regularly monitor its licensees. However, it also pays attention to how the agencies handle industrial self-monitoring reports, how they verify complaints, how they deal with the Ministerial monitoring programme PROPER and the Water Patrol initiative that is unique to East Java. It seeks to provide insights into how governments follow up on violations. In so doing, it considers whether and why governments follow up by imposing administrative sanctions, initiating criminal trails, settling disputes or through alternative means.

The following sections will describe the Provincial environmental agencies. Section 2 focuses on West Java, while section 3 considers East Java. Each section begins with an analysis of the geographical, socio-economic and institutional settings in which these agencies operate. The sections then focus on monitoring activities and ways that governments follow up on detected violations.[3]

This chapter concludes that the environmental agencies in the two Provinces differ considerably in how they detect and follow-up on violations. Nevertheless, overall there are considerable inconsistencies in the regulatory process. The agencies all utilise a patchwork of monitoring activities. However, they do not efficiently use the information they gather. Furthermore, the administrative law framework is not used to its potential. Officials often prefer to depend on alternative regulatory approaches that governments have poorly integrated with the basic regulatory mechanism for command and control. Moreover, particularly in West Java, officials prefer to rely on the criminal and private law frameworks to respond to violations.

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2 I also conducted fieldwork at the provincial environmental agency in North Maluku for several weeks. However, this chapter does not include the findings from this fieldwork because that agency's position differs considerably from that of the East and West Java agencies. Nearly all of the industrial activities in North Maluku are related to mining, and so mining agencies are intensively involved in regulating these activities. Additional research is required to understand the relationship between the environmental and mining agencies, in regulating the latter's environmental impact. That this agency barely operated from an office also complicated the research. Instead, officials mostly worked from home, which made it difficult to observe their daily practices.

3 This chapter focuses on monitoring and enforcement because, at the time of fieldwork, the government had only introduced the environmental license and provincial agencies had issued few, if any, of them. Nevertheless, as Kartikasari (2016) shows (see chapter 3), norm-setting continues to be a problematic aspect of the regulation process.

1 Regulating industrial water pollution in East Java Province

The Brantas is a large river in East Java Province. It originates near the city of Malang and flows over 320 kilometres towards the Provincial capital Surabaya. In 1994, approximately 13.7 million people lived in the Brantas watershed area, including Surabaya's three million inhabitants.[4] The river water is a vital source for drinking water, as well as for agricultural and industrial activities. However, as the river water approaches Surabaya, it becomes increasingly polluted with domestic, industrial and agricultural waste.[5] The drinking water company PDAM acknowledged that it had difficulty purifying the water to meet the required standards. According to the frontman of local environmental NGO Ecoton, Prigi Arisandi, the levels of mercury in 2010 were a hundred times above the legal standard. Low oxygen levels also caused mass fish deaths occasionally, while people reported the negative effects of the poor river water quality on their health.[6]

Nevertheless, between 2009 and 2012, there were indications that the water quality was improving somewhat. These improvements may have been due to the pressure that civil society actors had exerted on the government to increase its regulatory efforts. The East Java area has a history of civil society actors pressuring the government to take environmental measures. After serious incidents occurred in the 1970s involving polluted drinking water, civil society organisations demanded the government enforce water quality standards. In response, in the 1970s and 1980s, the government began conducting unannounced river inspections and closing polluting factories. It initiated progressive regulatory initiatives (e.g., PROKASIH and PROPER), which it later developed into national programmes (Lucas and Djati, 2007).

However, an unclear division of authority, the lack of proper legal instruments and enforcement had always been problematic. According to Lucas and Djati, these issues only increased after the fall of Suharto. The government began focusing mainly on surviving politically, rather than taking action against polluting industries. As a result, the water quality soon deteriorated. Furthermore, communities began directing their complaints and protests at

4 The Brantas River splits into two approximately 60 kilometres before it reaches the sea and just before it enters the urban area of Surabaya, becoming the Kali Surabaya and the Kali Porong. The Kali Surabaya flows further in the direction of the city and merges with Kali Tengah, known for its high pollution level. Eventually, in the city's heart, the Kali Surabaya splits a final time, into the Kali Mas and the Kali Wonokromo (Laporan Pemantauan Kualitas Air Sungai di Jawa Timur (PROKASIH) Tahun 2009, by Bidang Pengawasan dan Pengendalian BLH Provinsi Jawa Timur (2010)).

5 According to the 2010 East Java Environmental status report (Status Lingkungan Hidup Dearah), 1122 large and middle scale industries are located in the province.

6 'Environmental protection in Indonesia', interview with Prigi Arisandi. http://gardabrantas.com/2010/09/ecoton-lawsuit-against-east-java-gorvernor-for-river-pollution-control/.

industries rather than the government (Lucas and Djati, 2007; 2000: 1-6, 11-12, 20-1).

Nevertheless, some years after the *Reformasi* started, Surabayan civil society organisations again took a critical stand against the regulatory government. In 2007, environmental NGO Ecoton sued the East Java Governor and the Provincial Environmental Agency for insufficiently regulating the industrial impact on the Kali Surabaya River (i.e., a branch of the Brantas River). The NGO demanded that the Province improve the river water quality standards and use administrative coercion against violating industries by closing outlets or revoking their license.[7] A 2008 agreement eventually settled the case, where the government promised to 'take measures against violators in line with their tasks and authority'. Soon after, the Province established the Water Patrol (*Patroli Air*). It was a monitoring initiative involving various institutions, NGOs and journalists, which became an important regulatory instrument in East Java.

In 2010, NGO Ecoton again filed a lawsuit, arguing that the Governor and the environmental agency had not complied with the 2008 agreement. A new agreement settled this charge.

These developments demonstrate that critically minded civil society actors demanding the government take regulatory action did lead to additional regulatory efforts, which appeared to improve environmental conditions. However, the civil society demands did not lead the government to clarify and formally codify the responsibilities of its separate institutions.

1.1 A sketch of the East Java environmental agency

This subsection aims to explain how the East Java environmental agency detected violations and responded to non-compliant behaviour. The Provincial environmental agency of East Java is located in Surabaya and employs over one hundred officials.[8] The Ministry of Environment had rewarded the agency for its good data management. Nevertheless, Fatimah (2017) argued that the agency lacked a proper data management system, as it did not have a complete inventory of the industries it had licenced and should monitor. Furthermore,

7 In response to the NGO's demands, the Provincial government did not dispute that the government had an enforcement duty. However, either the District or the Central Government was authorised, the former because it had issued the license. The provincial government mentioned the River Basin Organisation (Balai Besar Wilayah Sungai that is part of the Public Works Department) as an institution with potential authority because the Brantas River was a river of national strategic interest. The Province also argued that it had already undertaken regulatory measures because it had carried out inspections through the PROKASIH and PROPER programmes and had cooperated with the police to prosecute violators criminally. It had also sent warnings to violators. These actions notably contradict with the argument that the government was not authorised in the case.

8 The agency employed 114 officials in 2010 and 134 officials in 2011.

there are inconsistencies in various reports on the number of sanctions that the environmental agency imposed on behalf of the Governor (Fatimah, 2017).

Two of the four agency's units were involved with regulating industries.[9] The 'Monitoring and Control' unit consisted of twenty-two officials and engaged in regulatory efforts such as inspections daily.[10] Officially, the unit consisted of subunits that focused on water and air pollution. However, in practice, the officials shared many of the monitoring tasks. The much smaller Communication unit handled complaints from citizens but mostly engaged with drafting the agency's performance reports, which informed the agency's rewards for its data management.

1.2 Monitoring in East Java

The East Java agency's monitoring efforts consisted of various elements. The regular monitoring efforts included inspection visits and assessments of industrial self-monitoring reports. The agency also carried out inspections within the context of its Water Patrol, and it was available to verify citizen complaints. This section focuses on the agency's regular monitoring efforts, its Water Patrol activities, and its complaint handling.[11]

1.2.1 Regular monitoring efforts and self-monitoring reports in East Java

As part of its efforts to regularly monitor industries, the East Java agency inspected 154 industries between January and October 2012, and it planned to inspect some 50 more that same year. According to an official, the Provincial environmental agency had the authority to monitor about 1400 industries regularly. The Provincial agency based its authority on the industries' locations within the Province and the considerable industrial risk of causing pollution (e.g., through wastewater discharge or hazardous material use). Furthermore, these industries were not included in the Ministerial monitoring programme PROPER.

The Provincial government considered that it had the authority to monitor a relatively high number of cases because officials reasoned that their mandate

9 The agency's four units were the Monitoring and Control unit, the Communication unit (responsible for handling complaints), the Environmental Planning unit (in charge of Environmental Impact Assessments and issuing environmental licenses), and the Conservation and Recovery unit.

10 This unit was called *Badan Pengawasan dan Pengendalian* or *'Wasdal.'*

11 The East Java environmental agency also carried out inspections within the context of the Ministerial monitoring programme, PROPER (see chapter 3). However, this research did not focus on this mode of monitoring by the East Java environmental agency because during the time of the fieldwork (October and November 2012) the agency was not conducting PROPER inspections.

extended beyond the EMA 2009 case limits. One Provincial official stated, 'The Province is always authorised. There is no problem with the division of authority between the Districts and the Province. All just join'. Another official said, 'The Districts issue the licenses, together we do the rest'. He claimed the Provincial government always invited District officials to assist with monitoring. Although two Provincial officials claimed not to know whether the Districts were properly monitoring and enforcing standards, another believed that the District officials did little environmental monitoring.

Since Provincial officials believed they had the authority to monitor 1400 industries, they had to select on which of those to focus. An official explained that they prioritised monitoring industries located along the Brantas and Solo Rivers. However, a regular inspection visit I joined visited two industries that were not located along those rivers and did not discharge wastewater or use hazardous waste. It appeared the officials had selected these industries rather randomly. These Provincial officials also had not invited District environmental agency officials to join these inspections.

Therefore, it appeared that any policy which described industry selection procedures and Provincial and District monitoring roles were either insufficiently specific or poorly implemented. As a result, officials had considerable room for discretion.

In preparing regular monitoring visits, officials collected as many industrial documents as possible (e.g., licenses, environmental impact assessments, or self-monitoring reports), an official clarified. There was no general archive room, and so officials usually kept piles of documents on or under their desks. One official commented that the Province often did not have access to the required documents, because other institutions had issued or approved them.

Before a regular inspection visit, the agency would usually send the industry a letter informing them of the upcoming agency visit. However, this was not the case in the two inspections I observed. For unknown reasons, the Provincial officials decided to visit these industries one day before the actual visit. As a result, the officials claimed to be less well prepared than normal. There had been no time to announce the visit or gather and analyse relevant documents. The poor preparation impacted the inspections, particularly because the officials spent a considerable amount of time arranging formalities and checking documents, rather than assessing the actual situation on the industrial plant sites.

Apart from the regular monitoring visits, the East Java agency assessed self-monitoring reports. The head of the water pollution subunit estimated that between 50 and 100 industries sent their self-monitoring reports to the East Java agency on a monthly or biannual basis. However, the agency did not keep records of self-monitoring submissions, and the subunit head also did not know how many industries were obligated to self-report to the Provincial agency. There was no complete inventory of the industries that the Province had licensed, and there was no overview of cases in which non-

compliant industries had been summoned to send their self-monitoring reports to the Province or District that had issued the license.

Thus, it was unclear on what grounds the Provincial agency received and reviewed the self-monitoring reports. Nevertheless, once the agency had received them, it divided the reports among officials from various units. They processed the data but did not store their findings in a shared data management system. During the first nine months of 2012, one official said she processed 69 reports and planned to do several more that year. However, she did not consider this a priority, and would only work on them when she had spare time. Nevertheless, as a result of these assessments, she had already drafted a warning letter to the violator seven times. However, for unknown reasons, these warning letters were still sitting unsent on the unit head's desk. Due to this experience, she did not plan to spend any more time writing warning letters if the self-monitoring reports indicated non-compliant behaviour.

The EMA 2009 established a clear obligation on licensees to self-monitor and self-report. However, it is evident that the East Java officials did not efficiently use the self-monitoring information since they did not prioritise the assessments, centralise data stores or consistently follow up on violations. Many officials reportedly distrusted the accuracy of the self-monitoring reports, suspecting the industries of manipulating the information in the reports. The unclear division of authority may have also played a role in the inconsistent assessments since it was unclear which institution was responsible for following up on the reports, and so no institution could be held accountable for not properly making use of them.

1.2.2 Water Patrol

The 'Water Patrol' is a regulatory initiative unique to East Java and is more geared towards enforcement than the aforementioned regulatory inspections and self-monitoring report assessments.

The government established the Water Patrol in 2008. Approximately once a month, officials from various institutions such as Provincial and District governments gathered to inspect industries located along the Brantas River together. Journalists and representatives of an NGO would also join them.[12] The group usually consisted of approximately twenty people and would embark on unannounced inspections. On small motorboats, members of the

12 The institutions and organisations involved in the Water Patrol are the East Java provincial environmental agency, Perum Jasa Tirta I, the East Java Industry and Trade agency, the East Java Public Waterworks agency, the environmental agencies of the Districts of Surabaya, Sidoarjo, Gresik, and Mojokerto, Brantas Water Board (Balai Besar Wilayah Sungai (BBWS) Brantas), the Technical Implementation Unit (UPT) under the Ministry of Public Works Buntung Paketingan, the NGO *Konsorsium Lingkungan Hidup,* various journalists and the drinking water company PDAM Surya Sembada of Surabaya.

Water Patrol would navigate along the Brantas River and its branches and take samples from the industries' wastewater outlets. When they suspected a regulatory violation, they would follow up with more thorough inspections. For example, they would examine samples in a lab or inspect the industry's terrain.

An agreement between the Provincial environmental agency, the police of Surabaya city and state company Jasa Tirta established the Water Patrol. Jasa Tirta was responsible for taxing industries for their use of river water in their operations. It did not have a direct interest in improving the river's water quality because it did not affect tax rates. Furthermore, the quality of the river water was the responsibility of the Provincial environmental agency, a director of one of Jasa Tirta's divisions explained. Nevertheless, Jasa Tirta significantly contributed human and financial resources to the Water Patrol. The director considered it a moral duty to make an effort to improve the water quality. At the same time, the drinking company PDAM had already complained several times to Jasa Tirta about the poor quality of the river water.

At first sight, the participation of the many officials from different institutions seemed inefficient and could have potentially led to complications regarding the division of authority between them. However, officials pointed towards the advantages of the broad participation in the Water Patrol. The multiple institutions and press confronting the industries signalled the importance of the Water Patrol's actions. Different officials keeping an eye on one another during the inspections would also deter corruption.

On 24 October 2012, a group of approximately twenty officials as well as several Jasa Tirta employees, seven journalists, and two NGO representatives gathered at one of Jasa Tirta's offices located along the Surabaya River.[13] They split into three smaller groups: two boat teams set out to take water samples from the outlets, while one travelled by car to inspect industries. The group selected industries for inspection that all had a past of non-compliant behaviour or had been suspected of non-compliance.

One of the boat teams took water samples at two industrial outlets. Both industries already faced criminal charges related to environmental violations. On board, a quick test of the oxygen level of the wastewater showed that in one case, the wastewater quality was acceptable. Although the quick test merely indicated the oxygen level, the group would not bring the water sample to the laboratory for further inspection. The group would also not inform the industry that they had conducted the inspection. The quick test of the wastewater sample from the second industry indicated that the oxygen level was below tolerable standards. Therefore, the group would send the sample to the laboratory, but the test did not give cause for immediate action. One official

13 The officials were from the provincial environmental agency, the environmental agency of Surabaya, the East Java Public Water Works agency, the Brantas Water Board and the drinking water company PDAM of Surabaya.

reasoned that the industry was already involved in a criminal trial, which he considered to be the maximum penalty and a more effective reaction than any administrative sanction. He seemed unaware that by imposing an administrative sanction, he could require the industry to halt the violation immediately.

The boat team passed other industries located along the Brantas River but did not take any other samples. In two cases, an official suspected that the industries had illegal underwater outlets. However, it was not possible to take valid samples to prove this, and the team took no further action. The team in the other boat, however, observed that warm, white water sprang from an underwater outlet and warned the team in the car, which then inspected the industry.

The car team inspected three industries that day, and the two boat teams took four samples, sending three of them to the lab for further examination. Thus, that day, some twenty officials inspected seven industries. However, it seemed that they did not use information optimally. For example, the groups did not bring all of the samples to the laboratory and not all indications of violating behaviour were followed up with more thorough inspections concerning, e.g., underwater outlets. Furthermore, it appeared that officials did not see much of a role for administrative law when industries were involved in a criminal trial, even if violations were taking place that immediately polluted the environment.

Despite the ostensible inefficiencies and inconsistencies, the Water Patrol cleverly avoided the problems related to the unclear division of authority. The involvement of the many institutions created a sense of multi-institutional ownership, and their presence had the potential to impress non-compliant industries. The relative consistency of monitoring and fairly serious measures against non-compliance may explain the success of the Water Patrol's deterrence mechanisms. In that sense, the Water Patrol had characteristics of command and control regulation. It may be that command and control regulation can be effective in Indonesia, since the Brantas River's water quality improved since the government established the Water Patrol. This possibility exists, even though the Ministry and many others in Indonesia refuse to believe this (see the discussion on this issue in chapter 2).

1.2.3 Complaint handling in East Java

Before the 2010 promulgation of the Ministerial Regulation on complaint handling, the East Java environmental agency received approximately eight complaints per year. Following the Ministerial Regulation, the agency established a complaint handling procedure. Since then, the number of complaints increased. The Communication unit, responsible for handling complaints, had received 33 complaints in the first ten months of 2012 and had verified only 12 of them. An official from the Communication unit made contradicting statements on whether this was due to the unit's lack of capacity or because

two-thirds of the cases did not fall under the Province's authority. The Communication unit found violations in 11 of the 12 cases and informed the Monitoring and Control unit, as well as the complainants, about their findings. It was the responsibility of the Monitoring and Control unit to decide how to follow-up on a case.

Despite the increased number of complaints since 2010, the overall amount remained relatively low, especially when compared to the West Java environmental agency, which received 125 complaints in 2011. There are several possible explanations for the relatively low number of complaints in East Java. First, complainants might not be aware that they can file a complaint at this agency, or they might have low expectations of how the agency will handle the case. Furthermore, complainants had an alternative in the Provincial police. A police officer stated that the Provincial police had a special environmental department, which received many complaints. The police would respond by immediately verifying the complaint and trying to settle the case through mediation. The District or Provincial level environmental agencies were not involved.

Fatimah (2017) shows that between 2012 and 2015, the number of complaints filed to the environmental agency more than doubled, from 33 to 74. In 24 of the 74 cases in 2015, the Province detected violations. In two cases, the Governor imposed administrative coercion. In an unknown number of other cases, he imposed a warning (Fatimah, 2017). Further research is required to explain the reasons behind the increase in the number of complaints.

1.3 Following up on detected violations in East Java

The previous section discussed the various modes of monitoring that the East Java environmental agency employed. This section discusses what the agency did once it detected a violation.

The preferred response to a violation is to give the violating industry guidance (*pembinaan*), the head of the environmental agency and the head of the Water Pollution subunit of the Monitoring and Control unit declared. By receiving technical advice and using persuasion, the industry can perform better. The agency's head said, 'The Governor has a 'Pro Job, Pro Poor' policy, so we cannot enforce the law because people would lose their job'. The subunit's head also stated that the agency is hesitant to use law enforcement, due to the possible impact on the industries' employees.

The agency's policy explicitly considered administrative sanctioning to be inappropriate when a violation caused damage. In the case of damage, the environmental agency should facilitate dispute settlement between the violator and the affected citizens, or assist the latter in bringing the case to court and gaining compensation for their damages. Criminal sanctioning was appropriate in the case of fatalities or wounded victims.

The practice was different from the representatives' statements and the presented policies. How a violation came to light informed how officials responded to it, rather than the characteristics of the violation. Therefore, this subsection discusses how official responses compared across violation notification methods. It closes with a description of an exceptional case of administrative law enforcement, where officials closed down a factory.

1.3.1 Following up on regular monitoring

According to the head of the Water Pollution subunit, the regular monitoring efforts indicated that approximately 40 per cent of the industries were non-compliant. However, the agency never imposed an administrative sanction in response. According to the head of the Monitoring and Control unit, the primary aim of the regular monitoring visits was to maintain good relations with the industries. If the agency detected violations, officials would give guidance (*pembinaan*) on how to achieve compliance. During one observed regular monitoring visit, officials did verbally threaten the industry with penalties. When an employee of a cake factory asked what would happen if they did not take the suggested measures, an official replied that if there was be no progress, the agency could eventually impose an administrative sanction and even pursue criminal prosecution. After the visit, the official added that she did not think the next visit would occur any time soon.

1.3.2 Following up on complaint verification

The agency detected most industrial violations through handling complaints and usually sent them to the District. The District would then issue a warning. During my fieldwork in October 2012, the Monitoring and Control unit of the Province followed up on three pollution cases that had been discovered through complaint verification. An official from the Monitoring and Control unit explained that he planned to bring one of these cases to a workshop on dispute settlement, organised by the Ministry of Environment, to ask the Ministry's advice on how to handle the case. It was a difficult case, the official said, because many people feared that if the government took measures to halt the violations, this would mean the industry would close, and the industry's employees would lose their jobs.

1.3.3 Following up on Water Patrol inspections & the case of closing a sugar factory

Water Patrol's initial policy had been only to give guidance (*pembinaan*) to violators. However, between 2008 and 2011, Water Patrol investigations led to warnings in at least 23 cases. It is unclear which government institution issued these warnings. In 14 of the 23 cases, criminal investigations (*penyidikan*) followed. In 2 cases, government officials imposed fines, even though implementing regulation on administrative fines did not yet exist. I found no data on how many industries began complying after these measures. Several officials

considered the Water Patrol to be successful and to have contributed to the improvement of the overall water quality of the Brantas River in recent years.

The Water Patrol played an especially remarkable role in a case involving a polluting sugar factory, Gempolkrep. The Patrol delivered proof of pollutions, which in July 2012 led to a severe administrative sanction that involved the factory's temporary closure. Nevertheless, a closer look reveals that the regulation process was not so straightforward. It was not clear whether the sugar factory had caused the pollution, what the 'administrative coercion' sanction involved, and to what extent the result of the regulation process had halted the violation.

On 24 May 2012, a short circuit in the factory's power supply caused highly concentrated sugar water to flow into the condenser and eventually leaked into the Brantas River for eight to twelve hours. Two days later, the factory reported the incident to Mojokerto's District environmental agency and sent copies to the East Java Province environmental agency and the Ministry of Environment.

On 27 May, another incident caused the wastewater treatment system to overload, and sugar water leaked into the river again. A member of an environmental NGO spotted dead fish floating in the Brantas River, some 20 kilometres downstream from the Gempolkrep sugar factory and informed the East Java environmental agency. The case had also raised media attention. A national newspaper called for the Governor to act. A local newspaper reported that people living 60 kilometres downstream from the factory, in Surabaya, caught the dead fish that were floating on the river surface and planned to consume or sell them.

The next day, on 28 May, the Governor sent the Water Patrol to find the cause of the mass fish death. The Patrol began the inspections in Surabaya. As it went further upstream along the many industries located along the Brantas, the Patrol claimed that the trace led undoubtedly to the sugar factory.

However, reports from this inspection and the meetings that followed told a different story. During the 28 May inspection, the Water Patrol had taken samples from only four of the approximately one hundred industries that were located along that part of the Brantas River. In the past, the Water Patrol had found three of the four industries to be non-compliant. The sugar factory had a clean reputation. It appears the industry's notification to the environmental institutions of the incidents or the NGO member's warning might have triggered the Patrol to include the sugar factory in its inspection.

Lab analyses of the water samples showed that the wastewater from all four industries did not meet the legal quality standards. The sugar and paper factories were violating the standards to a much higher degree than the other two, but surprisingly, the government did not take further measures against the paper factory. A small comment in the meeting's minutes suggested that was because the government was already criminally prosecuting the paper factory, implying that additional administrative sanctions were of no use.

All arrows now pointed at the sugar factory. On 4 July, the Governor imposed 'administrative coercion', meaning that the Governor ordered the sugar factory to stop its production process. This order was the starting point of months of negotiations between the government and the factory on which measures would be sufficient to lift the sanction. The factory claimed that the sanction was unjust because the incidents on 24 and 27 May had been dealt with properly, and that no violations were taking place when the government imposed the sanction. The government nevertheless demanded that the factory build a 'closed loop system' and an emergency pond, that in the future could prevent highly concentred sugar water from leaking into the river. After continuous monitoring visits and meetings, the factory eventually carried out the orders, and the government lifted the sanction. According to some, however, the factory never stopped its production process during the time the sanction was in effect.

From the moment the government imposed the sanction, protestors rallied against it. Some even physically threatened officials who visited the factory. Media coverage indicated the protesters were sugar cane farmers who feared that they would not be able to sell their yields if the factory closed. However, there were also rumours that the factory had hired protesters to pressure the government to lift the sanction. One official commented that the threatening experience made it unlikely that the Governor would again impose a similar sanction in the future.

People from the villages near the sugar factory did not join the protests, but neither sis they complain about the factory's environmental impact. There are several explanations for their reluctant attitude. First, many villagers were economically dependent on the factory. Over the decades, they had grown accustomed to water pollution. In addition, they feared that protests would lead to a violent confrontation with the factory's security force. This security force traditionally recruited its members from another nearby village that was located upstream from the industry, and therefore, did not experience the water pollution.

The government measures did result in the factory changing its production and wastewater systems. These could prevent pollution in the future. Thus, in this sense, it appears that the Water Patrol's efforts were potentially effective, although its procedures remain unclear.

1.4 Some conclusions on regulation by the East Java agency

The previous section on the East Java environmental agency's various modes of monitoring showed that, in practice, the detection method matters more than other characteristics for how the agency followed-up on a violation. In case of regular monitoring, the agency was likely to respond by providing guidance, violations discovered through complaint verifications were referred back to District governments, and if the Water Patrol found a violation, an

administrative sanction or criminal law trial would likely follow. These differing approaches indicated that the environmental agency was inclined to take tougher measures against violating industries when it cooperated with other institutions rather than when it operated alone. The argument that enforcement would have an undesirable effect on the industry's employees carried less weight in these cases.

2 The West Java environmental agency

This subsection seeks to understand which monitoring efforts the West Java environmental agency employed to detect violations, and how it responded to non-compliant behaviour. It also identifies some of the main differences and similarities between the East and West Java environmental agency industrial regulatory efforts. It will become clear that, similar to the East Java agency, the West Java agency's modes of monitoring formed a patchwork of information sources on how industries performed. The agency did not use these sources coherently, hampering the effective detection of non-compliant behaviour. Nevertheless, the agencies differed because the West Java agency was more inclined to handle pollution cases, when possible, by mediating between the violator and the affected citizens, rather than fulfilling an independent role as regulator.

2.1 A sketch the West Java environmental agency

West Java Province has approximately 46 million inhabitants. The Province neighbours Indonesia's capital and economic heart, Jakarta, making it an attractive area for industries to settle. Several large rivers begin in this Province, such as the Citarum and Ciliwung. Some rivers eventually flow towards Jakarta and should provide this city with drinking water. However, due to the domestic and industrial waste discharged into them, the river water is barely suitable for drinking. As a result, Jakarta depends on extracted groundwater, which contributes to the sinking of the city, causing major floods in the country's capital. Large-scale engineering projects are ongoing and are meant to protect the city against floods. However, it is important to understand why the rivers cannot provide the capital with water of sufficient quality. How do the regulatory approaches in upstream West Java, where many industries operate, fail to guarantee sufficient amounts of potable river water for downstream Jakarta?

The Provincial environmental agency of West Java holds office in the city centre of the Provincial capital Bandung, employing 100 officials in 2012. The agency consisted of four units, two of which were engaged in monitoring of and regulatory enforcement against industrial activities. The Environmental Pollution Management unit consisted of two subunits. The Monitoring subunit employed seven officials. It monitored the general river water quality and

processed the industries' self-monitoring reports. The 'Guidance Control' subunit consisted of eight officials. They carried out inspections within the context of PROPER and advised industries on how to improve their environmental performance.[14] As part of the Compliance, Partnerships and Capacity unit,[15] the Compliance subunit handled complaints and all cases involving hazardous and toxic materials. A young, charismatic female official, who was not afraid to confront violators, led the subunit's five officials.[16]

The agency's general policy on law enforcement, as one presentation described it, emphasised the importance of monitoring, providing guidance to industries, dispute resolution and building consensus among all involved parties. By not mentioning administrative or criminal sanctioning, it underlined the importance of relatively non-confrontational regulatory strategies.

Within the agency, the Environmental Pollution Management unit and the Compliance, Partnerships and Capacity unit were responsible for executing the agency's policy. The units were housed together, in one large room on the fourth floor of the agency's office building. However, the unit officials had different ideas on regulatory strategies. The Environmental Pollution Management unit aimed to maintain good relationships with industries, supporting and kindly persuading them to improve their environmental management. The unit head explained, 'Industries need help to become compliant. We cannot just give sanctions to them. They are important for the economy, and people need their jobs at the industries'. By contrast, the Compliance subunit had a reputation for taking serious enforcement measures against violators. Between 2009 and 2011, this subunit had been responsible for imposing administrative sanctions in 22 cases. In another 6 cases, it had initiated criminal prosecution, and in 9 cases, its mediations between the violating industry and affected citizens had resulted in agreements.

Below I will elaborate on the regulatory efforts of these units and subunits. The next subsection will discuss the various modes of monitoring through which the agency gathered information about the environmental behaviour of industries and was able to detect violations. Section 2.3 will explain how the agency followed up on detected violations and will demonstrate that the monitoring mode was often a determining factor in how the agency dealt with a violation, similar to the East Java agency's practices.

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14 This unit and the subunits were called *Bidang Penggelolaan Lingkungan, Sub-bidang Pemantauan* and *Sub-bidang Pembinaan Pengendalian*, respectively.

15 The unit and subunit were named Bidang *penaatan hukum, kemitraan dan kapasitas* and *Sub-bidang Penaatan Hukum*, respectively.

16 While one of the officials had a law degree, the other four subunit officials had a background in environmental technique.

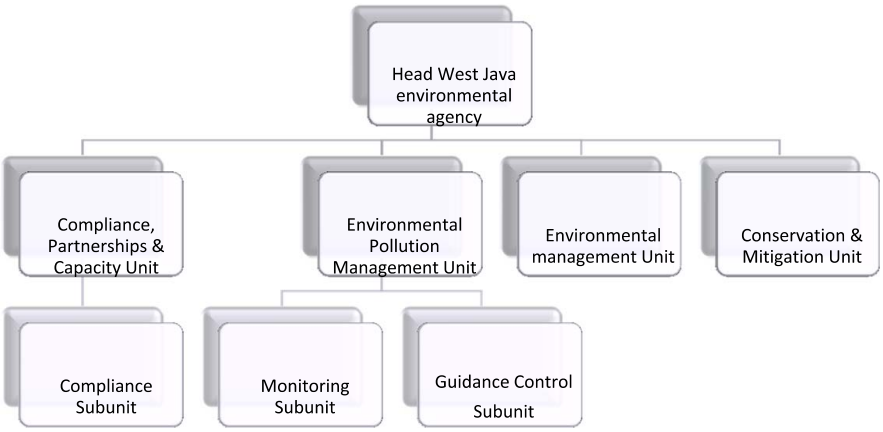

Figure 1. West Java environmental agency's organisational chart (simplified, focussing on subunits involved in regulation of industrial pollution)

2.2 Monitoring in West Java

This subsection provides more insight into the various modes of monitoring that the West Java agency employed to detect violations, and the roles of its different (sub-)units. It discusses the agency's regular monitoring efforts, as well as its inspections that took place within the context of PROPER and inspections that followed a complaint.

2.2.1 Monitoring the general river quality, regular monitoring, and self-monitoring in West Java

The West Java agency invested considerable time and money into monitoring the general water quality of seven large rivers in the Province.[17] Five times during the dry season, a team of officials from the Monitoring subunit, together with laboratory experts, would go on an expedition to take water samples at various locations along the rivers. The agency published certain results on its website. However, the Province could not do much when the results showed that the water quality was below government standards, an official leading the expedition explained. Since decentralisation, the Districts primarily had authority to regulate the sources of pollution within their territory, not the Province. However, Districts were unlikely to take action because of their economic interests in these industries. When the Province found that the water

17 Four rivers were monitored at the behest of the Ministry of Environment: the Cidanduy, Cisadane, Ciliwung and Citarum. The other three rivers – the Cilongksi, Cilamaya and Cimanuk – were monitored on the basis of West Java Provincial Regulation 3/2004.

quality was poor, the only thing it could do was organise a coordination meeting with the involved governments. But even this it had never done. Thus, the efforts to monitor the general water quality had not led to any enforcement measures.

Similar to the East Java agency, the West Java agency did not have an inventory of the industries that fell under the Province's monitoring and enforcement authority. However, unlike the East Java agency, the West Java agency usually did not inspect industries on a regular basis, but only when there was an indication that a violation was taking place.[18]

Nevertheless, the Monitoring subunit assessed the industries' self-monitoring reports. That subunit's 2010 analytical summary stated that 164 industries had sent a total of 743 self-monitoring reports to the Provincial agency. Some industries reported every month, others only once per year, but on average, the industries reported 4.5 times during 2010. In 231 reports (31 per cent), the industries reported they had not complied with the standards. The summary only mentioned which standards the industries had not met (e.g., the level of chemical or biological oxygen demand), but did not mention the extent to which industries had violated the standards.

It appeared that the agency used these reports in a rather haphazard manner, to put it mildly. The summary announced that the agency would further investigate five industries, four of which had not mentioned any violation in their the self-monitoring reports. Ten industries had reported that they had severely violated the legal standards, and one industry admitted in the eleven reports it sent during 2010 that it had not once been fully compliant. However, the subunit's summary did not announce plans for further inspection or enforcement measures towards these industries.

Notably, the summary only reported on industries in 17 of the Province's 27 Districts. The summary did not explain why it did not include industries from other Districts. The official who processed the self-monitoring reports explained that many industries sent their reports to the District, the Province and the Ministry of Environment, 'just to be sure'. She was not aware of any efforts to coordinate the assessments of the reports between the various levels. It was possible that officials at other institutions were processing the same reports as the Provincial environmental agency.

Despite the summary implying that the environmental agency had organised the assessments quite well, in reality, it had not. The self-monitoring reports lay stacked up against the walls of a small office room, waiting for officials to process them. One part-time official would pick a report from the piles and manually process the data into a spreadsheet. Due to time constraints, the official could not process all of the reports into digital files. She claimed to prioritise reports from industries that were 'on the agency's radar', e.g.,

18 The only exceptions were inspections carried out within PROPER and in which an indication of a violation was not required.

because citizens had filed complaints against the company or because PROPER inspections had discovered non-compliant behaviour.

In conclusion, the Province had substantial information about the local industrial performance through its general river quality monitoring and its assessment of the self-monitoring reports. However, it appeared that it did not fully use this data in considering enforcement measures.

2.2.2 *PROPER inspections in West Java*

The inspections that the Provincial agency carried out on behalf of the Ministry of Environment for its PROPER programme provided another source of information on industrial compliance.[19] The agency invested considerable time and effort in carrying out these inspections. Before 2011, the Ministry conducted the PROPER inspections, and the Province usually only accompanied the Ministry. However, in recent years, the Province would carry out part of the PROPER inspections independently. In 2011, the Guidance subunit of the Provincial agency planned to inspect 285 companies for PROPER. Teams of two or three officials usually carried out these inspections. From January until July, the head of the subunit herself spent three days a week accompanying PROPER inspections.

