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

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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?