During an inspection day, the officials would take water samples and inspect the industry's terrain. However, several factors appeared to cloud the officials' objective assessment. First, during the inspection day, the officials closely cooperated with company representatives to jointly draft the inspection report, which they largely based on information the company provided. The officials would then send the report to the Ministry, which would use it to rate the company. Second, before the inspection, the officials declared that they did not expect to find a company that was non-compliant. The head of the Guidance subunit explained that the Ministry had delegated the inspection task to the Province only for companies that it had previously rated as compliant (i.e., 'green' or 'blue').

The inspection of a factory in July 2011 confirmed that the objectivity of the officials was questionable. Between 2009 and 2010, the Ministry had rated the factory as 'blue'. That was why the Provincial officials did not expect any non-compliant behaviour in 2011. However, in fact the factory had a history of non-compliant behaviour. In the PROPER rating of 2008-2009, the factory had been rated 'black', and in eleven of the twelve monthly self-monitoring reports the factory had sent in 2010-2011, the factory itself had declared that it had violated the legal standards for the level of Total Suspended Solids (TSS) in the water. In September 2010, a local newspaper reported on a stench the factory was causing. Citizens submitted complaints on this topic to the Pro-

19 The background and characteristics of PROPER have been discussed previously in chapter 3.

vincial environmental agency. Together with District officials and the police, the Provincial environmental agency had inspected the factory. In December 2010, the Province imposed an administrative sanction in the form of a warning. In April 2011, the Provincial agency took samples again but was still awaiting the laboratory results. Despite these alarming signs, the head of the Guidance subunit did not expect to detect violations during this inspection day. She explained that the Compliance subunit had imposed the sanction after it had received a complaint. However, the issue had eventually been resolved because the neighbours had settled their dispute directly with the factory. Therefore, it would not be necessary to note the previously imposed sanction in the PROPER report, the official said.

During the inspection day, the officials cooperated intensively with the factory's staff in one of the factory's offices in order to finish the report. At the end of the day, they gratefully accepted a box with some of the factory products. Based on the report that was drafted that day, the Ministry rated the factory 'green' that year.[20]

This case raises serious doubts about whether officials critically carried out the PROPER inspections, and suggests that the officials were vulnerable to corporate capture. It also illustrates that the different subunit monitoring initiatives produced information and trajectories that were occasionally contradictory and poorly integrated.

2.2.3 *Complaint verification in West Java*

Complaints became increasingly important in the West Java agency's process of detecting violations. In 2008, the agency received 30 complaints. In 2010, the number doubled to 60 complaints. In 2011, the number further increased to 125 complaints. During the first four months of 2012, the agency had already received 36 complaints. One official expected that complaints would peak around the month of Ramadan later that year because complainants would hope that companies would give more compensation during that time of year for alleged environmental impacts. Another official explained that the Province had become much more responsive to complaints since the enactment of the Ministerial Regulation of 2010 on complaint handling.[21] This change occurred mainly because the agency could be sued in court if it did not handle a complaint within the set time frame, she said. This accountability mechanism apparently had a stimulating effect on the agency's regulatory efforts.

Complaints could be filed in various manners, in line with the Ministerial Regulation and the West Java agency's more detailed complaint-handling policy. The Compliance subunit, responsible for complaint handling within

20 Keputusan Mentreri Lingkungan Hidup Republik Indonesia 273/2012 tentang PROPER (Lapiran II) (http://www.menlh.go.id/DATA/SKPERINGKATPROPER2012.PDF).

21 Minister of Environment Regulation 9/2010.

the agency, did indeed receive complaints through various channels. Sometimes complainants sent a letter, and they occasionally demonstrated outside of the environmental agency or Governor's office. Subunit officials also considered newspaper reports on pollution and environmental damage as formal complaints. Nevertheless, the most common way to file complaints involved sending a text message to the private cell phone of one of the subunit's officials. These telephone numbers were not public. Thus, one needed personal connections to file a complaint in this manner, which was likely to raise the official's immediate attention. Nevertheless, all complaints were eventually registered manually in a large notebook.

According to the agency's complaint handling policy, the Province's response to a complaint depended on how an official classified a complaint. For example, when a case occurred in only one District, the environmental damage was relatively limited, and the damage did not affect the community, the Province would merely supervise and (if needed) give technical support to the District in handling the complaint. The Province would have a larger role in cases where the Governor had issued the license to a company, when the environmental impact crossed District borders, or when the community was exposed to damage or pollution, or there was serious damage. The Province prioritised these cases and would collect information about them within seven days, in collaboration with the District.

The head of the Compliance subunit confirmed that, in practice, the Province would verify a complaint immediately when there were indications that the case was serious. Organised demonstrations were the primary reason for considering a case as serious. However, in contrast to the policy, the Province would usually not notify the District about its verification plans, because the latter often had good relations with industries, the subunit's head explained. Consequently, there was a risk that the District would warn the industry that a Provincial environmental agency team was on its way to verify the complaint, and violations would be covered up.

2.3 Following up on detected violations in West Java

Where the previous subsection described how institutions detected violations in West Java, this subsection explains how the agency followed up on detected violations. The explanation is based on fieldwork observations made at the West Java agency and on the analysis of regulatory trajectories of 79 cases in which industries had been found non-compliant at some point between 2008 and July 2011.

The subsection begins by observing that, in many cases, besides the Province, Districts and the Ministry of Environment were also involved in following up on violations. However, their involvement's legal basis was often unclear, and the enforcement authority sometimes shifted between them. Additionally,

the institutions often lacked a clear procedure for who was ultimately responsible for consistent industrial monitoring and halting violations. The subsection then concentrates on the West Java environmental agency's efforts to follow up on detected violations. It concludes that the two agency units that were responsible for following up on violations had different, sometimes even conflicting, strategies. Finally, this subsection focuses on the Compliance subunit, and its efforts to deal with violations that the agency had detected through complaint verification. It explains how the subunit occasionally imposed administrative sanctions but preferred to mediate between polluting industries and affected citizens and to initiate criminal prosecution. The agency's formal policy on this issue differed from the practice.

2.3.1 *Unclear division of enforcement authority between District, Province and Ministry*

Chapter 2 explained that since decentralisation, the Districts are, in principle, authorised to regulate industries located within their territory. However, there are exceptions, primarily when industries have a transboundary impact and when the Ministry takes over authority through second-line enforcement.[22] Additionally, the implementing regulation on complaint handling created another possibility for shifting authority. The regulation concerns the authorised government not handling complaints promptly. In such cases, a higher administrative level can take over. Thus, the Province can take over from the District, and the Ministry from the Province.[23]

Nevertheless, detailed authority-shifting procedures for the aforementioned situations are lacking. As a result, in practice, it is often unclear which government or institution is ultimately responsible for handling a particular case. In cases where violations are serious, transboundary, or communicated through complaints, many institutions from various administrative levels are usually involved in the monitoring and enforcement efforts. It often appears that authority shifts never took place, but that institutions handled the case jointly, with potentially negative effects.

Chapter 5 discusses a transboundary pollution case in West Java involving frequent citizen complaints and severe pollution. The case exemplifies how the unclear division of institutional authority contributed to the continuation of pollution, due to inadequate institutional enforcement.

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22 As explained in chapter 3, the EMA 2009's reference to second-line enforcement refers to the Minister of Environment's ability to take over enforcement authority from the regional government in cases where violations are severe, and the authorised District or Province does not adequately execute its regulating tasks.

23 As explained in chapter 3, the EMA 2009 appears not to offer a legal basis for such a shift of authority.

This subsection focuses more generally on situations where the division of enforcement authority is blurred. First, it focuses on PROPER, the Ministerial monitoring programme that chapter 3 and the previous subsection discussed. It explains why there are uncertainties regarding the division of authority between the Minister and regional governments, and what the consequences were in practice. Second, this subsection looks at the unclear division of authority, particularly between the District and the Province, regarding transboundary cases and complaint handling.

PROPER and enforcement authority of the Minister

Of the 79 cases where institutions followed up on violating industries in West Java between 2008 and July 2011, the Ministry of Environment imposed administrative sanctions ten times. Two cases involved the textile industries in Rancaekek, which the next chapter elaborates. In the other eight cases, in 2008, the Ministry imposed sanctions after it had detected violations through its PROPER programme.[24]

The published 2007-2008 PROPER ratings reveal that four of the sanctioned industries were rated 'black', indicating that they were committing severe violations.[25] The four others received a red rating, implying they were somewhat non-compliant. Notably, the Ministry did not sanction ten other 'red' industries. The documentation does not explain why the Ministry sanctioned certain industries and not others. Nevertheless, the Ministry's imposition of administrative sanctions on 8 of the 18 violators in West Java that were discovered through PROPER in 2007-2008 was a high enforcement rate for Indonesian standards.

The 2008-2009 PROPER ratings showed that the Ministry only repeatedly rated one of the sanctioned companies as 'black'. Apparently, in this case, the sanction had not affected sufficient, if any, change. By contrast, the Ministry rated three of the previously 'red' companies as 'blue', finding them compliant. The other four sanctioned industries, however, disappeared from the PROPER rating list altogether. The Ministry offered no public explanation for their absence or regarding whether these companies remained non-compliant, but an official from the Provincial agency explained that PROPER excludes severely non-compliant industries.

The combined 2008-2012 PROPER ratings showed that the Ministry gave the same annual rating to two of the eight industries it sanctioned in 2008.

24 The Ministry imposed these ten sanctions in 2008. Based on the retrieved documentation, it appears that in later years, the Ministry no longer imposed sanctions on industries in West Java.

25 See Appendix 1 for a table of the sequential PROPER ratings of these eight sanctioned industries. The table is based on the Ministry of Environment's publications from various years. These are accessible via http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI (last assessed on 10 July 2018).

Most of these industries' performances deteriorated over the years. In 2008, they were rated 'red', but in 2012, they received a 'black' rating. This downgrade demonstrates that monitoring consistently and publishing results do not guarantee that companies will perform better.

The Ministry found two companies to be non-compliant for multiple, consecutive years. This finding implies that although the Ministry was aware that companies were non-compliant, it did not take adequate measures to stop their violations. This may have been because there appeared to be no legal basis for the Minister to impose administrative sanctions. After all, since decentralisation, the Districts primarily had regulatory authority. The EMA 2009 only provided a legal basis for a shift in monitoring and enforcement authority in transboundary and second-line enforcement cases. The Ministry did not specify if these conditions were applicable in cases where it imposed sanctions.

Notably, after 2008, the Ministry never again imposed administrative sanctions upon industries in West Java, either through PROPER or otherwise. In 2012, officials from the West Java environmental agency explained that the Districts were authorised to impose administrative sanctions when the Ministry detected violations through PROPER. At the same time, the officials acknowledged that Districts had never imposed sanctions after a negative PROPER rating. They explained that the Ministry had recently changed its strategy for following up on detected violations through PROPER. Instead of imposing administrative sanctions, the Ministry now aimed to criminally prosecute companies, particularly those that had been rated 'black' for three consecutive years. The officials applauded this development because they expected the deterrent effect from criminal sanctioning to translate into more compliant behaviour. On the other hand, it implied that the Minister would allow severe violations to continue before they would take action through criminal prosecution. Notably, a criminal sanction would not be able to halt the violation or recover the damages directly.

In sum, PROPER was an ad hoc regulatory programme because it inspected only a small part of Indonesia's industries. The programme existed parallel to the standard regulatory mechanism, where the licensing government was primarily responsible for monitoring and taking enforcement measures against industries. On the one hand, PROPER offered a fairly consistent monitoring method, with real risks that violating industries would face sanctions. In that sense, it resembled command-and-control regulation, even though the Ministry proudly presented it as the opposite (see chapter 3). However, particularly after 2008, the Ministry began to more inconsistently follow-up on detected violations, partially because it was unclear which government institution was responsible for this. Several Provincial- and District-level environmental agency officials considered the Ministry to have the primary responsibility for regulating industries that PROPER monitored. At the same time, the Ministry no longer imposed administrative sanctions. Thus, in 2012, it remained unclear which

institution was responsible for taking measures against violators that PROPER identified and the risk of being confronted with sanctions was small.

Juggling enforcement authority between the District and the Province

PROPER led to situations where it was unclear whether the Ministry or the District was responsible for regulating industries. However, the division of enforcement authority between the District and the Province was often also unclear.

As previously mentioned, the EMA 2009 provided a legal basis for shifting authority from the District to the Province in transboundary cases. The Ministerial Regulation on complaint handling established the possibility for shifting authority when the District did not respond to a filed complaint with sufficient speed. However, in practice, those who shifted enforcement authority from the District to the Province did not usually make the legal basis explicit. Shifts occurred rather randomly and inconsistently, as clear procedures for doing so were lacking.

The analysis of January 2008 through July 2011 case trajectories showed that the Province had followed up on some, though not all, of the violations it had detected through complaint verification. The available documents did not explain why the Province failed to follow up on certain violations.

My fieldwork observations during an inspection visit with Provincial environmental officials note the lack of clear procedures on the division of authority. In July 2011, three Compliance subunit officials inspected four industries. Before the inspections, the subunit officials prepared recommendation letters addressed to the District Head. These letters advised him to impose administrative sanctions against the companies. However, during the inspections, it became clear that although the industries had made improvements compared to the previous inspection, they were not yet compliant. In the afternoon, the officials visited the District Head. A Provincial official told him, rather positively, about the performances of the inspected industries, and advised him not to take enforcement measures. At the same time, they handed him the letters that advised the District Head to do the contrary. Later on, the Provincial officials explained there was no need to document that the oral recommendation they gave to the District Head differed from the one in the letter that they wrote before the inspections. The Province had, de facto, detected violations, but it did not report that it had recommended the District Head not to take measures. It thus became unclear which government was responsible for the fact that no measures were taken. The lack of clear authority-dividing procedures between the District and the Province meant that, de facto, the officials had considerable discretion as it was unclear what the different governments were expected to do.

The case trajectories analysis also showed that the Province had imposed administrative sanctions in many cases. However, it had merely given warn-

ings and imposed 'administrative coercion'. Notably, 'administrative coercion' meant that the government had ordered the violator to act a certain way.[26] The Province had never revoked a license.

The Compliance subunit head complained that in transboundary cases the District Head would, in practice, be able to decide if and what kind of enforcement measures would be taken against a violator. Another official stated, more generally, that the Province gathering proof of violating behaviour had never resulted in the District Head revoking the violator's license. He claimed that if the Provincial environmental agency had the authority to revoke licences, it would be able to operate more effectively.

Finally, the uncertainty regarding the division of authority also led to legal uncertainty for licensees. For example, during an inspection by the Provincial environmental agency's Compliance subunit, the director of the factory responded with agitation. A week earlier the police had also paid an inspection visit, and the director asked whether the environmental agency officials also wanted money. The officials reacted in a surprised manner, as they did not know about the police visit, but they also seemed unwilling to contact the police to ask about their inspection. This case illustrates that even relatively powerful industries had difficulty defending themselves against the corrupt behaviour of some officials. This difficulty was due, at least in part, to the fact that it was not clear which institutions were responsible for which activities. Some officials used the opportunity to extort money from licensees.

2.3.2 *Provincial agency's units and their conflicting regulatory strategies*

This section shows that units of the West Java environmental agency also responded differently to non-compliant behaviour. As mentioned previously, the subunits that fell under the Environmental Pollution Management unit tried to persuade the violator to improve its behaviour. In contrast, the Compliance subunit, which received the vast majority of citizen complaints, would swiftly seek an opportunity to confront the violator with more severe consequences (e.g., imposing an administrative sanction, initiating criminal prosecution, or compensating the damages that citizens had suffered).

In order to explain the different manners in which the units of the West Java agency dealt with detected violations, this subsection first describes a case that concerned the illegal staging of toxic waste. This case demonstrates how the units' violation response strategies conflicted. The case concerns a company that kept a pile of toxic fly ash unprotected in the open air. While the Environmental Pollution Management unit sought to solve the issue without sanctions, the Compliance subunit tried to initiate a criminal prosecution for the same act.

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26 See chapter 3 for a more elaborate discussion of 'administrative coercion' in Indonesia's environmental laws and regulations.

A complaint had informed the Compliance subunit that a company was keeping a pile of toxic fly ash unprotected in the open air. Because the case concerned a matter related to toxic material, the subunit's officials had hoped that it would be a suitable case for direct criminal prosecution, without having to first impose administrative sanctions.[27] A photo of the pile of fly ash could serve as proof. However, when the officials of the subunit arrived at the scene, they found the pile had been removed, although they could still detect its traces. The subunit's head was furious when she heard that Environmental Pollution Management unit officials had travelled to the same location a day earlier, instructing the company to remove the toxic pile. The District had informed that unit about the pile of toxic waste, asking for the Province's support in the matter. Officials from the unit immediately travelled to the industry and informed it that it should clean up the pile, which it did.

When the officials from the Compliance subunit inspected the industry, they pointed out to the director which improvements the factory still had to implement. While the director remained cooperative, at one point, he commented that he did not understand. He was usually in contact with an official from the Guidance subunit, which was also from the Provincial environmental agency. This official never pointed out these issues. The official from the Compliance subunit confirmed that the two subunits had different perspectives.

While the Compliance subunit had planned to approach the toxic waste pile case through criminal prosecution, the head of the Environmental Pollution Management unit explained why his unit took a different approach. He commented that the unit should cooperate with industries to find a solution rather than sanctioning them immediately. According to him, companies were often simply unaware of the compliance norms. It was the government's task to inform and assist them through guidance rather than sanctions. He added that the government had to consider the important economic function of industries, not least because they employed the local population.

This case demonstrated the lack of coordination between and conflicting strategies of the different (sub-)units within the Provincial agency, which led to the inefficient use of the agencies' limited regulatory resources and uncertainty for the regulated industry. It also showed that the choice for a certain regulatory approach (i.e., sanctioning or giving guidance) was determined more by which (sub-)unit would handle the case than by the characteristics of a violation itself.

In this case, the Compliance subunit aimed to criminally prosecute the violator, but in other cases, it would seek to impose administrative sanctions or try to mediate between the complainants and the company. The rest of this section focuses on the Compliance subunit's motivation to opt for administrative or criminal law enforcement, or for mediation.

27 See chapter 3 for an explanation of the 'ultimum remedium' principle and the interpretation of EMA 2009 on this issue.

2.3.3 Following up on verified complaints; the policy

As previously mentioned, the Compliance subunit received most of its cases through complaints. The agency's complaint-handling policy prescribed that within seven days after verification confirmed environmental pollution or damage, the Provincial and District teams from the environmental agencies should recommend further actions to an authorised institution, meaning the District Head or the Governor. This recommendation could constitute imposing an administrative sanction, initiating criminal enforcement, bringing the case before a private court, or trying to resolve the case through mediation. In cases of mediation, the Provincial environmental agency would act as mediator.

There are several problems with this policy. First, the policy noted that administrative sanctions are only suitable when the violator is willing to take measures. Thus, the government did not consider administrative law enforcement as an instrument through which to force the violator to become compliant, regardless of the violator's willingness to cooperate. Furthermore, that the environmental agency was to act as a mediator in pollution cases suggested that it could substitute its regulatory position for a neutral intermediary role in a pollution dispute between private parties. In this way, the agency released itself from its responsibility for taking adequate measures to protect the environmental public interest.

Moreover, the policy suggested that different regulatory approaches could not be pursued simultaneously. The agency could not recommend imposing an administrative sanction and simultaneously suggest a criminal investigation or assist in the recovery of damages that citizens had suffered. Therefore, the policy effectively forced the agency to choose whether it would prioritise the aims of administrative, criminal or private law approaches, as chapter 2 discussed, even though all of the aims could be relevant in a particular pollution case. Lastly, the policy suggested that in severe cases, the Province and District should carry out inspections together. However, the policy was unclear about which government would be authorised to decide how to follow-up on a case (e.g., who is authorised to impose an administrative sanction).

Despite the rather detailed trajectories that the Ministerial Regulation and the agency's policy on complaint handling described, the practice of the Compliance subunit often differed.

	Compliance subunit's enforcement statistics (January 2008-July 2011)	*Researcher's case trajectory reconstruction* (June 2007-July 2011)
Administrative sanction	39	38
Mediation leading to agreement	25	18
Initiating criminal prosecution	14	6[28]
Total	78	62

Figure 2. Table of follow-up action on detected violations by West Java environmental agency's Compliance subunit

2.3.4 Enforcement by the Compliance subunit, in numbers

The Compliance subunit's overview of enforcement statistics showed that between January 2008 and July 2011, the subunit had handled a relatively high number of complaints.[29] The subunit had received 205 complaints in total, 125 of which had been filed between January 2011 and July 2011. Section 2.3.5 explains the swift increase in the number of complaints in 2011.

Of the complaints that the Compliance subunit received between January 2008 and July 2011, it referred 60 cases to either the District or the Ministry of Environment. The subunit imposed an administrative sanction in 39 cases, initiated criminal prosecution in 14 cases, and mediated between the violator and the complainant(s) in 25 cases.

The enforcement statistics did not account for the remaining 67 complaints. It is possible that multiple complaints concerned the same industry. Furthermore, the statistics imply that the subunit did not use multiple regulatory strategies in one particular case, meaning for example it never imposed administrative sanctions during or before criminal prosecution or mediation. However, fieldwork showed that in reality multiple regulatory strategies were used, at least in some cases. Chapter 5 describes such a case in depth. By contrast, the subunit's rather simple overview of its enforcement efforts did not reflect such complex regulatory trajectories. This potential discrepancy raises questions about whether the subunit's overview accurately reflected its actual efforts to improve non-compliant behaviour.

28 In four of these six cases, the criminal sanction had been imposed alongside an administrative sanction or the establishment of an agreement.

29 By comparison, as section 1.2.3 mentioned, the East Java environmental agency handled approximately 8 complaints per year until 2010. However, this number quickly increased to 33 complaints in the first ten months of 2012, and to 74 in 2015.

This subsection aims to provide more insight into the daily practice behind the unit's enforcement statistics. How often did the Compliance subunit impose an administrative sanction and what did this entail? Why did the subunit opt for imposing an administrative sanction in some cases, while initiating criminal prosecution or mediation in others?

To answer these questions, I reconstructed the regulatory trajectories of more than 70 cases, based on more elaborate case summaries that the agency had produced. A comparison between the reconstruction of regulatory trajectories and the subunit's enforcement statistics, which encompass nearly the same period, shows a numerical discrepancy between the two sources. The analysis of the case trajectories concluded that the Province had imposed an administrative sanction 38 times.[30] On 18 occasions, the Province mediated between affected citizens and industries, which resulted in an agreement, which the Compliance unit called an 'Alternative Dispute Resolution sanction'.[31]

The analysis of trajectories showed that the subunit had only brought criminal charges against six industries. Four of these industries had also been involved in mediation or had faced an administrative sanction.

Notably, according to the subunit, all of the 78 cases it had followed-up on were the result of handling complaints. Thereby, it seemed that complaint handling was indeed crucial in detecting and taking measures against violators. However, the case trajectories reconstruction showed that only 27 of 62 cases stemmed from complaints. It also showed that 16 complaints had never been followed up by any verification or other regulatory action. This discrepancy indicated that the Compliance subunit overemphasised the importance of complaint handling in regulation.

The comparison between the enforcement statistics and the case trajectory analysis also reveals that the subunit's reported enforcement rates were somewhat higher than those found in the case trajectories (even though the latter covered a half year longer period). This discrepancy could indicate that the subunit exaggerated its enforcement rates. It is also possible that the documentation on which the case trajectory analysis was based was incomplete. This unresolved query brings us to a second finding, namely that the Provincial agency's archives did not provide a database sufficient for achieving a good overview of the individual case trajectories.

Regardless, the above comparison does not reveal why the agency occasionally opted for a particular follow-up method. The next section seeks to provide more insight into this matter.

30 On one occasion, the Province imposed a sanction on the same industry twice.

31 Three of these agreements had been made with one industry, namely Kahatex (see also chapter 5).

2.3.5 *Imposing administrative sanctions*

According to the case trajectories analysis, the Province imposed 38 administrative sanctions, 2 of which they imposed on the same industry successively. These administrative sanctions all involved warnings or orders to the violator to take measures. Notably, the Province never took concrete measures itself to halt the violations. As chapter 3 explained, this is unsurprising considering the legal framework for administrative sanctions in the EMA 2009. The case trajectories in West Java showed that the Provincial agency interpreted the concept as giving orders. As a consequence, in cases where the violator did not (fully) carry out the orders, the legal framework for administrative sanctioning left no other possibility for escalating the case than revoking or suspending the license.

In none of the cases where the Province imposed an administrative sanction was the legal basis for its enforcement authority clear. However, according to several officials, the Province differentiated between administrative sanctions it was and was not authorised to impose. These officials commented that the Province could not take concrete measures to halt a violation or revoke or suspend licenses. They reasoned that because the Province had not issued the violator's licenses, it did not have the power to impose severe sanctions. Consequently, the Province could only impose warnings and give orders, and was dependent on the violator for implementation. Notably, none of the Provincial officials remembered a District Head ever revoking or suspending a licence, even though they said the Province had occasionally recommended that the District Head do so.

The EMA 2009 does not provide a legal basis for the officials' reasoning that the Province had the authority to impose light administrative sanctions, but not stricter administrative sanctions. Nevertheless, the practice exemplified how Provincial officials dealt with the unclear division of authority, and particularly with shifts in authority between the District, Provincial and Central government. It showed how the Province occasionally and inconsistently played a role in law enforcement because it seemingly wanted to avoid tensions with other institutions involved in a particular case, which were unwilling to take more severe measures.

All and all, the Provincial environmental agency efforts were barely dissuasive since it did not impose administrative sanctions with concrete consequences for violators. At the same time, the Province's enforcement involvement made it less clear which institution was eventually responsible for violations continuing while institutions were aware of these violations.

In the majority of cases where it gave a warning or order, the Province never inspected whether the industry had indeed implemented the assigned measures. However, in 12 cases, the Province did carry out inspections. In 6 of these, the case trajectory documentation does not reveal the inspection findings. In the other 6 cases, inspections made clear that the violators had

partially implemented the assigned measures. In 4 cases, inspections had been carried out multiple times, showing that with every inspection compliance had improved. In fact, of all the cases that the Province had dealt with, only two industries became fully compliant after Provincial involvement. One industry was inspected three times within one year after the sanction was imposed, and was then reported as having implemented all of the orders. The other industry that became fully compliant was reported, after several inspections, as having executed all of the orders in the ADR agreement, which included its obligations under administrative law.

2.3.6 Acting as a mediator in disputes between violators and affected citizens

The Compliance subunit reported that between January 2008 and July 2011, an 'Alternative Dispute Resolution sanction' or 'ADR sanction' had been imposed in 25 cases. However, the case trajectories analysis found that industries and complainants had reached an agreement in 18 cases after the Provincial agency had acted as a mediator.[32] Furthermore, it found that 6 of these industries previously faced an administrative sanction, and on 4 of these occasions, the subunit had imposed an administrative sanction after the Province had concluded that the industry had insufficiently implemented the agreement.

These findings, particularly that the Compliance subunit referred to the agreements as 'ADR sanctions', all raise questions about how the agreements related to administrative sanctioning. As chapter 2 explained, agreements between two private parties concern, in principle, compensation for damages that one party inflicted upon another. By contrast, administrative sanctioning is particularly suitable for swiftly halting violations. However, the West Java environmental agency considered the ADR agreements as substitutes to administrative sanctions. The agreements between violators and citizens affected by environmental damage even came to resemble administrative sanctions in several ways.

Almost all agreements included measures that would promote the public interest in a cleaner environment. In fact, in nearly all cases the complaints that had initiated the mediations concerned violations of administrative norms. Therefore, the complaints could be considered requests to the regulator (i.e., the Provincial environmental agency) to enforce the law and take measures to halt the violation and recover damages, on behalf of the public. However, in none of these cases did the Provincial agency respond to the complaints by verifying whether the complainants' allegations were correct, and it did not take administrative law measures to halt any detected violation. Instead, the Province exchanged its responsibility as a regulator (i.e., promoting the

32 In the case of the Kahatex textile industry, which will be discussed extensively in chapter 6, an ADR agreement was made three times.

public interest in a clean environment by taking measures that would halt the violation) for a role as mediator in a dispute between private parties. Various agreements nevertheless included promises from violators that they would become compliant with the administrative law norms. This inclusion seemed to confirm the officials' idea that agreements between private parties could replace administrative sanctioning. Furthermore, some agreements stated that if the violator would not implement the agreed-upon points within the indicated period, the Province could impose heavier sanctions. It is unclear to what kind of sanctions this referred. However, these agreements increasingly resembled administrative sanctions through their referral to sanctions and with Provincial environmental agency officials co-signing the agreement, even as mediators.

Seven of the twelve agreements concerned issues that promoted the public interest in a clean environment as well as issues that promoted the private interests of the complainants. For example, the violator promised to give jobs, corporate social responsibility funding or other economic benefits to the complainants. The Rancaekek case, which the next chapter discusses, demonstrates that the consequences of these practices can have severe negative effects on pollution-affected communities, as not everyone who is affected by pollution can share in the compensation that is negotiated in the agreements.

In six of the twelve cases that reached an agreement, the agency never carried out another inspection to see how, if at all, the industry had implemented the agreement. In six other cases, the Province did oversee the implementation. In five of them, the inspections found that the industry had partially implemented the agreement. In one case, the Provincial agency even carried out four inspections, which led the industry to implement all of the agreed-upon points eventually. This implementation suggested that consistent follow-up increased the chances of positive industrial performance. However, the Provincial agency rarely conducted such consistent inspections.

Although agreements did occasionally contribute to the promotion of a cleaner environment, the practice of negotiating compliance also had considerable downsides. The fact that the agreements substituted for administrative sanctions caused problems. The following case demonstrates how officials believed that they were dependent on the agreement to legitimise their inspections.

In July 2011, Compliance subunit officials inspected a textile factory. One year earlier, they had acted as a mediator in the conflict between the factory and its neighbours, who had complained about the factory's wastewater quality. The mediation resulted in an agreement that implied the factory would improve the road as well as take several environmental measures (e.g., improving their wastewater treatment system). With that one-year-old agreement in hand, officials planned to check whether the factory had met the agreement. However, a factory representative said that the factory had reached a new agreement with the neighbours, one that did not include environmental

measures. One of the officials, who thought they had lost the basis for inspection, responded in an agitated manner, saying that the neighbours and factory were not allowed to reach a new agreement without notifying the Provincial agency. After all, the environmental agency had also signed the agreement, she reasoned. However, the agency had done so in the role of dispute settler, who – according to Article 86 of the EMA 2009 – should be impartial and not have any interest in the agreement. In principle, private parties may decide to make a new agreement without informing the former mediator about it. However, this private law agreement had administrative law qualities as well, and the Provincial agency had a stake in the proper execution of this agreement, for it concerned the protection of general environmental interests. These qualities became problematic when the private parties decided upon a different agreement that did not cover the protection of general environmental interests, for which the Provincial agency was responsible.

Compliance subunit officials confirmed that they considered the agreements as potential replacements for administrative sanctions. They preferred to first try to resolve cases through facilitating mediation, rather than imposing a sanction. It allowed them to circumvent the bureaucratic obstacles for dealing with violations. To explain the legal basis of this practice, one official referred to article 84 of the EMA 2009, which states that those in dispute should try to reach an 'out of court settlement' before bringing a case to court. He interpreted this article to mean that the Province should encourage an 'out of court settlement' before imposing an administrative sanction. He ignored that this article refers to conflicts between private parties, and that it differs from the administrative law framework. In the latter framework, the government is responsible for promoting public interests.

2.3.7 Criminal prosecution

Responding to violations through mediation was not the only option for how Provincial environmental agency officials could avoid taking administrative law enforcement measures. The Compliance subunit reported that between January 2008 and July 2012, it had initiated 14 criminal prosecutions against violators.[33]

Despite the limited number of criminal cases, the subunit head said that they spent approximately half of the subunit's budget on these cases. Criminal case preparations were costly, primarily because the subunit had to pay for the daily fees of public prosecutors, police and legal experts to come to the environmental office and discuss the possibilities for criminal prosecution.

33 Nevertheless, the case trajectories analysis found they only initiated criminal law enforcement against 6 industries. Four of these industries had also been confronted with an administrative sanction or had come to an agreement after mediation facilitated by the Provincial environmental agency.

Because of these costs, the agency could only initiate criminal prosecutions in two cases per year. However, until 2012, the subunit had brought no such case to court. Nonetheless, Compliance subunit officials preferred this sanction because they believed that its deterrent effect was much higher than that of administrative sanctioning or mediated agreements.

The six criminal cases all concerned violations related to hazardous and toxic waste. An official explained that this was because EMA 2009 outlines criminal law enforcement as, in principle, an 'ultimum remedium' that the relevant institution should only use after it has exhausted all other administrative law enforcement possibilities. According to the notes, this is particularly the case when violations are related to quality standards, wastewater, emissions, and nuisance. Since hazardous and toxic wastes are not listed here, the official considered the 'ultimum remedium' principle to not apply to such violations. He reasoned that administrative sanctions could not be used for these types of violations, even if there was an immediate threat to the environment.

The case described in subsection 2.3.1 illustrated the eagerness of the Compliance subunit to take on toxic and hazardous waste cases. However, this distracted the subunit's attention from other violations (e.g., wastewater violations). Furthermore, as explained in chapter 2, criminal sanctioning does not primarily aim to halt violations. Nevertheless, even though the Compliance subunit was primarily responsible for handling violations, it invested considerable time and budget in attempts to impose criminal sanctions. At the same time, this was a possibility for the environmental agency to delegate its regulatory responsibility to the public prosecutor and the criminal court.

3 Conclusion

This chapter looked at the different regulatory approaches used by the Provincial agencies of East and West Java. It aimed to explain these differences and their effects on promoting the public interest in a clean environment.

My observations confirmed Santosa's findings that a lack of budget and staff hampered the agencies' implementations. However, I also found that the agencies did not fully use their limited regulatory resources. This partial use was largely due to inconsistency in the regulatory process, in particular the monitoring of industrial environmental behaviour and post-detection enforcement against violations.

There were considerable differences between the agencies with regard to their operational contexts. For example, East Java's capital Surabaya is located at the mouth of a large river and is confronted by upstream pollution. By contrast, West Java's capital Bandung is located much further upstream, facing a lower degree of accumulated pollution. West Java also lacks East Java 's tradition of civil society actors pressuring the government to improve its

promotion of the public interest in a clean environment. These contextual factors might partially explain why the East Java environmental agency was, in several aspects, more thorough in its regulatory efforts than the West Java agency.

One of the main findings presented in this chapter is that there were considerable differences between the two provincial agencies in how they monitored and responded to violations. The East Java agency's regulatory efforts were characterised by features of command and control regulation, more so than in West Java. For example, the former conducted regulatory, unannounced and frequent follow-up inspections through the Water Patrol. Occasionally, it took concrete measures to halt a violation (e.g., in the case of the Gempolkrep sugar factory). These measures may have had some positive effect on the quality of the Brantas River.

The West Java agency's approaches were less consistent than those of the East Java agency. The agency did not conduct regular inspections and did not systematically process and assess the self-monitoring industrial reports. Nevertheless, the agency was active in responding to complaints and conducting inspections for the Ministerial programme PROPER. However, it did not gather and archive the programme's information systematically or consistently follow-up on detected violations.

Overall, this chapter concludes that regulatory initiatives with features of administrative law based, command and control regulation were fairly effective. Officials and scholars have often praised the Ministerial programme PROPER and the Water Patrol in East Java. These programmes include rather consistent monitoring and enforcement efforts and have features of command and control regulation. Nevertheless, the praises seldom acknowledge these features or do not consider them as explanations for the programmes' relative successes. Instead, the features are considered to be alternative regulatory approaches, representing the opposite of command and control. These agencies do not fully realise these programmes so long as they do not integrate them with regular command and control regulatory mechanisms. For example, when PROPER detects a violation, it is unclear which institution will follow up on it. As a result, despite proof of non-compliance, institutions often do not take effective measures to halt it.

Overall, officials in both in East and West Java avoided administrative law-based sanctioning that would have had serious and concrete consequences for violators (e.g., administrative coercion or licence revocation). Generally, they considered imposing administrative sanctions against serious environmental violations as an unfit approach. Particularly in West Java, officials preferred to respond to violations by seeking criminal prosecution against the violator. Alternatively, in cases were citizens had filed a complaint, the agencies would try to settle the case by mediating between the complainants and the violator. The case was, therefore, sidetracked from the administrative to the private law framework.

It is understandable that officials opted to avoid imposing administrative sanctions for several reasons. First, the weaknesses in the administrative sanctioning arrangements hindered effective enforcement. The definition of administrative coercion in the EMA 2009, suggesting that the government cannot take concrete measures to halt a violation, particularly weakened the government's regulatory position.

Second, policies detailing government tasks were lacking (e.g., regarding the frequency of regular monitoring and how certain institutions should follow-up on violations). As a result, the officials had discretion about if and which regulatory efforts they would undertake. The absence of clear policies on minimal governmental responsibilities resulted in there being no grounds for arguing that the government had taken too few measures.

Third, officials avoided administrative sanctioning because there was an unclear division of authority between the various involved institutions. This authority concerns the horizontal division between sectors, as well as vertically division between different administrative levels. Taking intrusive but effective measures that would have halted a violation could have led to confrontations with institutions that had other interests in the case. Therefore, officials from the many involved institutions preferred to seek consensus, referring to it as 'coordination'. Although the Water Patrol in East Java is an example of the potential benefits of 'coordination', the case studies in West Java and North Maluku demonstrate that it also carries serious negative implications. The involvement of many institutions resulted in regulatory processes that were long, inconsistent, costly and inefficient. Non-transparent 'coordination' made it unclear which institution was responsible for taking a certain decision – usually to not take intrusive enforcement measures – and why they had made that decision. This lack of transparency moreover led to more room for corruption. In general, it made it even more difficult to hold a particular government institution accountable for taking insufficient regulatory measures. The lack of accountability mechanisms meant there were few incentives for the government to perform its regulatory tasks better.

Officials also avoided administrative law enforcement because they assumed it had a limited deterrent effect in comparison to other regulatory approaches, particularly criminal law enforcement. Considering the weaknesses in the legal arrangements for administrative sanctioning, they did indeed have reason to think so. Nevertheless, officials were generally unaware of the different aims and characteristics of administrative, criminal and private law-based approaches to responding to violations and therefore could not deploy them effectively.

The West Java environmental agency usually opted to respond to complaints by mediating between complainants and violators. This created confusion regarding the government's responsibility and authority for addressing the pollution problem and placed responsibility on citizens to address the problem. Officials considered that mediating a private law dispute between

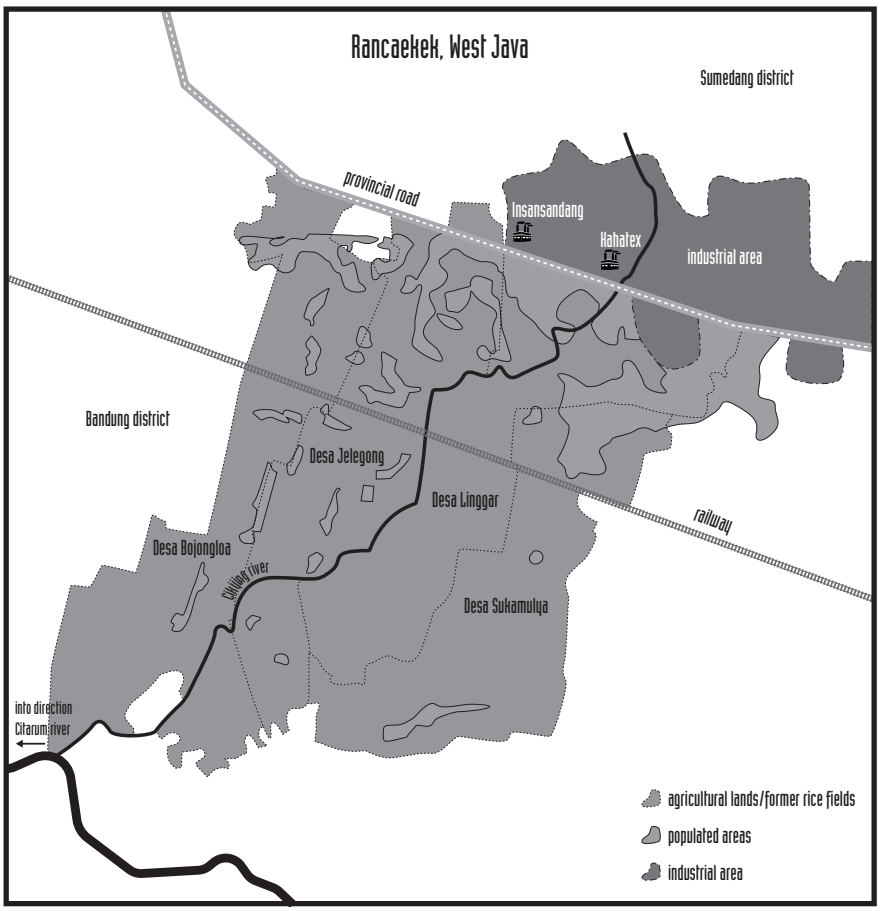
the violator and complainants was an adequate and preferred approach to addressing environmental problems. Although handling complaints in this manner appeared to legitimise the government's involvement, the administrative law framework offered the legitimate basis to intervene, regardless of the citizens' participation.

The next chapters concern pollution cases in West Java (chapter 5) and North Maluku (chapter 6). They demonstrate the negative environmental consequences of relying on regulatory approaches without properly integrating them with the basic command and control regulatory mechanism.

5 Two decades of wheeling and dealing
Regulating pollution in Rancaekek, West Java

This chapter is the first of two in-depth analyses of an industrial pollution case. The case is situated in the sub-district of Rancaekek, in the Province of West Java, approximately 30 kilometres from the Provincial capital, Bandung. Since the 1970s, many industries – including textile industries – have settled along the busy Provincial road that runs from east to west between Bandung and Tasikmalaya. The road forms the border between two districts: Sumedang in the north and Bandung in the south. Along the road, the densely populated areas of several villages stretch out. However, a few hundred meters further south, rice fields dominate the landscape.

The industries are located mostly on the north side of the road, in Sumedang district. However, it is the communities living on the south side of the road, downstream, that feel the environmental impact of industrial pollution. The pollution particularly affects the sub-district of Rancaekek, part of Bandung District. For more than twenty years, people there have complained about polluted wastewater. The often dark-blue coloured water flows through several *kampungs*, through the small Cikijing River and the connected irrigation system, affecting the rice production in the southern fields. The Cikijing River eventually flows into the infamous Citarum River, one of Indonesia's most polluted rivers, which supplies Jakarta with water.



Map 1: Rancaekek area, by author

This chapter seeks to understand why the government has not halted the pollution, how locals have responded to it, and how the pollution has impacted their lives. The first section sketches the environmental situation, demonstrating that there are many uncertainties regarding the pollution's precise environmental impact, the exact cause, and the timing of the pollution. At the time of fieldwork in 2012, government institutions held textile company Kahatex primarily accountable for causing the pollution. With 3500 employees, it is an important local job provider. However, before 2012, other industries had been accused of causing pollution as well.

Section 2 presents a reconstruction of regulation process developments that were still on-going after two decades and of how citizens attempted to seek redress throughout these years. It bases its reconstruction on an analysis of approximately 400 documents, as well as interviews with officials, interest

group members, and company representatives.[1] It explains why Rancaekek citizens have been unable to make the industry stop its polluting behaviour or pressure the government into taking adequate measures against pollution.

Section 3 bases its findings on ethnographic fieldwork in four Rancaekek villages that are considered the most affected by the pollution: Bojongloa, Jelegong, Linggar and Sukamulya. It shows how the outcome of the redress seeking process resulted in complex social relations within the villages. The outcome had a disruptive impact on social cohesion, and the inequality between villagers increased. In the end, the pollution exerted the highest price upon the most vulnerable people within the communities in an unexpected way.

1 River water pollution and its causes

The first public complaints about pollution in Rancaekek date from 1992. The sub-District Head of Rancaekek reported the issue to the District Head of Bandung, which a local newspaper reported on. For two decades afterwards, the pollution was the subject of many news reports, discussion papers and meetings with officials, industries, interest groups and citizens. Which industry or industries had caused the pollution? What was the extent of it, and when was it caused? Who was affected and how? The following section illustrates the problems in establishing the relevant facts of the case.

In 2011, the Provincial environmental agency, in cooperation with Bogor Agricultural University (*Institut Pertanian Bogor* or IPB), inventoried the soil quality in the affected area. The agency planned to use this study as a basis for seeking compensation for affected rice farmers (see sub-section 2.9). The assessment of ground samples allowed the agency to determine the depth to which particles from the wastewater had penetrated the soil in a 752-hectare area. The soil to the southeast of the Cikijing River had been especially polluted. The assessment found 14 per cent of the land to be heavily polluted, as waste particles had penetrated more than 60 centimetres into the soil. It found that 51 per cent qualified as moderately polluted, as the waste particles had penetrated 30 to 60 centimetres into the soil.

However, the soil quality assessment did not provide a full picture of the physical consequences of the pollution. Respondents indicated that the extent to which the pollution had affected the quality and quantity of the local rice

1 I recovered most documents regarding this case from the archives of the West Java provincial environmental agency. However, when available, I also used documents from other government agencies, non-government organisations and newspaper articles. I conducted interviews with officials and stakeholders during my fieldwork at the West Java environmental agencies in 2011 (see chapter 4), and during additional fieldwork in April and May 2012, which focused on this case. I have, on file, a fully annotated version of this chapter, with references to all documents and interviews.

production varied considerably, and did not fully match the soil quality assessment. Some areas where the soil had not or had barely been contaminated were almost entirely unproductive. Other heavily polluted soil areas still yielded approximately 25 per cent of normal rice production levels. Some non-assessed areas had also been affected.

Furthermore, the soil quality assessment did not specify when the pollution occurred and for how long it had been affecting the rice production. For example, in 2012, an irrigation channel had leaked, causing Cikijing's water to suddenly flow onto farming fields. According to some respondents, this had immediately affected the rice yield. Farmers explained that the size of their harvest was mostly determined by the quantity of rainwater and the quantity and quality of the irrigation water. The soil quality had no such direct impact.

Accounts differed on when the pollution began. Most of the 56 respondents said it became noticeable immediately after, or soon after, the textile company Kahatex had settled in the area in 1989. Conversely, some said the rice yields began to decrease only years later.

In short, there appeared to be no linear correlation between the outcomes of the soil quality assessment, the effects on the quality and quality of the rice production over the years, and the financial damage that people in Rancaekek had suffered. This assessment could also not clarify who had caused the pollution and who was responsible for recovering the damages. Nevertheless, the Provincial environmental agency did use the assessment to try and arrange compensation for those affected by the lower rice yields.

Moreover, respondents did not merely complain about the financial damage that they had suffered. Some were worried about the cassava, which now had a salty flavour, instead of its normal, sweet taste. Also, before the pollution problems, Rancaekek had been famous for its fish. A species called *ikan mas*, bred in local ponds, had long disappeared because it had not survived in the poor-quality water. Many people also expressed concerns about health. Some mentioned the water was no longer drinkable. Others had noticed that it had become difficult to wash off the dark colour of one's feet after working barefoot in the fields, and some complained about irritable skin. Others mentioned that some children had experienced breathing problems. Some had not yet noticed any health implications but were worried about potential future problems. For example, some were concerned about the children who played on the contaminated soil and they were uncomfortable growing garden vegetables for consumption. Several respondents claimed that Cikijing's water often had a dark blue – almost black – colour, and a peculiar smell. They claimed they could sometimes see steam coming from the water. These conditions often occurred at night.

The textile company Kahatex admitted that in the past, it might have caused pollution. However, it claimed it had never violated any environmental standards. The Sumedang District government agreed that Kahatex had always

complied with the environmental regulations on wastewater. By contrast, the Bandung District government, the Provincial government and the Ministry of Environment all claimed that Kahatex had been noncompliant (see section 2).

There are many local industries in the area, which raises questions about who caused the pollution, and to what extent. In the past, textile industries PT Insan Sandang, PT Five Star, and Kahatex had been accused of causing pollution. All three industries were located next to each other on the north side of the provincial road. Nevertheless, in 2012, government institutions primarily blamed Kahatex. One Kahatex representative claimed that this blame stemmed from his company being the largest in the area. The representative pointed toward other potential polluters, such as small car repair workshops along the busy road and the densely populated areas' domestic waste.

To conclude, government institutions involved in regulating the local industries were unable to provide accurate information on the extent, the causes and the impact of the pollution, information they would need to develop accurate policies and take proper regulatory measures against (potential) polluters.

The following sections will explain how the processes of regulation and redress seeking developed over two decades, and how this impacted the lives of people living in the Rancaekek area.

2 TWO DECADES OF REGULATING AND SEEKING REDRESS FOR POLLUTION

This section presents a reconstruction of the regulation and redress seeking processes as they developed between 1989 (i.e., when Kahatex arrived in the area) and April 2012 (i.e., the time of fieldwork). It provides insight into the many actors that were involved in these processes over the years, and how their attempts to deal with the pollution transformed over time.

Before commencing with the chronological account of developments, it should be noted that the approximately 400 documents I used for this reconstruction did not come from orderly archives. Instead, I recovered most documents from various folders at the West Java environmental agency, which contained bits and pieces of documentation. The agency had produced chronological case overviews, but these lacked many relevant details and references to important events, especially regarding the more distant past. This absence of a nuanced and detailed perspective on the case is characteristic of how the various government institutions dealt with the case over the years.

The available documents are often short on relevant details, for example on why government institutions took particular decisions, or who precisely represented Rancaekek's population in certain claims to redress. Despite these gaps, the chronology below indicates that during many different phases in the regulatory process, the behaviour of both government institutions and private parties was inconsistent. For example, governments did not follow

up on sanctions consistently, and NGOs radically shifted from critical to supportive of companies without clear reasons. However, none of these NGOs was held to account.

2.1 The first complaints during a period of centralisation (1989-1997)

In 1989 and 1990, the two textile companies PT Kahatex and PT Insan Sandang started their activities in the area. In 1992, a local newspaper first reported the local population's concerns regarding the environmental impact of the industrial activities. Around the same time, the Village Head of Rancaekek requested Bandung's District Head to assess the wastewater quality of Kahatex and Insan Sandang. Bandung's District Head then asked West Java's Governor to do so. At the same time, the textile industry Kahatex and the villagers of Jelegong agreed that the company would provide the villagers with clean water, funding to build sanitation facilities and that the industry would finish the construction of its wastewater treatment installation within two years. In return, Jelegong's villagers agreed not to complain again about the wastewater that was flowing through their village.

For several years, not much happened. However, in February 1997, the Minister of Environment requested that West Java's Head of police investigate complaints about pollution in Rancaekek against Kahatex, Insan Sandang, and the textile company Five Star. In 1998, a local NGO also accused these three textile companies, as well as textile company Banon, of causing the pollution.[2] The NGO asked to meet with these four companies. No concrete results were reported. Reports regarding the pollution did not mention the NGO again.

2.2 Unused regulatory authorities by the regional governments (1999)

The regional authorities' inaction also characterises the period that followed.

In 1999, research by the agricultural department of Bandung's Padjadjaran University concluded that the local soil pollution had led to a decrease of rice production and that the rice's absorption of heavy metals posed health threats. The media also reported that the pollution was leading to decreased rice harvests.

By this time, the decentralisation process had started, and regional governments obtained more powers to regulate industries. Bandung insisted that Sumedang impose administrative sanctions on the industries near Rancaekek. When the Sumedang district government did not follow the request after a month, Bandung's District Head called upon the Governor to take action. The

2 This NGO was named *Forum Dinamika Masyarakat Rancaekek (Dynamic Forum of the Rancaekek Community)*.

Provincial environmental agency informed the Governor that five textile companies (i.e., Kahatex, Insan Sandang, Five Star, Banon and Supratex) were neglecting their duties administratively and technically. However, the Governor could have halted the pollution under the revised Environmental Management Act (EMA) of 1997. The industries were in the Sumedang district, while the environmental impact was primarily occurring in Rancaekek, Bandung's sub-District. Therefore, this was certainly a 'transboundary' case, legitimating a regulating authority shift from the District to the Provincial level. However, the Governor refused to take adequate measures. The Provincial environmental agency actually recommended the Governor mediate the case, but the documentation did not explain which parties should be involved. The mediation suggestion marked the beginning of a long trajectory where the Provincial government repeatedly attempted to solve the issue through consensus, rather than using its administrative authorities to promote public environmental interests.

In its advice, the Provincial environmental agency anticipated that mediation would fail. In that case, it recommended that the matter be brought before a criminal court. The agency suggested creating four working groups on licensing, technical, social and legal matters to gather sufficient evidence for criminal prosecution. The Governor followed this advice, but the results were disappointing. One of the working groups recommended that the industries optimise their wastewater treatment systems, but it remained unclear what that meant in practice. Another working group made a fairly useless suggestion about sending a letter to the President to mediate between the industries and 'the community'.

In short, the Provincial government attempted to reach a consensus between the industries and the affected population, while the working groups aimed to organise the many involved government institutions. This consensus-seeking strategy would continue for years to come, without a serious threat of sanctions against violations of environmental standards.

2.3 Public demand to halt noncompliant behaviour (2000)

In 2000, the pressure on the government to take more concrete measures to halt the pollution increased. Media reported that Rancaekek's citizens had organised protests and requested the Provincial government take action. The military and the police were accused of using violence against the protesters, and a community representative complained about this matter to the national Parliament.

The West Java public prosecutor advised the Governor to establish a team to investigate whether the costs for environmental recovery could be reclaimed from the industries through a private lawsuit. If so, the public prosecutor

offered to represent the affected citizens. However, the suggestion was apparently put aside, since nothing happened.

Yet, the unrest in Rancaekek did not cease. The Provincial environmental agency tried to settle the discontent among rice farmers who had complained about decreasing yields. The agency organised a meeting with the farmers' group – *Forum Komunikasi Para Petani Rancaekek* (FKPPR) – together with government institutions from the Sumedang and Bandung Districts. The farmers demanded the rehabilitation of the Cikijing River and the affected rice fields.

In a press statement, a Rancaekek resident accused the companies Vonex, Indopon and Asia Agung of bribing protesters to halt their protests. The statement was also sent to numerous government institutions, from the President to the District Heads to Bandung's Parliament. The national Parliament received reports of a representative of Insan Sandang and a West Java police officer intimidating protesters. The Parliament asked the Minister of Environment, the West Java police and the Bandung police to handle the case. The statement somehow ended up at the Provincial environmental agency. In an internal letter, the agency's Environmental Impact unit asked the agency head for his permission to verify the complaints, and if they proved accurate, to take measures under the law. The unit did not refer to Padjadjaran University's 1999 research, which indicated that the pollution complaints were valid.

Meanwhile, Bandung's environmental agency issued a report that attributed the pollution to three industries – Kahatex, Insan Sandang and Five Star – and suggested that the case should be settled through mediation. Rancaekek's sub-District Head would consult with community leaders, NGOs and the farmers' group. Bandung's environmental agency would inventory all of the claims. Eventually, the Provincial environmental agency assisted the District in these efforts.

In this kaleidoscopic scenery of government institutions, companies and community members, another party entered the stage. The 'Combined Team for Waste Treatment of Rancaekek' or '*Tim G*' consisted of six Village Heads within Rancaekek and claimed to represent the interests of Rancaekek's population. In a joint statement with the farmers' group FKPPR and Rancaekek's sub-District Head, the team announced it would take over all regulatory tasks from the authorised government institutions at District, Provincial and Central government level. It announced itself as a monitoring body as well as the coordinating body organising the claims of institutions, community groups and others against the industries.

2.4 A private law agreement that resembles an administrative law approach (2001-2002)

In June 2001, the Provincial environmental agency issued an official investigation report, stating that it suspected Kahatex of disposing of half of its unprocessed wastewater through an illegal, hidden pipe. The report wrote that Insan Sandang was continuously disposing of wastewater without treatment. The agency recommended the Governor take administrative action, as 'shock therapy'. The agency's report also mentioned that locals demanded a supply of clean water and the 'normalisation' of the Cikijing River. I could not find evidence that the Governor acted upon the report's suggestions.

In the meantime, the Bandung government surveyed 225 people in the villages of Bojongloa, Jelegong, Linggar and Sukamulya. The government asked them what they considered a priority in response to the industries' environmental impact. The respondents prioritised compensation for the loss of income from lower rice yields (26 per cent of respondents), clean water (20 per cent), health care services (20 per cent), improved wastewater treatment systems (14 per cent), improved Cikijing River water (14 per cent), and a job at one of the plants (6 per cent).[3] This outcome served as a basis for mediation between the companies Kahatex and Insan Sandang and *Tim G*. The latter had proclaimed itself as the representative of Rancaekek's population and the governments at various administrative levels accepted it as such. Apart from *Tim G* and representatives of the industries, a somewhat bewildering range of government institutions took part in the mediation: the Provincial environmental agency, the Provincial water management body, the Sumedang and Bandung environmental agencies, and Rancaekek's sub-District Head. They participated in the meeting in a 'coordinating' capacity, not as regulators with enforcement responsibilities.

On 6 August 2002, the industries and *Tim G* reached an agreement. The companies would improve the functioning of their wastewater treatment systems following the standards set by the Provincial environmental agency. Sumedang would monitor the implementation. The industries would also manage their sludge following the legal requirements for hazardous and toxic waste and would provide the Rancaekek communities with clean water. Finally, the industries would pay 'compensation' to restore the Cikijing River. Kahatex, Insan Sandang and Five Star would pay 100 million rupiah, 8 million rupiah and 7.5 million rupiah (around € 8000, € 640 and € 600).[4]

The industries and community representatives made the agreement based on private law principles. However, the agreement also focused on administrat-

3 The survey did not explain its methodology, but the percentages adding up to 100 suggests that the respondents were only allowed to mention one desire.

4 As a currency rate, I use 12.500 Indonesian Rupiah=1 Euro, reflecting the average currency rates in September-December 2012.

ive law standards. Various government institutions, notably regulatory authorities, signed the agreement. However, they did so as witnesses to a private law agreement rather than as regulators with authority and responsibility based on public law. The agreement was, therefore, a peculiar mix between private and administrative law approaches to dealing with the pollution problems. Did the agreement mean that the institutions did not have the authority to enforce the law independent of the private agreement? What was their role in monitoring industrial compliance with the environmental standards in the private agreement?

Government institutions indeed started using the agreement of 6 August 2002 as a basis for their monitoring activities. After the inspections, the Sumedang environmental agency concluded that the industries had attempted to improve the functioning of the wastewater treatment systems, but with no 'optimal' result. West Java's water resource management agency – a branch office of the Ministry of Public Works – reported that it had restored the Cikijing River and the polluted area. Some respondents had noticed that for a few years, the restoration had had positive effects on the productivity of a few rice fields. However, the effects were limited because the budget had allowed the agency to sanitise only a small part of the polluted area. A few years later, the positive effects of the agreement waned altogether: the industrial wastewater had polluted the area once again, and the industries never kept their promise to provide clean water to the community.

It also became evident that *Tim G's* claim to be the legitimate representative of Rancaekek's communities was not undisputed. A farmers' group named *KCD Petanian* complained that the agreement of 6 August 2002 did not cover compensation for the loss of income due to the decrease in rice production. In response, Bandung's environmental agency inspected the Cikijing River and found that its water was still black and smelly. The agency contacted Kahatex and Sumedang's agency. That exchange resulted in yet another agreement, this time between the industries and *KCP Petanian*. The agreement's content was similar to the agreement made with *Tim G*, but it had another implementation arrangement. The Bandung government, the Sumedang environmental agency, Rancaekek's sub-District government, the Village governments, the companies and community representatives would all monitor the agreement's implementation. This agreement was primarily between private parties, but also involved government institutions and focused on environmental compliance. As a result, it seemed that environmental compliance was a matter to be arranged first and foremost between private parties. Consequently, the agreement undermined the independent and primary duty of government institutions to regulate the environmental performance of the industries to promote the public interest.

2.5 Administrative sanctions based on a private law agreements (2002-2003)

Soon after the private parties made their agreements, the Ministry and Province both took action against the companies.

In 2002, the Ministry of Environment assessed both Kahatex and Insan Sandang within the context of its PROPER programme.[5] It rated Insan Sandang as 'red', indicating non-compliance. It rated Kahatex as 'black', indicating severe violations.[6] However, the Ministry imposed no sanctions on either company.

However, in 2003, West Java's Governor gave a 'first warning' to Kahatex, Insan Sandang and Five Star based on the 6 August 2002 agreement between *Tim G* and the industries. The warning stated that the industries had not carried out the agreement and that the case could proceed to court if they made no improvements. Thus, a private law agreement became a basis for administrative law enforcement, and the court reference probably referred to the possibility of criminal law enforcement.

Five Star responded that it had not violated any standards, that it had optimised its wastewater treatment system, that the 'normalisation' of the Cikijing River was 'in process', and that it had supplied the people living near the Cikijing River with clean water. By contrast, Kahatex confirmed that it had not yet fully implemented the agreement. The company stated that it was trying its best.[7] Insan Sandang did not respond to the warning at all. The Province did not take further action against any of the companies. Paradoxically, one year later, Sumedang's District Head granted permission to Insan Sandang to dispose of wastewater in the Cikijing River.

By basing the administrative sanctions on a private law agreement, the government institutions further entangled private and administrative approaches to addressing the violations. They did not follow any clear administrative law procedure. This approach understated the government's duty to promote environmental interests – regardless of any private law agreement – and it became unclear which institution was authorised to regulate the indus-

5 The ministerial monitoring and public disclosure programme PROPER was previously discussed in chapters 3 and 4.

6 The lists with PROPER ratings from various years are accessible through the website of the Ministry of Environment: http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI (Last assessed on 10 July 2018).

7 It stated it was still working on improving its wastewater treatment system to meet the standards. It had provided clean water to Rancaekek's population, but the people in the area had not yet arranged storage facilities for the water. Therefore, Kahatex had not been able to carry out this point of the agreement. Kahatex did not mention if it had acted to 'normalise' the Cikjing River.

tries.[8] The institutions may have been reluctant to take adequate enforcement measures due to political pressure not to sanction the companies harshly. It is also possible that officials sincerely preferred mediation, as it allowed for citizen participation and created an opportunity to avoid the barriers and weaknesses of the institutional and legal framework. In any case, the chosen approach made it appear as if the government was dependent on the private law agreements to take enforcement actions. Above all, the approach proved rather ineffective. The mixing of private and administrative approaches made it difficult to hold any particular institution accountable for ineffectiveness or inaction.

2.6 Interest groups as regulators (2004-2007)

Since 1998, various local interest groups complained about the pollution in Rancaekek and negotiated with industries to come to a solution. Often, the precise outcomes of these meetings were not made public, but the increasing number of interest groups that wanted to negotiate with the industries suggests that the efforts paid off.

Tim G remained an active interest group. In February 2005, almost three years after it had come to an agreement with the industries, it complained to the Provincial environmental agency about the industries' poor execution of their promises. It stated that the industries had not yet optimised the wastewater treatment systems, provided the population with clean water, paid the 'compensation' for restoration, or provided medical services for the population.[9]

Other NGOs also became involved. NGO *Balepo* reported to Rancaekek's sub-District Head that it had taken water samples on 18 March 2005, indicating that Kahatex had violated the wastewater standards. It demanded that the company would fulfil its agreement with *Tim G* and asked the Minister of Environment and the public prosecutor to take measures against Kahatex. It also wished to participate in the discussions about improving the wastewater treatment systems and proposed a particular consultancy agency to be employed for this effort.

8 In 2003, the director of Kahatex was convicted by the Garut State Court for his involvement in the dumping of hazardous waste in the form of sludge in two villages near the city of Garut. A newspaper reported that the director was given a suspended prison sentence of two months and a fine of 5 million rupiah (approximately €400). The public prosecutor had demanded eight months in prison, but because of the director's good behaviour and all of the company's social activities in the neighbouring communities, the sentence was lowered. Remarkably, documents from the archives of the provincial environmental agency did not refer to this criminal conviction.

9 Notably, this issue had not been part of the agreement of 6 August 2002.

The NGO *KMPL* organised an 'open dialogue' in Rancaekek. Community representatives from Rancaekek, local environmental NGOs and Rancaekek sub-District officials attended the meeting. The participants decided that an integrated team should be established to examine the environmental situation, monitor the industries, and enforce the law in a 'firm and just' manner. The team would consist of Sumedang and Bandung environmental agency officials, District Parliamentarians, Provincial Parliamentarians, *KMPL* members and two 'community representatives'. In this way, non-state parties obtained some regulatory authorities.

In October 2005, the Province reported that the industries and the 'community of Rancaekek' had come to a new agreement. It is unclear who represented the community on this occasion, or whether members of *Tim G, KMPL* or *Balepo* were involved. The new agreement was largely similar to the one from 6 August 2002, but contained one addition: if the companies did not execute the agreement, the case would be taken to court. However, the agreement did not specify who would do so and whether the case would be brought to a private, criminal or administrative law court.

These developments indicate that NGOs' roles in regulating industrial environmental behaviour became substantial, but to whether this contributed to a cleaner environment is questionable. Even though one NGO explicitly requested the government use its authority to ensure corporate compliance, the NGOs eventually negotiated directly with the industries about their compliance, acting as private parties with no special administrative authority, while the authorised institutions failed to use their authority.

Furthermore, the Province did not specify the members of 'the community of Rancaekek'. The agreement suggested that community members agreed with its content, including the procedure for dealing with the polluting industries. However, the following incident showed that this was not the case.

Shortly after the new agreement was signed, an inhabitant of Rancaekek complained to the Minister of Environment, West Java's Governor and West Java's Parliament about the pollution, requesting that the government take action against the industries. *Tim G* informed the Minister, the Governor and the Provincial Parliament that it did not recognise this person as a member of the Rancaekek community and that the complaint should not be taken seriously because Kahatex was doing its best to improve its environmental performance.

There are no reports about whether these institutions responded to the inhabitant's request and I was unable to reconstruct precisely what caused *Tim G*'s change in attitude towards Kahatex. Nevertheless, this incident shows that different views existed among the inhabitants of Rancaekek. It also suggests that *Tim G* – which the District and Provincial governments accepted as a representative community group – had a sudden interest in excluding other community members from participating in the process and limiting the pressure on the polluting company.

2.7 Parallel regulatory approaches: Sanctioning and mediating (2007-2008)

In 2007, two parallel processes developed. The regional government institutions continually tried to arrange an agreement between the industries and complaining citizens. Simultaneously, the Minister of Environment intervened in the process by imposing administrative sanctions on Kahatex and Insan Sandang. The legal basis for the Minister's attempts at increased control over the case remained unclear. It was also unclear how the private law agreement process related legally to imposing administrative sanctions. As a result, it became uncertain who could and should take certain actions if neither the sanctions nor the agreement led to compliance.

Sanctions by the Ministry of Environment

In March 2007, a Ministry of Environment team inspected Kahatex and Insan Sandang. The Bandung and Sumedang environmental agencies accompanied the Ministerial team. The minutes of a follow-up meeting legitimise the inspection by referring to a citizen complaint that the Ministry had received. They do not state who filed this complaint or when they did so.

The team found that Kahatex's sludge license did not meet the legal requirements and that it also did not comply with the fly and bottom ash standards. Kahatex's wastewater, which it had treated in wastewater treatment systems, did not meet the standards, and the team discovered illegal outlets that discharged untreated wastewater. The team found that Insan Sandang discharged untreated wastewater directly into the Cikijing River and that its wastewater treatment system was not working optimally. The team also found that no properly licensed party was processing the fly and bottom ash, and sludge.[10]

Three months later, the Minister imposed administrative sanctions on both Kahatex and Insan Sandang.[11] The sanctions were referred to as 'administrative coercion'.[12] The Minister ordered the companies to end the violations

10 One year earlier, in 2006, the provincial environmental agency had already inspected Insan Sandang and had detected several violations. The flow meter had not been functioning properly, and during the final months of 2005, the quality of the discharged wastewater had not been sufficient. However, these findings did not lead to any enforcement measures.

11 Ironically, on the same day Kahatex was sanctioned by the Ministry of Environment for not having a license to process its sludge, another department of the Ministry issued a licence allowing Kahatex to use the sludge as fuel for its boiler. This timing indicates that there was a lack of coordination within the Ministry.

12 The EMA's concept of 'administrative coercion' was discussed in chapter 3. It explained that while 'administrative coercion' in the 1997 EMA had referred to concrete government actions to halt a violation, the 2009 EMA gave a more ambiguous definition of the concept. It could be interpreted as concrete government action as well as orders to the violator to take certain measures. However, the 2009 EMA had not yet been promulgated when the Ministry imposed the sanctions on Kahatex and Insan Sandang in 2007.

within one month, or 'sanctions in line with the law would follow'. The Ministry, the Provincial environmental agency and Sumedang's environmental agency would monitor the company's implementation of the orders. Sumedang's environmental agency would also play a 'coordinating' role between the institutions and the industries. Notably, the Bandung district would not play any monitoring role. However, the Ministry did summon the heads of the Provincial and Bandung environmental agencies to coordinate the investigation of damages the farmers and fishermen had suffered, and to facilitate Kahatex and Insan Sandang's compensation for these people. The Minister also asked the agencies to seek alternative water sources to irrigate the rice fields and to sanitise the rice fields and fishponds.

Kahatex objected to the sanction. It stated that it had always taken care of its environmental management, and argued that the Ministry of Environment's PROPER team could confirm this. This argument was unpersuasive, as Kahatex's PROPER ratings had been problematic. Although Kahatex had been compliant in 2006-2007, PROPER rated it 'red' in 2005. In 2002 and 2004, PROPER had even rated it 'black', meaning Kahatex was committing severe violations.[13]

Kahatex's reference to PROPER illustrates how it tried to use the existence of parallel monitoring initiatives to undermine the government institution's findings; an institution that was authorised to enforce the law. At the same time, neither the Ministry nor the Provincial or District environmental agencies considered Kahatex's response as a formal objection to the sanction and felt no need to provide a motivated response.

Another agreement between the industry and citizens

Around the same time, leaders of two Sumedang neighbourhoods submitted a complaint about Kahatex to the Provincial environmental agency. In response, the agency started a mediation process between the neighbourhood leaders and the industry, instead of opting for enforcement.

The neighbourhood leaders demanded the industry restore the land and clean water sources and offer 20 per cent of the available industrial labour jobs to people from the two neighbourhoods. They also requested positions as 'job brokers' on behalf of the industry. Kahatex declined the 20 per cent employment request but agreed to implement the environmental claims and to recruit personnel via the neighbourhood leaders. In return, the neighbourhood leaders would withdraw all of their environmental complaints and claims.

Representatives from at least six groups signed the agreement, namely neighbourhood representatives, Kahatex representatives, and officials from

13 See footnote 5 for a link to the relevant publications of PROPER ratings. Notably, Insan Sandang had been rated 'red' in 2002, 2004 and between 2006-2007, meaning it had been noncompliant. In 2005, it had been rated 'blue', i.e., compliant.

the Provincial environmental agency and eight officials from other Provincial, District, and Village institutions. The government officials signed the agreement in their capacity as witnesses. The Sumedang, sub-District, and Village governments would monitor the company's implementation of the agreement. Those governments would inform the Province of their findings. If any problems arose, all signatories would be involved in discussing the matter.

The agreement was remarkable for several reasons. First, the leaders' neighbourhoods were located upstream from Kahatex, and were, therefore, not as severely affected by the wastewater pollution as several villages in downstream Rancaekek. The leaders used the pollution issue for claims related to labour, and no one – including the government – seemed to object.

Second, the agreement stated explicitly that the Provincial environmental agency should act as a 'neutral third party'. However, because this was a 'transboundary' case, this agency was primarily responsible for regulating the industry and acted against the law by assuming neutrality. Indeed, the agency did not act neutrally in this private dispute. It expressed an interest in Kahatex complying with the environmental regulations and in preventing local social unrest.

Thirdly, the agreement's layout suggested that it was a government decision. It was even printed on the Provincial environmental agency's writing paper, and various government institutions signed the agreement. The agreement's formulations even resembled a law, starting with considerations and referring to several (administrative) laws, while continuing with chapters and articles. This layout might have given weight to the agreement, but it was not very helpful in delineating the regulatory duties of the various government institutions. The involvement of multiple institutions further blurred each institution's responsibility towards implementing its public duties.

By signing the agreement, Kahatex appeared to acknowledge it had caused pollution. However, by framing the agreement as being part of its CSR programme, it communicated its concessions as a community donation rather than compensation for its wrongdoing. Furthermore, the neighbourhood leaders seemed to have been bribed through their acceptance of job broker position in return for dropping environment complaints.

Finally, this agreement showed that government institutions were aware that community representatives used environmental arguments to bid for jobs and positions as job brokers. Section 3 of this chapter will demonstrate the devastating effects of this practice.

2.8 Local interest groups: attacking versus defending the industry (2007-2008)

In 2001, *Tim G* severely criticised Kahatex. However, over the years, the relation between the two improved. In May 2007, when the neighbourhood leaders made the aforementioned agreement with Kahatex, *Tim G* signed its own agreement with this company. It included Kahatex's consent to provide medical services, construct water wells and dredge the Cikijing River. *Tim G* then informed the Provincial environmental agency about this positive result, supposedly on behalf of Rancaekek's communities.

However, *Tim G* faced resistance from other local groups. One of them, *Pelangi,* requested the Sumedang and Bandung District Heads to investigate the organisation, accusing it of, among other things, unfairly distributing industrial donations amongst the community.

In response, *Tim G* reported all its activities included in its 413 million rupiah budget (approximately € 33.000). It argued that it had cooperated with government institutions to improve the river quality and had worked together with the industries – mainly Kahatex – to construct clean water wells and schools. It claimed that it had helped distribute small industrial donations to Rancaekek's population, e.g., through prayer mats and rice seeds. Together with Kahatex and another local NGO, it had distributed rejected textile materials from the companies to small home industries. *Tim G* had also cooperated with another NGO to recruit industry labourers.

As Section 3 will explain, the distribution of rejected textile materials amongst small local businesses and the recruitment of industry labourers became problematic local issues.

By the end of 2007, *Tim G* became less supportive of Kahatex. It complained to the Provincial government that Kahatex had not implemented the 2002 agreement, and requested that the Province verify this. Another local interest group, *LPLH,* defended Kahatex. The group asked Indonesia's President, the Minister of Environment and a national Parliamentary commission to revoke all charges against Kahatex because of its great work.

Other local interest groups continued to critique the industry and focused on the industry's environmental impact. Local NGO *Rancunit* was the most outspoken. They repeatedly asked the government to perform its duties, inspect the wastewater discharges and the river water quality, and supply the communities with clean water. It tried to force the Ministry of Environment to clarify how it had followed up on sanctions. It asked critical questions about the procedures. What would happen if the industries remained noncompliant? Would the industries only be sent a letter asking them to improve their behaviour? It also asked the Ministry for an environmental audit. It complained that the 'community' should be involved in inspections and should receive

compensation, rather than only hearing about the results.[14] In short, it raised all of the relevant issues, but never received a reaction from the Ministry.

In summary, Rancaekek's local interest groups often had contradictory and changing standpoints. It shows how the Rancaekek community was divided in their approach to the industries and in how to deal with the pollution they caused. Although it is difficult to know the precise reasons behind the varying and changing positions of the interest groups, the process was characterised by government institutions failing to perform their duties to promote the public interest, giving considerable power to citizens instead. Due to the non-transparent negotiation process between the industries and the interest groups, and the representation problems of the community members' interests, interest groups could opportunistically use their positions.

This research found few instances where interest groups were critically asked to explain their position. It seemed that starting an interest group could be a lucrative business and that the chances of being held accountable for unjustly claiming to represent community interests were small. At the same time, while some NGOs appeared to operate out of opportunism, several other interest groups genuinely seemed to call upon government institutions to take measures against pollution.

Section 2.10 will demonstrate that in the years to come, there was a further increase in the number of interest groups, many of which seemed not to be motivated to halt the pollution, but rather used the opportunity to promote their personal interests.

2.9 The regulation process 'muddles through' (2007-2012)

The inspection that led to the detection of violations in March 2007 and the sanctions that the Ministry imposed afterwards looked like milestones in the regulation process. However, not much happened when the sanctions did not lead to compliance. As the number of institutions involved in the case increased, it was unclear whether there was an institution that was ultimately responsible for protecting the public interest, or what regulatory authority each institution had. Therefore, it was difficult for citizens to force any of the institutions to act adequately and institutions could point the finger at each other for the lack of adequate measures.

As section 2.7 mentioned, in 2007, the Minister of Environment imposed administrative sanctions on Kahatex and Insan Sandang. One month later,

14 Article 7 of the 1997 EMA states that the community should play a considerable role in environmental management. However, it seems unlikely that the legislator intended this to imply that any environmental inspection or other assessment could become invalid when an individual or interest group argued it had not been present during the inspection or assessment.

the Provincial environmental agency met with the Bandung and Sumedang environmental agencies, and the Provincial water management agency to write an 'action plan', requesting the Ministry of Environment to conduct an environmental audit. One may consider this odd since the March inspection had already detected violations. The proposal also established an integrated team to arrange compensation for the affected farmers and the corporate social responsibility programme. The Provincial environmental agency would coordinate the team. Rancaekek's citizens would also be involved in the process, but the action plan did not specify the method of their involvement.

The involvement of more institutions

Bandung District officials had accompanied the Ministerial team on their March 2007 inspection visits, but the District Head had little trust in the inspection's effects. Therefore, he approached the Human Rights Commission to put pressure on other institutions to finally implement their regulatory tasks.

In response to the District Head's request and complaints from two local interest groups, the Human Rights Commission addressed the Kahatex and Insan Sandang directors directly, accusing them of violating the human right to a clean and healthy environment.

In July 2007, Bandung's District Head reported to the Human Rights Commission that an integrated team had been established and that an action plan had been drafted. He did not mention the mediation agreement or the administrative sanctions that had been imposed, nor did he request the Commission to take further action, possibly because he had faith in the action plan.

Three months later, the Provincial environmental agency responded to the Human Rights Commission's letter, stating it had handled the case by mediating the dispute between Kahatex and the two Sumedang neighbourhoods, that administrative sanctions had been imposed, and that an action plan had been drafted. This answer seemed to satisfy the Commission since it did not take any further action.

In September 2007, the Bandung environmental agency received complaints that Kahatex was taking considerable amounts of the river water that the community needed for irrigation. The District agency verified the complaints and found that Kahatex indeed had used 90 per cent of the river water. The Bandung agency requested help from the Provincial environmental agency but received no response.

Around the same time, the Head of the Provincial environmental agency's environmental impact assessment unit reported through an internal memo that both Kahatex and Insan Sandang had carried out all of the Minister's orders. The memo also said that the compensation for the farmers still needed to be arranged.

In October 2007, the national Parliament became involved. In response to complaints it had received, it asked the Bandung District Head to 'observe

the situation in relation to the environmental law'. Apparently, it was unaware that the Ministry of Environment had summoned the Provincial and Sumedang District governments – without the Bandung District government – to monitor the implementation of the orders the Ministry had given to the industries.

Furthermore, the national political party *Partai Demokrat* asked the President to revoke Kahatex's groundwater extraction license, while the Sumedang District had issued this license. Later that year, the party sent a complaint letter and a petition to Kahatex's director, stating that the farmers were suffering economic losses due to the industrial pollution. In the same period, the Pulp and Paper Board – an institution under the Industrial Department – took wastewater samples from both Kahatex and Insan Sandang. These samples indicated that Kahatex was compliant, but that in August, Insan Sandang's had not complied with the standards. The available documentation does not report what resulted from these actions.

The Province's strategy to seek consensus (2008)

In 2008, enforcement authority had apparently shifted to the Provincial government, since the Minister of Environment requested the Province to impose sanctions on Kahatex and Insan Sandang. However, instead of imposing sanctions, the Province continued to seek consensus among the involved parties, i.e., representatives of Rancaekek's population, the industries and the government institutions at all administrative levels. This approach was in line with the Province's previous strategy of mediating in the 2002 agreement between the industry and *Tim G*, and in the 2007 agreement between the industry and the Sumedang neighbourhood leaders.

In early 2008, the Provincial environmental agency invited eighteen institutions – from the Ministry down to the village level – as well as Kahatex and Insan Sandang, to discuss how they could accommodate the desires of 'the people of Rancaekek'. Initially, the focus was on improving the environmental conditions. These conditions could change through optimising the wastewater treatment systems, 'normalising' the river, properly managing hazardous waste and increasing the supply of clean water. Officials from all eighteen institutions and community representatives conducted an inspection visit. Most institutions concluded that Kahatex, Insan Sandang and Five Star were noncompliant. Insan Sandang was found to be the worst performing.[15] Only Sumedang District disagreed, as it found that both Insan Sandang and Kahatex were 'making

15 Furthermore, the level of two parameters assessed to determine the wastewater quality – sodium and chloride – had not yet been regulated by provincial regulations, even though the Ministry of Environment had suggested this in 2008 because particularly high levels of these chemical elements caused damage in Rancaekek. Despite the lacking regulation, the high level of these elements would later form part of the reason to impose an administrative sanction on these industries.

good progress'.[16] A few months later, Kahatex asked Sumedang's environmental agency to formally acknowledge that it had complied with the wastewater quality standards. This request confirmed that the Province was not the sole regulator in this case, but that multiple governments with different interests had taken on regulatory tasks.

Just as in 1999, in July 2008, West Java's Governor established working groups to handle the case, focusing on its technical, legal and social aspects. Over twenty departments from various institutions across all administrative levels of government participated. Later on, industrial, academic and NGO experts joined. After some time, they requested the Governor to extend the working groups' authority to be able to enforce the law. If the Governor had granted this request, multiple institutions and non-state actors would have shared enforcement authority. It would have made it even more difficult to hold any of them accountable if their approach failed to halt the pollution. The Governor never responded to this request.

Yet another agreement (2008)

Initially, the working groups merely aimed for the industries to improve their environmental performance. However, the groups' focus shifted after the officials of twenty different institutions witnessed a new agreement between Kahatex and Insan Sandang.

This agreement involved representatives of the four Rancaekek villages: Bojongloa, Jelegong, Linggar and Sukamulya. It focused less on environmental measures and more on economic compensation and villager benefits. The industries agreed to provide health care, deliver rejected industrial textile materials to local businesses, and recruit industrial labourers from these villages.

Although the agreement was primarily based on private law, it did have features of administrative law. For example, the institutions that witnessed the signing also monitored whether it was implemented correctly. Furthermore, the agreement included a 'sanctions' section, which noted that if industries did not implement the agreement, they would receive a 'warning'. If they did not react appropriately, 'other sanctions in line with the law would follow'. These sanctions appeared to refer to an 'enforcement pyramid' that was discussed in chapter 2. However, the precise consequences of non-implementation were unclear, along with how responses based on private, administrative and criminal law would relate to one another. This lack of clarity created legal insecurity for both the citizens and the industries involved in this agreement. The agreement and unclear 'enforcement pyramid' policy gave

16 Later that year, the Sumedang district government argued that Insan Sandang had been nearly compliant and that Kahatex's wastewater had been fully compliant between August and November 2008.

a considerable degree of discretion to the officials and allowed them to avoid taking decisions that could lead to conflict with other institutions or industries.

The Province imposes sanctions (2009)

Soon after the agreement was signed, the working groups focused on arranging compensation for the damages that the farmers in the four villages had suffered. They estimated that since 2001, 415 hectares of land had been damaged at the cost of over 132 billion rupiahs (approximately € 10,5 million).

At the same time, the working groups recommended that the Provincial legal bureau impose sanctions. Various government institutions also expressed their support for the Provincial environmental agency to impose sanctions on Kahatex and Insan Sandang.

By contrast, other institutions stated that the industries were compliant. The Pulp and Paper Board reported that in 2008 and 2009, Kahatex's wastewater quality met the legal standards. According to PROPER ratings, Kahatex and Insan Sandang had been compliant between 2008-2009, both scoring a 'blue minus'.[17] The divergence between sanctions and rankings illustrated not only unclear divisions of monitoring and enforcement authorities but also how institutions disagreed with one another on environmental performance.

In March 2009, the Provincial environmental agency ordered Kahatex and Insan Sandang to optimise their wastewater treatment systems, build wastewater ponds, install monitoring tools and study alternative rivers through which they could discharge their wastewater. Sumedang's environmental agency ordered both companies to follow these Provincial agency instructions.

Kahatex objected to the sanction, arguing that it had already attempted to improve its environmental management and that implementing the orders would lead to higher costs. It claimed that the government was obliged to assist industries in making further improvements. The Provincial environmental agency invited both Kahatex and Insan Sandang to present their views. After that meeting, the agency made minor adjustments to the orders.

In November 2009, eight months after the imposition of the sanctions, the Provincial environmental agency inspected whether the industries had implemented the orders.[18] The agency concluded that Kahatex had not executed any, while Insan Sandang had executed half. The agency then organised a meeting with five industries, including Kahatex and Insan Sandang, where the industries were allowed to explain which measures they had taken to improve their environmental performances and ask the government for technical advice. The industries presented their plans to build an integrated wastewater treatment system. Kahatex and Insan Sandang declared that they would

17 See footnote 5 for a link to the relevant publications of PROPER ratings.

18 However, during this inspection, the adjustments that the Province had made to the orders after meeting with the industries were not taken into account.

postpone assessing the possibility of discharging wastewater into another river.[19] Insan Sandang also requested advice from the agency on how to discharge the wastewater into another river. The Provincial environmental agency co-signed the declaration, seeming to consent to this alteration.

An incident leading to another agreement (2009)

In April 2009, a dam burst, causing wastewater to flow directly into the Cikijing River. The Provincial environmental agency informed the Governor about the incident, and sent copies of the letter to twelve institutions, as well as to Kahatex and Insan Sandang. Although it did not specify if or which industries were responsible for the incident, the agency closed the letter by stating that an administrative sanction had already been imposed recently. Thereby it suggested that Kahatex and Insan Sandang carried responsibility for the incident and that no further measures needed to be taken.

The incident also led to another agreement between community members of Rancawaru and Kahatex. Kahatex would repair the dam and employ fifteen people from Rancawaru, including the people who had represented the village during the negotiations. Seemingly, this was a compensation for the damages. It exemplifies how environmental issues were used to negotiate for economic benefits, and particularly for those who were present in the negotiations on behalf of a particular community.

The Province taking a tougher stand? (2010)

Early 2010, Insan Sandang informed the Ministry about its efforts to improve its environmental management. The Sumedang environmental agency declared that Insan Sandang had maintained proper wastewater quality, as per the 2007 agreement with Sumedang neighbourhood representatives. The District agency stated that these representatives were content with the discharged industrial wastewater because the farmers could use the groundwater that the industry extracted for irrigation purposes, particularly in the dry season.

Nevertheless, on the same day, the Provincial environmental agency announced that it would not suspend the 2009 administrative sanctions on Kahatex and Insan Sandang until the industries had optimised their wastewater treatment systems. At the request of the Sumedang environmental agency, Kahatex and Insan Sandang reported to the Provincial environmental agency their efforts to execute the orders, including constructing an integrated wastewater treatment plant. The industries even asked the Province for more detailed guidelines on what was expected from them.

19 Insan Sandang also requested advice from the agency on how to discharge the wastewater into another river.

However, the Provincial environmental agency seemed impatient. It called upon the Provincial police to discuss the possibilities for criminal prosecution. In its explanation to the police, it emphasised that none of the mediation efforts or administrative sanctions had resulted in any effects, contradicting their previous conclusions that Insan Sandang had carried out half of the orders.

Later that year, Insan Sandang and Kahatex requested the Sumedang District to extend their wastewater licenses. The meeting to discuss the matter occurred at one of the industries' offices. The Provincial environmental agency attended the meeting and in its report it noted that the industries had carried out all of the 2009 orders but it also claimed that both the companies had not complied with 'point 2 in the regulation' and that their wastewater license would not be extended. However, I did not find any accounts stating that the industries operated without this license.

Nearly three months later, various institutional representatives met at the Provincial environmental agency's office. They decided that the Provincial environmental agency, the Provincial legal bureau, the Districts, and environmental experts would monitor industrial behaviour together. They also decided that they would develop a 'cost-benefit instrument' that would help the government decide how to direct industries, particularly regarding wastewater treatment plant investments.

This episode leads to several conclusions. The imposition of sanctions seemed like a firm Provincial stance, but the later developments demonstrated that the sanctions were negotiable. In other words, the Province's strategy to seek consensus continued, yet this time its point of departure was an administrative sanction rather than a private law agreement.

Considering the options: administrative, criminal or private law approaches (2010)

Over the years, the Province alternated between mediating and imposing administrative sanctions addressing different industries. Neither approach had solved the pollution problem. Subsequently, the Provincial environmental agency began to focus on Kahatex, while scrutinising Insan Sandang to a much lesser extent, for unknown reasons.

In an internal memo, the Provincial environmental agency considered imposing another administrative sanction, since the Governor, the Sumedang and Bandung District Heads, the local Parliaments and the Minister of Environment were now all committed to the case. However, it noted that there was a considerable risk that the industries would 'not cooperate with the sanction'. Therefore, it ruled this option out. Criminal prosecution was ruled out for lack of evidence. The agency considered whether Kahatex could buy the polluted land and turn it into an industrial zone or residential area. However, the polluted area was extensive and too expensive. Another option was to try and arrange compensation for the affected communities, either through mediation or in court. The agency reasoned that if it mediated, it could influence the

outcome, potentially by including environmental measures in the negotiated outcome.

These considerations show how the Provincial agency simply ignored its authority to halt the violations and recover the damage at the expense of the violators through administrative legal processes. Instead, by opting to act as a mediator, it degraded its regulatory position, making its regulatory powers dependent on private parties.

The internal memo also revealed that there were disagreements within the Governor's working groups, in which multiple institutions from different administrative levels participated. The disagreement concerned the monitoring methodology and reliability of the industries' self-reporting data. Consequently, any monitoring of industrial environmental performance became problematic.

The working groups found that Rancaekek citizens were experiencing a 'crisis of trust' in the government, which the government tried to address by realising 'community demands'. In a meeting with 28 community representatives, the Provincial environmental agency established a list of demands. It is unclear how the agency selected the representatives. Five demands concerned environmental measures while the others concerned industry support for health posts, small business assistance, increased job opportunities and compensation for the land and harvest damages. On other occasions where institutions departed from the 'community demands', participants referred instead to the earlier agreement between Kahatex, Insan Sandang and the representatives of the four Rancaekek villages. In yet other meetings, institutions spoke of seven demands that only concerned environmental measures, such as optimising the wastewater treatment system, 'normalisation' of the river and rehabilitation of the polluted land. Other documents showed that community representatives focused mostly on economic benefits or compensation.[20]

In short, by centralising the 'community demands' in their approach, it appeared that the working groups and, in particular, the Provincial environmental agency were unwilling or unable to use administrative law enforcement instruments. Thus, they made themselves dependent on the community representatives to legitimise the pressure they would put on the industries to take the required environmental measures.

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20 By extension, in 2012, the Provincial environmental agency invested considerable time and budget in assessing the local soil quality. The agency inventoried the landowners to calculate who would be entitled to compensation, excluding a large section of the population from any compensation.

See section 1 and section 3.1 of this chapter.

Who is the regulator: the Ministry or the Province? (2010-2012)

In February 2010, the Provincial environmental agency announced it would stop its administrative law approach. It asked the Ministry of Environment for help handling the case, arguing that the case was too complex and was a 'national issue'. This announcement did not cause a complete shift of authority from the Province to the Ministry, but it began the Ministry's closer involvement.

Throughout 2010, the Provincial environmental agency kept monitoring the industries' wastewater quality. It concluded that during that year, both Kahatex and Insan Sandang were noncompliant several times, although the two firms were unwilling to acknowledge this.

In early 2011, the Provincial environmental agency once again found that Kahatex was violating wastewater quality standards and had not yet executed any of the orders imposed on it almost two years before. Insan Sandang had optimised its wastewater treatment system but failed to follow three other orders. Once again, both companies protested, arguing that they had implemented at least some of the measures.[21]

In April 2012, the Province found Kahatex noncompliant again. On top of this, during an unannounced inspection visit the Ministry of Environment found that one of Kahatex's wastewater treatment installations was not operational.

Despite the Ministry finding industries repeatedly noncompliant and not implementing orders, none of the involved institutions took concrete actions to halt the violations. Pressure from the Human Rights Commission and the national Parliament was ineffective. In short, there were no effective accountability mechanisms for incentivising government institutions to execute their regulatory tasks properly and for promoting the public interest in a clean environment.

2.10 The mushrooming of interest groups (2008-2012)

Meanwhile, people in Rancaekek knew that 'community representatives' could play a significant role in the developments.

21 In October 2010, various Kahatex's employees were prosecuted by the Sumedang public prosecutor for dumping hazardous waste in the Cimanggung sub-district, in Sumedang. Since this event did not take place in or near Rancaekek, this section does not discuss it here in detail. However, it should be noted that this criminal trial developed relatively fast. The employees were convicted one and a half years after the crime was committed. The trial preparations had been completely in the hands of Sumedang's public prosecutor. Unlike the pollution case in Rancaekek, the public prosecutor did manage to take a strong stand against Kahatex. Nevertheless, the criminal sanction did not contribute to improving environmental conditions.

Until 2007, only a handful of local interest groups had appeared. However, in 2008, the number of groups claiming to represent the community grew to more than fifty. They referred to themselves as, for example, 'citizens of Jelegong', 'citizens of Sukamulya', 'Forum of Concerned Villagers' and the 'Environmental Rescue Association'.

Some of these groups complained to the Provincial environmental agency about the employment situation, while others demanded compensation for farmers' losses. Others complained about the impossibility of breeding fish, the inability to consume polluted water, and the difficulty of selling contaminated land.

Sometimes these interest groups disagreed. For example, while the 'Environmental Rescue Association' advocated for a larger role of Rancaekek's sub-District Head, *Rancunit* filed a complaint against him to the Human Rights Commission. However, many organisations agreed that the government ought to improve its monitoring and enforcement. *Rancunit* even requested that the Human Rights Commission take over regulating from the authorised government institutions and impose sanctions on those who violated their economic and social rights.

Most groups used the strategy of sending letters to government institutions. Some also organised demonstrations at the Governor's and Provincial Parliament's offices. According to one respondent, some interest groups even covered the demonstrator's accommodation expenses. Most state institutions responded swiftly to the interest groups' demands, usually referring to them as 'the community'. They did not critically assess whom these interest groups represented and whether their demands perhaps merely served the group members' private interests. In 2012, one Provincial environmental agency official declared that the Ministry of Environment was now responsible for handling the case. Nevertheless, in daily practice, responding to the complaints and demands from the interest groups took up a considerable amount of Provincial agency officials' time.

2.11 Reflecting on two decades of regulating and redress seeking

Several patterns are noticeable when we reflect on the regulation and redress seeking processes as they developed in Rancaekek.

First, it had been unclear from the start which institution had the responsibility and authority to regulate the environmental behaviour of the industries in Rancaekek. Over the years, an increasing number of agencies became involved in the regulation process. Their coordination attempts led to even more confusion regarding decision-making responsibility. Even though inspections repeatedly showed that industries were violating the law, no institution could be held accountable for not taking adequate enforcement measures. Officials had an incentive to maintain good relations with their colleagues,

the powerful industries and the self-proclaimed community representatives. This approach often led to institutions making accommodations that offered short-term benefits to those directly involved in the process. Accountability mechanisms that would have incentivised the government to take adequate measures promoting a cleaner environment were lacking.

The institutions involved in the regulation process were particularly hesitant to take administrative law enforcement measures. They did impose administrative sanctions between June 2007 and March 2009, when the 1997 EMA was still in force. This law allowed the government to use administrative coercion, i.e., concrete action that would halt a violation immediately. However, the Ministry and Province merely imposed orders. It appears that officials generally believed that administrative sanctions always required industrial cooperation, as industries would have to implement the orders. The EMA 2009's definition of 'administrative coercion' reinforces this idea, implying that the government is not authorised to take concrete action to end violating behaviour immediately. Instead, the government often sought reconciliatory modes to handle the case.

Officials from the Provincial government tried to handle the case by mediating between Rancaekek interest groups and industries, which allowed them to circumvent the bureaucratic problems related to regulation and the (alleged) weaknesses of administrative sanctioning. One of the Provincial environmental agency's more remarkable efforts was acting as a mediator to have environmental measures included in private party agreements. This mediation was problematic for several reasons. First, there was no guarantee that the industries would implement the agreements. Since officials believed that the agreements were an adequate replacement for administrative sanctions, the mediation legitimised the government taking inadequate regulatory measures besides facilitating private law agreements. Finally, the agreements often did not merely address the environment and allowed those claiming to represent the 'community's interests' to promote their personal interests.

To summarise, the two decades of attempts to regulate the pollution in Rancaekek are characterised by continuous attempts to seek consensus amongst the directly involved institutions and private stakeholders, as well as by a lack of rigour amongst the responsible government institutions to take measures that, even in an early stage, could have halted the pollution. Regulatory and redress seeking processes became intertwined, as the government became dependent on citizens to take regulatory action and some interest groups used environmental arguments to seek compensation that served their private interests. It had negative consequences for the environment and severely damaged the social relations within the community. The next section will explain this phenomenon further.

3 THE DIFFUSE IMPACT OF THE INDUSTRIES ON VILLAGERS' LIVES

The previous section explained how the regulation process in Rancaekek developed over two decades and how interest groups tried to seek redress for industrial environmental damage. This section takes the perspective of people who live in the four villages, who were those primarily affected by the industrial pollution.[22] From west to east, these villages are Bojongloa, Jelegong, Linggar and Sukamulya (see map 1). People in these villages responded differently to the industrial activities and local pollution. As I will demonstrate, some managed to benefit from the industry-driven economy. Others suffered severely from both the failed regulation and the redress-seeking process that led to some villagers extorting others.

At first sight, the four villages seemed rather similar. At the time of my fieldwork, the number of inhabitants varied between 7,000 and 14,000 per village. The densely populated village areas were located along the busy provincial road, which also formed their northern border. Agricultural lands lay further south, occasionally with a small, old *kampung*. Close to the railway, real estate developers had recently constructed some housing complexes for lower-middle-class residents, many of whom had migrated to Rancaekek for industrial work. Across the railway, further south, there were more, rather isolated, *kampung*s. A few small, poorly maintained roads connected them to the more densely populated areas in the north. Many who lived here used to work on the surrounding rice fields, but their numbers diminished after the arrival of industries.

A second look, however, revealed that the four villages were quite different. Generally, the agricultural lands located in Linggar and Jelegong had been affected far more severely than those in Bojongloa and Sukamulya. The waste-water discharged into the Cikijing River entered Linggar's territory directly. The river and the connected irrigation channels then led the water directly onto some of Linggar's and Jelegong's rice fields. As a result, many fields were no longer productive.

Farther to the east, some of the fields in Sukamulya also depended on irrigation from the Cikijing, and production levels also dropped there. However, the Cimande River irrigated other fields in Sukamulya, and the quantities and quality of rice from those fields was said to be normal. The rice fields in Bojongloa that were irrigated by Cikijing's water were also affected by the

22 I interviewed 56 people in the four affected villages. However, the fieldwork in the villages was shortened to a period of ten days because conducting fieldwork in the area proved to be difficult. Respondents were frequently hesitant and even afraid to speak out, fearing the possible consequences of others within their villages noticing they were being interviewed. Some feared that they or a relative would lose their job at the industry or were afraid of a confrontation with *preman* (local thugs). Due to the tensions within the communities, it became increasingly difficult to find respondents.

pollution. However, many of Bojongloa's agricultural lands were at a higher altitude, so Cikijing's polluted water could not reach them.

Moreover, the village populations responded differently to the industrial presence. Linggar's and Sukamulya's inhabitants lived close to the industries. Many held a job there, owned *warungs* (eating stalls) where industrial workers came to eat, rented out rooms or houses to industrial labourers from outside the area, or ran small car repair shops. One particular type of business that developed mainly in Linggar was the trade in leftover textile materials, which the large textile industries sold at low prices to local businesses (e.g., home sewing shops).[23] Kahatex considered this part of its corporate social responsibility programme since it generated work for approximately 300 local people. Another source of income particular to Linggar and Jelegong landowners was the selling of unproductive rice fields to real estate developers who would then build housing complexes on them for immigrant factory labourers.

Bojongloa is located some four kilometres from the industries. Many people there continue to work in the agricultural sector. Bolongloa's village government focused on developing the village's service sector (e.g., by hosting bank offices). Bojongloa is also home to various groups or self-proclaimed 'NGOs' that provide 'recruitment services' to those looking for industrial employment.

In the areas south of the railway, the people from the villages responded differently to the industrial activities. Most inhabitants of the southern *kampungs* of Jelegong still work the rice fields. However, the pollution made this work more difficult. An official from Jelegong's village government explained that villagers prefer to keep working in the agricultural sector despite the pollution. In the southern parts of Bojongloa, where the impact of the pollution has been limited, many did the same. By contrast, the southern *kampung*s of Sukamulya and Linggar have become part of the industry-driven economy, with villagers working as industrial labourers or running small businesses such as catering services.

The villagers' professions and community social positions also influenced the industrial impact on their lives, perhaps even more so than their location. This section discusses different types of farmers, 'job brokers', and agricultural or industrial labourers. The final sub-section focuses on the role of interest groups and others who claim to represent the interests of the community.

23 This waste material was commonly referred to as 'DO', i.e., Delivery Order.

3.1 Farmers: 'land lords', small-holders and agricultural labourers

Newspapers and other documentation presented in section 2 suggest that Rancaekek's farmers are the primary victims of the industrial pollution. They made their voices heard by filing complaints, joining demonstrations and negotiating with the industries. Moreover, the Provincial environmental agency considers landowning farmers to be the primary victims. In 2012, the agency attempted to arrange compensation for them. It inventoried the landowners and assessed the soil quality. However, this approach was problematic in several ways.

First, it proved difficult to establish which landowner had suffered most from the pollution. As explained earlier, soil quality is not a good indicator of the damage done to yield production, which seemed more affected by the immediate water quality. Additionally, the landowner inventory did not mention where people owned land or their plot size. Government data on land ownership is contradictory. The Village governments registered land ownership in line with the cadastral agency registrations (*Badan Pertanahan Nasional Republik Indonesia* or *BPN*). However, the cadastral agency charged the Provincial environmental agency over a billion rupiah (approximately € 80 thousand) to provide information about land ownership. Therefore, the Provincial environmental agency made its own inventory, but without informing the Linggar Village government. The Provincial agency did so based on land tax data and information it had gathered during field visits to the area. The Provincial inventory listed over 2,300 landowners across the four villages, all owning relatively small plots of land.[24] However, fieldwork observations found several 'landlords' alongside 'small-holders' in the area. Among the 56 respondents, eleven identified as farmers. Ten of them owned between 3.7 and 7 hectares of land. One farmer explained that together with his brothers, his family owned 50 of the 752 hectares of polluted land. Two respondents said they owned a small plot of land.

It is common for local landowners to rent out land to a so-called *petani penggarap* or 'renting farmer'. The latter is entitled to the full profit from the yields. In some of these cases, the landowner lives far from Rancaekek, e.g., in Bandung or Jakarta. Sharecropping is also common. It means that local landowners, who are usually farmers themselves, lend some of their lands to a trusted community member, often a religious or neighbourhood leader[25] who would manage the land and cover the expenses. The landowner and the land manager share the revenues.

It should be noted that not all landlords are wealthy. For example, one man, who lives on the southern edge of the polluted area in Jelegong, owns

24 Linggar: 607 people. Bojongloa: 684 people. Sukamulya: 172 people. Jelegong: 840 people.
25 The religious leader was often the *ustadz* or the *guru ngaji*. The neighbourhood leader was the head of the 'RW or RT'.

a considerable amount of land. He manages 4.2 hectares, 1.15 of which had been affected by the pollution. No rice grew on it in the dry season and yields were half of the normal level during the rainy season. Although this farmer's house is bigger than that of others in the *kampung,* the living conditions are far less comfortable than those of most 'landlords' further north. The man, who spoke Sundanese, simply explained that his life had not changed much after the arrival of the industries.

Neither the Village government registers nor the Provincial environmental agency's inventory reflected these varieties in land tenure. The latter also did not consider whether the land was in a heavily or mildly affected area and whether the plots of land were even located within Rancaekek. Therefore, the Provincial environmental agency's inventory of landownership appeared inadequate as a basis for compensating all of the different types of farmers who had suffered from disappointing yields due to the pollution.

A second reason why the agency's inventory of landowners was unsuitable as a basis for compensation was that it overlooked the complexity of the social dynamics within the affected communities. Traditionally, farmers who own, rent or lend large plots of land have important positions within their communities and can employ other villagers as agricultural day labourers.[26] Patronage relationships between families that owned or managed land and families of land labourers existed for generations.

Almost all farming 'land lords' had complained about the pollution and the devastating effects on their yield and income. However, most of them seemed well off. They possessed relatively big and well-kept houses and smart clothes, and their children went to university. Some of these farmers explained that their relative wealth stemmed from their rice fields still producing normal yields, or from their land being in a non-polluted area. A few had managed to build small rice-processing factories next to their houses. One farmer said he had built the factory from the money he had received after selling a piece of unproductive land to a real estate developer who had constructed housing for migrant industrial labourers.

However, there is another source of income for these farmers, which is seldom openly discussed. One elderly, very poor looking farmer – who owned a small plot and cultivated it together with his wife – explained that one part of his land had become unproductive. He had sold it to a real estate developer, enabling him to pay for his children to get an industrial job. Paying a 'job broker' for recruitment as an industrial labourer had become a widespread practice in Rancaekek.

26 A daily fee for a day labourer would be approximately 25,000 rupiah (€2).

3.2 'Job brokers', NGOs and *preman*

The presence of the polluting textile industries created an intermediary market between the population and the industries. Almost all interviewees recognised that if one aspired to work in an industry, one could not directly apply. Instead, one had to go to a 'job broker', usually a community member with high social status. During pollution negotiations, the brokers had arranged with the industries that they would supply recruits, who had to pay the brokers for their services.

Some respondents believed the job brokers provided a noble service to their community members. They could arrange a job for those who no longer wanted to work as agricultural day labourers or who had trouble finding work on the unproductive fields. People who did not meet the industries' employment criteria benefitted especially from this approach. For example, most people in the *kampung*s had only a primary school diploma, while Kahatex required its workers to have a junior high school education. Furthermore, the industry preferred workers who were between 18 and 25 years old, and women to men, due to the delicate task of working with textiles. One woman explained that she did not meet the official education requirements, but a job broker had still been able to arrange a job for her.

However, most respondents were unsatisfied with this recruitment system, because they had to pay. The fewer requirements an aspiring industrial labourer met, the higher the fee he or she had to pay the job broker. Women paid an 'entry fee' of around 3 million rupiah, and men were said to pay approximately 8 million rupiah (respectively € 240 and € 640). That 'entry fee' is almost three to seven times a monthly income, which is around 1.2 million rupiah (€ 75). One respondent explained that some industrial labourers paid an additional monthly fee of 100,000 rupiah (€ 8). Some respondents complained that the job broker had occasionally been paid, but people still had to wait a long time before they were hired. Some even never got a job.

The recruitment system was a sensitive topic. Several respondents feared that they or a family member would lose their job if they would speak out against these practices. According to some, the job brokers were 'outsiders' who worked directly for the industries or were not from the region. Others said the job brokers were members of the local community who could be found in every village and neighbourhood. Only one respondent – a farmer – admitted that he was a job broker. Every one or two months he recruited about 20 people, although this depended on the industries' demand for new labourers. One respondent identified his brother – a neighbourhood leader – as a job broker. However, when I asked the brother, he denied he acted in this role.

Several respondents mentioned that Village government officials and neighbourhood leaders often also played a role in the recruitment process. One man explained that as a neighbourhood leader, he had the right to recom-

mend industrial labourers to the industry. However, he had never done so because he believed the industry could then prevent him from demonstrating. Another respondent said that in the past, Kahatex had indeed offered him money to not participate in a demonstration. Another said that demonstrating had enabled various family members to join the industrial workforce, without payment. One farmer explained that after a particular demonstration, each protesting farmer had five minutes to speak privately with an industry representative about what he needed to stop protesting. Another neighbourhood leader commented that protestors were always farmers and that children of industrial workers would not join the protests because their parents would then be fired. The farmer who admitted he was a job broker explained that he had often participated in demonstrations and considered his broker position as a fair trade-off between the industry and himself for the damage he suffered from the industrial pollution. By contrast, other 'land lords' and village and neighbourhood leaders denied that they had benefited from the demonstrations in which they had participated.

Village government officials certainly benefited from the situation. Kahatex claimed that 2,700 of its 3,500 employees were locals. This was a strong argument in favour of the industries' pleas about their positive local impact. However, an official from the Provincial environmental agency explained that it had become difficult to recruit locals because those who wanted a job and could pay the 'entry fee' were already hired. Job brokers now needed to recruit people from outside the region. The industry wanted immigrants to register themselves in one of Rancaekek's villages and apply for jobs so that it could maintain its record as a local job provider. Neighbourhood leaders and Village government officials could provide them with the required letters and identity cards, some of them allegedly charging a considerable fee for this service.

In sum, the recruitment system in which powerful community figures had gained positions as job brokers became a new source of income. The 'entry fees' indirectly provided them with compensation for the polluted rice fields. Those who used to work for the farmers as agricultural labourers on the rice fields now indirectly paid them the 'compensation' for the industrial pollution. At the same time, the recruitment system allowed the industries to control the community and prevent demonstrations, co-opting the community leaders. A legal advisor to Kahatex explained that companies were less afraid of the government and its measures, and more of negative publicity that protests could generate – particularly in the foreign countries to which they exported their goods.

NGOs and preman

Through the recruitment mechanism, the industry and the powerful community members kept a firm grip on each other. Both had an interest in keeping the status quo. Local NGOs were unable to break this balance and champion the interests of the most vulnerable within the Rancaekek communities, and the general public interest in a clean environment. Sadly, some NGOs even engaged in similar practices. The industries used the same strategy as with the farmers and neighbourhood leaders. They co-opted interest group leaders by offering them positions as job brokers. Various respondents declared that if one wanted a job, one could arrange this via an interest group, which they referred to as an 'NGO' (or *LSM)*. Almost all respondents used the terms 'NGO' and 'job broker' (*calon tenaga kerja*) interchangeably.

Both a Kahatex representative and the leader of the NGO Rancunit, one of the few interest groups that persisted throughout the years in addressing the pollution problems, explained that most interest groups demanded redress in the form of jobs or positions as 'job brokers'. Several times, the leader of Rancunit witnessed another NGO filing a complaint, and – without any clear reasons – withdrawing it a few weeks later. He remarked that these NGOs were initially sincere but that their goals changed over time, with farmers focusing on compensation. That 57 interest groups were active in Rancaekek in 2012 may indicate that it was a worthwhile effort, despite the lack of environmental results. One of the Provincial environmental agency's officials only qualified the head of the NGO Rancunit as 'good'.

So over the years, interest groups, farmers and neighbourhood leaders managed to manoeuvre themselves into positions where they could arrange jobs for themselves, their family members and friends, or charge fees to outsiders who wanted such jobs. This arrangement was a relatively recent development. Most interest groups active a decade earlier had focused on obtaining rejected textile materials that the major industries had sold to smaller, local industries. This activity continued but also changed in nature. A woman who owned a small business reselling the rejected textile materials explained that in the early years, it was a fair business between the industry and local people. However, nowadays companies from Bandung and Jakarta bought the materials and resold them at a higher price to the small businesses in Rancaekek. Still worse, she now had to pay off *preman* who intimidated her on a regular basis. The fear of *preman* was widespread in Rancaekek. These *preman* reportedly often had good contacts with Kahatex. A few respondents even accused Kahatex of paying the *preman* to control the people who raised their voices against the company.

3.3 Agricultural and industrial labourers

The people who still worked on the (semi-)productive rice fields of Rancaekek were mostly elderly. Young people in Rancaekek preferred to work for the industry because it was 'modern'.

In the southern *kampung*s of Sukamulya, many – mostly women – had managed to get jobs in the industry. Their husbands, however, were often unemployed or did not have steady jobs. Some got involved in illegal activities, one respondent commented. These *kampungs* also attracted small credit companies from Bandung city, which saw a business opportunity in providing loans to those who wanted to acquire a job through a job broker.

In Jelegong's southern *kampungs,* fewer people worked for the industry, and many were underemployed. Some respondents explained that the possibilities to work as a day labourer on nearby rice fields had decreased due to the pollution. Currently, if they wanted to work as agricultural labourers, they would have to travel further away, spending some 10,000 of their 25,000 rupiah daily wage (€ 0.8 of € 2 daily wage) on transportation.

Although many youngsters dreamed of working in the industry, those who did were generally unsatisfied because of the bad labour conditions. They referred to the strict targets and rules and the tiring eight-hour shifts. They said they could easily lose their jobs, e.g., when they were caught drinking water during their shift. Furthermore, people were only offered one-year contracts, and few managed to stay longer than that.

Many of the migrants who came to Rancaekek to work for the industries lived in the newly built housing complexes, situated on former rice fields that had become unproductive due to the pollution. Several respondents from these complexes were unaware that their house was built on polluted soil, and some were cultivating vegetables in their front yards. Several people complained about the smell and colour of Cikijing's water that passed nearby the houses. The neighbourhood leader of one of the housing complexes said that he heard about the pollution only months after he had bought his house. However, he did not care much since he was glad to have been finally able to buy an affordable house for his family.

Most of the 56 respondents whom I asked about appropriate redress hoped for clean water, sometimes in combination with sanitation of the polluted soil. However, a considerable number of respondents just wished that the industry would provide work for them or their children. Some merely hoped that it would become possible to get a job without having to pay for it and that the government would arrange this. Only a few respondents said they wished the social relations within the community would become peaceful again.

4 CONCLUSION

The regulation and redress seeking processes in Rancaekek became entangled in a way that was destructive for both the environment and for the social relations within the affected communities. By analysing the roles that citizens, interest groups and government institutions played in these processes, this chapter explained how it was possible that the situation evolved in this manner over two decades of pollution.

This chapter began with the regulation process and explained why it had not resulted in halting the pollution. After years of industrial pollution, the monitoring efforts from the involved institutions had not established the facts regarding the extent of the pollution, the industries that caused it, when violations had occurred, and whether they were still occurring. The many institutions involved in monitoring industrial environmental performance gave contradicting statements. The complaints from citizens, interest groups and the Bandung District were insufficient reasons for the regulator to conduct adequate, intensive monitoring, let alone take adequate enforcement measures to halt the violations and prevent further damage.

Complaints did not contribute to better regulation of the pollution mainly because redress seeking became entangled with and finally replaced regulation. Admittedly, the administrative law framework posed many hurdles to regulating industries, including unclear divisions of authority between institutions, and the weaknesses in the regulation in the monitoring and sanctioning. The officials from the various institutions responded by continuously looking for consensus amongst each another and with other relatively powerful key players, such as the industries and community leaders.

Mechanisms were lacking for holding the government accountable for failing its regulatory task, and thus there were barely any incentives for the regulator to take a firm stand against the industry. Additionally, officials believed that mediating negotiations between the polluting industries and citizens was the preferred approach to handling environmental cases. It was an opportunity to increase citizen participation in regulation and allowed officials to circumvent the administrative law obstacles to regulation, and the many institutions with conflicting interests. However, by doing so, officials reduced the case to a private law dispute. Citizens became responsible for standing up for the public interest in a clean environment, and they could not rely on the regulating government institutions to do so. As complaints were sidetracked from the administrative to the private law framework, violators and citizens could look for solutions that served them, rather than the public interest.

This way of handling cases had devastating consequences for the environment. However, it had equally devastating consequences for the social relations within affected communities. Although complainants first sought redress in the form of halting pollution, they settled for indirect compensation after two

decades. However, not all of those who had been affected by pollution had been in the position to negotiate with the industries about individual redress. As a result, the community members who had been strong enough to raise their voices against the pollution came into a position where they could gain compensation by extorting their more vulnerable fellow citizens. This enabled the industries to refrain from taking adequate environmental measures or paying compensation for the damages they caused. By co-opting the community leaders, they were able to silence critical voices and exercise social control over the nearby communities. The regulatory government acted instead as a witness to these arrangements.

In conclusion, this case demonstrates that people affected by pollution do not necessarily seek redress in the form of halting the pollution. Increasing the possibilities to seek redress thereby does not necessarily contribute to the promotion of the public interest in a clean environment. As long as the pollution continued, it served as a basis for making claims. However, the claims concerned compensation that did not benefit all community members.

These findings are similar to the 'compensation trap' that Van Rooij (2012) found in China.[27] This case adds that the redress seeking process justified the government's inaction towards adequate regulatory measures to halt the pollution, and contributed to increased inequality within the affected communities.

27 See chapter 2 for a more extensive discussion of this article.

6 Losing sight of appropriate redress
Mining and pollution in Kao-Malifut, North Maluku

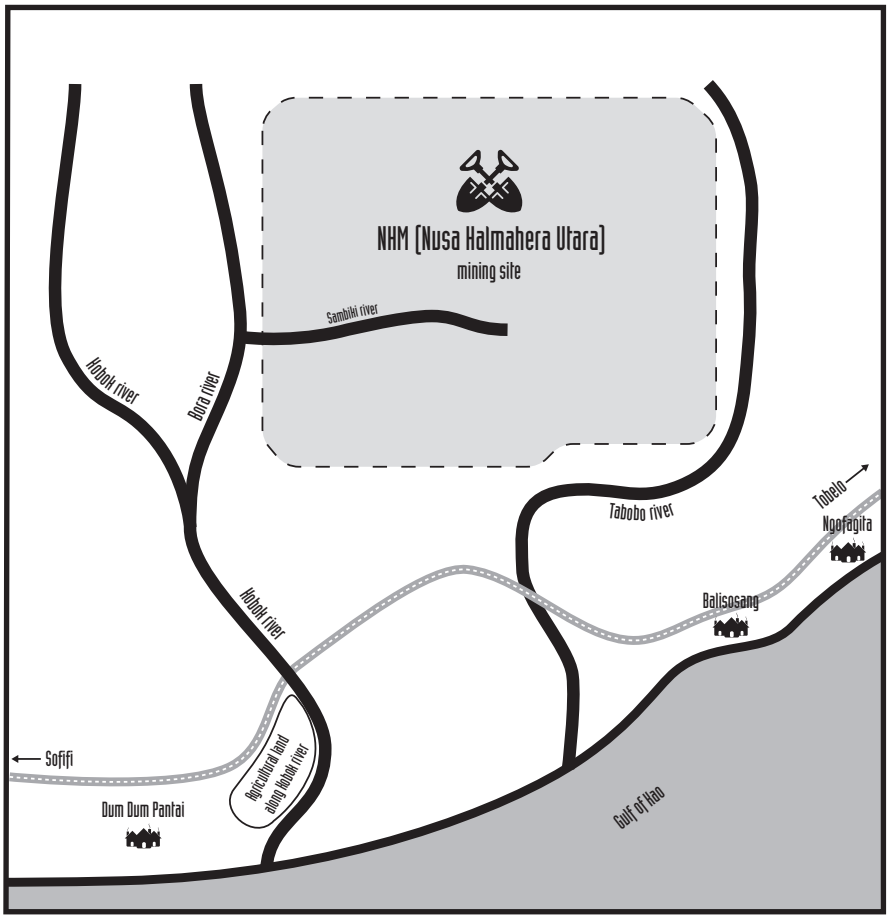
This book's second in-depth case study occurs in Kao-Malifut, on the island of Halmahera in North Maluku province. The gold mining company Nusa Halmahera Minerals (NHM) arrived in the area in the late 1990s. Gold mining is generally a polluting activity, amongst other things because of the chemicals that are used to extract gold from ore. In this case, citizens and interest groups began to complain about the environmental impact soon after the company became operational. However, the environmental impact was not their only concern. What the local population framed as grievances changed over time. This chapter discusses this framing process from the late 1990s until 2012. It focuses on the roles and perspectives of interest groups and villagers.

The Rolax-analytical framework, which chapter 2 discussed, offers a method for analysing the redress seeking process. The framework proposes assessing various elements in the process: peoples' real-life problems, whether they can formulate these problems into a grievance, the available redress forums, and whether they eventually achieve appropriate redress (Bedner and Vel, 2010).

However, in this case, the process did not develop linearly. Throughout the years, interest groups and villagers raised many grievances. The grievances moved beyond the mining's environmental impact and were continuously reframed in response to new opportunities. This framing and reframing of grievances happened regardless of whether the sought redress could contribute to solving the initial problem. This chapter seeks to understand how it was possible that redress became so detached from the initial problems, and the implications of this detachment.

I analysed approximately 450 documents related to the case, consisting mostly of local newspaper articles and NGO reports. During two fieldwork periods in 2009 and 2012, I interviewed 39 key government employees, NGO members, village representatives and mining officials, and asked villagers in four locations about the mining activities' impacts on their lives. In 2009, I interviewed more than 50 respondents in the villages of Ngofagita, Dum Dum Pantai and Balisosang. In 2012, I interviewed nearly 30 respondents, in Balisosang and on the agricultural land along the Kobok River, where the mining's environmental effects were most noticeable.[1]

1 A fully annotated version of this chapter, with references to all documents and interviews, is available with the author.



Map 2: Schematic map of Kao-Malifut area (not to scale), by the author.

The first section of this chapter sketches the regulating background against which the redress seeking process took place. It explains some of the particular features of regulating mining in Indonesia. It briefly describes how various governmental institutions were involved in regulating the mining company NHM's environmental impact. Section 2 describes the redress seeking process. It begins with a brief history of the Kao-Malifut area as a place marked by ethnic and religious tensions. It describes how interest groups addressed grievances for the first time soon after the company arrived, and how these grievances were reframed in later years. Section 3 focuses on the claims to redress related to indigenousness, and how they became a dominant theme in the redress seeking process after 2010. Section 4 explains how interest groups and villagers sought redress for the mining's environmental impact in particular. It focuses on the environmental NGO's role and how villagers reflected

on the environmental impact and the redress seeking process. Section 5 presents some general conclusions.

1 Regulating mining and NHM's environmental impact

In the mid-1990s, the Indonesian Central Government allowed the mining company NHM to operate on 296 square kilometres of land, through a so-called 'Contract of Work'. At that time, the Central Government held full powers of regulation over NHM's operations.[2] However, due to the decentralisation process that started in the late 1990s, regional governments received more authority to regulate mining activities. Nevertheless, recent laws and regulations[3] are not fully clear on whether the Province or District is authorised to regulate a particular case (Hamidi, 2015: 89). Additionally, existing 'Contracts of Work' need to be renegotiated and converted into mining permits, which Indonesia's Investment Coordinating Board would issue. This Board functions directly under the President. In the transitional period, the Contract of Works will remain honoured (PWC, 2017: 9, 33-32). Therefore, it is unclear to what the extent the District, the Province and the Central Government are authorised to regulate NHM.

The sectoral division of regulatory authority over mining activities is also unclear since forestry and environment regulations are not consistent with the Mining Law. Since the 1970s, various implementing regulations under the Mining Law set requirements on the environmental behaviour of mining companies. Since 1986, they are required to conduct Environmental Impact Assessments, and more recently, to obtain an environmental license (Devi and Prayogo, 2013: 22, 32-37, 56). However, it is unclear which institution is responsible for monitoring compliance with the environmental standards, particularly when the environmental impact crosses District or Provincial borders (PWC, 2017: 33).

The regulation process of mining activities is notorious for its lack of transparency and corruption (Hamidi, 2015). The economic stakes are high for governments at all administrative levels. For example, in 2011, mining accounted for 6.14 per cent of Indonesia's Gross Domestic Product, and tax revenues amounted to a total of 70.5 trillion rupiahs (approximately € 28 billion) (PWC, 2017: 22-3). Of those revenues, 80 per cent go to the Central Government, and only 20 per cent go to the regional governments (Hamidi, 2015: 81, 91). The stakes for local communities are also high, not least because

2 The 'Contract of Work' included the concession area on which the company could operate. This 'Contract of Work' system was abolished in 2009 and replaced by a permit system (Bhasin and Venkataramany, 2007; Scott and Tan, 2014).

3 Hamidi (2015) refers in particular to the Regional Government Acts of 2014 (Law 23/2014) and the Law on Mineral and Coal Mining of 2009 (Law 4/2009).

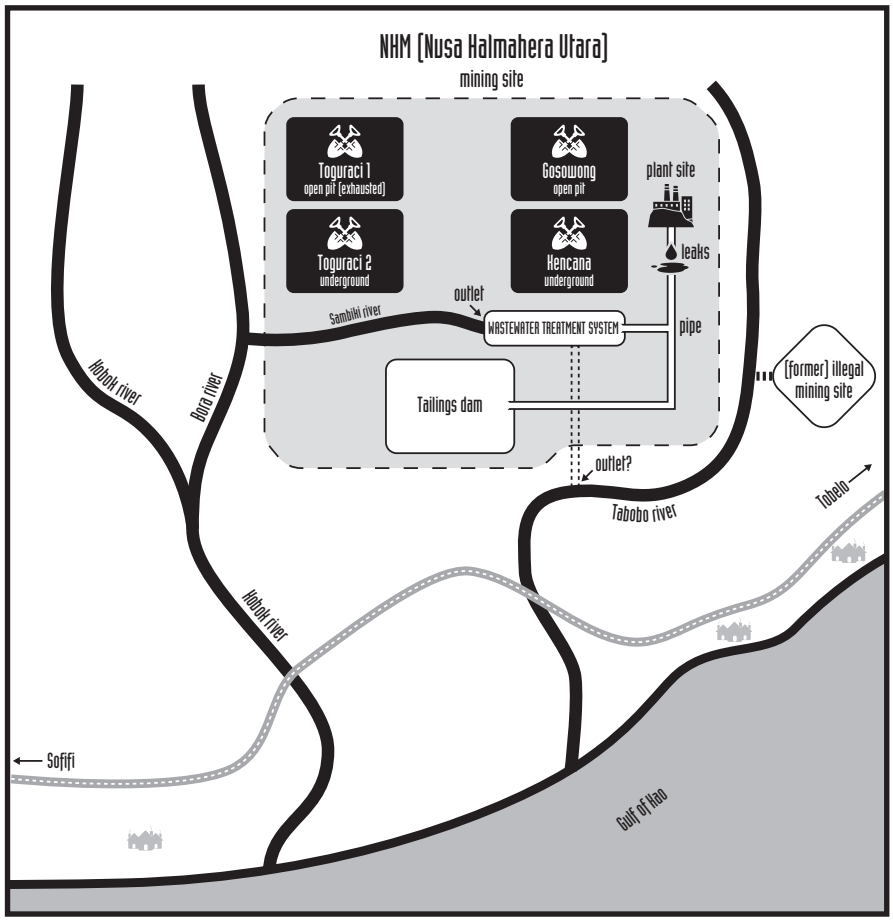
the mining industry provides job opportunities. Moreover, since 2007, the companies are supposed to act by following corporate social responsibility (Devi and Prayogo, 2013: 37-38). Mining debates include a strong call for increased citizen participation, also in their monitoring capacity overseeing mining activities (Hamidi, 2015: 96).

1.1 Regulating the environmental impact of NHM

In the 1990s, the Australian-Indonesian company NHM came to the Kao-Malifut area. In 2015, the company employed approximately 1,200 full-time workers, 95 per cent of who were Indonesians, and 55 per cent of who were local people. That year, the company produced approximately 330 thousand ounces of gold, valued at an estimated € 350 million (NHM, 2015).

The company exploited four mines. It began to operate the open-pit mines of Gosowong and Toguraci in 1999 and 2003, respectively. In 2006, NHM started to exploit the underground Kencana mine, and in 2011, it began operations in the underground mine Toguraci 2.

The company would transport ore from the mines to the plant, where they used chemical cyanide to extract the gold from the volcanic rocks. They then transported the extraction's waste material through pipes. They stored solid waste material in tailing dams, i.e., large pools of black mud. The wastewater was separated and detoxified before being discharged into the Bora River. Further downstream, the Bora River merged with the Kobok River, eventually flowing into the Gulf of Kao.



Map 3: Schematic map mining site NHM (not to scale), by the author.

Since their arrival, interest groups and villagers had accused NHM of causing environmental pollution. Over the years, different actors raised various environmental concerns, including the destruction of protected forest areas and river pollution, decreasing fish stocks and increasing health problems. They mentioned various possible causes, such as overflowing acid water from open-pit mines and insufficient wastewater treatment. Interest groups and villagers also accused the company of illegally discharging untreated wastewater into the Tabobo River and dumping tailing material.

However, government officials and the mining company accused small-scale miners (or 'community' or 'artisanal' miners) of causing pollution. Such miners operate illegally, obtaining ore from NHM mining sites and processing the raw material using mercury. These miners often discharge their wastewater directly into the environment without any treatment. When water samples contained

traces of mercury, NHM defended itself by saying that it did not use mercury. It claimed that only artisanal miners use it to extract gold, leading to environmental and health problems.[4]

Officials said that NHM polluted the Bora and Kobok Rivers, while illegal miners were responsible for polluting the Tabobo River. However, some respondents declared that illegal miners had also operated along the Kobok River. In recent years, the number of illegal miners diminished. After 2010, it became more difficult for them to obtain ore from the mining site because NHM no longer operated open-pit mines, and accessing the underground mines was very difficult for the small-scale miners.

In practice, mining and environmental institutions from all administrative government levels participated in regulating NHM's environmental behaviours. Officials gave conflicting statements of each institution's tasks and authorities. For example, a Provincial mining agency official said his agency was primarily responsible for monitoring NHM, while environmental institutions were merely authorised to carry out regulatory activities outside of NHM's terrain. By contrast, Provincial environmental agency officials said they also conducted monitoring at the mining site.[5]

Government institutions also contradicted one another about the company's level of compliance. Some stated that NHM generally complied with environmental standards. For example, the Ministry of Energy and Mineral Resources rewarded NHM with the Aditama (Gold) Environmental Award for its work in 2006-2007. However, the Ministry of Environment's PROPER programme rated NHM 'red' in 2006, indicating non-compliance. NHM later stated that the negative PROPER rating in 2006 was merely related to the absence of certain required licenses. Notably, between 2008 and 2012, the company's PROPER rating was 'blue', indicating compliance.[6]

A Ministry of Environment official expressed doubts on whether the negative 2006 PROPER rating was merely related to the absence of required licenses. In 2007, the Ministry received complaints from local interest groups about the mining activities' negative environmental impacts. In reaction, the Ministry formed an investigation team and took water samples. However, the team lost the samples on their way back to Jakarta. They eventually recovered

4 Presentation by Terry Pilch and Brett Fletch (Newcrest) 'Welcome to Gosowong Gold Mine' at the Ozmine 2012 Conference.

5 The Ministry of Environment's *Kali Bersih* (Clean River) Programme aimed to monitor the general quality of several rivers throughout the country. Within this programme, the provincial environmental agency had regularly taken water samples from the Tabobo River. This river had been notorious for the pollution that the illegal, small-scale miners had allegedly caused. However, the agency had always concluded that Tabobo's water quality was in line with the legal standards.

6 See press releases by the Ministry of Environment on the PROPER ratings between 2002 and 2014. http://proper.menlh.go.id/portal/?view=28&desc=1&iscollps=0&caption=PUBLIKASI.

them, and an examination revealed that the cyanide levels were above acceptable standards. However, due to the delay in examinations, the lab results could not be included in a legal procedure.

In the summer of 2008, officials from mining and environmental institutions, and District, Provincial and Central Government levels carried out a joint environmental audit. They did not publish the details, but a newspaper reported that they had detected no environmental violations or other problems. However, the District Parliament did not trust the audit results and requested additional research, conducted by the Centre for Environmental Studies from UGM University in Yogyakarta. The UGM report indicated that the cyanide and mercury levels were within tolerable limits. However, the environmental organisation Walhi criticised several methodological aspects of the research, such as where the UGM team took the samples. UGM's research results also surprised a researcher from a local university in Ternate. His research from 2007 on the water quality of the Tabobo and the Bora Rivers had indicated that the levels of both cyanide and mercury were above the legal standards.

In 2010, researchers from the well-respected ITB University in Bandung assessed the quality of fish from the area. They found that the levels of mercury and cyanide in shrimp and jackfruit fish were acceptable according to WHO standards. However, the high levels of mercury and cyanide in red snapper and mullet fish made them unsuitable for consumption (Simbolon, Simange and Wulandari, 2010). The company itself claimed that it had always complied with the wastewater quality standards.

In 2010, the District Head of Halmahera Utara complained to the National Parliament about NHM, with support from Walhi. Two years later, the same District Head fully supported the local NHM activities. A District mining agency official declared in 2012 that there had never been proof of NHM's non-compliance.

In sum, many institutions participated in regulating the mining activities gave conflicting statements about NHM's compliance. As a result, the environmental situation remains contested, including with regard to the identity of the polluter. The unclear division of authorities between government institutions, which often have considerable interests in keeping mining companies operational, makes it difficult to hold them accountable for taking insufficient regulatory actions.

2 Seeking opportunities to obtain redress for many grievances

This section chronologically describes how individuals and interest groups have attempted to seek redress for injustices allegedly caused by NHM. Several factors complicated the process severely. Groups contested the mining's environmental impact. Both government institutions and locals held high economic stakes in the mining activities. Also, the area was home to different

ethnic groups. Ethnicity served as the basis for redress claims, feeding into existing ethnic tensions.

This section demonstrates that grievances and redress seekers were not static. They transformed, often more because the opportunities to achieve redress or benefit from the mining activities changed than because they had to face new real life problems.

2.1 A brief history of the Kao-Malifut area and its population

The Kao-Malifut area is in Halmahera Utara District. The area consists of five Sub-Districts: Kao, Kao Utara, Kao Barat, Kao Teluk and Malifut. Each Sub-District has between 5,000 and 8,000 inhabitants and consists of 12 to 22 villages.

The Kao are the indigenous population in the area. They are predominantly Christians and have a customary system in which the highest leader is the sultan of the nearby island, Ternate. In the 1970s, a volcanic eruption threatened the island of Makian, located some 100 kilometres from the Kao-Malifut area. The Indonesian Central Government decided the Makian people had to migrate to the Kao region. Thus, 16 Makian villages were established on supposedly 'empty' land. However, the indigenous Kao population considered this land to belong to the Pagu, one of the Kao tribes. The Makian migrants are predominantly Muslim and generally supported the sultan of Tidore Island. Over the years, the migrant Makian managed to gain a relatively strong economic and political position in the poor Kao region. This gain frustrated the Kao, who felt that the government privileged the Makian by providing the migrants with, amongst other things, schools and roads (Duncan, 2005: 56-63; Wilson, 2008: 54-6; JŠger, 2017: 96-114)

NHM's arrival aggravated the existing frictions between the Kao and the Makian (Alhadar, 2001; Van Klinken, 2001: 6). In 1999, soon after the company became active in the region, a number of Kao representatives complained to the company about its recruitment policy. Of the local NHM workers, 90 per cent were Makian. The Kao also demanded more respect from the company for their indigenous leaders.

After Suharto's fall in 1998, the decentralisation process created opportunities to reset administrative boundaries across the country. New Provinces, Districts and Sub-Districts emerged throughout Indonesia (Van Klinken and Nordholt, 2007: 18-25). The Makian managed to get official recognition for their Sub-District, Malifut. Its territory comprised 16 Makian and 5 Kao villages. The Kao in these villages were upset because the new administrative boundaries separated them from other Kao villages (Duncan, 2005: 63). In addition, the rearrangement of administrative boundaries meant that Halmahera Barat District lost six villages to the Halmahera Utara District, leading to resentment among Halmahera Barat's inhabitants (JŠger, 2017: 102). As

section 2.2.3 explains, this division later had considerable repercussions for how the mining company divided its Corporate Social Responsibility fund.

In August 1999, a day after the government officially recognised the Malifut Sub-District, a violent conflict erupted between the Kao and Makian. Regional leaders in other parts of North Maluku, especially the two local sultans, became involved as well. Violence swiftly spread to other areas throughout North Maluku. The conflict lasted one year. Some 3,000 people were killed, thousands were injured, and approximately 200,000 became internally displaced (Van Klinken, 2007: 107-9, 118-9; Wilson, 2008: 1; Cordaid, 2001; International Crisis Group, 2009).

The conflict was often interpreted along religious lines, between Christians and Muslims. However, the roots of the conflict lay in the tensions between various local ethnic groups (Duncan, 2005).[7] Competition between the ethnic groups over mining company jobs seemed to have intensified the tensions.

After the conflict, it remained quiet in the area for some years. People seemed to have lacked the energy or desire to complain to the mining company. Only former NHM employees complained – Kao and Makian alike – having lost their jobs during the conflict when the mining company had to stop its operations.

2.2 Mass demonstrations, but for what cause? (2003-2004)

Three years later, with the support of interest groups from outside the area, new opportunities led to new complaints. However, the form of redress somehow became detached from the underlying problems. Complainants also did not form a homogeneous group to strive for the same kinds of redress.

The new actions were sparked by NHM's decision to start mining in a second location. This new Toguraci-mine was an open-pit mine, i.e., a landscape cavity exposed to the open air. Its location in a protected forest area triggered interest groups from outside the region to broadly resist NHM. National and international organisations, including Walhi and WWF Indonesia,[8] formed the Coalition against Mining in Protected Areas.[9] It focused on targeting NHM's open-pit mining activities in protected forest areas.

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7 Duncan (2005) provided a good overview of the violent events in 1999 and 2000 in Kao-Malifut and across North Maluku, emphasising the contradicting chronologies of the events and that the roots of the conflict are complex.

8 See for example 'NGOs urge Australian firm to stop mining in Halmahera', Jakarta Post, 24 December 2003.

9 This Coalition also consisted of Jarkarta-based JATAM (Mining Advocacy Network) and the Indonesian Centre for Environmental Law (ICEL), along with the Australian Mining Policy Institute.

Although the Forestry Law of 1999[10] banned open-pit mining in protected forest areas, the government still provided some permits to mining companies across Indonesia. The Coalition petitioned to the Constitutional Court to review the Government Regulation and Presidential Decree that permitted 13 companies across Indonesia, including NHM, to conduct open-pit mining in protected forest areas.[11] The NHM case then became part of a broader national campaign strategy against mining in such areas.

The Coalition also employed activities besides legal action. It sought media attention within Indonesia and abroad, lobbied against NHM, and supported mass demonstrations organised by local interest groups. In doing so, it focused attention on issues besides open-pit mining, such as the violation of customary rights. Before the violent conflict, Kao representatives had also made claims based on their indigenous status, demanding more jobs and respect for their indigenous leaders. By contrast, the Coalition referred to the land, claiming that NHM operated on traditional, indigenous land.

The Coalition also accused the special police force overseeing the mining site of violating human rights. It pointed to the mining company's alleged environmental impact, especially the acid water flowing from one of the non-operational open-pit mines. However, I found no records on complaints to regulatory institutions, e.g., demanding law enforcement measures. Remarkably, while the only appropriate redress for the grievances seemed to be NHM's departure from the area, the Coalition's only specific call for redress was the demand for more job opportunities for the local population.

In the extra-legal campaign against NHM, interest groups who initially addressed different grievances aligned with each other. For example, the Coalition supported former NHM employees who wanted to reclaim their jobs after they had been dismissed during the violent conflict. Kao and Makian joined forces as a group of former NHM employees collaborated with the Adat Pagu organisation (i.e., a Kao tribe advocating for its customary rights). In a joint petition, the two groups claimed that NHM and the government had not paid sufficient attention to labour and customary rights issues, or human rights and environmental matters. The petition did not specify these grievances, and it did not seek a particular kind of redress. By generalising the grievances, the petition possibly intended to promote support amongst other local (customary) leaders while denouncing the company before a broader audience (e.g., national and international NGOs and the media).

An informal NGO report from around 2003 provided snippets of the two customary Pagu leaders' opinions of the land, labour and environmental problems. Priest Yance Namotemo, of the Balisosang village, complained about

10 Law 41/1999.

11 See for example 'Walhi urges government to solve dispute in Halmahera', Jakarta Post, 15 January 2004, and 'Constitutional Court bows to pro-mining pressure', Down to Earth magazine, no. 66, August 2005.

the limited number of jobs for the local population – Kao and Makian alike – compared with the job opportunities for people outside the region. The customary leaders also lamented the mining's impact on river pollution and the related decrease in fish stock – particularly the '*teri*' species – in the nearby Gulf of Kao. They furthermore mentioned the health impact, referring to the polluted river water infecting a man's leg. Finally, they stated that the Gosowong-mine site had a sacred significance. The leaders concluded that if the mining company would meet the compensation demands, the community was likely to agree and would cease its protests. The leaders did not specify what kind of compensation they envisioned, but they likely meant monetary redress rather than environmental measures.

Tim 13, a group of 13 local leaders from Christian and Muslim villages wrote various statements opposing NHM. They organised mass demonstrations with the support of the Coalition. The group raised a wide variety of grievances, including the violation of indigenous rights, the lack of job opportunities and environmental matters, such as the open-pit mining in a protected forest area and pollution. The mining company and the special police force that secured the mining site accused the protesters of being illegal miners in the company's mining area. Eventually, the mass demonstrations came to a dramatic end in January 2004, when one of the protesters was shot and killed by the special police force.

After that, a group of community, customary, religious and youth leaders from the Kao-Malifut region dissociated themselves from the protesters, and especially from the latter's customary rights and land claims.

In the spring of 2004, the Coalition brought a case against the Government Regulation and Presidential Decree before the Constitutional Court. The Regulation and Decree had allowed 13 companies to conduct open-pit mining in protected forest areas, which they reasoned was unconstitutional. The plaintiffs partially won: six companies had to stop their open-pit mining activities in those areas. However, NHM was not among them. Down to Earth Magazine criticised the Court's decision, reasoning that NHM failed to conduct the required environmental impact assessment of the new open-pit Toguraci-mine (Down to Earth Magazine, 2005). Journalist Chris Hamby argued that the company managed to continue its open-pit mining activities in the area because it threatened to sue the Indonesian government, through the so-called investor-state dispute settlement (ISDS) arbitration mechanism for international investment agreements (Hamby, 2016).

After the Constitutional Court's ruling, the Coalition members' attention on the NHM case subsided. Taking further legal action would be too costly and time-consuming, while the outcomes of court cases were uncertain, a former staff member of an involved NGO commented. ÒIt is not possible to stop NHM. You would need a foreign law firm that is willing to invest a lot of time and money in litigation. Our goal was to put pressure through national and international platforms. We were not really after getting the mining

companies to stop their activities. If the people would have been happy with compensation that probably would have been enough,Ó he said. Indeed, people in the area did not seem to consider open-pit mining in protected forest areas to be a real problem. None of the respondents I interviewed in 2009 mentioned open-pit mining in protected forest areas as a wrong corporate action. None of the interviewees recalled that the 2003-2004 demonstrations were about this specific issue.

However, the new Forestry Law created an opportunity to reframe the overall dissatisfaction with NHM into a legal critique of NHM's actions. Various grievances related to different problems were bundled to mobilise people and increase the pressure on the company. As a consequence, it became less clear who experienced which problem and what redress would be appropriate. For example, the monetary redress that according to the former NGO staff member could have been a satisfying kind of redress, would not solve the problems related to the environmental impacts, the customary and land rights, or limited job opportunities.

Soon after the Constitutional Court's ruling, most national and international organisations retreated from the case in Halmahera.

2.3 Reframing grievances (2004-2009)

After the demonstrations and the Constitutional Court decision, the protests against NHM ceased. I did not find reports of developments in the redress seeking process anytime between mid-2004 and 2005. Nevertheless, in the following years, the redress seeking process slowly revived. Local interest groups raised some of the same themes as in previous years: limited local job opportunities and environmental pollution. Grievances related to a new issue also arose. The increased amount of Corporate Social Responsibility funding that the company provided to villages near the mining site led to more interest groups becoming involved, with problems arising about the fund's distribution.

2.3.1 Labour related grievances

The issue of former NHM employees losing their jobs after the violent conflict in 1999-2000 was addressed for the last time in 2008. The Provincial Parliament facilitated a meeting between former NHM employees and the company. However, I found no documents that reported on the meeting's outcome. Former NHM employees whom I interviewed in 2009 said that they still hoped NHM would reemploy them, but that they were no longer participating in demonstrations or actively trying to achieve this goal. Overall, many respondents lamented the mining company's limited local job availability. This limited availability was partially related to mining work requiring a certain education, which the respondents and their relatives often lacked. Some also

complained about the unfair recruitment procedure. One 'needs to know someone within the company' and has to pay them to be recruited. Although limited job opportunities were one of the biggest frustrations for many respondents, interest groups and the media only sporadically mentioned grievances related to this issue after 2009.

2.3.2 *Environment related grievances*

Between 2004 and 2009, interest groups increasingly combined grievances related to the environmental impact and violations of indigenous rights.

The North Maluku branch of the environmental organisation Walhi (i.e., Walhi Malut) met with the Minister of Environment in 2006 to call for an environmental audit of NHM. The organisation suggested that NHM had caused severe environmental damage with its wastewater and with acid water overflowing from the Gosowong-mine, and through its drilling, blasting and demolition activities. When the government finally conducted an environmental audit in 2008, it did not grant Walhi's request to be part of the auditing team.

Walhi Malut also protested at the District Parliament's office, together with interest group *Forum Peduli Halamahera Utara*. It claimed that NHM had polluted the Kobok and Tabobo Rivers, obstructing access to clean water and causing a decline in the fish stock. They also claimed that NHM had taken indigenous land from the Pagu tribe without consulting the population.[12] As redress, the organisations demanded a revision of NHM's Contract of Work and a cancellation of all mining activities. In response, NHM workers started protesting against the possible closure of the mine.

Together with anti-mining NGO JATAM, Walhi Malut organised a seminar to discuss the mining's economic benefits and negative environmental impacts. A Provincial Government representative complained that NHM's Contract of Work did not sufficiently serve regional interests. By contrast, a Provincial Mining agency official said that the mining company contributed to the local economy through its taxes and royalty payments.

In 2006, the Village Head of Bukit Tinggi and several others reported to Walhi Malut that many people, including children, were suffering from itchy skin and swellings after they had bathed in the Tabobo River. Others complained about the loss of livelihoods due to the declining shrimp stock. Walhi reported on citizens' complaints that the river water was no longer drinkable.[13] Meanwhile, five political parties in the Provincial Parliament advocated that the government should legalise small-scale, illegal mining, despite it

12 Notably, this was the first time the issue of indigenous rights violations was framed as a land problem specific to the Pagu tribe.

13 During 2006 and 2007, Walhi Malut focused on the villages of Tabobo and Bukit Tinggi. In 2012, a former Walhi Malut member noted that inhabitants from these two villagers had become particularly eager to engage in demonstrations against the mining company.

causing severe environmental damage, because local communities could then also benefit from the mining activities.

These developments demonstrate that different groups addressed environmental grievances and occasionally combined them with grievances concerning indigenous land. However, they usually sought redress through economic compensation for the local communities, rather than cancelling activities at the root of the grievances.

2.3.3 *CSR related grievances*

In January 2008, complaints were first raised about NHM's Corporate Social Responsibility (CSR) funding. When NHM first arrived in 1998, it paid 64 million rupiahs (approximately € 5000) to the fund for nearby villages. However, after Indonesia's Company Law of 2007 made it mandatory for mining companies to provide CSR,[14] the amount increased significantly. In 2007, NHM paid 24 billion rupiahs (approximately € 1.9 million), with each village receiving an average of approximately € 22 thousand. However, the fund's distribution led to controversies within and between the villages, between the Halmahera Utara District Government and NHM, and between NHM and specific groups within the community.

The fund's distribution mechanism changed over time. Initially, a Community Consultative Committee managed the fund. After 2000, the company took over. In 2004, the District Government came to manage the fund's distribution, but according to NHM, considerable parts of the fund disappeared, and it feared this would lead to unrest.[15] Therefore, in 2007, the company established a CSR team to work closely with 'village teams' (*tim desa)* that drafted proposals on behalf of villagers to allocate the funding. The fund's donations were in the form of goods and services and could be spent on, e.g., building materials, health services and scholarships.

In 2008, the Malifut and Kao Teluk Sub-District Heads complained about this distribution mechanism and questioned whether each village received its allocated amount of funding. They considered the CSR funding as redress for the violations of indigenous rights. They also criticised the recruitment system, since the company had not hired enough locals. In 2009, NHM admitted it encountered difficulties with allocating the fund. Serious problems had occurred in about 10 per cent of the villages.

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14 Law 40/2007 obligated companies engaged in natural resource businesses to allocate one per cent of their gross revenues to CSR.

15 In 2009, complainants suspected NHM's sub-contractors, who were responsible for delivering construction materials donated within the CSR programme, of corruption. The complainants also doubted whether NHM's CSR fund amounted to one per cent of the company's revenues.

Ngofagita was one of the villages where CSR distribution issues caused tensions. Many respondents were dissatisfied with the village team, which consisted of three members, including the Village Head and the Village Secretary. 'The slow distribution of the fund is the *tim desa*'s fault. (É) There are always a lot of discussions in meetings between the team and other village members. I suspect that NHM does not know much about the situation in the village. The people who distribute the fund can easily take advantage of the situation. Those people only think about themselves.' Many respondents felt they did not have any options to address grievances. 'We do not have enough skills to talk to the *tim desa.* It's always the same people who talk. During meetings, I tried to speak but I was easily interrupted. If we already lack the skills to talk to the *tim desa*, forget about expressing our opinion to the District Government.'

Dum Dum Pantai became divided about the CSR's distribution. The Government reset administrative borders after the decentralisation process, and the village became part of the District Halmahera Utara. One part of the population identified strongly with their former district, Halmahera Barat. In response, the Halmahera Utara government offered Dum Dum villagers the possibility to register under either Halmahera Utara or Halmahera Barat. Therefore, from 2006, Dum Dum had two village administrations, including two Village Heads. While supporters of each District lived side by side, only the villagers registered under Halmahera Utara received CSR funding.

Many Dum Dum respondents considered the CSR funding as redress for the negative impact the mining had on them. 'It would be fair if the CSR went to the whole village because the whole village is affected by the mining. However, the village team decided that Halmahera Barat people are not entitled to CSR, but NHM does not know about that.' One of NHM's CSR team members commented that the company would not have any problem distributing CSR to those registered under Halmahera Barat. However, he said: 'It is not NHM's, but the Government's responsibility. NHM doesn't want to get involved in that'.

Dum Dum's Village Head under Halmahera Utara was also accused of committing fraud. 'He takes personal benefit from the assistance provided by NHM. For example, if there are ten families who have not yet received CSR, the Village Head reports that twenty families are still waiting for CSR. He will keep the difference himself.'

After 2010, discussions about alternative distribution mechanisms for the CSR fund dominated media reports on NHM. The discussions were initiated by the Halmahera Utara District Head's demands to the National Parliament. He claimed that the District Government should have more regulatory power under the Regional Government Act and that the District should receive company shares to compensate for the mining's environmental damage caused. He also suggested revising the CSR programme so as not to contradict the District's development plans. The District Head threatened to close down the

company if his demands were not met. The District Head also announced that he would establish a foundation to manage the CSR fund. NHM rejected this idea. However, between October 2010 and mid-2012, 29 local parties – including NGOs and Village Heads – stepped forward and competed to obtain a position in the CSR distribution mechanism. To solicit public support, some claimed that they could address both CSR problems and other mining-related issues.

NHM eventually refused to allow any local party to play a part in the fund's distribution while local interest groups continued raising CSR-related problems. These problems included the late payment of CSR scholarships, resulting in students' expulsions from their universities. They also included late CSR payments to the village teams and alleged fraud by the NHM's sub-contractors responsible for delivering CSR-financed goods and services.

In sum, CSR laws and policies led to controversies within and between villages, between the Halmahera Utara District government and NHM, and between NHM and specific groups within the community. At the village level, tensions increased as village representatives were accused of personally benefiting from their position in distributing the CSR fund. Many also saw CSR as redress for the company's wrongdoings. As section 4 will demonstrate, CSR could be used to 'buy off' people who had complained about the mining's environmental impacts.

2.3.4 *Bundling grievances and seeking monetary redress*

After 2008, a growing number of interest groups increasingly voiced grievances related to various themes together, often aiming for monetary redress.

In early February 2008, the local interest group *Aliansi Masyarakat Lingkar Tambang* (*AMLT*) blocked the road to NHM. Walhi Malut reported on the blockade, writing that it consisted of '*masyarakat adat*' (the indigenous community), including representatives from the Pagu, Boeng, Modole and Towiliko tribes. They also reported that *AMLT* demanded 500 billion rupiahs (approximately € 40 million) as redress for the violations of their indigenous and environmental rights.

Later that month, another group that claimed to represent five Sub-Districts also demonstrated against NHM, blocking access to several vital work locations for various days. District Parliament members facilitated the meetings between the protesters and NHM. The tense meetings did not lead to any concrete agreement.

In May 2008, a student group called *AMPP* proposed to nationalise NHM, while another group called *Forum Peduli Daerah Halmahera Utara* staged demonstrations to demand more job security for mine workers and improved management of CSR distribution. One advocacy team announced that it would file a lawsuit against NHM for the NHM's Corporate Social Responsibility team mismanaging the CSR. The District Parliament's chairman also stated that the

distribution through the company's CSR team was not transparent and that NHM's empowerment programme (as part of the CSR programme) did not work properly. Walhi Malut and interest group *ORANG* accused NHM of causing a decrease in the Gulf of Kao's fish stock.

A local division of the Indonesian National Youth Committee (*KNPI*) asked the demonstrators to stop their protests and await the discussion between the District Parliament, the District Government and NHM regarding regional legislation possibly recognising the local population's customary status. *KNPI* said such regulation could serve as a basis for making further claims, referring to the mining case in Papua New Guinea with the company, PT Freeport. In that case, formal recognition of the customary status had resulted in benefits for the local population, including housing and shares in the company (Sethi et.al., 2011).

In 2009, five Kao leaders from different tribes sued the Republic of Indonesia as well as NHM in the first instance court in Tobelo to have NHM return the customary land and to obtain a compensation of 7 billion rupiahs (approximately € 500,000). The court rejected the claims, finding insufficient proof that the land was Kao customary land. On appeal, the High Court of North Maluku upheld the first court's decision. During the case, the position of these five leaders appeared to be controversial within their communities.[16] Different persons claimed to be the customary leaders of the same groups. Nonetheless, neither the court nor Parliament asked critical questions about this issue. As a result, there was a window of opportunity for fortune seekers to bring forward grievances on behalf of a group, and seek redress that would merely serve their private interests.

Despite the many complaints, some interest groups were satisfied with NHM. For example, a group called Forum of Concerned Youth Halmahera Utara (*FP2HU*) said the district parliament had evaluated NHM's performance incorrectly, especially concerning its assistance to the local population. According to this group, NHM had fulfilled its duties.

2.3.5 Parliaments acting as intermediaries between citizens and the company

As previously mentioned, in 2006, the Provincial Parliament's chair declared that this Parliament was the most appropriate forum to resolve problems related to labour, the environment and customary land. Nevertheless, in 2008, a delegation from the District Parliament and the District mining agency approached the National Parliament and the Ministry of Mining to ask for help in solving the problems between NHM and the local population. They asked the National Parliament to revise the NHM's Contract of Work in order

16 One of the appellants, Yeskiel Ngingi, claimed to be the customary leader (*sangaji*) of the Pagu tribe. However, around that time, many respondents in the predominantly Pagu village of Balisosang identified Yakop Nanotemo as the Pagu leader at that time.

to give more power to the District Government and suggested that the District Parliament manage the distribution of the CSR funding. In response, the Ministry of Mining met with NHM to discuss the District Parliament's proposal. The parties agreed that the Central Government would audit the distribution of CSR funding, while the District Government and Parliament would establish a foundation for the fund's distribution. The 'indigenous people' would conduct a comparative study of PT Freeport in Papua New Guinea to assess their arrangements on customary rights and CSR. Finally, the Central Government and District environmental agency would conduct a joint environmental audit. The audit concluded that the environmental impact did not exceed any legal standards.

2.3.6 Reflecting on the reframing and bundling of grievances

The grievances voiced between 2006 and 2009 revolved around violations of labour, the environment, and customary rights. However, the details changed. Labour problems no longer evolved around the dismissed workers. Environmental problems no longer related to acid water overflowing from the mine or to open-pit mining in protected forest areas. The violation of customary rights no longer concerned the lack of respect for customary Kao leaders but focused on land, especially Pagu land. It seems that grievances were reframed according to the new possibilities of achieving (monetary) redress or benefits. The number of different local interest groups that sought redress increased, and they frequently competed with one another instead of taking a joint stand against the company. Their efforts often had the veneer of rent-seeking and opportunism. The link between redress and sought benefits also became further detached from real-life problems that people who lived near the mining site experienced.

The roles of Parliaments also stand out. They began to act as intermediaries between the redress seekers and the company, instead of holding the government accountable for failing its regulatory tasks. It shows how the regulation process that ought to promote the public interests instead facilitated private parties in their quest for redress.

3 THE REVIVAL OF INDIGENOUSNESS AS A BASIS FOR CLAIMS

The developments of grievances and claims related to the indigenous status of Kao, specifically the Pagu, are key to explaining the dynamics of the redress seeking process in Kao-Malifut.

As described in section 2, soon after the mining company's arrival, the indigenous Kao demanded the company's respect for their indigenous leaders and claimed to be entitled to more jobs than the migrant Makian. After the conflict between 1999-2000, the issue of ethnicity was temporarily not

emphasised as a basis for claims, perhaps because the conflict highlighted the danger of such an approach. However, in the turmoil of the mass protests in 2003 and 2004, the ethnicity issue was raised again. This development coincided with a general turn towards indigenousness as a basis for land claims in Indonesia (see, e.g., Henley and Davidson, 2007; Bakker and Moniaga, 2010).

This section demonstrates how, throughout the years, grievances were reframed because opportunities to achieve redress changed. It also shows how the redress seeking process can have harmful effects on the social relations in communities. Although indigenous-based claims were directed primarily at the company, the Pagu tribe's increased awareness about their status also fuelled tensions between the different ethnic groups in the area.

3.1 The Pagu in 2009

When I conducted fieldwork in 2009, the Pagu people I interviewed rarely made claims to compensation based on the loss of indigenous land. The leader of the Pagu tribe, *sangaji* Yakub, lived in Balisosang, a predominantly Christian and Pagu village. He had suffered from a stroke, so his brother priest Yance – who was part of *Tim 13* in 2003 – had taken over many of his tasks.

Yance played down claims that were based on the indigenous status of the Pagu, particularly those related to land. 'Honestly speaking, we did not know much about our right to customary land until in 2002 two NGOs from Ambon came to make us aware of that. [...] It is true that close to the mining site there is a grave of one of the former *adat* leaders. Before we became Christians, people went there to worship their ancestors, but not anymore. Nevertheless, people still have respect for that. The grave has been destroyed by NHM.'

Yance was most frustrated by the mining decision-making process excluding the community, and he linked this to customary rights (D'Hondt and Sangaji, 2010: 20). 'The biggest problem in Balisosang is that *adat* rights are not respected. The concession was an agreement between the company and the central government, but the community should have been involved in the decision-making. It should have been an agreement between the company, the government and the community.' Keeping in mind the memory of the 1999 conflict, Yance made no distinction between the Kao – or more specifically, the Pagu – and the Makian regarding the extent to which each group would

be entitled to involvement in the decision-making process or compensation for land loss.[17]

Many respondents in the villages of Balisosang and Dum Dum Pantai identified as Kao, and more specifically, as Pagu. In 2009, most said ethnicity and indigenousness were important to them. A majority thought that the mining company should have asked the people for permission to use the land. A few respondents were dissatisfied with the redress the company had provided for the loss of land and other negative effects. 'NHM's mining activity is on Pagu land because the landowners of the mining area are from here. However, the loss of land affects not only the direct owners of that land but the whole community. The compensation paid by NHM is very little. It is not enough for all we have lost: the land, the plantations, our livelihood.' Someone else remarked: 'They stole our land and now they don't improve our lives.' By contrast, others were unsure whether the company had violated customary rights. They said they did not feel any special attachment to the land on which NHM operated, based on their ethnic background. 'We no longer went to the land for rituals. The landowners who had plantations received compensation for the land they lost,' one respondent explained (D'Hondt and Sangaji, 2010: 10).

Although in 2009, barely any of the Balisosang respondents made claims to the mining company based on their Pagu identity, many did express their desire to be hired by NHM or one of its sub-contractors.[18]

3.2 A revival of claims based on customary rights: compensating the Pagu or individual landowners?

In 2010, the issue of 'indigenousness' was spectacularly revived as a ground for seeking redress. When national NGO *Aliansi Masyarakat Adat Nusantara* (*AMAN)* became active in the Kao-Malifut area, it organised national conferences in Halmahera Utara's District capital Tobelo in 2010 and 2012. The 2010 conference marked the starting point of *AMAN*'s activities to increase the Pagu's awareness about their substantial entitlement to compensation for the customary land they lost to NHM.

That same year, Pagu-leader Yakup passed away. One year later, priest Yance – who had also formally replaced his brother as the Pagu leader – died as well. It left the Pagu – approximately 8,000 people living in 17 different

17 The Coalition Against Mining in Protected Areas, the Kao and Malifut Community Council and local leader Yance Namotemo linked *adat* rights to the general right of the community to be involved in the decision-making process or to be entitled to compensation for the loss of land.

18 Two respondents worked as a driver and in the catering service for NHM's sub-contractors. One of them estimated that NHM salaries are between 5 and 6 million rupiahs per month, while sub-contractors pay between 2 to 3 million per month.

villages – without *sangaji*. According to tradition, the sultan of Ternate should appoint the *sangaji's* successor. However, when *AMAN* learned that the Pagu were without a leader, it facilitated a leadership process in an entirely novel fashion. It organised 'focus group discussions' (FGDs) in the 17 Pagu villages with the village elders. During these discussions, the participating villagers decided that the only candidate for the position, a woman named Ibu Ida, would become the new *sangaji*. *AMAN* representatives reasoned that the deviation from the traditional procedure was justified for democratic and emancipatory reasons.

The new Pagu-leader was a charismatic woman. In 2012, she demanded free access to the Pagu's customary land on which NHM operated. She also demanded either the restoration of the mining area to its previous condition or 20 to 50 per cent of shares in NHM's profits.[19] A member of the local *AMAN* division did not worry about the potential tensions between Pagu and non-Pagu if the Pagu would obtain shares. "All those who would like to become Pagu are welcome to join the tribe," he reasoned.

However, the redress seeking strategy of the new Pagu leader did lead to tensions with other local community members. For example, in 2012, a few Makian cultivated a piece of land that a plantation company had abandoned. The Pagu's new awareness led certain tribe members to demand that the Makian ask permission from the Village Head of one of the Pagu villages to use the land, which the Makian refused. The Pagu *sangaji* received death threats, and people threw rocks at Pagu houses in the Soso village.

The new *sangaji*'s strategy required that the land on which NHM operated would be recognised as Pagu land. However, the majority of respondents considered the land to be the property of individual owners, who in many cases happened to be Pagu. Most Dum Dum respondents felt that the individual landowners who had lost land to NHM were properly compensated. 'The land taken by NHM was not *adat* land. It belonged to private owners who were compensated.' Another respondent remarked: 'NHM bought the land from the owners. They received a fair price.' Several respondents differentiated between selling the land and being compensated for losing it. 'Last year, NHM just took our land without our consent. We asked for 50 million rupiahs (some € 4000), but we only received 20 million (€ 1600).'

Others said they had sold their land to NHM, but the company had pressured them to agree to an unfair price. Only a few Dum Dum respondents said that the company had violated their indigenous land rights. 'The *adat* people have not been consulted, only the local government. NHM should have

19 In 2012, *AMAN* engaged in drafting maps of the Pagu area. They did so in support of the claim that the area is indeed Pagu customary land. It also planned to conduct linguistic research to prove that certain names (e.g., Toguraci and Gosowong) derive from the Pagu language.

made an agreement with the *adat* people, especially with the *sangaji*.' Another respondent remarked: 'It is Pagu land so it should go to the whole community.'

Grievances related to indigenousness transformed over time. These transformations concerned whose rights had been violated and, therefore, who was entitled to redress: the Kao, the Pagu or the local population as a whole. The claims to particular kinds of redress also changed, from more jobs for a particular ethnic group, to respect for indigenous leaders, access to and restoration of the indigenous land and shares in the company. To the outside world, the indigenous population was usually portrayed as a unified group, with collective rights to redress, e.g., for the loss of land. However, as already indicated, many considered the loss of land as an individual landowner issue, rather than something for which the mining company should compensate the indigenous as a collective.

The increased awareness of indigenous status led to tensions between different ethnic groups in the area. Some of those who self-identified as entitled to redress because of the loss of Pagu land expanded their claims to demand that local people with a different ethnic background ask the Pagu's permission to use the land. These demands increased the risk of conflict between ethnic groups and demonstrated the potentially harmful effects of seeking redress when the logical link between the real-life problem and the redress is lost. In this case, the real-life problem appeared to be the general poverty of the local population. It also included the frustration, among the Kao in particular, that they could barely share in benefits from the natural resources that were hidden in the ground on which they lived. In the current socio-political circumstances, framing the grievance as being related to the violation of indigenous rights provides an opportunity to share in the redress benefits. However, this is not a solution for all those in Kao-Malifut who live in poverty.

4 Addressing environmental grievances, but no appropriate redress (2010-2012)

Since the mining activities began, affected individuals sporadically raised environmental problems in attempts to seek redress. As section 2 described, in 2003 and 2004, a coalition of interest groups addressed issues such as open-pit mining in protected forest areas, the overflowing of acid water from open-pit mines, and the fish stocks decreasing in the Gulf of Kao. However, in the years that followed, the groups paid less attention to the mining's environmental impact.

Between 2010 and 2012, two issues dominated the public discussions about NHM: the CSR's division mechanism and the redress seeking attempts for customary land rights violations. The media barely mentioned grievances related to the mining's environmental impact. However, several incidents occurred involving leaking pipes and were visible and tangible. The next

section will explain how a small group of redress seekers – through private negotiations with the company – were able to achieve some redress for that environmental impact of the mining.

Section 4.2 focuses on the environmental NGO Walhi and tries to explain why it had little success in addressing the mining company's environmental impact, despite the organisation's long-time involvement in the case. Section 4.3 presents villagers' views on the mining's environmental impact on their lives and illustrates the discrepancy between the narratives of redress seeking groups and the reality of pollution on the ground.

4.1 Some redress for some people

On 17 March 2010, one of the pipes that transported waste material from NHM's plant to the wastewater treatment facility leaked. Walhi Malut had obtained an inspection report written by the Provincial mining agency that contained detailed information about the exact time of the incident and the amount of leaked material. Walhi Malut urged the District government to impose a sanction, which it did not.

Despite the leakage, the PROPER programme rated NHM as 'blue' later that year.[20] This rating indicated that the Ministry of Environment considered NHM to have been fully compliant throughout that year. Walhi Malut objected to the rating by referring to the pipe leak incident and by emphasising that it had particularly affected people from Balisosang.

On 3 February 2011, a second pipe leak occurred, which Walhi Malut reported on through the local media. Again, Walhi Malut obtained detailed information about the leak and said that Balisosang was primarily affected. It used the momentum to direct attention to the overall degradation of the water quality since 2000. The water was no longer suitable for consumption: the pollution caused fish to die, and negatively affected crops along the river. People had been forced to move and take their children out of school to help their parents earn money after suffering from the environmental impact. Walhi Malut requested the Provincial environmental agency investigate the case, and threatened to organise demonstrations and bring the case to court.

On 2 June 2011, a witness reported that he had seen another broken pipe on NHM's terrain, leaking white-coloured water into the river. A newspaper reported that NHM's staff had rushed down to the location to clean it up with heavy equipment. According to members of Walhi Malut, the NHM staff had asked villagers not to report the incident to Walhi Malut. A local newspaper quoted the director of Walhi Malut asking why the public was not properly informed and why NHM's management was not criminally prosecuted, as had happened in a similar case in Sulawesi.

20 The PROPER programme has been discussed more extensively in chapter 3.

On 10 June 2011, a fourth leak occurred. To gather evidence, Walhi Malut visited the location of the incident, together with people from Balisosang. They photographed the broken pipe, the milky water and a dead fish. The Balisosang interest group *Peduli Ramah Lingkungan* (*PRL*) – with Balisosang's Village Head amongst its members – reported to local media that *PRL* had gathered proof because 'the District Government of Halmahera Utara and the Provincial environmental agency did nothing'.

While various local interest groups supported *PRL*'s demand to close down NHM,[21] one group named *LIRA* said that NHM's closure would negatively impact its employees and that *PRL* was only acting in its own interests. It proposed the District Parliament mediate between the company and *PRL*. Other groups proposed the same.[22] In other words, when one interest group asked the government to perform its legal, regulatory duty, other interest groups suggested that the government mediate a conflict between two private parties.

In response to Walhi's reports, officials from the Ministry of Environment travelled to the location and directed NHM on how to handle the situation. At the same time, *PRL* handed over the proof it had gathered on the leak to the District Parliament, and urged the parliament members to visit the location, together with leaders from the District executive government.

PRL claimed that the Balisosang population was suffering from skin problems and that crops had died after the leaks. The Village Head of Balisosang – who was also a member of *PRL* – said that Balisosang had suffered the negative environmental impact relatively more than other villages. Therefore, they argued that NHM should construct clean water facilities in Balisosang. NHM eventually gave in and constructed water wells along the polluted Kobok River, where people from Balisosang cultivated plots of land. However, it rejected the Village Head's request for new electricity facilities as a form of redress.

Certain people along the Kobok River said they were satisfied with the water wells. However, many people who suffered from the river pollution had not received wells. Furthermore, the wells provided access to clean water, but they did not resolve the risk to health problems and the decreased fish stock. Instead, Balisosang representatives used the environmental problems to negotiate for financial compensation and other benefits from NHM (e.g., improved electricity facilities in Balisosang, contributions to the village's church and jobs for Balisosang's people). Notably, the CSR funding was to pay for these benefits. However, although Balisosang's representatives considered using

21 *KNPI* said the District Parliament did too little and that the District environmental agency should investigate the case. The group *LSKPH* demanded that the District Parliament form an investigation team.

22 Political party PKP agreed with *LIRA* that the parliament should mediate. Interest groups *Fopermas, Kao Center* and *SKPH* also asked the government to mediate.

the CSR fund to compensate for damages, the CSR was not legally intended to provide redress.

The Balisosang representative's redress seeking strategy required them to change the pollution narrative. They argued that the pollution was only related to the pipe leakages in 2010 and 2011. The photographs of the broken pipes created an opportunity to deliver visible proof of the company's environmental wrongdoings and to pressure it in the negotiations. However, according to many respondents, the pollution had been there long before the leaks. They believed the representatives had been 'bought off' with additional CSR funding. Since the river pollution only directly affected a few people from Balisosang, the village representatives were unlikely to repeatedly pressure the company to improve its environmental behaviour or to urge the government to take regulatory measures to protect the environment.

4.2 Reflecting on the role of an environmental NGO

For many years, the environmental NGO Walhi played a role in the redress seeking process in the Kao-Malifut area. This subsection explains the NGO's redress seeking strategy throughout the years and why its success was limited.

In 2003 and 2004, the national office of Walhi had directly addressed various grievances related to mining. In later years, Walhi also attempted to raise international attention for the case in Kao-Malifut, reframing the problems in appealing terms. For example, during a human rights conference in Bali in 2010, Walhi drew a parallel between global warming and the mining activities in North Maluku. It argued that the government should be held responsible for violating the economic, social, cultural and political rights of the villagers of Balisosang. Walhi also emphasised the need to unite all people who had experienced injustices. Balisosang pollution victims, affected fishermen, those encountering labour problems, and those whose indigenous land rights were violated should organise together. It proposed to establish a network of local NGOs to stand up for their common interests. However, the substance of these common interests was unclear. This lack of clarity resembled the strategy of the mass protests in 2003, which also lost the nuance of different appropriate redresses.

In 2005, Walhi established its branch in North Maluku, Walhi Malut. Two years later, Walhi Malut engaged in a project financed by UNDP LEAD.[23] The first phase of this project (2007-2008) established local complaint posts for the population to address their (environmental) grievances (D'Hondt and Sangaji,

23 United Nations Development Programme Legal Empowerment and Assistance for the Disadvantaged.

2010: 28).[24] However, since people submitted few complaints, the project adopted a different strategy during the second and final phase of the project (2009-2010). Walhi Malut staff members were embedded in eight selected villages where they talked with the villagers almost daily, gathered complaints and discussed how these could be addressed. The aim was to increase the villagers' awareness of environmental problems, to mobilise them to take a stand against the company and the government, and to gather evidence of the environmental impacts.

According to Walhi Malut, NHM was entirely responsible for the local pollution through its illegal discharging of wastewater and dumping of tailing material. However, despite Walhi's long and intensive involvement in the case, the organisation could not gather convincing evidence that supported these claims. When I examined the organisation more closely, I found that its inconsistent gathering and archiving of data hindered its attempts to address the environmental grievances. Walhi members' distrust towards the authorities also hampered their attempts to seek redress.

In the archives of Walhi Malut, I found an undated report, with no recorded author, stating that illegal miners were active in the area, using both mercury and cyanide to extract gold. Analyses of water samples of both the Bora and Tabobo River had shown that the levels of mercury did not exceed the legally tolerable standards, but that levels of cyanide were too high. The report did not say whether NHM or the illegal miners should be held responsible for the pollution. It found that the population living within one kilometre of the waste disposal site were at risk: after 5 to 20 years, consuming or coming into skin contact with the cyanide-polluted water could cause skin diseases and affect vital organs (e.g., kidneys, brain, heart, nerves, and liver).[25] In 2012, the members of Walhi Malut were unaware that this report existed. They were also unaware that in 2003, Walhi had complained about acid water overflowing from the open-pit mines, which was then believed to be the biggest source of pollution.

When I asked them about this, the Walhi Malut members explained that the computer with the records had broken down. Staff members keeping case data on their personal computers also hampered proper archiving. These

24 The posts hardly received complaints. The first phase of the LEAD project did train some villagers to gather information and evidence. However, the training lacked a clear vision for how a solution-based strategy would actually use the information. It seems that Walhi Malut's presence during this first phase had a limited impact. LEAD itself was not satisfied and remarked that, despite Walhi Malut's efforts in the project's first phase, the communities near the mine had not gained sufficient critical understanding and independence to be able to see the real conditions under which they were operating.

25 Despite lacking a published date and the name of the author, the report descripted its methodology, including the time and locations of sample taking, increasing its credibility. By contrast, the personal archives of one of Walhi Malut's former members also contained laboratory analyses of water samples, but the documents lacked the locations and times when the samples were taken.

computers were separated from the organisation's data system. Walhi Malut's members were moreover often young and worked on a voluntary or temporary basis for the duration of a project. The fast staff turnover hindered the development of the organisation's institutional memory. It also impeded the development of a more robust data management system that could help them build a case against the mining company.

As a consequence, the members of Walhi Malut looked for evidence of environmental violations in an ad hoc manner. For example, in early 2010, they went to the NHM mining site and took photos of various locations tthey considered 'suspicious' (e.g., swampy and with dead trees). These characteristics could indicate illegal dumping of tailing material. However, the organistion's members did not dare inform the authorities or media because they had no permission to enter NHM's terrain. They also took water samples but did not have them analysed.

Walhi Malut also took pictures of villagers in Tabobo. These villagers had medical anomalies, including nodules. One graphic photo showed a young child with a bleeding head wound. Walhi Malut suspected that these anomalies were related to the river pollution caused by NHM. They brought the child's blood samples to a hospital in Ternate, but the laboratory refused to investigate whether there were traces of toxic substances. The organisation's members interpreted this as a conspiracy against them. As part of the same conspiracy, the local press would no longer be willing to publish Walhi Malut's findings.

A former Walhi Malut member criticised the organisation's functioning and its redress seeking strategy. He believed strategic choices were primarily made based on funding opportunities. As a result, the strategy lacked consistency. For example, Walhi Malut was very active in the area around NHM's mining site for a few years. However, when the project funding of these activities ended in 2011, it focused its attention on cultural heritage preservation in another region and on another mining company elsewhere in the Province. Walhi's sudden departure from the Kao-Malifut area affected the relationship with the villagers, he said. If in the future Walhi would like to become active in Kao-Malifut again, it would first have to regain the villagers' trust. Some respondents in one of the villages where Walhi had been active confirmed this. One fisher called them 'very money minded'. Another stated: 'The negative environmental impact is merely invented by people who wanted to make money out of that.'

The former Walhi Malut member was also concerned about the unintended effects of organisation's activities in the villages. In Tabobo and Bukit Tinggi, the population became eager to engage in demonstrations, he said, particularly against river pollution. 'They often call me to ask my advice on how to organise the demonstrations. And then all of a sudden, the protests are cancelled. I never hear what they have achieved. (...) When they receive money, they will stop the demonstrations. They spend the money on the mosques.

You can see that in Tabobo and Bukit Tinggi; the mosques are much nicer than elsewhere.'

In summary, Walhi and Walhi Malut's strategy to seek redress was characterised by attempts to gather evidence of environmental wrongdoings and to mobilise people against the mining company. However, their attempts were often ad hoc, due to the temporary funding opportunities and the quick turnover of inexperienced staff. This prevented the organisation from building a strong case against the mining company based on proof the organisation had gathered over the years.

The failed attempts to achieve redress left Walhi Malut's members distrustful of the government institutions that were responsible for regulating the company's environmental impact. In the early years of the redress seeking process, the organisation urged them to take regulatory measures, but later in the process, the organisation started avoiding them. At the same time, the organisation's continuous failed attempts to address the environmental problems also damaged the villagers' trust in the organisation.

4.3 Villagers' perspectives on pollution

The previous sections demonstrated that those who sought redress for the environmental impact frequently identified Balisosang, a village of approximately 420 inhabitants, as the one that suffered the most from the pollution. This approach was somewhat strange because the polluted Kobok River flows approximately ten kilometres away from the village. This subsection shares the perspectives of villagers who had not been directly involved in the redress seeking process. How did villagers in Balisosang and along the Kobok River perceive the mining's environmental impact on their lives? How did fisherman in Dum Dum who experienced a decrease in fish in the Gulf of Kao perceive the environmental problems? What did these villagers think of the attempts to seek redress for the mining's environmental impact?

I interviewed villagers in 2009 and 2012. In 2009, only a few respondents mentioned that the mining had polluted the local water sources. 'The water in the Kobok River has become brown and black, especially in the rainy season.' One man stated that he left his farming lands close to the river because of the pollution. Some respondents worried about the possible health impact. 'We saw the waste in the river, but the water is still used for drinking and bathing. Recently some people started complaining about an itching skin and stomach aches.' Another declared: 'In a village meeting, government officials advised us to no longer drink the water. But the people who have lands close to the river still drink it because there is no other water source.' Others added that the amount of fish decreased. 'I used to make a living by fishing and farming. But the fish disappeared after NHM came.'

However, most of Balisosang respondents said that they had not been directly affected. 'We don't know about the environmental impact because we have not experienced it yet. We heard about the river pollution but that only affects people who have farming land over there, not us.' Others were sceptical about the environmental complaints. One woman questioned whether the health complaints were related to the mining, and another thought that the bombs and poison used to catch the fish caused the decreasing fish stock in the Gulf of Kao. 'People also complain about the quality of the river water, but they still drink it, so it cannot be that bad' (D'Hondt and Sangaji, 2010: 37-40).

Within three years this mixed picture changed completely. In 2012, nearly all respondents in Balisosang believed that the mining activities had a negative environmental impact. Various respondents mentioned that the Kobok River's water had become murky. Most agreed that the water was no longer drinkable, that people suffered from an itching skin after bathing in the Kobok River, that fish had died and that it was unsafe to consume the fish from the rivers and the Gulf. Two respondents recalled that, during a village meeting and through flyers, government officials had informed people that they should no longer consume the river water.

Newspapers, Walhi Malut, and Balisosang's Village Head portrayed Balisosang as the village that had been most affected by the pollution, with all of its inhabitants suffering. However, there were different accounts of how many of them were actually affected. Some owned land along the Kobok River, but estimates of how many were widely disparate.

Several respondents had heard that NHM arranged for water wells to provide access to clean water along the Kobok. Some respondents considered this an appropriate solution for the pollution problem, but others thought the pollution should stop altogether. 'I am afraid that NHM will use the installation of the water wells to please the government, while the environmental problems will just continue', one man said.

When asked how the pollution problems could be addressed, some commented that the government did not do anything. 'I cannot do anything by myself. There needs to be a 'community aspiration', and then we can address our problems via the Village Head', one woman said. Two other respondents spoke positively about the direct link that the Village Government had with the company and considered the CSR funding as a kind of compensation for the mining's negative impact. They mentioned that the Village Government, right after the pipe leaks, had managed to install water wells and taps. Several respondents also stated that they would be satisfied if NHM provided sufficient jobs for the villagers.

Redress along the Kobok's riverbanks, but for whom?

Along the relatively small Kobok River, some ten kilometres south of Balisosang, people work on plots of land where they grow vegetables and other crops. In the weekends, they usually return to their home villages, such as Balisosang.

Nearly all respondents along the Kobok River confirmed that they had noticed pollution. Some said the pollution was continuously noticeable, while others said the water turned blue or red only after it had rained. A few said that the colour of the water turned blue every evening, and remained that colour until the morning. All agreed that the water was not suitable for drinking. Some people brought water from their home villages, which required quite an effort. Others who lived closer to the main road would get their drinking water from NHM, at the security post at the entrance of the mining site. Most respondents had heard that bathing in the river water could lead to skin rashes, but only one respondent had experienced this himself. A few respondents also reported that the quantity of the harvests had diminished and that fish in the river had died.

After the pipe leaks in 2010 and 2011, NHM had constructed water wells along the Kobok River. Not everyone along the river had access to these wells, which NHM had only constructed for residents of Balisosang, specifically those who had good connections to the Village Government. Some of them respondents complained that the water from the wells was smelly and murky.

Remarkably, the accounts of the two respondents who had a water well on their plot of land differed from those of others. For example, while almost all respondents indicated that the pollution had been occurring for many years, the two respondents said that the pollution had started only recently, right after the pipe leak incidents. The two argued that only people from Balisosang had plots of land there. Therefore, they thought it was fair that their village would be compensated for the environmental damage that the company had caused. They trusted that the Village Head of Balisosang would soon negotiate with NHM to arrange more funding for Balisosang's church, more jobs for Balisosang's people and monthly payments to compensate for the destruction of the land.

Fishermen from the village of Dum Dum Pantai also said they had suffered directly from the mining's environmental impact on the fish stock in the Gulf of Kao. 'It is still possible to make a living as a fisherman, but it is nothing compared to the 1970s when you did not even need a boat to go fishing. You could just walk through the water to catch them. (...) Rivers have become polluted because NHM dumps its waste directly into the water.' Another Dum Dum fisher commented: 'I don't know why the amount of fish decreased. It could be because of changes in the weather or the current. But before the company came, there was still a lot of fish. It could also have disappeared because of NHM's waste.' In 2003 and 2004, during the mass demonstrations

against NHM, the protestors had raised the decrease in the fish stock in the Gulf of Kao as a grievance. However, both before and after, people rarely sought redress for this issue, most likely because the Dum Dum fishers lacked access to interest groups and government institutions to promote their cause.

In conclusion, the mining's environmental impact affected the lives of villagers in Balisosang, Dum Dum and those along the Kobok differently. For some, the impact was much more severe than for others. The case demonstrates the discrepancy between the narrative employed by the Balisosang representatives to seek redress, and the perception of villagers who were directly affected by the polluted water. It shows the importance of framing a pollution problem in an appealing manner, e.g., by illustrating it with photographs and linking it to the image of indigenous people. However, the real problem remained unaddressed. People who suffered from the pollution but had no access to the redress seeking process remained empty-handed. The involved government institutions again did not take a firm stand to promote the public environmental interest. The few people who tried to seek redress for the environmental impact changed the narrative, trying to achieve at least some kind of redress for a few people. They were unlikely to address the true magnitude of the mining's environmental impact.

5 CONCLUSION

This chapter presented research findings on the process of redress seeking for environmental grievances caused by gold mining in the Kao-Malifut area in North Maluku. It sought to understand how it was possible that redress became so detached from the initial problems and the detachment's implications. It is worth briefly addressing the lessons from this case.

For a start, the redress seeking process did not develop linearly (i.e., from a real-life mining-related problem to redress that solved the problem). The reason for this lies partially in the regulatory and socio-economic backgrounds against which the redress seeking developed.

The regulation process had an unclear division of authority between multiple institutions that often had considerable financial interests in keeping the mining company operational. Certain institutions were critical of the mining company's environmental performance, but this did not lead to a thorough assessment of the company's compliance. The lack of clarity surrounding the environmental impact persisted and obstructed redress seeking efforts.

Regarding the case's socio-economic context, the population living in and around the mining area was generally poor, and the different ethnic groups had a history of severe inter-group tensions. The mining company's arrival aggravated these tensions. Different people were also affected by the mining company's presence in different ways, and they based claims for redress on

different grounds. Consequently, there was a serious collective action problem. A multitude of interest groups competed with one another over redress. Interest groups frequently made claims on behalf of a particular group of affected citizens, but the extent of their representativeness remained unclear. Compensation and benefits also became mechanisms for co-opting interest groups, who initially had been critical of the company.

The interest groups seeking redress for environmental problems were hindered by the difficulties involved in gathering proof and building a strong case against the company. In the course of the redress seeking process, environmental arguments were increasingly used to achieve financial compensation and a share in the company's benefits.

The redress process also involved grievances expanding beyond the mining's environmental impact. Local people were generally dissatisfied with limited job opportunities. Some lamented the lack of respect for their indigenous rights and the loss of land. The distribution of the company's CSR fund was also problematic. Grievances related to these themes were often bundled to gain traction. Grievances were often reframed throughout the years. This reframing was usually not the result of new problems, but due to changed opportunities. For example, the new Forestry Law, the increased attention on the loss of indigenous land, and the visible evidence of pipe leakages all presented new opportunities for expression.

In the complexity of multiple and flexible grievances, the link between the initial problem and the desired redress became increasingly distant. This growing gap occurred in part because people considered financial compensation and a share in the mining company's economic benefits as appropriate redress for certain problems.

This approach had considerable negative implications. First, the detachment of the problem from the redress made it unclear who was entitled to redress, and what redress was appropriate. In the case of river pollution, although many people suffered, those with no access to representative interest groups received nothing.

Those who were capable of participating in the process and getting some compensation were less likely to address the root problem. They were also less likely to demand that the regulating institutions improve in their responsibility to promote a clean environment. Instead, they were likely to opt for negotiating with the company. The role of Parliaments stimulated this behaviour, since they acted as intermediaries rather than pressuring the regulating institutions to solve the pollution problem.

Finally, although people initially directed claims at the company, the process increasingly contributed to social divisions relations within the affected communities. The increased emphasis on indigenous rights also led to tensions between community members. This approach accentuated differences between people, making their differences the basis for their redress claims.

Finally, this case and the one of Rancaekek demonstrate how government agencies seem to conceive of democracy as a process that requires them to keep all parties in a conflict satisfied to the extent that they do not revolt. Legislation in their view is not something they should implement as the outcome of a democratic process, but rather as a reference point in the negotiations between the different parties involved. In the end, this undermines the essence of a democracy under the rule of law.

7 The nexus between regulation and redress seeking

Most of Indonesia's rivers are polluted. This pollution directly affects the lives of millions of people because they use the river water for consumption or irrigation. Pollution's indirect effects include people depending on groundwater (instead of river water). Groundwater extraction can lead to subsidence and subsequently to floods. Generally, river water quality has deteriorated across the country, despite legal and institutional regulatory frameworks for industrial pollution advancing substantially and opportunities increasing for citizens to address industrial water pollution problems.

This thesis has tried to understand why this is so. The central question is how affected citizens and interest groups, as well as authorised government institutions, engage in processes of regulation and redress seeking for industrial pollution; why they do so; and what effect does this have on the environment and social relations within affected communities. In answering this question, this study takes two angles: the regulation and redress seeking process. While these processes are often studied and understood in relative isolation, this study concludes that in order to answer the central question, they need to be understood in conjunction.

Regulation and redress seeking processes each have different goals, key actors and trajectories. The key actors in the regulation process are the regulatory government and the regulatee, in this case, an industry. The government can stimulate, discourage or even enforce certain regulatee behaviour to promote a particular public interest, such as clean river water. By contrast, the redress seeking process departs from the perspective of a citizen confronted with the problem of water pollution.

In cases of industrial river water pollution, one may assume that the goals of the two processes are the same: clean(er) river water. It seems obvious that increased opportunities to regulate and seek redress will increase the likelihood of achieving cleaner river water. The processes appear to simply complement one another. When regulation proves to be ineffective, citizens seeking redress may still lead to a cleaner river. Alternatively, when citizens are unable to achieve redress, regulation may lead to cleaner water. Redress seeking is particularly appealing as an alternative option in situations where the government falls short of executing its regulatory tasks. Apparently, the worst that can happen is that both processes fail. Therefore, it is understandable that most studies and debates focus on the processes in relative isolation, aiming to identify and understand the strengths and weaknesses of each process indi-

vidually. It seems reasonable to expect that increased possibilities to regulate and seek redress will lead to cleaner rivers, or at least will not hinder the achievement of that objective.

This thesis nevertheless demonstrates that the interactions between regulation and redress seeking processes are complex and that they do not automatically complement one another. An improved understanding of the nexus between them has become even more relevant since the processes seem to converge in practice. Recent debates on regulation and redress seeking suggest that the roles of the government, citizens and interest groups in these processes are quite similar. Chapter 2 explained that strict 'command and control' regulation, in which the government commands strict norms and controls compliance through enforcement, became a less popular regulatory approach. Although some scholars argued that having a minimum level of 'command and control' regulation remains vital, many scholars, policy-makers and officials have emphasised the virtues of alternative regulatory approaches, citizen participation in regulation processes and redress seeking. Consequently, the government's room to respond to violations has increased, alongside the role of citizens as regulatory participants and redress seekers. However, the positions and responsibilities of the government and citizens in these processes have become less clear.

This thesis contributes to existing debates on regulation and redress seeking processes by stressing the importance of identifying and understanding the nexus points between the two processes. Instead of just assuming the processes complement one another, this study offers a more sophisticated way of understanding the effects of their interactions. It also helps explain why confusion exists in Indonesian reactions to industrial pollution about the roles the government and citizens (should) play in the promotion of a cleaner environment, and why this confusion has negative consequences for the environment and beyond.

Before exploring the nexus between regulation and redress seeking processes, this thesis first identified the weaknesses and strengths of each in turn. These analyses provided an initial answer to why industrial water pollution remains a severe problem in Indonesia.

The false dichotomy between command and control regulation and its alternatives

The goal of the regulation process is to promote a particular public interest. Chapter 2 explained that in the early days of environmental regulation, the dominant regulatory approach was 'command and control'. The government has the authority, to be found primarily in administrative law, to command strict norms (e.g., by setting norms in a license) with which the licensee needs to comply. It controls the licensee's behaviour by monitoring it and enforcing the law in cases of violation. In recent decades, the limitations of 'command and control' regulation have been widely acknowledged. Such regulation

requires that the government has large capacity in terms of resources, expertise and staff. Moreover, if the government is more responsive to the licensee and involves non-state parties (e.g., market-actors, civil society and citizens) in the regulation process, it is often assumed that it can more effectively promote the public interest. Consequently, both international and Indonesian debates about regulation have stressed the virtues of alternative regulatory approaches and increased citizen participation.

In attempting to identify the strengths and weaknesses of the existing regulatory approaches, questions arise about their legal and institutional arrangements. To what extent do these arrangements contribute to the promotion of cleaner river water? Chapters 3 and 4 identified some of the main strengths and weaknesses of the current legal and institutional frameworks for the regulation of environmental matters in Indonesia. Chapter 3 demonstrated that in the last decades, there have been improvements in many respects. The Environmental Management Act (EMA) of 2009 covers a wide range of issues and leaves room for innovative regulatory approaches. Environmental agencies have also been established in all districts and provinces. Santosa's (2014) seminal study on the functioning of environmental agencies at regional government levels has argued that the legal framework offers a sufficient basis for the effective promotion of environmental interests, but that the regional government agencies' implementation requires improvements. Chapter 4 confirmed Santosa's findings that a lack of budget and staff hampers the environmental agencies' implementation. However, it also found that the limited resources that are available for regulation have not been used to their full potential. This underuse is largely due to inconsistencies in norm-setting, monitoring and enforcement. The inconsistencies hamper the effectiveness of the regulation process, particularly in the phases of monitoring and following up on detected violations. For example, data gathered through various monitoring and enforcement activities are poorly archived and inefficiently used.

The legal framework reflects – or perhaps is at the root of – the inconsistencies in the regulatory practice. Comparing the EMA 2009 to its predecessor, the EMA 1997, the legal arrangements for command and control regulation based on administrative law have been weakened in specific vital aspects. The EMA 2009 no longer stresses the importance of a consistent sequel between the phases of norm-setting, monitoring and enforcement in the regulation process. Furthermore, the arrangements in the EMA 2009 for administrative law enforcement have actually limited the government's authority to take concrete action to halt violating behaviour and recover damages at the expense of the violator.

The legal framework is also unclear about how command and control regulation based on administrative law relates to other regulatory approaches. These approaches include ad hoc programmes such as PROPER, which is run by the Ministry of the Environment. This programme exists parallel to the

basic regulatory mechanism, based on command and control, in which primarily the district governments are authorised to regulate the environmental behaviour of industries. The lack of clarity about how the regulatory approaches relate to one another leads to an unclear division of authority between the Ministry and the regional government. For example, it is unclear whether the Ministry or the regional government is authorised to enforce the law after the Ministry detects a violation through PROPER. Other alternative regulatory approaches, such as the use of economic instruments, are also poorly integrated with the basic regulatory mechanism. Wibisana (2016) has argued that many Indonesian scholars and policy-makers consider such alternative regulatory approaches as opposing command and control regulation and that therefore the alternatives can replace the poorly functioning command and control regulation. They do not see a need to improve command and control regulation or to integrate the alternatives with command and control. However, this is a false opposition because alternative regulatory approaches often depend on the basic regulatory system based on command and control to function effectively.

The lack of clarity in the legal framework also concerns the relation between the administrative, criminal and private law frameworks relevant for addressing environmental pollution. This vagueness is particularly problematic when it comes to following up on detected violations. While the quality of the administrative law framework for regulation declined in some vital aspects, the EMA 2009 expanded and emphasised the importance of the criminal and private law arrangements to follow up on violations. In theory, administrative law measures for regulation allow the authorised government to halt violations as soon as possible. Criminal law enforcement only punishes behaviour after it has taken place, usually after a long and costly court trial. It can only indirectly influence future behaviour through its potential deterrent effects.

The EMA 2009 partly prescribes the conditions under which a particular approach is suitable. However, it fails to emphasise that administrative law arrangements aim to halt violations swiftly and to recover the damages done to the public good. The emphasis on criminal and private law arrangements reflects and justifies that, in practice, responses to violations are often based on criminal and private law frameworks, even though these frameworks are generally less suitable to effectively protect the public interest in a clean environment.

Bureaucratic behaviour in environmental regulation

When exploring the regulatory practices of provincial environmental agencies and identifying their strengths and weaknesses, one must first note that there are considerable differences between the agencies in how they monitor and respond to violations. For example, the regulatory efforts of the East Java agency have more characteristics of command and control regulation than

the efforts in West Java. The former conducts regulatory inspections and occasionally takes concrete measures to halt a violation, while the latter does not.

Empirical research nevertheless indicated that, overall, officials were poorly aware of the differences between administrative, criminal and private law frameworks for responding to violations. For example, in both East and West Java, officials considered imposing an administrative sanction to be an unsuitable approach in response to a serious violation that was causing considerable damage. In fact, they often avoided imposing administrative sanctions. Particularly in West Java, officials preferred to respond to violations by seeking criminal prosecution possibilities against the violator. Alternatively, when citizens filed complaints, officials would often try to settle those cases by mediating between the complainants and the violator. In this way, cases were subjected to private instead of administrative law frameworks.

There are several reasons why officials avoided imposing administrative sanctions. First, the weak legal arrangements offered limited support for using administrative law enforcement instruments effectively. In particular, the EMA 2009's definition of administrative coercion weakened the government's regulatory position, suggesting that the government could not take concrete measures to halt a violation. Secondly, policies detailing the government's tasks (e.g., the frequency of regular monitoring and how to respond to certain violations) were often lacking. Thirdly, officials were confronted with an unclear division of authority between various involved institutions. This concerns the horizontal division between sectors and vertical division between administrative levels. Taking intrusive but effective measures to halt a violation could lead to confrontations with institutions that had other interests in the case. Therefore, officials from the many involved institutions preferred to seek consensus among themselves. Often, this internal consensus seeking resulted in lengthy deliberations euphemistically referred to as 'coordination'.

Although the Water Patrol in East Java is an example of the potential benefits of 'coordination', the case studies in West Java and North Maluku demonstrate that 'coordination' can also carry serious negative implications. The involvement of many institutions resulted in regulatory processes that were long, inconsistent, costly and inefficient. In addition, their involvement made it increasingly difficult to hold a particular government institution accountable for taking insufficient regulatory measures, allowing more room for corruption. The lack of accountability mechanisms led to a situation in which the government had few incentives to improve its regulatory performance

Officials also often avoided administrative law enforcement because of their assumptions about its limited deterrence effect compared to other regulatory approaches, specifically criminal law enforcement. However, there are strong indications that regulatory initiatives are fairly effective when they have features of command and control regulation and are based on administrative

law. Officials and scholars have often praised the ministerial programme PROPER and the Water Patrol in East Java for their effectiveness. These programmes are characterised by rather consistent monitoring and enforcement efforts by the government. These command and control features offer an explanation for the relative success of the programmes, but are seldom acknowledged as such. Instead, the Ministry as well as some scholars consider the programmes to be alternative regulatory approaches, opposite to command and control.

As mentioned earlier, the West Java environmental agency often opted to respond to complaints by mediating between complainants and violators. The resulting agreements frequently served the private interests of the complainants. For example, in the Rancaekek case, complainants negotiated for positions as 'job brokers', recruiting industrial labourers in return for payments from these recruits. That the agreements often included environmental measures that the violator promised to implement, suggested that the negotiations between the private parties also led to less pollution. Therefore, the agreements appeared to be an adequate replacement of an administrative decision. However, in practice, they often did not lead to compliant behaviour. Instead, they affirmed the government's lack of enforcement and even undermined the government's independent authority to take regulatory measures.

Thus, when violations were detected as a result of complaint handling, cases were often side-tracked to a twilight-zone between the administrative and private law framework. As a result, the regulatory government's authority and responsibility became unclear. Its position further weakened when it seemed dependent on private agreements to take monitoring and enforcement actions. Hence, it made private parties – and citizens in particular – responsible for the promotion of the public interest in a clean environment. Furthermore, the replacement of a formal administrative decision with a private agreement made it more difficult for citizens to object to a government decision and demand – if necessary, through court – that the government take enforcement measures.

Overall, across Indonesia, complaint handling and mediation as alternative dispute resolution are promoted and are generally assumed to go hand in hand; mediation is considered the proper way to deal with violations brought up by a complaint. However, this overlooks the negative implications of a private agreement replacing an administrative law response. It realises the possibilities of citizens acquiring private gains, industries cheaply buying off the investments they should have complied with, and governments barely being held accountable for insufficiently promoting the public interest in a clean environment.

So what are the strengths and weaknesses of the legal and institutional arrangements for regulation? We can conclude that both the legal framework as well as the environmental agencies' practices reflect the tendency to address industrial pollution by depending on alternative regulatory approaches instead

of administrative law-based 'command and control'. Officials, policy-makers as well as scholars appear not to be well aware of the different characteristics of the various regulatory approaches. Most importantly, many are unaware that administrative law instruments aim to empower the executive to promote the public interest in a clean environment. To the contrary, encouraged by international and national debates, they reject the idea that administrative law-based command and control can be effective. As a counterpoint, this thesis has demonstrated the negative consequences of relying on other regulatory approaches without properly integrating them with the basic command and control mechanism for regulation. At the same time, the relative successes of PROPER and the Water Patrol in East Java strongly indicate that regulatory approaches that have administrative law-based command and control regulation characteristics are effective in promoting a clean environment.

At first glance, the position of citizens and interest groups in the regulation process seems to have improved. They have more opportunities to participate in the regulation process. The government needs to consult them when licenses are issued, and they have increased opportunities to file complaints. In recent debates – for example, about the revised Government Regulation on River Pollution Control – there has been a tendency to further expand citizen participation in monitoring and enforcement of the regulation process. However, such expansion only further delegates the government's regulatory responsibility to citizens. A closer look at the redress seeking process explains the risks of addressing environmental pollution by individually compensating damages to citizens instead of promoting the public interest in a clean environment.

The options for citizens to seeking redress for pollution

When citizens are faced with river water pollution, it is appealing to assume that they will always want a cleaner river as redress. If so, increased redress seeking opportunities for affected citizens increase the likelihood of achieving cleaner rivers. Such likelihoods seem particularly true when the government fails to execute its regulatory task adequately. Even if the redress seeking process does not lead to a cleaner environment, it may still lead to some compensation for the affected, which seems fair enough. The worst that can happen, or so it seems, is that victims fail to obtain any redress at all.

In the Indonesian context, it is understandable that one would stress the potential benefits of increased redress seeking opportunities, whatever those benefits may be. The preference for relying on citizens and civil society organisations, rather than on the government, is not merely a consequence of a government failing its regulatory duties. The authoritarian regime only recently made way for a new era, in which democracy is highly valued. The attention to participation in regulation and the fact that 'Access to Justice' is currently a prominent policy goal can be seen as a reaction to an authoritarian past. Therefore, it is relatively uncommon to find a critical attitude in Indonesia

towards the roles of citizens and interest groups, at least when it comes to addressing industrial pollution.

Nevertheless, this thesis demonstrated that the process of seeking redress is not straightforwardly geared towards achieving cleaner rivers. To better understand the dynamics of the process, one needs to ask what the 'real life problem' is that people face. Do they frame this problem as a grievance? How so? Which 'paths to justice' are available? If they eventually achieve redress, what consequences does this have?

Chapters 5 and 6 answered these questions through case studies in West Java and North Maluku. The cases differ in several respects. First, in the West Java case, the textile industry's pollution was the most prominent problem for nearly all citizens living downstream from the industry. On the other hand, in North Maluku, citizens felt that the mining company caused other injustices alongside environmental damages. For example, the indigenous people felt that the mining company did not respect their indigenous rights. Many respondents also complained about the unfair distribution of Corporate Social Responsibility (CSR) funding that the mining company provided to nearby villages. Only a relatively small part of the population was directly affected by pollution. Thus, the variety of stakeholders with differing interests was greater in North Maluku. Finally, in North Maluku, more people questioned whether environmental pollution was occurring or had occurred in the first place. As a result of these factors, the redress seeking process in the North Maluku was more complex than in West Java.

Despite these differences, there are also striking commonalities between the redress seeking processes in both cases. First of all, in both cases, the local population hoped to profit from the economic benefits of the industrial activities, particularly in the form of jobs and CSR funding. As a result, citizens often did not seek redress that would endanger these benefits, and many accepted the pollution in return for them. For many people, poverty appeared to be a more urgent real-life problem than pollution.

Furthermore, the case studies demonstrated the importance of distinguishing between the variety of stakeholders in the affected communities. The community members were quite heterogeneous. The industrial plant's neighbours were affected by the pollution in different ways. They had different interests and the grounds on which they could base their claims to redress also varied. For example, in West Java, the rice farmers argued that they had suffered particular damages because the pollution had caused a decline in the harvest. At the same time, land labourers found it more difficult to find work after many rice fields became unproductive.

Nevertheless, the labourers never made compensation claims, perhaps finding it difficult to pinpoint the extent of the damages and proving any causal relations. They were also less capable of raising their voices than the often more educated and relatively more powerful farmers.

The case study in North Maluku also exemplifies how not all affected citizens can base compensation claims on similar grounds. Representatives of the village Balisosang claimed that their village and all of its inhabitants had suffered from pollution. They managed to have water wells installed, providing access to clean water. They also claimed CSR funding that would benefit all of Balisosang's inhabitants. However, not everyone in the village had been directly affected by the pollution. Meanwhile, people from other villages who had suffered from the pollution directly were unable to present themselves as victims. They did not receive anything.

These examples demonstrate that affected complainants do not necessarily seek halting pollution. Instead, those who sought redress usually demanded economic compensation. It served their private, short-term interests, but did not offer a solution to the long-term impact of widespread pollution. Hence, increasing the possibilities to seek redress for those directly affected by pollution does not necessarily contribute to the promotion of the public interest in a clean environment.

Dealing with pollution by compensating a few local community members had negative consequences beyond the environmental impact. Social relations became tense within the affected communities. Inequality increased because the compensation did not benefit all community members. In West Java, mediation between the industries and farmers and other powerful community figures resulted in the latter two receiving privileged positions as 'job brokers', recruiting labourers for the industries. Former land labourers needed industrial jobs and now had to pay the job brokers a high 'entry fee' to receive them. They thereby indirectly compensated the farmers for the environmental damage the latter had suffered.

In reality, the redress seeking process resulted in more powerful community members, such as the farmers, exploiting the more vulnerable community members who had been unable to engage in the process. Inequality increased within the affected community, while the pollution problem remained unresolved. In North Maluku, interest groups began competing with one another for CSR benefits. Social tensions increased between the indigenous community members and migrants, as the former strongly advocated in favour of making indigenous rights the basis for redress. Such advocacy even led to violent incidents between the indigenous and migrant population.

These case studies illustrate that those engaged in the redress seeking process often have a higher social status within the affected communities. They can frame their interests in appealing ways. Unlike the poorer community members, they have time, money and knowledge to engage in the process actively. The increase of interest groups engaged in the redress seeking processes in both cases indicates that the process became a lucrative business of presenting oneself as a 'community representative'. The government often uncritically accepted those who claimed to legitimately represent the community interests, even though officials admitted they were aware that redress

seekers were often merely involved for their private gains. Government documentation usually referred to these people and groups as 'the community' (*masyarakat*), without precisely specifying who they were. Referring to them as 'the community' seemingly legalised any claim they made. Institutions usually provided plenty of opportunities for interest groups and 'community representatives' to make claims for redress, even if such claims did not serve the public interest in a clean environment and worked to the disadvantage of other community members. The West Java environmental agency mediating positions for the 'job brokers' exemplifies this. Hence, when addressing pollution was not considered a matter of collective interest, power differences within communities increased.

A final common feature of the redress seeking processes in both case studies in West Java and North Maluku is that they have continued for over two decades without closure. Citizens continuously made redress claims while their initial reason – the pollution – was not halted. The redress seeking processes did not develop linearly. The process did not begin with one static real-life injustice and neatly evolved until redress was achieved for it. Particularly in the North Maluku case, redress seekers, grievances and redress claims changed continuously. Often these changes did not stem from situational shifts (e.g., a worsening of the pollution's impact). The changes usually occurred as a response to new redress seeking opportunities. For example, photos of a broken pipe strengthened Balisosang's representatives in their claims for water wells and more CSR funding. Nevertheless, this was barely related to the larger problem of continuous river pollution. Furthermore, as indigenous rights became a popular theme, this became a new basis for redress claims, even though few people considered their indigenous status to justify such claims.

To conclude, the redress seeking process seldom contributed to cleaner rivers. Representing the interests of the whole community proved to be problematic. Encouraged by the idea that citizen participation benefits the regulation process, government institutions were uncritical towards those who claimed to represent the community's interests and even supported quests for redress that merely served personal interests. As long as the environmental problems continued to exist, so did the basis for related claims for redress. In fact, as redress seeking evolved into an opportunity for citizens to acquire compensation, it contributed to increased social tensions and inequality within the affected communities. In North Maluku, people competed with one another over compensation and emphasised their ethnic differences, as ethnicity became a basis for claims. In the West Java case, farmers exploited their less fortunate community members in their positions as 'job brokers', a position that they negotiated through mediation with the industries. Rather than acting as a regulator and halting the violations, the government facilitated the mediations that had led to this outcome.

Exploring the nexus between regulation and redress seeking

We have looked at the processes of regulation and redress seeking separately. We have concluded that the regulation process has considerable weaknesses and that redress seeking is not a straightforward process towards achieving cleaner river water. With this in mind, which interconnections and interdependencies exist between the processes? What trade-offs, if any, are there between the roles that government institutions, citizens and interest groups play in regulation and redress seeking processes related to addressing industrial pollution?

The most apparent nexus point between the two processes is complaint handling. By filing a complaint, affected citizens can try to seek redress by pressuring the government to execute its regulatory responsibility to detect violations and take enforcement measures. This option assumes that citizens merely seek redress in the form of cleaner river water and that they can count on the government to take adequate regulatory measures. If true, the only relevant questions are whether citizens have access to the authorised government institution and whether this institution properly halts the violation or restores the situation to its prior condition. If the regulation and redress seeking process are merely interconnected in this way, then increased possibilities for Indonesian citizens to file complaints and expanded regulatory approaches are likely to increase the probability of cleaner river water.

However, in the Indonesian practice of addressing industrial pollution, the nexus between the processes is more complex. This thesis argues that the actual roles that citizens, interest groups and the government play in regulation and redress seeking processes do not align with the theory that increased opportunities to regulate and to seek redress inherently contribute to a better promotion of the environmental interests. This disparity is importantly related to the changing ideas about regulation and redress seeking. Alternative regulatory approaches for command and control have been introduced that created more room for the government to choose its regulatory approach. Moreover, increased citizen and interest group participation in regulation processes, as well as the expanded opportunities for citizens to seek redress, have off-loaded the responsibility to promote the public interest in a clean environment from the government onto citizens.

In order to highlight the crucial nexus points between the two processes, the next section will zoom in on the three phases of the regulation process. It will explain the roles of citizens, interest groups and the government in these phases, from the perspectives of both regulation and redress seeking, and will highlight the differences between their theoretical and actual positions in Indonesia.

Participation in the norm-setting

Increased citizen and interest group participation in the regulation process is particularly relevant in the phase of norm-setting. For example, the government should consider the viewpoints of citizens and interest groups, as well as other stakeholders, before it issues a license. By weighing all interests properly, the government can prevent citizens from facing problems after an industry becomes operational.

In the Indonesian legal framework, the arrangements for participation in the norm-setting phase have improved. With the introduction of environmental impact assessments, industries are required to consult with communities that may be affected by operations. Nevertheless, at least two concerns remain. First, few guidelines dictate whom the government should accept as a representative stakeholder of community interests, and how the government should weigh the concerns these representatives raise. This study demonstrated that proper representation of community interests could be highly problematic. Interests within communities are usually diverse, and citizens often focus on the potential economic benefits of an industry, rather than on its long-term environmental impact. Therefore, increased citizen participation in norm-setting far from guarantees that industries will respect environmental interests.

Second, in cases such as in North Maluku and West Java, the government issued licenses decades ago. Citizens and interest groups usually only have an opportunity to influence the norm-setting process when industries need to acquire new licenses or renew old ones. In this respect, that environmental licences do not have an expiration date is a considerable weakness of the current, relevant legal arrangements. A lack of a set moment to reconsider previous norms makes it difficult to adjust to the norms in response to newly expressed viewpoints from citizens, or to technological developments that allow for setting stricter norms.

The monitoring phase: who is responsible for detecting violations?

In the system of command and control regulation, the role of citizens and interest groups in the regulation process becomes limited after the norm-setting phase. The authorised government institution is primarily responsible for monitoring whether the industry complies with the set norms, and for enforcing norms if necessary. However, the regulation and redress processes overlap when citizens file complaints. The citizen tries to seek redress by calling upon the government to execute its regulatory task of detecting and halting violations and taking measures to restore the situation. As such, citizens are the government's extra eyes in the monitoring phase. Nevertheless, the government remains legally responsible for regulating licensee behaviour.

However, in practice in Indonesia, the role of citizens in the monitoring phase has increased. Over the last years, both legally and in practice, complaint

handling gained a prominent place in the regulation process. At first sight, this appears to be a positive development from the perspective of redress seeking. However, two reservations arise. First, filing a complaint does not mean that a citizen can express their concerns and count on the government to take adequate monitoring and enforcement measures. Since complaint handling became an important issue in policies and practice, the number of complaints is growing. To properly process these complaints, the government tends to require complainants to deliver proof of the violation before taking regulatory action. The monitoring responsibility thus moves from the government to citizens. Such a move weakens the citizens' position considerably.

Enforcement or other ways to follow-up on violations?

Over time, the legal framework has provided the government with more administrative law enforcement instruments for promoting the public interest in a clean environment. However, the government has poorly implemented such instruments. Due to this ineffectiveness, and encouraged by international debates on regulation, Indonesian policymakers, officials and scholars perceived administrative law enforcement as undesirable by definition. Their attention on further developing the legal framework for command and control regulation ceased, both in general and in particular for administrative law enforcement. As a result, the quality of the legal arrangements for command and control regulation diminished, which in turn confirmed the notion that command and control was indeed an ineffective regulatory approach.

At the same time, alternative regulatory approaches were embraced. Such a reaction even extended to diverting cases to the private law framework, where the authorised government institution mediated between complainants and violators. Officials in West Java believed that by acting as an alternative dispute settler, they were applying an alternative regulatory approach. They also believed this approach responded to calls for increasing citizen participation and thereby created more opportunities for seeking redress. Meanwhile, such mediation allowed the government to avoid taking potentially controversial enforcement measures. Officials preferred to avoid confrontations with both licensees and other stakeholder government institutions.

However, side-tracking cases from the administrative to the private law framework has considerable downfalls. There is no guarantee that participants will prioritise environmental interests. The case studies demonstrated that participants might primarily promote their private interests. This approach can have negative implications for other community members whose interests are not well represented. The government did not critically assess who represented the community interests or whether the requested redress promoted a public interest. The lack of sufficient criteria outlining eligible individuals and complaints resulted in a lucrative business of referring to environmental wrongdoings to promote one's private interest. Such actions were only open

to those who were able to make their voices heard. These people were often not the most vulnerable individuals within the affected communities. Furthermore, in West Java, that complaining about environment pollution was likely to result in private gains led to a situation where the environmental agency was bombarded with complaints. Handling these complaints through mediation took up considerable regulatory capacity from the government. A vicious circle ensued, with environmental pollution continuing as the basis for new claims.

It should be noted that mediation agreements often do not only serve the complainant's private interests. The agreements also often address environmental measures that the violator should take. Private agreements can arguably thus contribute to a cleaner environment. However, the alleged importance of such agreements contributes to undermining the administrative authorities' legitimacy. In West Java, officials have made themselves dependent on private agreements for taking monitoring and enforcement measures. The environmental agency's administrative law authorities somehow insufficiently legitimise such regulatory action. Such a perceived dependency demonstrates the confusion that exists among officials about the differences between private and administrative law approaches to addressing pollution.

Additionally, when violations are diverted from the administrative to the private law framework, the possibilities decrease for demanding the government take adequate regulatory measures. During my fieldwork, I never encountered a case where the government considered a complaint as an objection against a previous government decision to (not) take regulatory measures. I also did not meet citizens calling upon the administrative court to force the government to take regulatory actions. Instead, mediations were mushrooming.

Blurred boundaries between regulation and redress seeking

This thesis asked how citizens and interest groups affected by pollution, as well as authorised government institutions, engage in processes of regulation and redress seeking for industrial pollution, why they do so and what effect this has on the environment and on social relations within affected communities. In answer to this, we can conclude the following.

This study demonstrated that regulation and redress seeking processes related to addressing industrial water pollution in Indonesia have specific complications and dynamics. However, the processes have become more intertwined. Such increased interconnectedness stems mainly from national and international debates amongst scholars, policymakers and officials. The debates encourage the development of alternatives for administrative law-based command and control regulation. Meanwhile, increased citizen engagement opportunities focus on the regulatory and redress seeking processes.

As a result, the distinctive features of these processes have become less obvious. Affected citizens and the government have, in some respects, switched

positions. Citizens are responsible for monitoring and following up on violations, while the government retreats from its regulatory responsibilities by avoiding the use of its administrative law regulatory powers to promote the public interest. The government often relies on the private law to mediate conflicts between affected citizens and violators, ignoring the fact that such an approach promotes neither environmental interests nor the interests of the affected community, due to the goal displacement that takes place. The goal of those who claim to represent the community members' interests is no longer promoting the public interest in environmental protection, but the private interest share in the financial benefits of the industry. A vicious circle now exists where pollution continues and serves as a basis for interest groups and individuals to make claims that serve their private interest.

The parties who have a relatively privileged position in regulation and redress seeking processes – the government, the industries and the citizens with relatively powerful positions within their communities – have an interest in maintaining the status quo. All of them can profit, or can at least avoid confrontations with other powerful players, as they continue to seek consensus amongst one another. Neither government actors nor community representatives can be held accountable for the inadequate protection of environmental interests. Meanwhile, the most vulnerable people cannot participate in regulation and redress seeking processes. They remain unheard and invisible. They cannot count on the government or on the people who claim to represent them to promote their interest in a cleaner environment.

Besides the inadequate protection of the environment, side-tracking violations to the private law framework can even lead to more inequality and social tensions within the affected communities. The impacts of environmental pollution also travel further downstream, affecting the lives of many others. This broader impact makes addressing industrial pollution an eminent public interest issue, for which occasional individual compensation is an inappropriate kind of redress. At the same time, the alleged dichotomy between command and control regulation and other regulatory approaches -and the negative connotations with the former and the positive with the latter- is so strong amongst Indonesian officials, policy-makers and scholars, that it hinders a more nuanced reflection on how various regulatory and redress seeking processes relate to one another, in both theory and practice.

Most studies in the fields of regulation and redress seeking (or 'access to justice') have viewed these processes in relative isolation, assessing the stages, the enabling and disabling factors, and the outcomes in each process separately. They focus primarily on questions such as: did the redress seeking process lead to a satisfactory result in the eyes of the redress seeker, or did the regulation process lead to compliance by the regulatee? When departing from the assumption that redress seeking for public interest issues (e.g. environmental protection) will inherently be directed towards a similar outcome as the regulation process that aims to protect that same public interest, assessing the

processes in isolation seems fair. However, this study demonstrated that the outcomes of both processes do not necessarily go hand in hand, due to complex interaction between the regulation and redress seeking processes.

Some scholars have pointed out that regulation and redress seeking processes can interrelate. e.g. when redress seekers are able to force the government or the regulatee to take measures that promote a certain public interest, or -just the opposite- when they are unable to play a regulatory role, for example when caught in a compensation trap (Van Rooij, 2012), or when citizen involvement in regulation can lead to governments offloading their responsibility to protect the public interest to citizens (Chhotray and Stoker, 2009b and Mascini, 2013).

This study builds on these studies, and contributes to the ongoing debates on regulation and redress seeking (or access to justice) by arguing that in cases where redress seeking processes concern public interest issues and regulation processes involves citizen participation, it is crucial to assess both processes separately as well as in conjunction, and to do so systematically. This involves looking at the roles of all actors and stakeholders in different stages of both processes, as well as the impact of processes, also beyond the original purpose of regulation (i.e. environmental protection) and of redress seeking (coming to a satisfactory result in the eyes of the person or group that seeks redress).

By acknowledging the many links between the processes, this study tries to develop a more sophisticated approach to understanding how and why citizens, interest groups and state institutions address industrial pollution in Indonesia, and the adverse effects this has on the environment and beyond. By doing so, this study concluded, amongst other things, that in this case of addressing industrial pollution in Indonesia, the conjunction between the processes resulted in confusion amongst policy makers, officials and scholars with regard to concepts related to the two processes, false assumptions about their impact, and a diminished quality of the legal framework to address industrial pollution cases. It also demonstrated that the involvement of citizens and interest group in regulation contributed to poor regulation, as well as to shifting power structures within affected communities, increased inequality and social tensions.

To conclude, this study calls for a critical debate on how, in Indonesia, the regulation process can become more effective in promoting a clean environment, and how citizens can seek redress in the form of halting pollution and restoring the environment. This debate should focus on how various regulatory approaches relate to one another and should question the role of citizen participation. This thesis argues for renewed attention to the administrative law framework for command and control regulation because its vagueness and inconsistencies breed ineffectiveness in alternative regulatory approaches. Premature normative judgements should not inform the debates on, for example, the effectiveness of specific regulatory approaches or on the positive effects of increased possibilities for citizens to seek redress. Instead, socio-legal

research can provide improved insight into the challenges of acting against river pollution. A better understanding of the interaction between law and practice is crucial to identifying opportunities for improvement. The empirical research in this thesis has also shown that there are considerable differences in how industrial pollution is addressed in Indonesia.

Many questions remain about the implications of various regulatory approaches and about how environmental interests can be effectively promoted. How do, in other cases across the country, government institutions at different administrative levels deal with industrial pollution, and how do they interact with each other, as well as with NGOs, citizens and the industries? How effective are they, and why? Are there examples of cases where citizens or NGOs were successful in protecting the environmental public interests, and which factors prevented that goal displacement took place? Which adjustments in the Environmental Management Act would be suitable to provide a more adequate legal framework to protect the public interest in a clean environment, and which institutional measures could contribute to this goal? Other remaining questions stretch beyond the Indonesian and beyond the public interest in a clean environment. For example, does goal displacement take place in other cases of redress seeking and regulation processes, and why or why not? Are directly affected citizens and grass root organisations more susceptible to goal displacement than interest groups that have more distance to the case? Did in other cases, positive normative assumptions about citizen participation in regulation hinder the critical assessment of the real consequences of this participation among officials and scholars?

Throughout the research, time and time again, officials, scholars, NGOs and donor organisations displayed their interest in these matters and more in general in the importance of conducting the empirical and socio-legal research to inform policy debates. An example is the realization and success of the MERW project. Continuing this research, to which this thesis has contributed, will be of eminent importance for regulating and preventing industrial pollution, and therefore for restoring cleaner rivers in Indonesia.

Samenvatting (Dutch summary)

De aanpak van industriële watervervuiling in Indonesië
Op het raakvlak van overheidsregulering en burgerinitiatieven

Nagenoeg alle Indonesische rivieren zijn vervuild, en zo'n twee derde is zelfs ernstig vervuild. Tegelijkertijd is 80 procent van de bevolking afhankelijk van rivierwater om zich in te wassen en soms zelfs om te drinken. Er zijn ook indirecte gevolgen. In Jakarta bijvoorbeeld, onttrekken veel mensen en bedrijven grondwater om gegarandeerd te zijn van een redelijke waterkwaliteit. Mede door deze grondwateronttrekking is de stad aan het zinken. In de afgelopen tien jaar zijn sommige plekken al 2,5 meter gezakt en de helft van de stad ligt inmiddels onder zeeniveau. Terwijl er wordt gewerkt aan versteviging van de kust, onderzoek ik in dit proefschrift of de oplossing deels bovenstrooms gezocht kan worden, op de plekken waar de watervervuiling wordt veroorzaakt. Welke (juridisch) middelen zetten de overheid en burgers in om schonere rivieren te bewerkstelligen, en met welk resultaat?

De meeste rivierwatervervuiling in Indonesië wordt veroorzaakt door huishoudens. Industrieën zijn verantwoordelijk voor *maar* ongeveer 30 procent van de rivierwatervervuiling. Desondanks richt ik me in dit proefschrift op industriële vervuiling omdat het, in theorie, makkelijker te reguleren is. Industrieën zijn minder talrijk dan de miljoenen mensen die bijdragen aan de huishoudelijke vervuiling. De overheid weet (meestal) waar de industrieën zich bevinden en veel industrieën hebben middelen ter beschikking om hun milieumanagement te verbeteren. Effectievere en efficiëntere regulering van industriële vervuiling heeft potentie om een grote slag te slaan in de verbetering van de rivierwaterkwaliteit. Maar in de praktijk blijkt dit heel moeilijk te realiseren.

Dit proefschrift analyseert hoe de Indonesische overheid en milieuslachtoffers industriële vervuiling aan de kaak stellen. Hoe proberen slachtoffers genoegdoening te vinden, en wat is de rol van de overheid in regulering? Ik heb de juridische kaders voor regulering en het zoeken naar genoegdoening geanalyseerd, gekeken hoe provinciale milieudiensten overtredingen opsporen, en optreden tegen overtredingen, en ik heb twee casussen van vervuiling uitgebreid onderzocht; in West Java en in Noord Molukken. Daaruit kwam naar voren dat ondanks de toegenomen burgerparticipatie, de vervuiling niet

is verminderd, noch dat er redelijke compensatie voor de slachtoffers wordt bewerkstelligd. In tegendeel.

Mijn bevindingen plaats ik in het licht van het actuele bestuurskundige en rechtswetenschappelijke debat over regulering (hoofdstuk 2). Het reguleringsdebat draait om de vraag wat de meest efficiënte en effectieve manier van reguleren is. Moet regulering vooral een zaak van de overheid zijn, of is 'alternatieve regulering' mogelijk? En hoe? In hoeverre moeten en kunnen bijvoorbeeld ook het bedrijfsleven en vervuilingsslachtoffers een bijdrage leveren aan dit proces? De standpunten hierover veranderen door de tijd heen. De afgelopen decennia is er een tendens om het maatschappelijk middenveld en burgers een grotere rol te laten spelen bij regulering. Juist in een land als Indonesië, waar de overheid haar milieutaken maar beperkt kan of wil uitvoeren vanwege gebrekkige middelen en corruptie, lijkt het logisch dat grote betrokkenheid van slachtoffers in het reguleringsproces zal leiden tot een beter milieu en bijdraagt aan 'democratisering', met alle voordelen van dien. Maar kloppen deze aannames? Hoe verhouden regulering en het zoeken naar genoegdoening (*redress seeking)* door milieuslachtoffers zich tot elkaar? Dit proefschrift beantwoordt deze vragen op basis van antropologisch en juridisch onderzoek.

Hoofdstuk 3 bespreekt de Indonesische juridische kaders voor regulering van industriële vervuiling en het zoeken naar genoegdoening door slachtoffers. De Indonesische milieuwetgeving is de afgelopen decennia in vele opzichten verbeterd. De milieuwet heeft de mogelijkheden om een overtreder strafrechtelijk te vervolgen uitgebreid, en velen juichen dit toe, vooral vanwege het vermeende afschrikwekkende effect. Maar in de praktijk is het stafrechtelijke veroordelen van een vervuiler een moeilijk, langdurig en kostbaar proces. De milieudienst van West Java bijvoorbeeld besteedt de helft van zijn handhavingsbudget aan het voorbereiden van strafzaken, terwijl nog nooit een zaak voor de rechter is gebracht.

Tegelijkertijd is de juridische basis voor een bestuursrechtelijke aanpak van industriële vervuiling op een aantal belangrijke punten verslechterd. Bestuursrechtelijke sancties zijn primair een middel voor de bevoegde overheidsinstantie om, in het publieke belang, overtredingen zo snel mogelijk te bëindigen en de gevolgen ongedaan te maken. Maar de Indonesische milieuwet suggereert dat de bevoegde overheidsinstantie alleen 'aanwijzingen' kan geven aan de overtreder. Daarmee is ze afhankelijk geworden van de overtreder om de vervuiling te stoppen.

Aan de andere kant hebben Indonesische burgers in de afgelopen decennia nadrukkelijk meer mogelijkheden gekregen om hun milieuklachten aanhangig te maken bij de bevoegde overheidsinstanties. Deze instanties zijn vervolgens ook verplicht de klachten na te trekken. Burgers kunnen zo proberen om via het bestuursrecht genoegdoening te vinden, namelijk door de bevoegde over-

heidsinstantie te verzoeken in te grijpen en de milieuovertreding te beëindigen. Burgers kunnen op deze manier, door overtredingen te signaleren, een belangrijke rol spelen bij regulering. Maar de milieuwet voorziet niet alleen een rol voor burgers via het bestuursrecht. De wet geeft nadrukkelijk de mogelijkheid aan slachtoffers om te onderhandelen met de vervuilende industrie over genoegdoening, op basis van privaatrecht. De milieuwet noemt expliciet dat de milieudienst als mediator kan optreden in deze 'alternatieve geschillenbeslechting' tussen industrie en getroffen burgers. Hierdoor lopen regulering en het zoeken naar genoegdoening op complexe wijze door elkaar; de overheidsinstantie die verantwoordelijk is voor regulering en het publieke belang in een schoon milieu moet dienen, treedt op als onpartijdige derde in een conflict tussen private partijen. Dit onderzoek kijkt naar de gevolgen hiervan voor de aanpak van de vervuiling en voor de sociale verhoudingen binnen gemeenschappen die getroffen zijn door vervuiling.

Hoofdstuk 4 schetst een beeld van de dagelijkse reguleringspraktijk door de provinciale milieudiensten in Oost Java en West Java. Provinciale overheden spelen vaak een belangrijke rol bij de regulering van vervuiling, ondanks het feit dat de gemeenten sinds het begin van het decentraliseringsproces, eind jaren '90, in bijna alle gevallen in eerste instantie hiertoe bevoegd zijn. Provincies nemen vaak handhavingstaken over van de gemeenten wanneer vervuilingszaken enig statuur hebben, bijvoorbeeld wanneer demonstraties plaatsvinden of als er media-aandacht is voor de zaak.

Indonesische academici, ambtenaren en ngo's erkennen dat de regulering van industriële vervuiling door de overheid vaak zwak is. Als redenen voeren zij veelal op dat de overheid grote economische belangen heeft bij de industriële activiteiten, zoals lokale werkgelegenheid en belastinginkomsten, en dat zij gevoelig is voor corruptie. Andere vaak genoemde redenen zijn dat de overheid beschikt over te weinig middelen en expertise voor effectieve handhaving. Deze studie onderschrijft deze oorzaken, maar wijst tegelijkertijd op een aantal andere redenen. Naast de eerdergenoemde juridische gebrekkigheden in de milieuwet, is de verdeling van bevoegdheden tussen de vele betrokken overheidsinstanties onduidelijk. Dit draagt ertoe bij dat instanties en bestuurders vrijwel niet ter verantwoording (kunnen) worden geroepen wanneer zij onvoldoende optreden, bijvoorbeeld als zij geen administratieve maatregelen (sancties) inzetten om een overtreding daadwerkelijk te beëindigen.

Alhoewel er vrij grote verschillen zijn tussen de handhavingspraktijk in Oost en West Java hebben deze provinciale milieudiensten met elkaar gemeen dat ze weinig consistent optreden in de verschillende fasen van het reguleringsproces. Dat wil zeggen dat de controle op de naleving van vergunningen willekeurig en ad hoc plaatsvindt, en ook het optreden na de constatering van overtreding zeer inconsistent is. Als gevolg daarvan is de kans klein dat een industrie die een overtreding begaat, geconfronteerd zal worden met consequenties die haar gedrag zullen corrigeren. Daarmee is ook de afschrikwekken-

de werking van handhaving nihil. Tot slot lijken ambtenaren vaak aannames te hebben over het effect van mediatie tussen milieuslachtoffers en vervuilende industrieën, terwijl deze in de praktijk vaak niet blijken te kloppen. Dit blijkt uit twee casussen die ik bespreek in hoofdstuk 5 en 6.

De eerste casus speelt zich af in de buurt van Bandung, in de provincie West Java (hoofdstuk 5). In de jaren '70 en '80 vestigden verschillende industrieën waaronder textielfabrieken, zich bij de plaats Rancaekek. Begin jaren '90 klaagde de burgemeester dat industriële watervervuiling de rijstvelden in zijn gemeente aantastte. Deze velden lagen stroomafwaarts ten opzichte van de industrieën die net aan de andere kant van de gemeentegrens waren gehuisvest. Doordat de vervuiling de gemeentegrenzen overschreed, raakte de provincie al snel bij de zaak betrokken. Maar twintig jaar later was er na heel veel overleg tussen verschillende overheidsinstanties op gemeentelijk, provinciaal en centraal niveau nog altijd geen oplossing. De handhaving bleef halfslachtig, niet alleen vanwege de economische belangen, maar ook omdat het onduidelijk was welke overheidsinstantie bevoegd (en verantwoordelijk) was om op te treden. Het was een zaak van pappen en nathouden tussen de belanghebbenden aan de onderhandelingstafel, inclusief de verschillende overheidsinstanties, de industrieën, en lokale vertegenwoordigers. Maar geen van hen kwam echt op voor de milieubelangen.

De verklaring daarvoor vond ik door het analyseren van de economische strategiën van de bevolking. Rijstboeren die vaak grote stukken land bezaten hadden zich tijdens demonstraties en onderhandelingen met overheid en industrie beklaagd over de tanende productie van hun velden. Maar tijdens mijn veldwerk viel op dat veel boeren een relatief welvarend bestaan leidden. Zij hadden alternatieve bronnen van inkomen gevonden, bijvoorbeeld door vervuilde, onproductieve rijstvelden te verkopen aan projectontwikkelaars. Die bouwden er huizencomplexen op voor arbeidsmigranten die op de industrie afkwamen.

Een andere alternatieve inkomstenbron kwam voort uit de positie die veel dorpsleiders (waaronder rijke boeren en landeigenaren) hadden verworven als bemiddelaar voor fabrieksarbeiders. Deze positie hadden ze bedongen na protesten tegen de vervuilende industrie. De industrie had maandelijks veel nieuwe arbeiders nodig, en veel armere dorpelingen wilden graag voor de fabrieken werken. Als landarbeider op de onproductieve rijstvelden was er bijna geen werk meer te vinden, en jongeren zagen het werken in een fabriek als 'modern'. Om een baan te bemachtigen in de fabriek betaalden zij drie tot acht keer een maandsalaris aan de dorpsleiders die optraden als bemiddelaar en die hen konden voordragen als nieuwe fabriekswerknemers. Kortom, de uitkomst van het proces om genoegdoening te vinden voor de vervuiling was dat de armsten in de gemeenschap indirect de compensatie voor de vervuiling betaalden aan de rijkere boeren en landeigenaren. Deze arme fabrieksarbeiders zouden het wel uit hun hoofd halen te demonstreren tegen de industrie of

bemiddelende dorpsleiders, uit angst hun baan te verliezen. De industrie had niks meer te vrezen van de voorheen protesterende boeren en andere dorpsleiders die welvoeren bij de status quo. Ze ervoer geen enkele druk om milieumaatregelen te nemen. Overigens waren ambtenaren van de provinciale milieudienst op de hoogte van de regelingen tussen de industrie en de dorpsleiders. Ze organiseerden zelfs de onderhandelingen, onder het mom van burgerparticipatie en informele, alternatieve geschillenbeslechting.

Hoofdstuk 6 beschrijft een casus die zich afspeelt op het eiland Halmahera in de provincie Noord Molukken. Sinds eind jaren '90 is het Australisch-Indonesische goudmijnbedrijf *Nusa Halmahera Minerals* (NHM) daar actief. Het gebied wordt, behalve door natuurlijke rijkdommen, gekenmerkt door de verschillende etnische en religieuze achtergronden van de bevolking. De inheemse, vaak katholieke Kao-bevolking woonde dichtbij de moslims die in de jaren '70 naar het gebied waren gëmigreerd. Er bestonden al lange tijd spanningen tussen deze groepen, onder andere door verschillen in kansen op een baan in de mijnbouwsector. Dit leidde rond de eeuwwisseling tot een zeer gewelddadig conflict tussen de groepen.

In 2003 vonden de eerste protesten tegen de milieueffecten van het bedrijf plaats. De visstand in de Golf van Kao zou zijn afgenomen en het bedrijf zou illegaal opereren in beschermd bosgebied. Een aantal ngo's van buiten de regio steunden de protesten, als onderdeel van juridische en andere acties tegen tientallen mijnbouwbedrijven verspreid door het land. Maar het ging niet alleen over het milieu. De demonstranten en ngo's klaagden ook over de beperkte werkgelegenheid voor de lokale bevolking en het onrechtmatig gebruik van het land op basis van landrechten van de inheemse bevolking. De verschillende klachten werden gebundeld om een vuist te maken tegen het bedrijf, maar onduidelijk was welke oplossing op zijn plaats was, en voor wie. Het mijnbouwbedrijf wuifde de protesten weg en beweerde dat de demonstranten illegale, kleinschalige mijnbouwers waren die erts uit de mijnen ontvreemdden en dit daarna bewerkten met chemicaliën, zonder enige milieumaatregelen te nemen. De rechtszaak noch de protesten leidden uiteindelijk tot verandering, op het gebied van de milieu-impact of andere zaken waarover onvrede bestond.

Tijdens mijn eerste veldwerkperiode in 2009 werd duidelijk dat er verschillende perspectieven waren en mensen in deze regio verschillend omgingen met de mijnbouw in hun omgeving. Sommigen ervoeren ernstige overlast door de vervuiling, anderen helemaal niet. Voor velen bleken de economische belangen bepalend voor hun houding ten opzichte van het bedrijf. Werkgelegenheid was een belangrijk thema. In een aantal dorpen waren problemen ontstaan door de verdeling van het Maatschappelijk Verantwoord Ondernemen fonds (*Corporate Social Responsibility fund*) dat het bedrijf ter beschikking stelde aan lokale gemeenschappen. Corruptie op dorpsniveau leidde tot spanningen

binnen de gemeenschappen. De milieu-impact en het gebruik van het land was in 2009 maar voor weinig mensen die ik sprak een reden voor onvrede.

Tijdens mijn veldwerk in 2012 was dit beeld totaal veranderd. Een ngo die opkwam voor rechten van inheemse gemeenschappen was zeer actief geworden in het gebied. Ze had de claims op land en compensatie op basis van inheems recht doen herleven. Alhoewel de claims in eerste instantie gericht waren tegen het bedrijf, leidde het hernieuwde bewustzijn van de etnische identiteit ook tot nieuwe spanningen tussen de inheemse en migrantenbevolkingsgroepen in de regio. De inheemse bevolking werd zich bewuster van de mogelijke compensatie die samenhing met haar inheemse status, terwijl de migrantenbevolking dergelijke aanspraken niet kon maken. Wat betreft het milieu slaagde één dorp erin zich als het meest getroffen te presenteren. Op basis daarvan hadden dorpelingen waterputten gekregen om toch toegang te krijgen tot schoon drinkwater en werden onderhandelingen gepland voor financiële compensatie voor het hele dorp. Maar getroffenen uit andere dorpen werden niet gecompenseerd, en ook de vervuiling werd geen halt toegeroepen.

Deze casus leerde mij hoe dynamisch het proces van het zoeken naar genoegdoening kan zijn. Er was niet duidelijk één onveranderlijk probleem waarvoor een en dezelfde groep steeds eenzelfde soort genoegdoening probeerde te vinden. Actoren, en de thema's die zij door de jaren heen aandroegen als grond voor genoegdoening, en het soort genoegdoening, veranderden steeds. Deze transformaties traden meestal niet op als gevolg van bijvoorbeeld meer vervuiling of minder werkgelegenheid. De veranderingen volgden meestal op gewijzigde kansen op het krijgen van een bepaald soort genoegdoening, bijvoorbeeld door een wetswijziging of omdat inheemse rechten een populair thema werden. Tegelijkertijd waren de mensen die onrecht ervoeren vaak niet de mensen die genoegdoening zochten. Een van de belangrijkste lessen uit deze casus is dat claims voor genoegdoening in eerste instantie gericht waren op het bedrijf, maar dat ze ook invloed hadden op de sociale verhoudingen binnen de gemeenschap. Etnische verschillen werden bijvoorbeeld benadrukt doordat claims gebaseerd werden op inheemse rechten, waarop de migrantenbevolking zich niet kon beroepen. Zo leidden claims gericht op het bedrijf ook tot spanningen onder de getroffen bevolking.

De dynamische sociale processen in beide casussen laten zich maar moeilijk vertalen in juridische procedures. De reden daarvan is dat juridische procedures doorgaans uitgaan van vrij statische problemen en actoren; ze gaan ervan uit dat er een duidelijk probleem is, zoals vervuiling, en dat iemand of de groep die daar last van heeft zal proberen daar genoegdoening voor te vinden. Maar de werkelijkheid is weerbarstiger, omdat allerlei belangen, sociale verhoudingen, en veranderende kansen op genoegdoening meespelen. Bovendien blijkt het, naarmate de tijd vordert, steeds ingewikkelder om in de ontstane sociale en economische complexe omstandigheden tot een goede oplossing te komen. Velen hebben baat bij de status quo waarin vervuiling plaatsvindt. Zelfs slachtoffers van vervuiling kunnen baat hebben bij de vervuiling omdat

ze op een of andere manier (financiële) compensatie hebben weten te krijgen. Helaas is de consequentie dat vele andere slachtoffers die minder macht hebben niet worden gecompenseerd. Bovendien blijven de milieuproblemen voortduren.

Veel ambtenaren, beleidsmakers en academici in Indonesië juichen 'alternatieve geschillenbeslechting' toe, als vorm van 'alternatieve regulering'. Ze zijn ervan overtuigd dat de informele sfeer en laagdrempeligheid van de onderhandelingen zal leiden tot een goede oplossing voor zowel de industrie als de milieuslachtoffers, en bovendien denken ze dat met deze manier van burgerparticipatie de tekortkomingen van een slecht regulerende overheid kunnen worden omzeild.

In dit proefschrift concludeer ik dat het raakvlak tussen regulering en het zoeken naar genoegdoening in de Indonesische praktijk veel gecompliceerder is. De casussen laten zien dat door burgers op een dergelijke manier te betrekken bij handhaving het onduidelijk wordt in hoeverre het optreden tegen milieuovertredingen een verantwoordelijkheid is van de overheid, en of de aanpak van vervuiling een privaatrechtelijke of bestuursrechtelijke kwestie is. Als burgers afspraken maken met de industrie over naleving, in hoeverre is de overheid dan nog verantwoordelijk voor naleving van bestuursrechtelijke wet- en regelgeving? Of hoeft de industrie zich alleen nog maar te houden aan de afspraken die ze heeft gemaakt met de burgers? En wie zitten er eigenlijk aan tafel als belangenbehartigers van de getroffen gemeenschap? Uit de vervuilingscasussen in West Java en Noord Molukken blijkt dat deze vertegenwoordigers vaak niet alle segmenten van de gemeenschap representeren en bovendien dat zij niet, of slechts in beperkte mate, het milieubelang behartigen. Bovendien kunnen de sociale verhoudingen binnen getroffen gemeenschappen onder druk komen te staan.

In dit proefschrift pleit ik ervoor om bij de analyse van de aanpak van industriële watervervuiling een integrale blik te hanteren, waarbij wordt gekeken naar het reguleringsproces (in hoeverre de milieudoelen worden bereikt en op welke manier), naar het proces van zoeken naar genoegdoening vanuit het perspectief van getroffen burgers, en naar de raakvlakken tussen beide processen. Zo kunnen op systematische wijze de perspectieven van alle betrokkenen en belanghebbenden worden belicht en een compleet beeld worden verkregen van de effecten van regulering en het zoeken naar genoegdoening. Dit beeld kan hopelijk dienen als voeding voor debatten over de wenselijkheid van de situatie en over eventuele mogelijkheden tot verbetering van bescherming van milieubelangen en van de sociale verhouding binnen lokale gemeenschappen.

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Appendix

PROPER ratings of industries in West Java sanctioned by the Ministry of Environment in 2008

Sanctioned by Ministry in 2008	*PROPER 2007-2008*	*PROPER 2008-2009*	*PROPER 2009-2010*	*PROPER 2010-2011*	*PROPER 2011-2012*
Adetex I	*Black*	not mentioned	*Blue*	not mentioned	not mentioned
Albasi Parahyangan	*Black*	*Black*	not mentioned	not mentioned	not mentioned
Panca Mega Adi Mulia	*Black*	not mentioned	not mentioned	not mentioned	not mentioned
Wiska	*Black*	not mentioned	*Blue*	*Blue*	*Blue*
Parisindo Pratama	*Red*	*Blue*	*Blue*	*Red*	*Blue*
Himalaya Tunas Texindo	*Red*	*Blue*	*Red*	*Red*	*Black*
Kertas Padalarang	*Red*	not mentioned	*Black*	not mentioned	not mentioned
Pulau Mas Texindo	*Red*	*Blue*	*Red*	*Blue*	not mentioned

Curriculum vitae

Laure d'Hondt was born in Hilvarenbeek, on 4 April 1981. After completing her secondary education in Nijmegen in 1999 she travelled to Latin America, and spent more than a year in Mexico and Guatemala, to travel, learn Spanish, and to do volunteers work.

In 2001, Laure began her studies at Leiden University; Cultural Anthropology (BA and MA, 2006) and Law (BA, 2007). During her studies she continued to frequently travel to Central America, where she did an internship at the Royal Dutch Embassy in Guatemala, conducted research for her Master thesis on mediation, and worked as a travel guide.

In 2008, Laure started working at the Van Vollenhoven Institute (VVI) of Leiden Law School, Leiden University. She was a researcher in the 'Access to Justice in Indonesia' project in cooperation with the World Bank Indonesia and UNDP Jakarta. Besides conducting research on access to environmental justice in North Maluku, Indonesia, she fulfilled several coordinating and editing tasks. In March 2010, Laure started her PhD research as part of the research programme 'Legal Empowerment as a means to development? A political-legal study of rights invocation by pollution victims in China and Indonesia'. In the meantime, in 2014, Laure obtained her Master degree in Constitutional and Administrative Law (LLM) from the University of Amsterdam (LLM, 2014).

Between 2010 and 2018, Laure was also teaching Law, Governance and Development and other courses at the Leiden Law School as well as at the Leiden University College. She also gave guest lectures at various universities in the Netherlands and Indonesia.

In 2016, Laure became the lead researcher in the project 'Making Environmental Regulation Work for the People' that was financed by the Royal Dutch Embassy in Jakarta. The project built on the insights from her PhD research and aimed to lead to concrete improvements in the regulation of industrial pollution in Indonesia. VVI cooperated with the Indonesian Center for Environmental Law as well as with Indonesian scholars, local NGOs and the Indonesian Ministry of Environment and Forestry.

Since 2018 Laure chose to continue her career in socio-legal studies by teaching social science and law at secondary school level. She hopes to contribute to develop this subject in the class room and more broadly in the general curriculum. Laure lives near Nijmegen, together with her partner Jeroen and her son Noël.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2018 and 2019

MI-300 N.N. Koster, *Crime victims and the police: Crime victims' evaluations of police behavior, legitimacy, and cooperation: A multi-method study,* (diss. Leiden), Amsterdam: Ipskamp Printing 2018

MI-301 J. Zhu, *Straightjacket: Same-Sex Orientation under Chinese Family Law – Marriage, Parenthood, Eldercare*, (diss. Leiden), Amsterdam: Ipskamp Printing 2018

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